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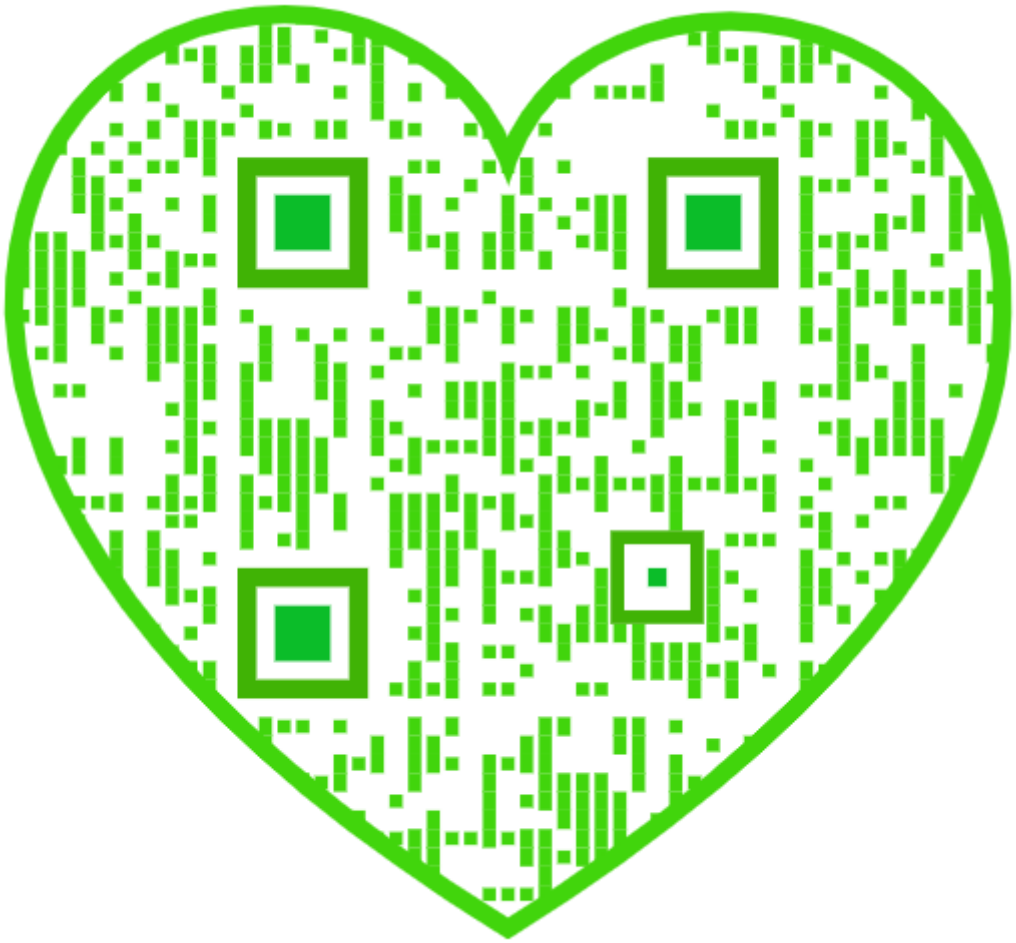

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I. DEFINITION AND GENERAL NATURE.

A. Definition. An affidavit is a declaration on oath, reduced to writing,[1] and affirmed or sworn to by affiant before some person who has authority to administer oaths.[2]

B. Distinguished from Deposition. An affidavit differs from a deposition in that it is taken *ex parte* and without notice, while a deposition is taken on notice to the opposite party, who is given an opportunity to cross-examine the witness.[3]

C. Distinguished from Pleadings. An affidavit cannot be made to take the place of an answer in abatement or in bar,[4] and, on the other hand, it is gen-

1. **Must be in writing.**—There can be no such thing as an unwritten affidavit. Windley *v.* Bradway, 77 N. C. 333; Shelton *v.* Berry, 19 Tex. 154, 70 Am. Dec. 326. But see Baker *v.* Williams, 12 Barb. (N. Y.) 527, in which it was held that the word "affidavit," as used in N. Y. Laws (1834), p. 421, should be interpreted to mean any form of legal oath, and that such oath might be oral.

2. Bouvier L. Dict.
Alabama.— Watts *v.* Womack, 44 Ala. 605.
Illinois.— Hays *v.* Loomis, 84 Ill. 18; Harris *v.* Lester, 80 Ill. 307.
Kentucky.— Bishop *v.* McQuerry, 13 Bush (Ky.) 417.
Michigan.— Knapp *v.* Duclo, 1 Mich. N. P. 189.
Missouri.— Barhydt *v.* Alexander, 59 Mo. App. 188; Norman *v.* Horn, 36 Mo. App. 419.
Nebraska.— Bantley *v.* Finney, 43 Nebr. 794, 62 N. W. 213.
New Jersey.— Hitsman *v.* Garrard, 16 N. J. L. 124.
South Carolina.— State *v.* Sullivan, 39 S. C. 400, 17 S. E. 865.
Tennessee.— Grove *v.* Campbell, 9 Yerg. (Tenn.) 7.
Texas.— Shelton *v.* Berry, 19 Tex. 154, 70 Am. Dec. 326.
Virginia.— Hawkins *v.* Gibson, 1 Leigh (Va.) 475.
As to who may take affidavits see *infra*, III.
Necessity for affiant's signature.— The definition given in Bacon Abr. tit. Affidavit, is "an oath in writing, signed by the party deposing, sworn before and attested by him who hath authority to administer the same," but by the weight of modern authority the signature of affiant is not deemed an essential part of the affidavit. See *infra*, V, F.
A professional statement of an attorney, on a motion to set aside a default, that, although he appeared in the cause and moved for a continuance, he had no authority to appear, is regarded as an affidavit. Rice *v.* Griffith, 9 Iowa 539.
Affidavit includes oath.— Under a statute requiring an oath it is sufficient if the matter be reduced to the form of an affidavit, signed and sworn to by the person making it, since the affidavit includes the oath. Edwards *v.* McKay, 73 Ill. 570; Burns *v.* Doyle, 28 Wis. 460.

3. Atchison *v.* Bartholow, 4 Kan. 124. See also Bishop *v.* McQuerry, 13 Bush (Ky.) 417, 418 (wherein an affidavit is defined to be "a written declaration under oath, made without notice to the adverse party"); Stimpson *v.* Brooks, 3 Blatchf. (U. S.) 456, 23 Fed. Cas. No. 13,454 (wherein the court said: "Deposition is a generic expression, embracing all written evidence verified by oath, and thus includes affidavits; but, in legal language, a distinction is maintained, in courts of law and chancery, between depositions and affidavits. A deposition is evidence given by a witness under interrogatories, oral or written, and usually written down by an official person; while an affidavit is the mere voluntary act of the party making the oath, and may be, and generally is, taken without the cognizance of the one against whom it is to be used"); and, generally, DEPOSITIONS.

4. Kellogg *v.* Sutherland, 38 Ind. 154.

erally held that a verified pleading cannot serve the purpose of an affidavit required by statute.[5]

II. Who May Make.

A. In General. An affidavit must, of course, be made by a person having knowledge of the facts,[6] and who is legally competent to testify under oath.[7] In determining this question reference must always be had to the statutes and rules of court governing the particular affidavit. Thus, where a statute specifically points out who may make a certain affidavit, it can be made by no one other than those specified.[8]

B. Agent or Attorney — 1. In General. Where it is prescribed by statute or rule of court that an affidavit shall be made by the party in person, no one else can make it.[9] Ordinarily, however, authority to make an affidavit is given to an

5. Gawtry *v.* Doane, 51 N. Y. 84; Blatchford *v.* New York, etc., R. Co., 7 Abb. Pr. (N. Y.) 322. But see Atchison *v.* Bartholow, 4 Kan. 124, wherein it was held that a petition properly verified might be read as an affidavit in an application for an injunction.

A complaint in a criminal prosecution is not necessarily equivalent to an affidavit, although on oath, since it need not necessarily be certified by the magistrate and may be merely formal and made by one having little, if any, knowledge of the facts, while an affidavit is understood to be a sworn statement of facts or a deposition in writing, including a jurat or certificate of the magistrate showing that it was sworn to before him. State *v.* Richardson, 34 Minn. 115, 24 N. W. 354.

6. Cheek *v.* James, 2 Heisk. (Tenn.) 170.

As to the necessity of showing knowledge or means of information on part of affiant see *infra*, V, E, 4.

Married woman suing as feme sole.— Where a married woman is allowed to prosecute a divorce suit as a *feme sole* an affidavit made by her, in person, for an injunction to restrain the husband from disposing of his property, may be received. Kirby *v.* Kirby, 1 Paige (N. Y.) 261.

Guardian of minor.— The father of a minor who is his next friend in an action can, as his natural guardian, make an affidavit in replevin for such minor. Wilson *v.* Me-ne-chas, 40 Kan. 648, 20 Pac. 468. Such affidavit is regarded as the individual affidavit of the guardian, and if it be false he may be prosecuted for perjury. Wade *v.* Roberts, 53 Ga. 26.

Affidavit by several.— Several persons may swear to and sign the same statement of facts in a single affidavit. Tayler *v.* State, 48 Ala. 180.

Affidavit of one sworn to by another.— Where the affidavit of a juror is sworn to be correct by another party it may be treated as the original affidavit of the latter. Wilson *v.* Berryman, 5 Cal. 44, 63 Am. Dec. 78.

Foreigner sworn through interpreter.— Where, by the jurat to an affidavit of debt made by a foreigner, it was certified that the affidavit was interpreted by A, professor of languages (he having first sworn that he understood the English and French languages), to deponent, who was afterward sworn to the truth thereof, it was held sufficient. Bose *v.* Solliers, 4 B. & C. 358, 10 E. C. L. 614.

7. **Person convicted of felony.**— Under a statute providing that one convicted of felony should be incompetent to testify unless pardoned, it was held that one who has served out a sentence for forgery could not make an affidavit to his petition for a discharge under the insolvency laws. People *v.* Robertson, 26 How. Pr. (N. Y.) 90. But in North Carolina it has been held that although a person be infamous he is still competent to make any affidavit necessary to the furtherance of the cause in which he is engaged. Ritter *v.* Stutts, 43 N. C. 240; Hall *v.* Cox, 1 N. C. 12; ——— *v.* Kimborough, 1 N. C. 12.

Insane persons.— Before the affidavit of an insane person can be received there must first be an inquiry into his mental capacity to make such affidavit. Spittle *v.* Walton, L. R. 11 Eq. 420, 40 L. J. Ch. 368. And see, generally, Insane Persons.

Atheist — Collateral attack.—An affidavit cannot be collaterally attacked on the ground that affiant is an atheist. It would be unfair to exclude such affidavit without giving affiant an opportunity for reply or explanation. Leonard *v.* Manard, 1 Hall (N. Y.) 223.

Failure to object to competency.— An affidavit tendered and received in evidence on the hearing of an application for an injunction, no objection being made on the ground of incompetency of witness and no motion being made to withdraw or rule out the affidavit, may be considered, whether witness was competent or not. Putney *v.* Kohler, 84 Ga. 528, 11 S. E. 127.

8. Steinbach *v.* Leese, 27 Cal. 295; State *v.* Washoe County, 5 Nev. 317; Brown *v.* Walker, 8 N. Y. Suppl. 59. See also *Ex p.* Aldrich, 1 Den. (N. Y.) 662, wherein it was held that, under a statute providing that on the redemption of land sold under execution by the holder of a junior judgment the assignment must be verified by the affidavit of the redeeming creditor or by that of a subscribing witness to such assignment, an affidavit made by a person described as the agent of the redeeming creditor was insufficient. See also *infra*, II, B, 1.

9. *Colorado.*— Davis *v.* John Mouat Lumber Co., 2 Colo. App. 381, 31 Pac. 187.

Georgia.— Hadden *v.* Larned, 83 Ga. 636, 10 S. E. 278.

Indiana.— Shattuck *v.* Myers, 13 Ind. 46, 74 Am. Dec. 236.

Missouri.— Squires *v.* Chillicothe, 89 Mo.

attorney or agent where, on account of sickness, absence from the jurisdiction, or for other good reason, the party cannot make it himself;[10] and, in the absence of any statute or rule of court to the contrary, it is generally held that an affidavit may properly be made by an agent or attorney having knowledge of the facts sworn to.[11] The relationship of attorney and client or principal and agent must exist at the time the affidavit is filed, and, where a suit has been begun and an affidavit made by an unauthorized attorney, a subsequent ratification by plaintiff is not sufficient to sustain the proceedings.[12]

2. Necessity of Showing Authority. Where an affidavit is made by one person in behalf of another the fact of agency must be shown in some way.[13] In some

226, 1 S. W. 23; Norvell *v.* Porter, 62 Mo. 309; Huthsing *v.* Maus, 36 Mo. 101.

North Carolina.— Sheppard *v.* Cook, 3 N. C. 426.

Wisconsin.— Western Bank *v.* Tallman, 15 Wis. 92.

Missouri — Affidavit where judgment by confession.— In Missouri, where a judgment is rendered by confession under a power of attorney from the debtor the affidavit required of plaintiff in the judgment must be made by him in person, and not by his attorney in fact or agent. Bryant *v.* Harding, 29 Mo. 347.

By party or his attorney.— Where a statute requires an affidavit to be made by the judgment creditor or his attorney it cannot be made by an agent not the attorney of the judgment creditor. *In re* Heath, 40 Kan. 333, 19 Pac. 926.

10. *Illinois.*— Lockhart *v.* Wolf, 82 Ill. 37.

Iowa.— Widner *v.* Hunt, 4 Iowa 355.

Kentucky.— Clark *v.* Miller, 88 Ky. 108, 10 S. W. 277.

Louisiana.— Williams *v.* Brashear, 16 La. 77.

New York.— Geib *v.* Icard, 11 Johns. (N. Y.) 82.

United States.— The Harriet, Olc. Adm. 222, 10 Fed. Cas. No. 6,096.

Absence from court not sufficient.— The Louisiana act of 1839, § 16, allowing an affidavit to be made by the agent or attorney of the party "in the case of the absence of said party," was held not to extend to cases where the party was merely absent from court. Beatty *v.* Tete, 9 La. Ann. 129.

Attorney's clerk.— The authority of an attorney to make an affidavit in behalf of his client does not usually extend to the clerk of such attorney. Ames *v.* Merriman, 9 Wend. (N. Y.) 498; Chase *v.* Edwards, 2 Wend. (N. Y.) 283.

Stranger to record.— Sometimes an affidavit required in the progress of a cause — such as an affidavit of defense, one to open a judgment, or one for a continuance — may be made by a stranger to the record. Hunter *v.* Reilly, 36 Pa. St. 509; Sleeper *v.* Dougherty, 2 Whart. (Pa.) 177; James *v.* Young, 1 Dall. (Pa.) 248; Guyer *v.* Cox, 1 Overt. (Tenn.) 183.

11. *Alabama.*— Murray *v.* Cone, 8 Port. (Ala.) 250.

California.— Will *v.* Lytle Creek Water Co., 100 Cal. 344, 34 Pac. 830.

Indiana.— Abbott *v.* Zeigler, 9 Ind. 511; Espy *v.* State Bank, 5 Ind. 274.

Louisiana.— Hardie *v.* Colvin, 43 La. Ann. 851, 9 So. 745.

Maine.— Atwood *v.* Higgins, 76 Me. 423.

Michigan.— Nicolls *v.* Lawrence, 30 Mich. 395.

Missouri.— Norvell *v.* Porter, 62 Mo. 309.

Texas.— Doll *v.* Mundine, 84 Tex. 315, 19 S. W. 394; Blum *v.* Bassett, 67 Tex. 194, 3 S. W. 33 [*distinguishing* Robinson *v.* Martel, 11 Tex. 149]; McAlpin *v.* Finch, 18 Tex. 831.

A general agent, specially instructed by his principal to place the latter's claim against a third person in a lawyer's hands and to take such proceedings as may seem proper, is authorized to make affidavits in the principal's name in an attachment suit. Allen *v.* Champlin, 32 La. Ann. 511.

Person authorized by party to collect.— The affidavit for an attachment may, in the absence of any statutory provisions for the appointment of agents or attorneys for the purpose, be made by any one authorized by plaintiff to collect. Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068.

Illinois — Party or authorized agent.— Under Ill. Prac. Act, § 42, an affidavit for a continuance must be sworn to by the party or his authorized agent. School Directors *v.* Hentz, 57 Ill. App. 648.

In admiralty courts the authority of proctors to make affidavits is more extensive than that of attorneys in law courts. The Harriet, Olc. Adm. 222, 11 Fed. Cas. No. 6,096.

12. Johnson *v.* Johnson, 31 Fed. 700, wherein it was held that the fact that an attorney had been accustomed to attend to all the litigation of his brother did not, in the absence of instruction or authority from his brother to institute a particular suit or to sue out the writ of attachment therein, constitute him "the agent or attorney" of the brother, who, under Ky. Code Proc. § 550, might make the affidavit in attachment. See also Attorney and Client.

13. What is sufficient showing.— In Missouri it is held that if the fact of agency appears from the whole record a failure to state it in the affidavit is not fatal. Gilkeson *v.* Knight, 71 Mo. 403; White Sewing Mach. Co. *v.* Betting, 53 Mo. App. 260; Ring *v.* Charles Vogel Paint, etc., Co., 46 Mo. App. 374. But in Texas, under a statute requiring an affidavit to be made by plaintiff, his agent, or attorney, it was held that an affidavit by "B. F. Fly," without any description of him as agent or attorney of plaintiff, was insufficient, although the petition for the

jurisdictions it has been held that the affidavit must contain a direct averment under oath of affiant's authority,[14] but, generally, it is deemed sufficient if the fact of agency be stated by way of recital,[15] and there need be no averment that affiant acted in behalf of his principal, such fact being inferred.[16]

3. Showing Why Principal Did Not Act. Where the authority of the attorney or agent depends upon the inability of the principal, through absence or other cause, to make the affidavit in person, it is necessary for the affidavit to state the reason why the principal did not himself make it.[17] Under some statutes, however, the attorney or agent has the same power to make the affidavit as is given the principal, and where this is the case there is no necessity to give any reason why such affidavit was not made by the principal.[18]

writ was signed by "Fly & Fly, attorneys for the plaintiffs." Willis *v.* Lyman, 22 Tex. 268.

14. Miller *v.* Chicago, etc., R. Co., 58 Wis. 310, 17 N. W. 130; Sloane *v.* Anderson, 57 Wis. 123, 13 N. W. 684, 15 N. W. 21; Wiley *v.* Aultman, 53 Wis. 560, 11 N. W. 32. So in Lithgow *v.* Byrne, 17 La. Ann. 8, it was held that an affidavit for a writ of sequestration, purporting to have been made by an agent and which did not contain an express averment of the agent's authority, was bad. But see Simpson *v.* Lombas, 14 La. Ann. 103.

15. *Michigan.*— Wetherwax *v.* Paine, 2 Mich. 555.

Minnesota.— Smith *v.* Victorin, 54 Minn. 338, 56 N. W. 47.

Missouri.— White Sewing Mach. Co. *v.* Betting, 53 Mo. App. 260.

Nebraska.— Tessier *v.* Crowley, 16 Nebr. 369, 20 N. W. 264.

Pennsylvania.— Duffie *v.* Black, 1 Pa. St. 388.

Texas.— Evans *v.* Lawson, 64 Tex. 199.

New York.— In the earlier New York cases it was held that the fact of agency must be expressly sworn to, and not merely stated by way of recital. *Ex p.* Shumway, 4 Den. (N. Y.) 258; Cunningham *v.* Goelet, 4 Den. (N. Y.) 71; *Ex p.* Monroe Bank, 7 Hill (N. Y.) 177, 42 Am. Dec. 61. See also People *v.* Johnson, 1 Thomps. & C. (N. Y.) 578; People *v.* Perrin, 1 How. Pr. (N. Y.) 75. But this holding was doubted by the court in People *v.* Ransom, 2 N. Y. 490; and the contrary was directly held in Miller *v.* Adams, 52 N. Y. 409.

Direct averment better practice.— In Remington Sewing Mach. Co. *v.* Cushen, 8 Mo. App. 528, it was held that while it was undoubtedly more correct that the fact of the agency of affiant should be stated and sworn to, yet where the affidavit was "J. L. Jackson, agent for plaintiff, makes oath and says," the absence of a statement as to the fact of agency was not fatal.

16. Mandel *v.* Peet, 18 Ark. 236; Wright *v.* Coles, 11 Metc. (Mass.) 293; Stringer *v.* Dean, 61 Mich. 196, 27 N. W. 886.

Sufficient affidavit.— Where a statute authorizes an affidavit to be made by plaintiff or some one in his behalf, an affidavit signed "J. M. Spencer, per D. M. Spencer," is sufficient. Spencer *v.* Bell, 109 N. C. 39, 13 S. E. 704.

17. Cohn *v.* Baldwin, 74 Hun (N. Y.) 346, 26 N. Y. Suppl. 457; Talbert *v.* Storum, 21 N. Y. Suppl. 719; Van Ingen *v.* Herold, 19 N. Y. Suppl. 456; Pittsburgh Bank *v.* Murphy, 18 N. Y. Suppl. 575; Clark *v.* Sullivan, 8 N. Y. Suppl. 565; Cowles *v.* Hardin, 79 N. C. 577; Sloane *v.* Anderson, 57 Wis. 123, 13 N. W. 684, 15 N. W. 21.

Enables court to judge of sufficiency of reasons.— In Griel *v.* Buckius, 114 Pa. St. 187, 190, 6 Atl. 153, the court said: "It has never been held that no one but the defendant can make the affidavit of defense. Cases may arise where it would be physically impossible for the defendant to make such an affidavit. Under such and similar circumstances we have no doubt that an affidavit of defense may be made on behalf of the defendant by an attorney at law or other person duly authorized, but the reason why it is not made by the defendant should be set forth in the affidavit. The court can then judge of the sufficiency of such reason. It would never do to allow a stranger to the record to intermeddle in this manner. The correct rule would seem to be that when a defendant puts in a stranger's affidavit it must show upon its face sufficient reason why it was not made by the defendant himself,— that a real disability existed which prevented him from making it, and the circumstances giving rise to the disability."

Chancery — Affidavit by counsel.— In People *v.* Spalding, 2 Paige (N. Y.) 326, it was held that an affidavit of counsel, on a bill to set aside for irregularity an attachment issued for the breach of an injunction, was not sufficient unless good reason were shown for dispensing with the affidavit of the party or his solicitor.

Sufficient showing.— An affidavit for attachment which states that it is made by the attorney because plaintiff resides out of the county is sufficient. Cribben *v.* Schillinger, 30 Hun (N. Y.) 248.

Omission supplied aliunde.— In Deshay *v.* Persse, 9 Abb. Pr. (N. Y.) 289 note, an affidavit was made by counsel for the moving party on account of the latter's absence, but it omitted to allege such fact. On the hearing of the motion counsel stated that his client was absent. This absence being conceded, and no other objection being made to the affidavit, it was held that the defect would be disregarded.

18. Espy *v.* State Bank, 5 Ind. 274; Doll *v.* Mundine, 84 Tex. 315, 19 S. W. 394.

4. Knowledge or Information of Affiant. As a general rule an affidavit by one person in behalf of another must be made from facts within the personal knowledge of affiant, independent of mere hearsay of the party or others;[19] and an affidavit so drawn as to raise the inference that it was made on hearsay is insufficient.[20] It is the better practice, and always desirable, that such an affidavit should set forth affiant's means of knowledge,[21] and, where made on information and belief, the sources of information and grounds of belief should be stated.[22] Under some statutes, however, it has been held that where the statements in the affidavit are direct and positive it is not essential that affiant state his means of knowledge.[23]

C. In Behalf of Partnership. It has been held that an affidavit cannot be made by a partnership in the firm-name, since it would be impossible to convict the individual partners of perjury upon the evidence of such affidavit alone;[24] but where it appears in the body of the affidavit that it was sworn to by one of the partners it is sufficient, though signed with the firm-name.[25]

D. In Behalf of Corporation — 1. Private Corporation. Since a corporation must of necessity act through its agents, it follows that where a statute or rule of court requires an affidavit to be made by the party in person, such affidavit, where the party is a corporation, may be made by an agent or officer authorized by the general provisions of law to make oaths in behalf of the cor-

19. Talbert *v.* Storum, 21 N. Y. Suppl. 719; Cross *v.* National F. Ins. Co., 17 N. Y. Civ. Proc. 199, 6 N. Y. Suppl. 84; Read *v.* Haynie, Hempst. (U. S.) 700, 20 Fed. Cas. No. 11,608.

Facts solely within knowledge of client.— It is not competent for an attorney to swear to facts which are solely within the knowledge of his client. Widner *v.* Hunt, 4 Iowa 355.

20. Cutler *v.* Rathbone, 1 Hill (N. Y.) 204.

21. *Iowa.*— Bates *v.* Robinson, 8 Iowa, 318.

New York.— Cribben *v.* Schillinger, 30 Hun (N. Y.) 248; *Ex p.* Monroe Bank, 7 Hill (N. Y.) 177, 42 Am. Dec. 61; Pittsburgh Bank *v.* Murphy, 18 N. Y. Suppl. 575.

North Carolina.— Cowles *v.* Hardin, 79 N. C. 577.

Wisconsin.— Sloane *v.* Anderson, 57 Wis. 123, 13 N. W. 684, 15 N. W. 21.

England.— Sullivan *v.* Magill, 1 H. Bl. 637.

As to the necessity in general for the affidavit to show the means of knowledge or information of affiant see *infra*, V, E, 4.

Sufficient affidavit.— An affidavit in attachment made by the attorney, stating that the facts set out in the petition are better known to him than to plaintiff, and that he knows them to be true, is sufficient. Rausch *v.* Moore, 48 Iowa 611, 30 Am. Rep. 412.

22. Dorman *v.* Crozier, 14 Kan. 224; Crowns *v.* Vail, 51 Hun (N. Y.) 204, 4 N. Y. Suppl. 324, wherein it was further held that where an affidavit in respect to a transaction of the client was made by one who was simply an attorney of record in an action, and who, so far as the record showed, was only his attorney for that action, the plain inference was that such attorney had no personal knowledge of the facts as to which he affirmed. See also *infra*, V, E, 4, b, (II).

23. Bates *v.* Robinson, 8 Iowa 318; Anderson *v.* Wehe, 58 Wis. 615, 17 N. W. 426 [*disapproving* an intimation to the contrary in Wiley *v.* Aultman, 53 Wis. 560, 11 N. W. 32]. And see *infra*, V, E, 4, a.

In Missouri an affidavit for attachment made by an agent need not disclose his means of knowledge. Gilkeson *v.* Knight, 71 Mo. 403 [*distinguishing* Eldridge *v.* Steamboat William Campbell, 27 Mo. 595; Bridgeford *v.* Steamboat Elk, 6 Mo. 356, the rule stated in these cases applying only to the statutory proceeding against boats.]

24. Norman *v.* Horn, 36 Mo. App. 419; Gaddis *v.* Durashy, 13 N. J. L. 324. But see Randall *v.* Baker, 20 N. H. 335, wherein an affidavit sworn to in the firm-name and signed by one of the partners in the firm-name was held to be sufficient, there being nothing to show that all the partners did not swear; and the magistrate having certified that the said partnership (using the firm-name) took the oath, it was held to be a good certificate that all the members of the firm so designated swore.

25. Fortenheim *v.* Claflin, 47 Ark. 49, 14 S. W. 462, wherein the affidavit began, "I, Robert Powell, state," etc., and was signed "Forrester & Powell."

Affidavit of individual partner.— In Bennett *v.* Gray, 82 Ga. 592, 9 S. E. 469, it was held that an affidavit stating that R. McD. Bennett was a member of the firm of J. F. Bennett & Co., and that he was the duly authorized agent of said firm to make the affidavit, and signed "J. F. Bennett & Co., by R. McD. Bennett," was not the affidavit of the firm, but that of R. McD. Bennett, since if it had been false the person signing it could have been indicted for perjury.

Failure to give full names of partners.— Where the affidavit fails to give the full names of the individual partners it may be amended. Emerson *v.* Detroit Steel, etc., Co., 100 Mich. 127, 58 N. W. 659.

poration.[26] Who are authorized to exercise this power is, of course, a question depending in large measure upon the statutes.[27] An attorney may make the affidavit in a case where he could make it were the party a private person;[28] and a recital of the fact of affiant's agency or official position is usually regarded as sufficient to show his authority to make the affidavit.[29]

2. MUNICIPAL CORPORATION. With reference to a municipal corporation it has been held that a member of the city council might make an affidavit for the issuance of a *subpœna duces tecum* in an action in which the city was a party;[30] and that an affidavit for a change of venue should be sworn to by the city attorney rather than by the mayor or other chief officers.[31]

III. WHO MAY TAKE.

A. Domestic Affidavits — 1. IN GENERAL. Courts of record and the judges thereof have an implied power to take affidavits for use in proceedings before them,[32] but otherwise the power exists only where given by statutory enactment, and in determining the question reference must be had to the statutes.[33]

26. St. Louis, etc., R. Co. *v.* Fowler, 113 Mo. 458, 20 S. W. 1069; Wheeler, etc., Mfg. Co. *v.* Lawson, 57 Wis. 400, 15 N. W. 398; Western Bank *v.* Tallman, 15 Wis. 92.

27. Secretary.— In Missouri an affidavit may properly be made by the secretary of the corporation. St. Louis, etc., R. Co. *v.* Fowler, 113 Mo. 458, 20 S. W. 1069. But in Minnesota it is not one of the ordinary powers or duties of the secretary of a corporation to make an affidavit for the removal of the cause to which the corporation is a party from a state to the federal court; and where such affidavit is made by the secretary it must be shown that he is authorized by the corporation to make it. Dodge *v.* Northwestern Union Packet Co., 13 Minn. 458.

Managing agent of foreign corporation.— The general or managing agent within the state of a foreign corporation is not such an officer as may make an affidavit for a change of venue in behalf of the corporation. Wheeler, etc., Mfg. Co. *v.* Lawson, 57 Wis. 400, 15 N. W. 398.

28. Silver Peak Mines *v.* Hanchett, 80 Fed. 990.

Showing why not made by proper officer.— Under Ky. Civ. Code, § 550, which provides that "the affidavit of an agent or attorney must state the absence from the county of the party or parties for whom it is made, and the fact that the affiant is agent or attorney," an affidavit for an attachment on behalf of a corporation must, when verified by an attorney for the corporation, show the absence from the county of the officer or agent who would be required to verify it if in the county. Northern Lake Ice Co. *v.* Orr, 102 Ky. 586, 44 S. W. 216.

Must have knowledge of the facts.— An affidavit in a case required of a defendant under W. Va. Code (1891), c. 125, § 46, made for a corporation by its attorney therein, not importing that he is conversant with the facts but stating that he verily believes, from information given him by the corporation, that nothing is due plaintiff, is not a sufficient affidavit with a plea to set aside an office judgment. Quesenberry *v.* People's Bldg., etc., Assoc., 44 W. Va. 512, 30 S. E. 73.

29. *Michigan.*— Forbes Lithograph Mfg. Co. *v.* Winter, 107 Mich. 116, 64 N. W. 1053.

Missouri.— White Sewing Mach. Co. *v.* Betting, 53 Mo. App. 260.

Nebraska.— Moline, etc., Co. *v.* Curtis, 38 Nebr. 520, 57 N. W. 161.

Texas.— Cleburne First Nat. Bank *v.* Graham, (Tex. App. 1889) 22 S. W. 1101.

United States.— Silver Peak Mines *v.* Hanchett, 80 Fed. 990.

As to description of affiant in general see *infra*, V, E, 2.

30. Wheeling *v.* Black, 25 W. Va. 266.

31. Corpenny *v.* Sedalia, 57 Mo. 88.

32. Scull *v.* Alter, 16 N. J. L. 147; English *v.* Bonham, 15 N. J. L. 431; Baker *v.* Grigsby, 7 Heisk. (Tenn.) 627.

Ex officio judge.— In Craig *v.* Briggs, 4 Paige (N. Y.) 548, it was held that an affidavit might be sworn to before a state senator, since he was an *ex officio* judge of the court for correction of errors, which the senate was at that time.

Court not of record.— An assistant justice of a ward court, not being a judge of a court of record, is incompetent to take an affidavit. Wood *v.* Williams, 1 N. Y. Leg. Obs. 154.

33. Register of deeds.— In Kansas an affidavit may be sworn to before a register of deeds. Thompson *v.* Higginbotham, 18 Kan. 42.

Recorder of Philadelphia.— An affidavit may be taken before the recorder of the city of Philadelphia. Election Cases, 65 Pa. St. 20; Schumann *v.* Schumann, 6 Phila. (Pa.) 318.

Commissioner of deeds.— In New York commissioners of deeds have general power to take affidavits. People *v.* Cady, 105 N. Y. 299, 11 N. E. 810; Jones *v.* Smith, 16 Johns. (N. Y.) 232; Hopkins *v.* Menderback, 5 Johns. (N. Y.) 234. And the legality of the appointment of a commissioner *de facto*, exercising such office under color of an appointment by the governor and senate, will not be collaterally inquired into. Parker *v.* Baker, 8 Paige (N. Y.) 428.

Alderman.— In Noble *v.* U. S., Dev. Ct. Cl. 83, it was held that an affidavit purporting to have been sworn to before an alderman

An affidavit not sworn to before an officer authorized by law to take it is of no force or validity whatever;[34] and so, where it appears on the face of the affidavit that the person who administered the oath had no authority to do so, it will be treated as a nullity.[35] An officer upon whom the power is conferred is bound to take an affidavit when requested, and his refusal so to do is a misdemeanor.[36]

2. WHERE NO SPECIAL OFFICER DESIGNATED. Where an affidavit is required to be made and the statute does not designate any particular officer or officers before whom the act shall be performed, it may be done before any officer having general authority under the statutes to administer and certify oaths.[37]

3. NOTARIES PUBLIC. Notaries public have no authority to take affidavits except such as is given them by statute,[38] but in most jurisdictions they have

was *prima facie* sufficient, although the court did not judicially know that the alderman had the power to administer oaths.

Authority conferred by department of federal government.— Where an act of congress requires an oath to be administered, such oath, under the usage and regulations of the proper department of the government, may be administered by a state officer having power under the laws of his state to administer oaths, although there be no federal statute conferring the power on such officer. U. S. *v.* Bailey, 9 Pet. (U. S.) 238, 9 L. ed. 113; U. S. *v.* Winchester, 2 McLean (U. S.) 135.

Appointment by federal judge.— Under the act of congress of 1812 the United States district court for the district of Arkansas was empowered "to appoint such and so many discreet persons, in different parts of the district, as it shall deem necessary, to take acknowledgments of bail and affidavits, which shall have the like force and effect as if taken before a judge of this court." Under a rule made by the district court in pursuance of such statute it was held that justices of the peace and masters in chancery of the state of Arkansas were authorized to take affidavits to be used in the circuit court of the United States in civil causes, and that affidavits so taken were as valid and effectual as if subscribed in open court. Gray *v.* Tunstall, Hempst. (U. S.) 558, 10 Fed. Cas. No. 5,730.

34. *Arkansas.*— Edmondson *v.* Carnall, 17 Ark. 284.

Michigan.— Greenvault *v.* Farmers, etc., Bank, 2 Dougl. (Mich.) 498.

New York.— Stanton *v.* Ellis, 16 Barb. (N. Y.) 319; Berrien *v.* Westervelt, 12 Wend. (N. Y.) 194; Winnington's Estate, 1 N. Y. Civ. Proc. 267.

Tennessee.— Baker *v.* Grigsby, 7 Heisk. (Tenn.) 627.

United States.— Haight *v.* Morris Aqueduct, 4 Wash. (U. S.) 601, 11 Fed. Cas. No. 5,902.

England.— Reg. *v.* Bloxham, 6 Q. B. 528, 51 E. C. L. 528, 14 L. J. Q. B. 12; Blakeley *v.* Abeles, 11 Jur. N. S. 325, 11 L. T. Rep. N. S. 716.

As to the necessity for the jurat to show the officer's official character see *infra*, V, G, 3, h.

Master in chancery.— Where there was no statute conferring upon masters in chancery the power to take affidavits it was held that an affidavit sworn to before a master was of no force. Stanton *v.* Ellis, 16 Barb. (N. Y.) 319.

Coroner.— In Berrien *v.* Westervelt, 12 Wend. (N. Y.) 194, it was held that a coroner not being one of those officers to whom general power was given to administer oaths or to take affidavits, and having no special authority to take an affidavit in any cause pending in court, an affidavit of a plaintiff in replevin taken before a coroner was a nullity.

35. Davis *v.* Rich, 2 How. Pr. (N. Y.) 86; Shaw *v.* Perkin, 1 Dowl. N. S. 306, 5 Jur. 1197.

In order to convict an affiant of perjury it must appear that the officer who administered the oath had competent and legal authority to do so. Van Dusen *v.* People, 78 Ill. 645.

Insufficient interest to disqualify officer.— In Peck *v.* People, 153 Ill. 454, 39 N. E. 117, it was held that the fact that the affidavit as to the mailing of notices to the owners of property assessed was sworn to by one of the commissioners appointed to make the assessment before another one of said commissioners, as notary public, did not invalidate the affidavit, especially on collateral attack, since the commissioners had no personal interest in the assessment proceeding.

36. People *v.* Brooks, 1 Den. (N. Y.) 457, 43 Am. Dec. 704.

37. *Alabama.*— Wright *v.* Smith, 66 Ala. 545.

Arkansas.— Love *v.* McAlister, 42 Ark. 183.

California.— Dunn *v.* Ketchum, 38 Cal. 93.

New Jersey.— McKernan *v.* McDonald, 27 N. J. L. 541; Seidel *v.* Peschkaw, 27 N. J. L. 427.

New York.— Wood *v.* Jefferson County Bank, 9 Cow. (N. Y.) 194.

For the purpose of a prosecution for perjury under the Missouri statute it is enough that the affidavit was made before an officer having general authority to administer oaths, without showing that such officer had authority to administer this especial oath. State *v.* Boland, 12 Mo. App. 74.

38. Trevor *v.* Colgate, 181 Ill. 129, 54 N. E. 909.

As to presumption of notary's authority to take affidavits in other states see *infra*, III, B. 2, b, (II).

been given power to perform such acts within the territorial limits of their jurisdiction.[39]

4. Justices of the Peace. A justice of the peace has no authority to take affidavits except where it is conferred upon him by statute,[40] but such power has been given very generally to justices.[41]

5. Clerks of Court. Clerks of court are usually authorized to take affidavits[42] within the territorial limits of their jurisdiction,[43] though it seems that in the

Affidavits for use in federal courts.— In the case of *In re* McKibben, 16 Fed. Cas. No. 8,859, 12 Nat. Bankr. Reg. 97 [*disapproving* Blake Crusher Co. *v.* Ward, 3 Fed. Cas. No. 1,505, 1 Am. L. T. Rep. N. S. 423], it was held that the act of congress of July 29, 1854, did not give notaries authority to take affidavits for use in the United States courts. See also Buerk *v.* Imhaeuser, 4 Fed. Cas. No. 2,107*a*. But notaries were given such power by the act of congress of Aug. 15, 1876, c. 304. *In re* Bailey, 2 Fed. Cas. No. 727, 15 Nat. Bankr. Reg. 48.

39. *Alabama.*— Taylor *v.* State, 48 Ala. 180.

Colorado.— Walker *v.* People, 22 Colo. 415, 45 Pac. 388.

Georgia.— Jowers *v.* Blandy, 58 Ga. 379.

Illinois.— Edwards *v.* McKay, 73 Ill. 570.

Indiana.— Davis *v.* State, 138 Ind. 11, 37 N. E. 397.

Michigan.— Crone *v.* Angell, 14 Mich. 340.

Missouri.— Barhydt *v.* Alexander, 59 Mo. App. 188; State *v.* Boland, 12 Mo. App. 74.

Not restricted to affidavits in pending actions.— The statute giving notaries power to certify affidavits is not to be construed as restricting their power to affidavits in actions pending. Mosher *v.* Heydrich, 1 Abb. Pr. N. S. (N. Y.) 258; 30 How. Pr. (N. Y.) 161.

40. Green *v.* Breckinridge, 4 T. B. Mon. (Ky.) 541; Trabue *v.* Holt, 2 Bibb (Ky.) 393; Christman *v.* Floyd, 9 Wend. (N. Y.) 340; People *v.* Tioga County, 7 Wend. (N. Y.) 516; Baker *v.* Grigsby, 7 Heisk. (Tenn.) 627. And see Munn *v.* Merry, 14 N. J. L. 183, wherein it was held that, under a statute requiring a certain affidavit to be taken before the justice who tried the cause, another justice had no power to take it.

Affidavit required to be taken by clerk.— In Campbell *v.* Whetstone, 4 Ill. 361, it was held that where a statute required an affidavit to be made before the clerk of the court it could not be made before a justice of the peace; and that therefore an affidavit for a writ of foreign attachment could not be made before a justice of the peace.

41. *Alabama.*— Bloodgood *v.* Smith, 14 Ala. 423.

Arkansas.— Humphries *v.* McCraw, 5 Ark. 61.

Delaware.— Shute *v.* Gould, 4 Harr. (Del.) 203.

Missouri.— Glasgow *v.* Switzer, 12 Mo. 395; Kearney *v.* Woodson, 4 Mo. 114.

New Jersey.— Smith *v.* Abbott, 17 N. J. L. 358.

England.— Turnbull *v.* Moreton, 1 Chit. 721, 18 E. C. L. 393; Watson *v.* Williamson, 1 Dowl. P. C. 607.

No power outside county.— A justice of the peace has no authority to act as such outside the limits of his own county, and an affidavit made before him when outside his county is therefore invalid. Grayson *v.* Weddle, 80 Mo. 39.

Arkansas — Mayor of incorporated town. — In Robinson *v.* Benton County, 49 Ark. 49, 4 S. W. 195, it was held that, under Mansfield Dig. § 797, conferring upon mayors of incorporated towns all the powers of a justice, a mayor was authorized to take affidavits within the limits of his corporation.

42. People *v.* Vasalo, 120 Cal. 168, 52 Pac. 305; Fergus *v.* Hoard, 15 Ill. 357; Laha *v.* Daly, 1 Bush (Ky.) 221; Chesapeake R. Co. *v.* Patton, 5 W. Va. 234.

Clerk of United States court.— Under a state statute giving power to the clerk of any court to take affidavits, a clerk of the United States court may administer the oath to an affidavit. Parker *v.* Clark, 7 W. Va. 467. But in Robinson *v.* Gregg, 57 Fed. 186, it was doubted whether a clerk of the circuit court of the United States had a general power to administer oaths.

Questions arising under United States timber-culture act.— Under the United States statutes an affidavit taken before a county clerk of Oregon may be used before the register and received in any proceedings or question arising under the timber-culture act of June 14, 1878, in which an affidavit is allowed by any law of the United States or regulation of the land department thereof. U. S. *v.* Shinn, 8 Sawy. (U. S.) 403, 14 Fed. 447.

Extent of authority out of court.— Under Va. Code (1819), § 12, empowering clerks to administer oaths, the authority of such officer to administer an oath out of court extended only to cases in which, without regard to circumstances, the making of the affidavit was a necessary prerequisite to the performance of an official act which the clerk was called on to perform. Com. *v.* Williamson, 4 Gratt. (Va.) 554.

An affidavit for a warrant of extradition laying the venue as "State of Wisconsin, Municipal Court, City and County of Milwaukee," and certified as "Sworn to before me, Julius Meizelwich, clerk of the Municipal Court," complies with the act of congress providing that an affidavit upon which a requisition may be granted shall be sworn to before "a magistrate." *In re* Keller, 36 Fed. 681.

43. **Florida — No power outside county.**— In Florida the clerk of the circuit court of one county cannot take an affidavit in another county. Such clerk's power is confined to the limits of his own county. Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391.

absence of express statutory authority such power cannot be exercised in vacation.[44]

6. **Deputies.** The act of taking an affidavit being ministerial in its nature,[45] it follows that the authority of an officer to perform such act extends also to his deputy;[46] and it has been held that the absence or inability of the principal to act need not be shown.[47] The jurat may be signed by the deputy either in his own name, as deputy, or in the name of his principal, by himself as deputy.[48]

7. **Attorney of Record — a. In General.** Under court rules in England an attorney of record in a pending suit is prohibited from taking affidavits to be used in the cause;[49] and the same rule prevails in a number of jurisdictions in the United States[50] and in Canada.[51] But there is nothing in the common law forbidding such an act to be performed by an attorney, and, therefore, it is generally held that, in the absence of any statute or rule of court to the contrary, an affidavit is not defective because taken by an attorney in the cause.[52]

44. Greenvault *v.* Farmers, etc., Bank, 2 Dougl. (Mich.) 498. But see James *v.* Jenkins, Hempst. (U. S.) 189, 13 Fed Cas. No. 7,181*a*, wherein it was held that although there was no express provision in the statute delegating to a clerk the power to administer oaths in vacation to affidavits in attachment, yet he was authorized to do so, it having been the universal practice.

45. Ferguson *v.* Smith, 10 Kan. 396; Kerr *v.* Ailsa, 1 Macq. 736.

46. *Iowa.*— Finn *v.* Rose, 12 Iowa 565.

Kansas.— Ferguson *v.* Smith, 10 Kan. 396.

Michigan.— Dorr *v.* Clark, 7 Mich. 310.

Minnesota.— Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823.

Nebraska.— Merriam *v.* Coffee, 16 Nebr. 450, 20 N. W. 389.

New York.— People *v.* Powers, 19 Abb. Pr. (N. Y.) 99; Lucas *v.* Ensign, 4 N. Y. Leg. Obs. 142. But see Norton *v.* Colt, 2 Wend. (N. Y.) 250, wherein a motion for judgment as in case of nonsuit was denied because the affidavit was sworn to before a deputy clerk of a county, the clerk being in full life.

Deputy collector of customs.— Under the act of congress of March 3, 1817, the deputy collector of the customs is a permanent officer and may exercise and perform the functions, powers, and duties of the collector. Therefore, where an oath required to be administered by the collector was taken before the deputy, it was held that a charge of perjury could be sustained thereon. U. S. *v.* Barton, Gilp. (U. S.) 439, 24 Fed. Cas. No. 14,534.

Deputy treasurer-general.— In Malonny *v.* Mahar, 1 Mich. 26, 2 Dougl. (Mich.) 432, it was held that, under a statute giving the deputy treasurer-general authority to act in behalf of his principal, the deputy, in the absence of his principal, might administer the oath required to be taken by the tax-collector on returning lands on which the taxes had not been paid.

Deputy register.— Where an affidavit was signed by the "deputy register" it was held that, since he held that position by virtue of being deputy clerk, he was an officer entitled to administer oaths; therefore that the subscription "deputy register," instead of "deputy clerk," might be regarded as a mere mistake in the legal designation of his office. Torrans *v.* Hicks, 32 Mich. 307.

47. Finn *v.* Rose, 12 Iowa 565; Dorr *v.* Clark, 7 Mich. 310.

48. People *v.* Powers, 19 Abb. Pr. (N. Y.) 99; State *v.* Rosener, 8 Wash. 42, 35 Pac. 357; State *v.* Devine, 6 Wash. 587, 34 Pac. 154; Anderson *v.* Kanawha Coal Co., 12 W. Va. 526.

Sufficient signing.— An affidavit taken by a deputy clerk and signed by him "F. W. Ely, Clerk of District Court, St. Louis County, per J. R. Carey, Deputy," is good. Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823; Gillig *v.* Independent Gold, etc., Min. Co., 1 Nev. 247. But see Palmer *v.* McCarthy, 2 Colo. App. 422, 31 Pac. 241; Robinson *v.* Gregg, 57 Fed. 186, in which cases it was held that a jurat stating that the oath was taken "before me, A. B., clerk," etc., and signed "A. B., clerk by C. D., deputy," was insufficient, because purporting to be certified by an officer other than the one before whom the oath was taken.

49. 1 Daniell Ch. Pr. (6th Am. ed.) 891; Hopkinson *v.* Buckley, 8 Taunt. 74, 4 E. C. L. 46; Rex *v.* Wallace, 3 T. R. 403; Doe *v.* Roe, 8 Dowl. P. C. 340.

50. *Arkansas.*— Hammond *v.* Freeman, 9 Ark. 62.

Colorado.— Frybarger *v.* McMillen, 15 Colo. 349, 25 Pac. 713; Martin *v.* Skehan, 2 Colo. 614; Anderson *v.* Sloan, 1 Colo. 33.

Kansas.— Schoen *v.* Sunderland, 39 Kan. 758, 18 Pac. 913; Tootle *v.* Smith, 34 Kan. 27, 7 Pac. 577; Warner *v.* Warner, 11 Kan. 121.

Nebraska.— Horkey *v.* Kendall, 53 Nebr. 522, 73 N. W. 953, 68 Am. St. Rep. 623; Collins *v.* Stewart, 16 Nebr. 52, 20 N. W. 11.

New Jersey.— Pullen *v.* Pullen, (N. J. 1889) 17 Atl. 310; Den *v.* Geiger, 9 N. J. L. 225.

New York.— Kuh *v.* Barnett, 57 N. Y. Super. Ct. 234, 6 N. Y. Suppl. 881; Taylor *v.* Hatch, 12 Johns. (N. Y.) 340; Bliss *v.* Molter, 58 How. Pr. (N. Y.) 112.

See also Attorney and Client.

51. Gosselin *v.* Bergevin, 11 Quebec Super. Ct. 288; McLellan *v.* Harris, 6 Brit. Col. 257; Dunsmith *v.* Klondike, etc., Gold Fields Co., 6 Brit. Col. 200.

52. *California.*— Reavis *v.* Cowell, 56 Cal. 588; Kuhland *v.* Sedgwick, 17 Cal. 123.

Illinois.— Evans *v.* Schriver Laundry Co., 57 Ill. App. 150; Richardson *v.* Sheehan, 46 Ill. App. 528.

b. Extent of Prohibition. The prohibition, where it exists, is restricted to the attorney of record,[53] and does not extend to such attorney's partner,[54] or clerk;[55] nor does it apply to affidavits made preparatory to the commencement of a suit.[56]

c. Affidavit Voidable Only. The fact that an affidavit has been sworn to before an attorney of record will not, unless expressly so provided by statute, render it absolutely void, but voidable only,[57] and the objection must be taken at the earliest opportunity, else it will be waived.[58]

B. Foreign Affidavits — 1. In General. It has been held that, in the absence of statutory authority, an affidavit taken outside the state is of no validity;[59] but, generally, it has been customary to receive affidavits taken in other jurisdictions by officers authorized by the common law and the practice of the courts to administer oaths.[60] The subject is now generally governed by stat-

Indiana.— Yeagley *v.* Webb, 86 Ind. 424.
Massachusetts.— McDonald *v.* Willis, 143 Mass. 452, 9 N. E. 835.
Michigan.— Snyder *v.* Hemmingway, 47 Mich. 549, 11 N. W. 381 [but the practice was afterward expressly prohibited by Mich. Pub. Laws (1877), No. 6].
Minnesota.— Young *v.* Young, 18 Minn. 90.
Missouri.— State *v.* Noland, 111 Mo. 473, 19 S. W. 715.
Texas.— Ryburn *v.* Moore, 72 Tex. 85, 10 S. W. 393; Bradberry *v.* State, 7 Tex. App. 375.
Wisconsin.— Dawes *v.* Galsgon, 1 Burn. (Wis.) 8, 1 Pinn. (Wis.) 171.
United States.— Atkinson *v.* Glenn, 4 Cranch C. C. (U. S.) 134, 2 Fed. Cas. No. 610.

Matter of custom.— In Reavis *v.* Cowell, 56 Cal. 588, 591, the court said: "We are of the opinion that an attorney who is a notary may take the affidavit of his client. It is now, and has been for many years, the practice in this state; and, however improper or reprehensible the practice may be, there is nothing in the law which prohibits it." And in McDonald *v.* Willis, 143 Mass. 452, 9 N. E. 835, the court said: "It is true that a man cannot be a judge and attorney for one of the parties in the same cause. But it has always been the uniform usage for attorneys for either party to administer oaths, as justices of the peace, to their clients or others when the necessity for voluntary affidavits arises in a case; and there is no sound objection to this where the oaths are voluntary, and the act of the justice is substantially ministerial, and not judicial."

53. Counsel in the cause.— In New York it has been held that the rule forbidding attorneys to take affidavits of parties to the cause did not apply to one who merely was counsel in the cause. Griffin *v.* Borst, 4 Wend. (N. Y.) 195; Willard *v.* Judd, 15 Johns. (N. Y.) 531; People *v.* Spalding, 2 Paige (N. Y.) 326.

Relationship must exist when affidavit made.— An affidavit made before a commissioner or an attorney who acts as the attorney of the defendant, before an appearance is entered, cannot be used; but it must be clearly shown that he acted as such attorney at the time of taking the affidavit.— it is not sufficient to show that he is so at the time of making the objection. Kidde *v.* Davis, 5 Dowl. P. C. 568; Beaumont *v.* Dean, 4 Dowl. P. C. 354.

54. Hallenback *v.* Whitaker, 17 Johns. (N. Y.) 2; People *v.* Spalding, 2 Paige (N. Y.) 326; Turner *v.* Bates, 10 Q. B. 292, 59 E. C. L. 292.

55. Schuyler Nat. Bank *v.* Bollong, 24 Nebr. 821, 40 N. W. 411; Doe *v.* Roe, 5 Dowl. P. C. 409, W. W. & D. 68; Goodtitle *v.* Badtitle, 8 T. R. 638; Cocksedge *v.* Rickwood, 2 Barnes Cas. 37; Foster *v.* Harvey, 4 De G. J. & S. 59, 69 Eng. Ch. 59.

56. Smith *v.* Ponath, 17 Mo. App. 262; Vary *v.* Godfrey, 6 Cow. (N. Y).) 587; Adams *v.* Mills, 3 How. Pr. (N. Y) 219.

57. Swearingen *v.* Howser, 37 Kan. 126, 14 Pac. 436; Horkey *v.* Kendall, 53 Nebr. 522, 73 N. W. 953, 68 Am. St. Rep. 623, wherein it was held that such an affidavit could not be collaterally attacked.

Leave to amend.— Where an affidavit was sworn to before plaintiff's attorney a motion to set it aside was granted, but leave was given plaintiff to file a new affidavit *nunc pro tunc.* Anonymous, 4 How. Pr. (N. Y.) 290. See also Swearingen *v.* Howser, 37 Kan. 126, 14 Pac. 436, wherein it was held that leave to file an amended affidavit should be granted.

58. Linck *v.* Litchfield, 141 Ill. 469, 31 N. E. 123; Gilmore *v.* Hempstead, 4 How. Pr. (N. Y.) 153.

As to necessity of acting promptly, the court, in Smith *v.* Ponath, 17 Mo. App. 262, 263, said: "An examination of the numerous authorities cited for the appellant leads easily to the conclusion that, while the courts have in many cases declared that the administering of an oath to his client by an attorney, in a course of procedure, was improper, as an abuse of the relations existing between them, and that an affidavit so taken would not be heard if objected to by the adverse party when offered, yet it has never been supposed that the objection could be entertained when made for the first time on appeal or error; unless, possibly, in one of those rare instances where the making of an affidavit in the mode referred to is expressly prohibited by statute."

59. Ramy *v.* Kirk, 9 Dana (Ky.) 267; Scull *v.* Alter, 16 N. J. L. 147.

60. Fox *v.* Lawson, 44 Ala. 319; Hays *v.* Bouthalier, 1 Mo. 346; Marshall *v.* Mott, 13 Johns. (N. Y.) 423.

For English decisions bearing on this ques-

ute;[61] and where this is the case an affidavit, to be receivable, must be taken before one of the persons specified in the statute.[62] When taken and certified in accordance with the statute such affidavit is to be regarded as *prima facie* authentic.[63]

2. Showing Official Character and Authority — a. In General. In order for an affidavit taken outside the state to be received it must be shown that the person before whom it was taken was one of those authorized to perform such acts.[64]

tion see the following cases: Dalmer *v.* Barnard, 7 T. R. 248; Kevan *v.* Crawford, 45 L. J. Ch. 658; *In re* Eady, 6 Dowl. P. C. 615; *In re* Bernard, 2 S. & T. 489, 31 L. J. Prob. Cas. 83; *In re* Lane, 22 Wkly. Rep. 39; O'Neill *v.* Doran, 10 Ir. R. Eq. 187; Bell *v.* Turner, L. R. 17 Eq. 439, 22 Wkly. Rep. 391; Lyle *v.* Ellwood, L. R. 15 Eq. 67, 42 L. J. Ch. 80.

Lord mayor of London.— In Taylor *v.* Knox, 1 Dall. (Pa.) 158, it was held that an affidavit of debt sworn to before the lord mayor of London was sufficient.

Mayor of city in another state.— In Pennsylvania it was held that an affidavit sworn to before the mayor of a city in another state, who affixed the corporate seal of the city, was sufficient. Woods *v.* Watkins, 40 Pa. St. 458.

61. Officers authorized to take acknowledgments.— In some states it is provided that affidavits may be taken in other states by officers authorized to take acknowledgments. Rowley *v.* Berrian, 12 Ill. 198; Turtle *v.* Turtle, 31 N. Y. App. Div. 49, 52 N. Y. Suppl. 857; Stanton *v.* U. S. Pipe Line Co., 90 Hun (N. Y.) 35, 35 N. Y. Suppl. 629; Hyatt *v.* Swivel, 52 N. Y. Super. Ct. 1; Bowen *v.* Stilwell, 9 N. Y. Civ. Proc. 277; Phelps *v.* Phelps, 6 N. Y. Civ. Proc. 117; Harris *v.* Durkee, 5 N. Y. Civ. Proc. 376; Williams *v.* Waddell, 5 N. Y. Civ. Proc. 191.

Persons authorized to take depositions.— In Ohio an affidavit made outside the state, in pursuance of Ohio Code, § 74, must be made before a person authorized by section 341 to take depositions. Fitch *v.* Campan, 31 Ohio St. 646.

Commissioners of deeds are authorized by some statutes to take affidavits outside the state. Stone *v.* Kaufman, 25 Ark. 186; Grider *v.* Williams, 25 Ark. 1; Andrews *v.* Ohio, etc., R. Co., 14 Ind. 169; Irving *v.* Edrington, 41 La. Ann. 671, 6 So. 177; Young *v.* Rollins, 85 N. C. 485.

Justices of the peace are also among the officers to whom such power is commonly given. Posey *v.* Buckner, 3 Mo. 604; Walker *v.* Bamber, 8 Serg. & R. (Pa.) 61; Turnbull *v.* Moreton, 1 Chit. 721, 18 E. C. L. 393; Watson *v.* Williamson, 1 Dowl. P. C. 607. But in Scull *v.* Alter, 16 N. J. L. 147, it was held that an affidavit of indebtedness in insolvency proceedings, taken before a justice of the peace in Pennsylvania, could not be received in a New Jersey court in which such proceedings were pending.

Consul or commercial agent of United States.— Affidavits taken in foreign countries before consuls or other commercial agents of the United States are admitted in some jurisdictions. Seidel *v.* Peschkaw, 27 N. J. L. 427; Welsh *v.* Hill, 2 Johns. (N. Y.) 373. But in Herman *v.* Herman, 4 Wash. (U. S.) 555, 12 Fed. Cas. No. 6,407, it was held that where the solicitors agreed that an answer to be given in France might be taken and sworn to before any person authorized to administer oaths by the laws of France, the agreement was not complied with if answer were sworn to before the American consul.

62. Love *v.* McAlister, 42 Ark. 183; Murdock *v.* Hillyer, 45 Mo. App. 287; Benedict *v.* Hall, 76 N. C. 113; Griffin *v.* Smith, 4 Jur. 413, 8 Dowl. P. C. 490.

63. Dillon *v.* Rand, 15 Colo. 372, 25 Pac. 185; Andrews *v.* Ohio, etc., R. Co., 14 Ind. 169.

64. *Georgia.*— Castellaw *v.* Blanchard, 103 Ga. 97, 31 S. E. 801; Behn *v.* Young, 21 Ga. 207.

Illinois.— Trevor *v.* Colgate, 181 Ill. 129, 54 N. E. 909.

Maryland.— Bartlett *v.* Wilbur, 53 Md. 485.

New York.— Cream City Furniture Co. *v.* Squier, 2 Misc. (N. Y.) 438, 21 N. Y. Suppl. 972.

North Carolina.— Miazza *v.* Calloway, 74 N. C. 31.

South Carolina.— Spragella *v.* Monte Bruno, Mill (S. C.) 279.

West Virginia.— Bohn *v.* Zeigler, 44 W. Va. 402, 29 S. E. 983.

As to necessity for showing officer's authority in case of domestic affidavits see *infra*, V, G, 3, h.

Illinois — Authenticated like acknowledgment.— Where an affidavit for use in Illinois is taken in another state the authority of the person administering the oath must be authenticated in the same manner as in the case of an acknowledgment taken in another state. Rowley *v.* Berrian, 12 Ill. 198.

New Jersey — Necessity of reciting notary's official capacity.— In Magowan *v.* Baird, 53 N. J. Eq. 656, 33 Atl. 1054 [*disapproving* Sutherland *v.* Jersey City, etc., R. Co., 8 N. J. L. J. 45; Minford *v.* Taylor, 12 N. J. L. J. 282], it was held that an affidavit to a chattel mortgage, sworn to before a notary public in Pennsylvania, was sufficient although the jurat contained no recital that the officer was a notary public of that state. The judgment rendered by Bird, V. C., in Whitehead v. Hamilton Rubber Co., 53 N. J. Eq. 454, 32 Atl. 377, was affirmed, though the court held that he erred in ruling that such a recital was necessary. And in Feuchtwanger *v.* McCool, 29 N. J. Eq. 151, it was held that where the notary's official designation was contained in the jurat a failure to annex it to the signature was not material.

Thus, where a statute provides that affidavits may be taken outside the state before a judge of a court of record, an affidavit certified by a judge cannot be received unless it be shown that the court over which he presided was a court of record.[65]

b. Authority under Laws of Own State — (I) *In General.* Where, by statute, it is provided that an affidavit may be taken by any person authorized by the laws of his own state to perform such act, it must be shown that the officer was so authorized.[66]

(II) *Notary Public — Presumption of Authority.* By the weight of authority it is held that no presumption will be indulged that a notary public has authority under the laws of another state, and that an affidavit taken by a notary will not be received in the absence of proof that he has been given such power by the laws of his own state;[67] but there are authorities to the contrary.[68]

Not a judicial proceeding of another state. — An authentication called for by a Maryland court (as a verification to a pleading) is a part of the judicial proceedings of that state, and is not such a judicial proceeding of another state as comes within the federal constitution and the acts of congress respecting the manner in which such proceeding shall be proved. Gibson *v.* Tilton, 1 Bland (Md.) 352, 17 Am. Dec. 306.

Amendment.— In West Virginia an affidavit, taken outside the state and lacking the certificate of authentication required by the statute, may by leave of court be amended by appending to it such certificate. Bohn *v.* Zeigler, 44 W. Va. 402, 29 S. E. 983.

65. Coward *v.* Dillinger, 56 Md. 59; Evesson *v.* Selby, 32 Md. 340.

Sufficient showing.— Where the certificate showed that the court in which the judge presided had a clerk and seal, it was sufficient evidence that such court was a court of record; and an attestation by the clerk "by his official seal" was held to be sufficient, since the clerk of a court of record is ordinarily the official keeper of its seal, and the seal of the court is his "official seal." Moore *v.* Carson, 12 Tex. 66.

Shown by evidence aliunde.— Under Iowa Code, § 3692, providing that affidavits may be taken out of the state before any judge or clerk of a court of record, the failure of the certificate to show that the court was a court of record is not fatal, but that fact may be shown by evidence *aliunde.* Levy *v.* Wilson, 43 Iowa 605.

66. Keefer *v.* Mason, 36 Ill. 406; Warren *v.* Swinburne, 9 Jur. 510.

New York.— N. Y. Code Civ. Proc. § 844, provides that affidavits may be taken without the state "before an officer authorized by the laws of the state" to take acknowledgments. Under this it has been held that such an affidavit is insufficient unless there be a certificate that the officer who took it was authorized by the laws of his own state to take acknowledgments therein. Turtle *v.* Turtle, 31 N. Y. App. Div. 49, 52 N. Y. Suppl. 857; Stanton *v.* U. S. Pipe Line Co., 90 Hun (N. Y.) 35, 35 N. Y. Suppl. 629; Hyatt *v.* Swivel, 52 N. Y. Super. Ct. 1; Bowen *v.* Stilwell, 9 N. Y. Civ. Proc. 277; Phelps *v.* Phelps, 6 N. Y. Civ. Proc. 117; Harris *v.* Durkee, 5 N. Y. Civ. Proc. 376; Williams *v.* Waddell, 5 N. Y. Civ. Proc. 191. But see Ross *v.* Wigg, 34 Hun (N. Y.) 192, 6 N. Y. Civ. Proc. 263, wherein it was held [Follett, J., dissenting] that the words "the state" as used in the statute referred to the state of New York, and not to the state in which the affidavit was taken; and an affidavit was sufficient if taken before a person authorized by the laws of New York to take acknowledgments, regardless of whether he had that power under the laws of his own state.

67. *Alabama.*— Alabama Nat. Bank *v.* Chattanooga Door, etc., Co., 106 Ala. 663, 18 So. 74.

Georgia.— Brunswick Hardware Co. *v.* Bingham, 107 Ga. 270, 33 S. E. 56.

Illinois.—Trevor *v.* Colgate, 181 Ill. 129, 54 N. E. 909; Ferris *v.* Commercial Nat. Bank, 158 Ill. 237, 41 N. E. 1118; Smith *v.* Lyons, 80 Ill. 600; Keefer *v.* Mason, 36 Ill. 406; Figge *v.* Rowlen, 84 Ill. App. 238.

Indiana.— Teutonia Loan, etc., Co. *v.* Turrell, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419.

Missouri.— Barhydt *v.* Alexander, 59 Mo. App. 188.

Affidavit not purporting to be made outside state.— Where an affidavit, purporting to be taken by a notary public, did not show that it was made outside the state, it was held to be admissible over an objection that it bore no certificate of such notary's official character. Richardson *v.* Comer, 112 Ga. 103, 37 S. E. 116.

Amendment.— In Goldie *v.* McDonald, 78 Ill. 605, it was held that a certificate as to the notary's power to take affidavits in his own state might be filed by way of amendment.

68. In Wood *v.* St. Paul City R. Co., 42 Minn. 411, 44 N. W. 308, it was held that whether the authority of notaries public to administer oaths be of statutory origin or founded on customary law, it is now universal and should be judicially recognized as one of their general powers; and affidavits authenticated by the official seals of notaries of other states should be placed on the same footing as their authentications of commercial documents. See also Conolly *v.* Riley, 25 Md. 402; Tucker *v.* Ladd, 4 Cow. (N. Y.) 47.

c. Sufficiency of Authentication. Where the manner in which the officer's authority is to be proved is not pointed out by the statute, any competent evidence is sufficient.[69] In many jurisdictions, however, the mode is specified, and where this is the case the authentication must be in the prescribed manner;[70] but a literal adherence to the statute is not required, a substantial compliance therewith being regarded as sufficient.[71]

IV. OATH OR AFFIRMATION.

In order for an affidavit to be valid for any purpose, it must, of course, be sworn to or affirmed by affiant.[72] It is not essential, however, that affiant should

69. Figge *v.* Rowlen, 84 Ill. App. 238.

Jurat in usual form under seal.— Where a statute conferring authority upon certain persons to take affidavits in foreign countries prescribed no particular mode of authentication, it was held that a jurat in the usual form, under the seal of the officer, was sufficient. City Bank *v.* Lumley, 28 How. Pr. (N. Y.) 397.

Missouri — Certificate of clerk under seal. — The official character of the officer taking an affidavit in another state is sufficiently proved by the certificate of the clerk, under the seal of the court. Hays *v.* Bouthalier, 1 Mo. 346.

70. Draper *v.* Williams, 8 Blackf. (Ind.) 574; Sloane *v.* Anderson, 57 Wis. 123, 13 N. W. 684, 15 N. W. 21.

Knowledge of officer's handwriting.— A certificate to an affidavit taken in another state must state, in compliance with the statutes, that the person making the certificate has knowledge of the handwriting of the officer before whom the affidavit was sworn to. Bowen *v.* Stilwell, 9 N. Y. Civ. Proc. 277.

Seal not showing name of state.— Where the seal to an affidavit taken by a commissioner of Iowa in another state gave only the name of the commissioner, and the name of the state was written with a pen, it was held to be insufficient under a statute requiring such seal to show the name of the state. Gage *v.* Dubuque, etc., R. Co., 11 Iowa 310, 77 Am. Dec. 145.

Insufficient authentication.— A certificate of authentication to a foreign affidavit which states that a man of the same name as the person who had administered the oath is a magistrate, but not that the person who administered it is a magistrate, is insufficient. U. S. *v.* Burr, 25 Fed. Cas. No. 14,692*c*.

71. Ross *v.* Wigg, 34 Hun (N. Y.) 192; Manufacturers', etc., Bank *v.* Cowden, 3 Hill (N. Y.) 461.

Sufficient authentication.— Where an affidavit is taken before a justice of the peace of another state the official character of such justice sufficiently appears where the clerk of the county court of the county in which he resides certifies that he was then an acting justice duly commissioned, etc., and two of the commissioners of the same court certify that the person giving the certificate is clerk, and his official acts entitled to due faith and credit. Posey *v.* Buckner, 3 Mo. 604.

An affidavit taken in Ohio before a notary whose authority was authenticated by the certificate of the clerk of a court of record, reciting that such notary was authorized by the laws of Ohio to take affidavits and acknowledgments in that state, was held to be sufficiently authenticated to render it admissible in the courts of New York. Levy *v.* Levy, 29 Misc. (N. Y.) 374, 60 N. Y. Suppl. 485.

Signature "believed to be genuine."— The clerk's certificate under W. Va. Code, c. 130, § 31, verifying a notary's signature to an affidavit taken in another state, is sufficient where it states that the signature "is believed to be genuine," this being a sufficient compliance with the statute requiring a certificate "verifying the genuineness of the signature." Heffernan *v.* Harvey, 41 W. Va. 766, 24 S. E. 592.

Objections without merit.— Objections to the form of certificates authenticating affidavits taken abroad, on the ground that they did not state that the affidavit was subscribed before the judge who made the certificate and did not specify the place where the affidavit was taken, were held to be without merit. Belden *v.* Devoe, 12 Wend. (N. Y.) 223.

72. *Illinois.*— Kehoe *v.* Rounds, 69 Ill. 351; McDermaid *v.* Russell, 41 Ill. 489.

Indiana.— Cantwell *v.* State, 27 Ind. 505.

South Carolina.— Doty *v.* Boyd, 46 S. C. 39, 24 S. E. 59.

Texas.— Hardy *v.* Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80.

Washington.— Tacoma Grocery Co. *v.* Draham, 8 Wash. 263, 36 Pac. 31, 40 Am. St. Rep. 907.

West Virginia.—Cosner *v.* Smith, 36 W. Va. 788, 15 S. E. 977.

And see *supra*, I, A.

As to oaths and affirmations in general see OATHS AND AFFIRMATIONS.

As to necessity for jurat showing that the affidavit was sworn to see *infra*, V, G, 3, d.

Refusal to take oath.— A paper prepared to be sworn to by one who afterward refused to swear to it will not be given any weight though an affidavit be made stating that the intended affiant said that the paper was true. Thompson *v.* Fuller, 8 N. Y. Suppl. 62, 939.

An affidavit cannot be made by proxy, but affiant must do his own swearing. Thus, where the name of a claimant was signed to an affidavit by another person who swore thereto and signed the name in the absence of claimant and without his knowledge, he never having in fact deposed to the contents of the affidavit, it was held that such paper

"hold up his hand and swear" in order to make his act an oath, but it is sufficient if both affiant and the officer understand that what is done is all that is necessary to complete the act of swearing;[73] and the oath or affirmation may be administered in accordance with the religious belief of affiant.[74]

V. Form and Contents.

A. In General. The formal and substantial requisites of an affidavit are matters depending for the most part upon the purposes for which such affidavit is to be used and the statutes under which it is drawn, and, therefore, the statutes governing the particular affidavit should always be consulted.[75]

was properly treated as no affidavit, there being no contention that the person who actually signed was acting as the agent of claimant. Shecut *v.* Trubee, 99 Ga. 637, 26 S. E. 60.

Objection not considered on appeal.—A motion to quash an attachment on the ground of the omission of the word "sworn" in the affidavit will not be considered on appeal when raised there for the first time. Merrielles *v.* State Bank, 5 Tex. Civ. App. 483, 24 S. W. 564.

Service of copy before oath taken.—It is irregular to serve a copy of an affidavit on which a motion is to be founded previous to its being sworn to. Wilson *v.* Tiffany, 3 Wend. (N. Y.) 310.

73. Dunlap *v.* Clay, 65 Miss. 454, 4 So. 118.

Acts not amounting to oath.—Where an attorney at law prepared an affidavit for the purpose of foreclosing a chattel mortgage, signed his name to it, and then laid it on the desk of the clerk of the superior court, at which the latter was sitting, the attorney at the same time remarking: "Here is an affidavit I want to swear to; I have already signed it; the facts stated in it are true," and it does not appear that the clerk heard what the attorney said, but it does appear that no oath was formally administered and that the clerk did not then nor till long afterward sign the jurat, the affidavit was not duly made, and the clerk had no authority to issue an execution thereon. Matthews *v.* Reid, 94 Ga. 461, 462, 19 S. E. 247.

The agent of a creditor went to a justice of the peace and asked him to prepare papers for the issuance of an attachment, in favor of his principal, against the estate of a debtor. The justice prepared the affidavit and other papers and, handing them to the agent, asked "if it was all right," to which the agent replied that it was. The agent did not sign the affidavit, no oath was administered, and no attempt to make an oath made. It was held that there was no affidavit. Carlisle *v.* Gunn, 68 Miss. 243, 8 So. 743.

74. Newman *v.* Newman, 7 N. J. Eq. 26. And see, generally, Oaths and Affirmations.

75. **For sufficient forms** of affidavits see the following cases:

Arkansas.— Cheadle *v.* Riddle, 6 Ark. 480.

California.— Ede *v.* Johnson, 15 Cal. 53.

Illinois.— McCormick *v.* Wells, 83 Ill. 239; Rowley *v.* Berrian, 12 Ill. 198.

Indiana.— Turpin *v.* Eagle Creek, etc., Gravel Road Co., 48 Ind. 45; Hosea *v.* State, 47 Ind. 180; Kleber *v.* Block, 17 Ind. 294.

Iowa.— Kirby *v.* Gates, 71 Iowa 100, 32 N. W. 191; Stone *v.* Miller, 60 Iowa 243, 14 N. W. 781; Rausch *v.* Moore, 48 Iowa 611, 30 Am. Rep. 412; Levy *v.* Wilson, 43 Iowa 605.

Maine.— Atwood *v.* Higgins, 76 Me. 423.

Nebraska.— Bantley *v.* Finney, 43 Nebr. 794, 62 N. W. 213; Whipple *v.* Hill, 36 Nebr. 720, 55 N. W. 227, 38 Am. St. Rep. 742, 20 L. R. A. 313.

New Hampshire.— Randall *v.* Baker, 20 N. H. 335.

New York.— People *v.* Sutherland, 81 N. Y. 1.

United States.— *In re* Keller, 36 Fed. 681.

And for affidavits to be used for a particular purpose or in a particular proceeding see the specific titles.

Affidavits written in foreign language.— In Spencer *v.* Doane, 23 Cal. 418, it was held that affidavits which were written in a foreign language and filed on a motion for a new trial were properly excluded. But in *In re* Eady, 6 Dowl. P. C. 615, an affidavit originally written in a foreign language, but translated and the translation verified, was held to be sufficient.

Objections to the sufficiency of an affidavit must be raised at the earliest opportunity, else they will be waived.

Connecticut.— McGinnis *v.* Grant, 42 Conn. 77.

Illinois.— Linck *v.* Litchfield, 141 Ill. 469, 31 N. E. 123.

Indiana.— Rosenstein *v.* State, 9 Ind. App. 290, 36 N. E. 652.

Iowa.— Snell *v.* Eckerson, 8 Iowa 284.

Mississippi.— Yeizer *v.* Burke, 3 Sm. & M. (Miss.) 439.

Missouri.— Squires *v.* Chillicothe, 89 Mo. 226, 1 S. W. 23; Smith *v.* Ponath, 17 Mo. App. 262.

New York.— City Bank *v.* Lumley, 28 How. Pr. (N. Y.) 397; Gilmore *v.* Hempstead, 4 How. Pr. (N. Y.) 153.

Texas.— Merrielles *v.* State Bank, 5 Tex. Civ. App. 483, 24 S. W. 564; Etter *v.* Dugan, 1 Tex. Unrep. Cas. 175.

Plea in abatement is the proper mode of raising an objection that an affidavit for attachment has not been verified and subscribed, or that the officer who took it had no authority. Lowry *v.* Stowe, 7 Port. (Ala.) 483.

B. Entitling — 1. Necessity — a. When Cause Pending — (I) *In General.* It is the general rule that an affidavit taken for use in a pending cause must be entitled in such cause, so that it may show to what proceedings it is intended to apply, and support an assignment of perjury in case it prove to be false.[76]

(II) *Where Cause Is Otherwise Identified.* But since the object of entitling is merely to show in what suit the affidavit is to be used, an affidavit will not be disregarded because lacking a title where the cause to which it is intended to apply is otherwise clearly identified.[77] Thus an affidavit referring or attached to another paper, properly entitled in the cause, is good by relation thereto, though not itself entitled.[78]

b. When No Cause Pending. If there be no suit pending at the time the affidavit is taken it should not be entitled, for affiant, it is said, could not in that case be convicted of perjury if the affidavit were false;[79] but in some jurisdic-

76. *Illinois.*— Watson *v.* Reissig, 24 Ill. 281, 76 Am. Dec. 746.

Michigan.— Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. 1119, 15 Am. St. Rep. 288; Whipple *v.* Williams, 1 Mich. 115.

Mississippi.— Saunders *v.* Erwin, 2 How. (Miss.) 732.

New York.— Irroy *v.* Nathan, 4 E. D. Smith (N. Y.) 68; Burgess *v.* Stitt, 12 How. Pr. (N. Y.) 401; Higham *v.* Hayes, 2 How. Pr. (N. Y.) 27.

West Virginia.— Vinson *v.* Norfolk, etc., R. Co., 37 W. Va. 598, 16 S. E. 802.

United States.— Goldstein *v.* Whelan, 62 Fed. 124; Buerk *v.* Imhaeuser, 4 Fed. Cas. No. 2,107*a*.

England.— Owen *v.* Hurd, 2 T. R. 643; Johnson *v.* Simpson, 1 L. T. Rep. N. S. 60.

77. Hays *v.* Loomis, 84 Ill. 18; McCormick *v.* Wells, 83 Ill. 239; Harris *v.* Lester, 80 Ill. 307; Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. 1119, 15 Am. St. Rep. 288; Kearney *v.* Andrews, 5 Wis. 23; Shook *v.* Rankin, 8 Biss. (U. S.) 477, 21 Fed. Cas. No. 12,804.

In Yard *v.* Bodine, 18 N. J. L. 490, it was held that an affidavit for an appeal from a justice's court, sent up by the justice with the appeal papers, was not insufficient because not entitled in the cause, where there was nothing to show that it was not made in such cause, and the transcript or certificate of the justice showed that appellant had in fact filed an affidavit with him in due season.

Identity appearing on face of affidavit.— It is not necessary to entitle an affidavit if it shows upon its face that it is an affidavit in the proper suit. Dunham *v.* Rappleyea, 16 N. J. L. 75. And see Saunders *v.* Erwin, 2 How. (Miss.) 732, to the effect that every affidavit taken in the progress of any suit must have upon its face, either at the commencement of it or in its body, the title of the suit in which it is taken and to the proceedings of which it is intended to apply.

78. *Arkansas.*— Powers *v.* Swigart, 8 Ark. 363.

California.— Watt *v.* Bradley, 95 Cal. 415, 30 Pac. 557.

Iowa.— Levy *v.* Wilson, 43 Iowa 605.

Michigan.— King *v.* Harrington, 14 Mich. 532.

New York.— Anonymous, 4 Hill (N. Y.) 597; *Ex p.* Metzler, 5 Cow. (N. Y.) 287.

England.— Prince *v.* Nicholson, 1 Marsh. 70, 5 Taunt. 333, 1 E. C. L. 176.

79. *Arkansas.*— Kinney *v.* Heald, 17 Ark. 397.

California.— McCrary *v.* Beaudry, 67 Cal. 120, 7 Pac. 264.

Florida.— West *v.* Woolfolk, 21 Fla. 189.

Indiana.— Hawkins *v.* State, 136 Ind. 630, 36 N. E. 419.

Michigan.— Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. 1119, 15 Am. St. Rep. 288.

New York.— Milliken *v.* Selye, 3 Den. (N. Y.) 54; People *v.* Tioga County, 1 Wend. (N. Y.) 291; Whitney *v.* Warner, 2 Cow. (N. Y.) 499; Haight *v.* Turner, 2 Johns. (N. Y.) 371; People *v.* Dikeman, 7 How. Pr. (N. Y.) 124; Stacy *v.* Farnham, 2 How. Pr. (N. Y.) 26.

Wisconsin.— Quarles *v.* Robinson, 2 Pinn. (Wis.) 97.

United States.— Baldwin *v.* Bernard, 9 Blatchf. (U. S.) 509 note, 2 Fed. Cas. No. 797; Sterrick *v.* Pugsley, 1 Flipp. (U. S.) 350, 22 Fed. Cas. No. 13,379; Blake Crusher Co. *v.* Ward, 3 Fed. Cas. No. 1,505, 1 Am. L. T. Rep. N. S. 423.

England.— Green *v.* Redshaw, 1 B. & P. 227; Reg. *v.* Jones, 1 Str. 704; King *v.* Cole, 6 T. R. 640; Rex *v.* Harrison, 6 T. R. 60. But see Clarke *v.* Cawthorne, 7 T. R. 321, wherein the court refused to discharge a defendant out of custody on the ground that the affidavit on which he had been held to bail was entitled in the cause.

Reason for rule.— In Haight *v.* Turner, 2 Johns. (N. Y.) 371, 372, the court said: "It is a settled rule of practice in the English courts that on a motion for an information, or in an affidavit to hold to bail, the affidavit must not be entitled, and if it be entitled it cannot be read. The reason assigned is that there is, at the time, no cause pending in the court, and an indictment for perjury, in making such an affidavit, must fail, as it could not be shown that such a cause existed in the court in which the affidavit was made."

Right to reject title as surplusage.— If an affidavit is entitled in a case where it should not be, the title cannot be rejected as sur-

tions the entitling of an affidavit sworn to before the actual commencement of the action is not now regarded as a material defect.[80]

2. Sufficiency — a. In General. A wrongly entitled affidavit cannot be received, since affiant could not be punished for perjury in case he swore falsely,[81] but it has been held that a mistake in the title is immaterial after judgment.[82]

b. In What Cause. The affidavit should be entitled in the cause in which it is to be used.[83] Thus, on a motion to set aside proceedings on a bail-bond, the affidavit is properly entitled in that suit, and not in the original cause.[84] Where an affidavit was entitled as of two causes, but it appeared that both titles referred to the same suit, it was held that one of the titles being correct the other might be rejected as surplusage.[85]

c. Name and Style of Court. It has been held that the title embraces the entire heading, including the name and style of the court as well as the names of the parties,[86] and that an affidavit entitled in the wrong court is fatally defective;[87] but, generally, an affidavit which identifies clearly the cause to which it belongs

plusage (Milliken *v.* Selye, 3 Den. (N. Y.) 54); at least if such rejection will render material portions of the affidavit meaningless (Blake Crusher Co. *v.* Ward, 3 Fed. Cas. No. 1,505, 1 Am. L. T. Rep. N. S. 423).

Harmless entitling.— In *Ex p.* La Farge, 6 Cow. (N. Y.) 61, it was held that an affidavit on motion for a mandamus which was headed "Sup. Court. In the matter of John La Farge against the judges of the court of common pleas of Jefferson county," was not such an entitling as to prevent its being read, since it was not entitled in any cause as pending in the supreme court.

An affidavit for a certiorari to a justice's court may be entitled in the cause below, but not in the appellate court. Whitney *v.* Warner, 2 Cow. (N. Y.) 499.

80. Crombie *v.* Little, 47 Minn. 581, 587, 50 N. W. 823, wherein the court said: "Another objection to the affidavit is that it was void because entitled in a cause not yet commenced. There are undoubtedly decisions which go to this length, but they are, in our judgment, devoid of reason, and based upon a frivolous technicality."

In New York it is provided by statute that the entitling of an affidavit in a suit which is not commenced may be disregarded as not affecting the rights of the adverse party. Pindar *v.* Black, 4 How. Pr. (N. Y.) 95.

Waiver of objection.— Where an affidavit for an order of arrest was entitled in the cause it was held that the objection was waived by defendant predicating his motion to discharge the order on such affidavit, and presenting a response thereto. City Bank *v.* Lumley, 28 How. Pr. (N. Y.) 397.

81. Humphrey *v.* Cande, 2 Cow. (N. Y.) 509; Hawley *v.* Donnelly, 8 Paige (N. Y.) 415.

For form of affidavit defective as to title see Vinson *v.* Norfolk, etc., R. Co., 37 W. Va. 598, 16 S. E. 802.

Should follow title of writ.— The title of affidavits in a cause should pursue the writ of summons. Marshall *v.* Adams, 2 Jur. 944, 1 W. W. & H. 296.

82. Majors *v.* Edwards, 36 Nebr. 56, 53 N. W. 1041.

Where a rule has been substantially disposed of it cannot afterward be objected that the affidavits upon which the rule was drawn up are not correctly entitled. Viner *v.* Langton, 5 Dowl. P. C. 92.

83. Whipple *v.* Williams, 1 Mich. 115; Dickenson *v.* Gilliland, 1 Cow. (N. Y.) 481; Baxter *v.* Seaman, 1 How. Pr. (N. Y.) 51.

Action on case — Affidavit entitled in debt. — In Dunham *v.* Rappleyea, 16 N. J. L. 75, it was held that where an affidavit on appeal, in an action of trespass on the case, was entitled as in an action of debt the defect was fatal.

84. Phelps *v.* Hall, 5 Johns. (N. Y.) 367; Pell *v.* Jadwin, 3 Johns. (N. Y.) 448.

Where wrong title immaterial.— On a motion to set aside the proceedings on a bail-bond it was held that affidavits made in support of the motion and entitled in the original cause, attached to an order to stay proceedings, which was entitled in the bail-bond suit, with a notice of motion showing the real object of the application, might be read. *Ex p.* Metzler, 5 Cow. (N. Y.) 287.

85. Roosevelt *v.* Dale, 2 Cow. (N. Y.) 581.

Where a rule is obtained in two causes the affidavits must be entitled in both of them, though plaintiff and defendant are the same in both. Corry *v.* Wharton, 2 Scott 436, 30 E. C. L. 648; Pitt *v.* Evans, 2 Dowl. P. C. 226. But see Harper *v.* Mount, 2 Jur. 990.

86. Bowman *v.* Sheldon, 5 Sandf. (N. Y.) 657.

87. Clickman *v.* Clickman, 3 How. Pr. (N. Y.) 365.

Affidavit on appeal.— In Clickman *v.* Clickman, 1 N. Y. 611, it was held that an affidavit on appeal to the court of appeals should not be entitled in the supreme court, although it was provided by statute that the title of an action should not be changed in consequence of an appeal, since such statute referred only to the title of the action, and not to the name or the style of court.

will be sufficient though entitled in the wrong court,[88] or omitting the title of the court altogether.[89]

d. Names of Parties — (I) *In General.* In an affidavit to be used in a pending cause the title should give the names of the parties in the same manner as in the other papers in the cause,[90] and ordinarily it is proper to follow the writ in this regard.[91] The words "plaintiff" and "defendant" need not be added after the names;[92] nor is any description of a party usually necessary,[93] except where he is suing in a representative capacity, in which case the affidavits in the cause should be entitled accordingly.[94] In England the christian names of the parties are required to be given,[95] and a material variance in this respect will render the affidavit defective.[96]

(II) *Where Several Parties* — (A) *Necessity of Naming All.* Under the English practice the names of all the parties to the suit are required to be given,[97]

88. Bowman *v.* Sheldon, 5 Sandf. (N. Y.) 657; Blake *v.* Locy, 6 How. Pr. (N. Y.) 108.

89. Wilborn *v.* Blackstone, 41 Ill. 264.

90. **"A B v. C D"** is ordinarily the proper mode of stating the title of the suit. Richards *v.* Isaac, 2 Dowl. P. C. 710, 1 C. M. & R. 136.

"Ad sectam" instead of "versus."— Where an affidavit was entitled "C D *ads.* A B" instead of "A B *v.* C D," it was held sufficient, being clearly applicable to only one cause. Bowen *v.* Wilcox, etc., Sewing Mach. Co., 86 Ill. 11.

All papers in cause wrongly entitled.— Where the affidavit and all the other papers in the cause were wrongly entitled, the parties being reversed and entitled "*versus*" instead of "*ad sectam*," it was held to be fatal. Parkman *v.* Sherman, 1 Cai. (N. Y.) 344 [*distinguishing* Ryers *v.* Hillyer, 1 Cai. (N. Y.) 112, in which case some of the papers were properly entitled].

91. White *v.* Feltham, 3 C. B. 658, 54 E. C. L. 658; Bland *v.* Dax, 10 Jur. 8, 15 L. J. Q. B. 1.

Defendant sued by wrong name.— Where a defendant sued by a wrong name enters his appearance under his right name it is proper to entitle an affidavit "A B *v.* C D, sued as E F." Hodgson *v.* May, 7 Dowl. & L. 4, 14 Jur. 653; Dunn *v.* Hodson, 1 Dowl. & L. 204, 7 Jur. 971; Jones *v.* Eldridge, 1 Dowl. N. S. 10, 4 M. & G. 266, 43 E. C. L. 144; Baldwin *v.* Bauerman, 12 C. B. 152, 74 E. C. L. 152, 16 Jur. 892; Belcher *v.* Goodered, 4 C. B. 472, 56 E. C. L. 472, 4 Dowl. & L. 814. See also Lomax *v.* Kilpin, 16 M. & W. 94, 16 L. J. Exch. 23; Tagg *v.* Simmons, 4 Dowl. & L. 582, 16 L. J. Q. B. 319.

Marriage of female defendant pending suit. — Where a suit is begun against a woman and she marries pending suit, an affidavit made thereafter should be entitled in accordance with the original title of the cause. Roosevelt *v.* Dale, 2 Cow. (N. Y.) 581.

Change of name pending suit.— Where, pending an action against a company, the name of the company is changed by act of parliament, and a motion is afterward made in such action, a suggestion should be entered of the change of name and the affidavits entitled in the new name. Hibblethwaite *v.* Leeds, etc., R. Co., 15 Jur. 1015, 21 L. J. Exch. 37.

92. Munzesheimer *v.* Heinze, 74 Tex. 254, 11 S. W. 1094. But see Harris *v.* Griffiths, 4 Dowl. P. C. 289, 1 Hurl. & W. 515.

93. Reeves *v.* Crisp, 6 M. & S. 274; Miller *v.* Miller, 2 Scott 117.

Where there are two persons of the same name, if no addition is given to the surname of one of them in the title of an affidavit, it will be presumed to be the name of the elder. Young *v.* Young, 1 Dowl. N. S. 865, 6 Jur. 916; Singleton *v.* Johnson, 9 M. & W. 67, 1 Dowl. N. S. 356, 5 Jur. 114. And see Shrimpton *v.* Carter, 3 Dowl. P. C. 648.

94. Engler *v.* Twysden, 6 Scott 580, 1 Arn. 269; Steyner *v.* Cottrell, 3 Taunt. 377; Casley *v.* Smith, 4 Dowl. P. C. 477; Clarke *v.* Martin, 3 Dowl. P. C. 222; Phillips *v.* Hutchinson, 3 Dowl. P. C. 20; Wright *v.* Hunt, 1 Dowl. P. C. 457; Fletcher *v.* Lechmere, 5 M. & G. 265, 44 E. C. L. 146, 2 Dowl. N. S. 848, 6 Scott N. R. 173, 12 L. J. C. P. 151.

Immaterial variance.— Where an affidavit in a cause, in which A, suing by his next friend, was plaintiff, was entitled "A, suing by her next friend," it was held to be an immaterial variance. Abrahams *v.* Taunton, 1 Dowl. & L. 319, 7 Jur. 678.

95. Fores *v.* Diemar, 7 T. R. 661; Barham *v.* Lee, 2 Dowl. P. C. 779, 4 Moore & S. 327, 30 E. C. L. 553; Clothier *v.* Ess, 3 Moore & S. 216, 30 E. C. L. 508, 2 P. C. 731.

96. Watson *v.* Reissig, 24 Ill. 281, 76 Am. Dec. 746; Reg. *v.* Surrey, 8 Dowl. P. C. 510, 4 Jur. 559; Symes *v.* Prosser, 15 M. & W. 151, 2 Dowl. & L. 49, 15 L. J. Exch. 199; Joll *v.* Curzon, 5 C. B. 205, 57 E. C. L. 205.

Omission of letter — Idem sonans.— An omission of a letter in the name of a party in the title of an affidavit, the word being *idem sonans*, is no ground for discharging a rule obtained upon such affidavit. Gray *v.* Coombes, 10 C. B. 72, 70 E. C. L. 72, 14 Eng. L. & Eq. 252; Cooper *v.* Tilly, 7 Jur. 679.

97. Bullman *v.* Callow, 1 Chit. 727, 18 E. C. L. 397; Fores *v.* Diemar, 7 T. R. 661, 2 East 182, note *a*; Thomkins *v.* Geach, 5 Dowl. P. C. 509; Masters *v.* Carter, 4 Dowl. P. C. 577, 1 Hurl. & W. 672; Doe *v.* Want, 2 Moore 722; Theobald *v.* Brame, W. W. & D. 219. But see Reg. *v.* Christian, 1 C. & M. 388, 41 E. C. L. 214, to the effect, it seems, that a person may be convicted of perjury contained in an affidavit entitled "A B against C D and others," although, by the rules of the courts, all parties should be named.

but in the United States an affidavit entitled "A B *et als. v.* C D *et als.*" is generally sufficient, provided the cause is clearly identified thereby.[98]

(B) *Change of Parties.* Where a writ has been sued out in the names of two plaintiffs and afterward one of them is allowed to sever, an affidavit subsequently drawn should not be entitled in the names of both;[99] nor can an affidavit entitled in a cause against two defendants be used in a cause against one of them only.[1]

C. Venue — 1. NECESSITY. In a number of cases it has been held that no presumption can be entertained as to where an affidavit was made if no place is mentioned therein, and that consequently the omission of the venue is fatal to the affidavit.[2] But in most jurisdictions the courts indulge the presumption that the officer who took the affidavit acted within his jurisdiction, and, therefore, while it is always the proper practice to prefix a venue to an affidavit, an omission in this respect is not regarded as fatal.[3]

2. SUFFICIENCY. It is not essential that the venue be contained in the caption of the affidavit. It is sufficient if the place of administering the oath appear either there,[4] or in the jurat.[5] Where the officer's authority to administer oaths

98. Seymour *v.* Bailey, 66 Ill. 288; Maury *v.* Van Arnum, 1 Hill (N. Y.) 370; White *v.* Hess, 8 Paige (N. Y.) 544; Hubby *v.* Harris, 63 Tex. 456. *Contra,* Arnold *v.* Nye, 11 Mich. 456.

99. Whipple *v.* Williams, 1 Mich. 115.

1. Graham *v.* Elmore, Harr. (Mich.) 265. But in Hawes *v.* Bamford, 9 Sim. 653, 16 Eng. Ch. 653, it was held that where, after the filing of an affidavit in a suit against three defendants, one of them was struck out, an injunction might be granted on the affidavit as originally entitled.

2. Barhydt *v.* Alexander, 59 Mo. App. 188; Thompson *v.* Burhans, 61 N. Y. 52; People *v.* Decamp, 12 Hun (N. Y.) 378; Cook *v.* Staats, 18 Barb. (N. Y.) 407; Clement *v.* Ferenback, 1 N. Y. City Ct. (N. Y.) 57; Schemerhorn *v.* Develin, 1 Code Rep. (N. Y.) 13; Saril *v.* Payne, 4 N. Y. Suppl. 897; Lane *v.* Morse, 6 How. Pr. (N. Y.) 394; Smith *v.* Collier, 3 N. Y. St. 172; Smith *v.* Richardson, 1 Utah 194. And to the same effect see Burns *v.* Doyle, 28 Wis. 460.

Statement of officer's residence.— In Cook *v.* Staats, 18 Barb. (N. Y.) 407, 408, the affidavit contained no venue. The jurat was: "Sworn before me, this 7th day of Nov. 1853, Geo. B. Ketchum, Com'r. of Deeds for the city of Buffalo." It was held that this affidavit was insufficient.

Evidence aliunde — Amendment.— While the weight of authority in New York sustains the doctrine stated in the text, yet it has been held that the fact that the oath was administered by a proper officer within his jurisdiction may be shown otherwise, and the omission rectified by amendment. Babcock *v.* Kuntzsch, 85 Hun (N. Y.) 33, 32 N. Y. Suppl. 587, 1 N. Y. Anno. Cas. 300; Smith *v.* Collier, 3 N. Y. St. 172; Reedy Elevator Co. *v.* American Grocery Co., 48 N. Y. Suppl. 619.

3. *California.*— Reavis *v.* Cowell, 56 Cal. 588.

Illinois.— Stone *v.* Williamson, 17 Ill. App. 175.

Kansas.— Baker *v.* Agricultural Land Co., (Kan. 1900) 61 Pac. 412.

Minnesota.— Young *v.* Young, 18 Minn. 90.

Nebraska.— Merriam *v.* Coffee, 16 Nebr. 450, 20 N. W. 389; Miller *v.* Hurford, 13 Nebr. 13, 12 N. W. 832. But see Blair *v.* West Point Mfg. Co., 7 Nebr. 146, wherein an objection that the affidavit of service of summons had no venue was held to be well taken.

New Jersey.— Benson *v.* Bennett, 25 N. J. L. 166; Smith *v.* Abbott, 17 N. J. L. 358.

Oregon.— Dennison *v.* Story, 1 Oreg. 272.

South Dakota.— State *v.* Henning, 3 S. D. 492, 54 N. W. 536.

United States.— Ormsby *v.* Ottman, 85 Fed. 492, 56 U. S. App. 510, 29 C. C. A. 295.

In Sullivan *v.* Hall, 86 Mich. 7, 13, 48 N. W. 646, 13 L. R. A. 556, the court said: "The necessity of stating a venue at all is reluctantly confessed by the authorities."

Not ground for collateral attack.— A judgment is not subject to collateral attack because the affidavit which is the foundation of the proceeding has no venue. Avery *v.* Good, 114 Mo. 290, 21 S. W. 815.

4. Rahilly *v.* Lane, 15 Minn. 447.

Place appearing on face of affidavit.— Notwithstanding the fact that the venue of an affidavit to the statement required of a railroad company for assessment purposes of its property was stated as of a county in the state of California, and referred to such property as being "within this state," yet, where it plainly appeared from the face of the affidavit that it related to property in Lander county, Nevada, the affidavit was held to be sufficient. State *v.* Central Pac. R. Co., 17 Nev. 259, 30 Pac. 887.

Affidavit taken by United States commissioner.— Where an affidavit is taken before a United States commissioner the venue should be given thus: "United States of America, District of ———," and not "State of ———, County of ———." Sterrick *v.* Pugsley, 1 Flipp. (U. S.) 350, 22 Fed. Cas. No. 13,379.

5. Wood *v.* Blythe, 46 Wis. 650, 1 N. W. 341.

As to the jurat showing place of administering the oath see *infra,* V, G, 3, f.

is coextensive with the limits of the state it is not necessary for the affidavit to show at what place in the state it was taken.[6] The omission of the letters "*ss.*" is not a material defect.[7]

3. Prima Facie Force. The venue stated in an affidavit is *prima facie* evidence of the place where it was taken.[8]

D. Date. The date is not an essential part of an affidavit, and if a date is erroneously stated the mistake may be shown.[9]

E. Body of Instrument — 1. Sufficiency in General — a. Ability to Sustain Charge of Perjury. The chief test of the sufficiency of an affidavit is whether it is so clear and certain that an indictment for perjury may be sustained on it if false.[10]

b. Substantial Compliance with Statute. An affidavit which employs words of equivalent import and effect to those used in the statute under which it is drawn is sufficient — a literal compliance is not exacted.[11]

c. Alleging Grounds in Alternative. An affidavit is insufficient which states in the alternative the grounds on which relief is sought.[12]

d. Legal Conclusions. An affidavit should not state legal conclusions which are merely the opinion of affiant. The facts on which such conclusions are based should be set forth, so that the court may draw its own inferences.[13] Thus, where a remedy is given by statute in certain specified cases, an affidavit is not sufficient which merely alleges that the case is one of those men-

6. Sullivan *v.* Hall, 86 Mich. 7, 48 N. W. 646, 13 L. R. A. 556; Perkins *v.* Collins, 3 N. J. Eq. 482, wherein the venue was "State of New Jersey, ss."

7. Babcock *v.* Kuntzsch, 85 Hun (N. Y.) 33, 32 N. Y. Suppl. 587, 1 N. Y. Annot. Cas. 300; McCord, etc., Mercantile Co. *v.* Glenn, 6 Utah 139, 21 Pac. 500; Smith *v.* Richardson, 1 Utah 194.

8. Van Dusen *v.* People, 78 Ill. 645; Barhydt *v.* Alexander, 59 Mo. App. 188; Cook *v.* Staats, 18 Barb. (N. Y.) 407; Lane *v.* Morse, 6 How. Pr. (N. Y.) 394; Smith *v.* Collier, 3 N. Y. St. 172.

9. Freas *v.* Jones, 15 N. J. L. 20.

Reference to jurat.— The date given in the jurat may be looked to in order to fix the date of the affidavit. Holmes *v.* London, etc., R. Co., 13 Q. B. 211, 66 E. C. L. 211, 6 Dowl. & L. 536, 13 Jur. 8; Craig *v.* Lloyd, 3 Exch. 232, 6 Dowl. & L. 487.

10. *Kentucky.*— Peers *v.* Carter, 4 Litt. (Ky.) 268.

New Jersey.— Gaddis *v.* Durashy, 13 N. J. L. 324.

New York.— People *v.* Sutherland, 81 N. Y. 1; People *v.* Becker, 20 N. Y. 354; Van Wyck *v.* Reid, 10 How. Pr. (N. Y.) 366.

Texas.— Mays *v.* Lewis, 4 Tex. 38.

Wisconsin.— Miller *v.* Munson, 34 Wis. 579, 17 Am. Rep. 461; Quarles *v.* Robinson, 1 Chandl. (Wis.) 29, 32 note, 2 Pinn. (Wis.) 97, 99 note.

United States.— Blake Crusher Co. *v.* Ward, 3 Fed. Cas. No. 1,505, 1 Am. L. T. Rep. N. S. 423.

England.— Watson *v.* Walker, 1 Moore & S. 437.

Where in words of statute.— An affidavit is not sufficient unless perjury can be assigned upon it, even though it be in the very words of the statute. Miller *v.* Munson, 34 Wis. 579, 17 Am. Rep. 461.

11. Story *v.* Story, 32 Ind. 137; Stanhope *v.* Dodge, 52 Md. 483; Schwartz *v.* Allen, 7 N. Y. Suppl. 5.

"Verily believes"—"Has good reason to believe."—An affidavit stating that affiant "verily believes," instead of using the statutory form, "has good reason to believe," is not bad on that account, the form used being the stronger of the two, and perjury being assignable thereon. Russell *v.* Ralph, 53 Wis. 328, 10 N. W. 518.

12. Collins *v.* Beebe, 54 Hun (N. Y.) 318, 7 N. Y. Suppl. 442; Leonard *v.* Bowman, 21 N. Y. Civ. Proc. 237, 15 N. Y. Suppl. 822; Billings *v.* Noble, 75 Wis. 325, 43 N. W. 1131.

13. *Georgia.*— Baker *v.* Akerman, 77 Ga. 89.

Kansas.— Pemberton *v.* Hoosier, 1 Kan. 108.

New York.— Hodgman *v.* Barker, 60 Hun (N. Y.) 156, 14 N. Y. Suppl. 574; Westervelt *v.* Agrumaria Sicula Societa, etc., 58 Hun (N. Y.) 147, 11 N. Y. Suppl. 340; Mechanics, etc., Bank *v.* Loucheim, 55 Hun (N. Y.) 396, 8 N. Y. Suppl. 520; Miller *v.* Oppenheimer, 2 N. Y. City Ct. 408; Moore *v.* Becker, 13 N. Y. St. 567; Hinman *v.* Wilson, 2 How. Pr. (N. Y.) 27; Markey *v.* Diamond, 19 N. Y. Suppl. 181; Brown *v.* Keogh, 14 N. Y. Suppl. 915; Cattaraugus Cutlery Co. *v.* Case, 9 N. Y. Suppl. 862.

Tennessee.— Perkins *v.* Gibbs, 1 Baxt. (Tenn.) 171.

West Virginia.— Delaplain *v.* Armstrong, 21 W. Va. 211.

An allegation in an affidavit that one is a creditor is but a statement of a conclusion. Wallace *v.* Chicago, etc., Stove Co., 46 Ill. App. 571.

Must not allege facts argumentatively.— An affidavit under N. Y. Code Civ. Proc. § 872, to obtain an order for the examination of plaintiffs before trial, must allege positively and not argumentatively and inferentially the facts going to show the necessity

tioned in the statute, without stating the facts from which such conclusion may be drawn.[14]

e. Clerical Errors and Omissions. Where the meaning clearly appears from the context an affidavit will not be vitiated by mere grammatical or clerical errors,[15] or by the omission of words not material to the sense.[16]

f. Scandalous and Impertinent Matter. An affidavit must not contain scandalous and impertinent matter,[17] and if open to this charge it should be suppressed.[18]

g. Interlineations and Erasures. An affidavit should be free from interlineations and erasures.[19]

2. Name and Description of Affiant. Except in cases where affiant is acting in some special capacity, the omission from the body of the instrument of his name and description is not material, provided the affidavit be signed by him;[20] but where an affidavit is required to be made by a person acting in a certain capacity, the name of affiant and the capacity in which he acts should be stated.[21]

for such examination. Feuchtwanger *v.* Dessar, 5 N. Y. Suppl. 129.

14. Pindar *v.* Black, 4 How. Pr. (N. Y.) 95.

15. Pierpont *v.* Pierpont, 19 Tex. 227 ("known" instead of "unknown"); Corrigan *v.* Nichols, 6 Tex. Civ. App. 26, 24 S. W. 952; Bromley *v.* Foster, 1 Chit. 562, 18 E. C. L. 307 note; Anonymous, 1 Chit. 562 note, 18 E. C. L. 307; Anonymous, Lofft. 274.

Singular instead of plural.— Where an affidavit filed by one of several appellants used the words "affiant is aggrieved" instead of "affiants are aggrieved," it was held to be a mere clerical error not vitiating the affidavit. Ross *v.* Davis, 13 Ark. 293.

Past tense instead of present.— The use of the past tense instead of the present in an affidavit, as "was" instead of "is," will not ordinarily vitiate it. Vincent *v.* Snoqualmie Mill Co., 7 Wash. 566, 35 Pac. 396. But see Howarth *v.* Hubbersty, 3 Dowl. P. C. 455, wherein "said" was used instead of "says."

16. Clark *v.* Miller, 88 Ky. 108, 10 S. W. 277; Huffman *v.* Hardeman, (Tex. 1886) 1 S. W. 575; Rex *v.* Stafford, 5 Dowl. P. C. 238.

Where the word "dollars" was omitted from an affidavit, but an account annexed thereto showed the sum intended, it was held that the omission in the affidavit was not material. Jean *v.* Spurrier, 35 Md. 110.

17. Powell *v.* Kane, 5 Paige (N. Y.) 265; Balls *v.* Smythe, 2 M. & G. 350, 40 E. C. L. 636.

18. Opdyke *v.* Marble, 18 Abb. Pr. (N. Y.) 375. But see Zimmerer *v.* Fremont Nat. Bank, 59 Nebr. 661, 81 N. W. 849, wherein it was held that where an affidavit contained objectionable matter a motion to strike out should be confined to such matter, and not directed against the whole affidavit.

Denial of costs.— In England a party incorporating scandalous and impertinent matter in his affidavit will be deprived of his costs. Thompson *v.* Dicas, 2 Dowl. P. C. 93; Cassen *v.* Bond, 2 Y. & J. 531; Balls *v.* Smythe, 2 M. & G. 350, 40 E. C. L. 636, 2 Scott N. R. 495.

19. Didier *v.* Warner, 1 Code Rep. (N. Y.) 42; Doe *v.* ———, 5 Jur. 531. And see *In re* Imeson, 8 Dowl. P. C. 651; Savage *v.* Hutchinson, 2 Eq. Rep. 368, 24 L. J. Ch. 232.

A line drawn through two words in the jurat of an affidavit, leaving them perfectly legible, is nevertheless an erasure, although the omission or retention of the words will not vary the sense. Williams *v.* Clough, 1 A. & E. 376, 28 E. C. L. 187.

20. Davidson *v.* Bordeaux, 15 Mont. 245, 38 Pac. 1075; People *v.* Sutherland, 81 N. Y. 1; Cunningham *v.* Doyle, 5 Misc. (N. Y.) 219, 25 N. Y. Suppl. 476. Where the affidavit by a plaintiff in an action contained an allegation that "he was the plaintiff above named," and was properly entitled in the action, it was held sufficient, although his name was omitted at its commencement. Morris *v.* Watson, 23 N. Y. Wkly. Dig. 286.

Misrecital treated as clerical error.— Where an affidavit was signed and sworn to by Charles H. Lee, but began by the recital, "Fred. B. Lee, of said county, being duly sworn," etc., it was held that the legal effect of the affidavit was the same as if the name of affiant had not been recited at all in the body thereof, and such misrecital was treated as a clerical error. Torrans *v.* Hicks, 32 Mich. 307.

Sufficient statement of affiant's residence. — In People *v.* Cady, 105 N. Y. 299, 307, 11 N. E. 810, it was held that where an affidavit had the venue, "City and County of New York," and continued: "I, Phineas C. Kingsland, of the City of New York," etc., the fact of affiant's residence in the city was sufficiently set forth, under a statute requiring affiant to be a resident of the city.

21. People *v.* Sutherland, 81 N. Y. 1.

Where statute prescribes who may make. —Where a statute specifically prescribes what persons may make an affidavit, and requires it to be shown that affiant is one of the specified persons, a failure to show this renders the affidavit defective. Steinbach *v.* Leese, 27 Cal. 295; State *v.* Washoe County, 5 Nev. 317.

An affidavit in supplementary proceedings is insufficient if it fails to show that it was made by the judgment creditor, or his attorney, or someone authorized to make it in his behalf. Brown *v.* Walker, 8 N. Y. Suppl. 59.

Affidavit by agent — Immaterial mistake. — An affidavit of attachment signed by plaintiff's agent, which, in describing the nature of the claim, inadvertently stated that "plaintiff" makes oath, instead of using the word

Thus, where an affidavit is made in behalf of a corporation, the affidavit should describe affiant sufficiently to show that he is a person authorized to perform such act.[22]

3. Showing Oath or Affirmation. The fact that affiant makes his statements on his oath or affirmation should be stated in the body of the affidavit.[23]

4. Knowledge or Information of Affiant — a. Positive Allegation. Material facts within the personal knowledge of affiant must be alleged directly and positively, and not on information and belief,[24] and facts will not be inferred where affiant has it in his power to state them positively.[25] Sometimes, moreover, a statute providing for the making of an affidavit requires the facts to be positively stated, and where this is the case an affidavit on information and belief cannot be received.[26] Where the facts are positively affirmed it is not necessary for affiant to state the source of his knowledge,[27] and the affidavit will be presumed to have been made on his personal knowledge if the facts are of such a character that he may have known them, and it does not appear that he did not;[28] but where it

"affiant," is not defective. Whipple *v.* Hill, 36 Nebr. 720, 55 N. W. 227, 38 Am. St. Rep. 742, 20 L. R. A. 313.

22. Forbes Lithograph Mfg. Co. *v.* Winter, 107 Mich. 116, 64 N. W. 1053; White Sewing Mach. Co. *v.* Betting, 53 Mo. App. 260; Cleburne First Nat. Bank *v.* Graham, (Tex. App. 1889) 22 S. W. 1101.

As to who may make affidavits in behalf of corporations see *supra*, II, D.

Sufficient affidavits.—An affidavit which begins by reciting: "Silver Peak Mines, a corporation, the plaintiff above named, by M. A. Murphy, its attorney, being duly sworn," etc., though irregular in form is not a nullity, the true interpretation thereof being that it is the affidavit of M. A. Murphy, who is the attorney of the corporation. Silver Peak Mines *v.* Hanchett, 80 Fed. 990.

And in Moline, etc., Co. *v.* Curtis, 38 Nebr. 520, 57 N. W. 161, it was held that an affidavit for attachment was not void, although it purported in its opening clause to be that of a corporation, where it appeared in connection with what followed to be that of an agent of the corporation, and that he made the oath thereto, and signed it.

23. Kehoe *v.* Rounds, 69 Ill. 351; Cosner *v.* Smith, 36 W. Va. 788, 15 S. E. 977. And see *supra*, IV.

As to necessity for jurat to show that the affidavit was sworn to see *infra*, V, G, 3, d.

In England it is held that an affidavit which omits to state that affiant "made oath" is insufficient notwithstanding the jurat states that it was sworn to. Phillips *v.* Prentice, 2 Hare 542, 24 Eng. Ch. 542; Oliver *v.* Price, 3 Dowl. P. C. 261; Doe *v.* Clark, 2 Dowl. N. S. 393, 7 Jur. 327, 12 L. J. Q. B. 69; Allen *v.* Taylor, L. R. 10 Eq. 52.

24. Whitlock *v.* Roth, 10 Barb. (N. Y.) 78; Willes *v.* James, 1 Dowl. P. C. 498; Reg. *v.* Manchester R. Co., 3 N. & P. 439, 2 Jur. 857.

As to affidavits made by agents or attorneys see *supra*, II, B, 4.

Sufficient allegations.— An affidavit that defendant had left the country to avoid the service of summons, "as shown by the return of the constable," is not on information and belief, the reference to the return being made as evidence. Webster *v.* Daniel, 47 Ark. 131, 14 S. W. 550.

If the facts are alleged in an affidavit upon the knowledge of affiant, a preliminary statement that the facts stated upon affiant's knowledge are true, and that so far as they are stated upon information he believes them to be true, does not affect the validity of the affidavit. Wheat *v.* Ragsdale, 27 Ind. 191.

In Cummings *v.* Woolley, 16 Abb. Pr. (N. Y.) 297 note, it was held that an averment of a fact, "as deponent has since learned," amounted to a positive allegation, and not an allegation on information and belief.

25. Brooks *v.* Hunt, 3 Cai. (N. Y.) 128.

No presumption will be indulged to supply a defect in an affidavit for attachment which, if not supplied, would prevent the affidavit from coming up to the requirements of the statute. City Nat. Bank *v.* Flippen, 66 Tex. 610, 1 S. W. 897.

Ambiguous language.— In affidavits drawn by counsel for the parties litigant language which is ambiguous in its nature will be construed most strongly against the party in whose behalf such affidavits were prepared. Nebraska Moline Plow Co. *v.* Fuehring, 52 Nebr. 541, 72 N. W. 1003.

26. Thompson *v.* Higginbotham, 18 Kan. 42; Atchison *v.* Bartholow, 4 Kan. 124; Campbell *v.* Hall, McCahon (Kan.) 53; Lewis *v.* Connolly, 29 Nebr. 222, 45 N. W. 622; Gawtry *v.* Doane, 51 N. Y. 84.

In Dyer *v.* Flint, 21 Ill. 80, 74 Am. Dec. 73, it was held that an affidavit for attachment must positively and unequivocally allege the statutory requirement; and that allegations made on information and belief were not sufficient. For a similar holding under the Georgia statute see Neal *v.* Gordon, 60 Ga. 112.

27. Pierson *v.* Freeman, 77 N. Y. 589.

"Any person familiar with the facts."— Under a statutory provision allowing a certain affidavit to be made by "any person familiar with the facts," it was held that such affidavit need not recite that affiant was familiar with the facts. Muirhead *v.* Sands, 111 Mich. 487, 69 N. W. 826.

28. Crowns *v.* Vail, 51 Hun (N. Y.) 204, 4 N. Y. Suppl. 324. But see U. S. *v.* Moore,

appears that affiant could have had no personal knowledge as to material allegations the affidavit is defective.[29]

b. Information and Belief — (I) *In General.* Oftentimes affiant's knowledge of matters stated in his affidavit must of necessity rest upon information derived from others, and where this is the case it is generally sufficient if he aver that such matters are true to the best of his knowledge and belief.[30] Belief is to be considered an absolute term in this connection; hence, to swear that one believes a thing to be true is equivalent to swearing that it is true,[31] and perjury may be assigned on such affidavit if false.[32]

(II) *Showing Sources of Information.* Where material allegations are made on information and belief, the sources of information and grounds of belief should be set out,[33] and a good reason given why a positive statement could not be procured.[34] Thus, if the conclusions of affiant are drawn from the contents

2 Lowell (U. S.) 232, 26 Fed. Cas. No. 15,803, wherein it was held that an affidavit to the existence of a fact does not import that affiant has personal knowledge thereof unless so stated, or the fact be of such a character that he must have personal knowledge.

Facts taken as true on appeal.— Where an affidavit for an arrest states the facts positively, and such facts may possibly have been within affiant's knowledge, and are not disputed or denied by defendant, the court on appeal may take such facts as true. Pierson *v.* Freeman, 77 N. Y. 589.

29. Ferris *v.* Commercial Nat. Bank, 158 Ill. 237, 41 N. E. 1118; Hodgman *v.* Barker, 60 Hun (N. Y.) 156, 14 N. Y. Suppl. 574.

Where an affidavit was couched in such general terms as to include facts which affiant could not know of his own personal knowledge, it was held that it might be entirely discredited. Cook *v.* De la Garza, 13 Tex. 431.

30. *California.*— Fleming *v.* Wells, 65 Cal. 336, 4 Pac. 197.

Illinois.— Hays *v.* Loomis, 84 Ill. 18.

Indiana.— Curry *v.* Baker, 31 Ind. 151 ("as affiant is informed and verily believes").

Massachusetts.— Clement *v.* Bullens, 159 Mass. 193, 34 N. E. 173.

Missouri.— Steamboat Osprey *v.* Jenkins, 9 Mo. 643 ("true to the best of his knowledge").

New York.— Pratt *v.* Stevens, 94 N. Y. 387 ("to deponent's best knowledge, information, and belief"); Whitlock *v.* Roth, 10 Barb. (N. Y.) 78; City Bank *v.* Lumley, 28 How. Pr. (N. Y.) 397.

Pennsylvania.— Election Cases, 65 Pa. St. 20 ("to the best of affiant's knowledge and belief").

Virginia.— Jackson *v.* Webster, 6 Munf. (Va.) 462.

United States.— *In re* Keller, 36 Fed. 681 ("as said deponent verily believes").

Following language of statute.— An affidavit that the statements contained in a notice of lien are true to the knowledge, or information and belief, of affiant is good, such being the language of the statute. Cunningham *v.* Doyle, 5 Misc. (N. Y.) 219, 25 N. Y. Suppl. 476.

Sufficient compliance with statute.— An affidavit appended to an appraisement by appraisers that "the foregoing appraisement is correct, to the best of our judgment," is sufficient under a statute requiring an affidavit that "the same is in all respects a true assessment, to the best of their judgment and belief." Large *v.* Keens Creek Draining Co., 30 Ind. 263, 95 Am. Dec. 696.

"Good reason to believe" facts stated.— An affidavit stating that defendant, "as this deponent has good reason to believe, has disposed of his property," etc., was held to be sufficiently positive in its allegation that affiant had good reason to believe the facts stated. Nicolls *v.* Lawrence, 30 Mich. 395.

Affidavit made by agent of party.— Where an affidavit recited that affiant says "that he is the duly authorized agent in this behalf of the plaintiff, and that he verily believes," etc., it was held that such affidavit was not defective on account of uncertainty as to whether the statement was made on the belief of affiant or that of plaintiff. Angus *v.* Sullivan, 166 Ill. 461, 46 N. E. 1079.

31. Simpkins *v.* Malatt, 9 Ind. 543.

32. Harris *v.* Heberton, 5 How. (Miss.) 575; Mairet *v.* Marriner, 34 Wis. 582.

33. Harris *v.* Taylor, 35 N. Y. App. Div. 462, 54 N. Y. Suppl. 864; Whitlock *v.* Roth, 10 Barb. (N. Y.) 78; Miller *v.* Oppenheimer, 2 N. Y. City Ct. 408; De Weerth *v.* Feldner, 16 Abb. Pr. (N. Y.) 295; Claflin *v.* Baere, 57 How. Pr. (N. Y.) 78; City Bank *v.* Lumley, 28 How. Pr. (N. Y.) 397; Markey *v.* Diamond, 19 N. Y. Suppl. 181; Thompson *v.* Best, 4 N. Y. Suppl. 229. And see *supra*, II, B, 4.

34. Steuben County Bank *v.* Alberger, 78 N. Y. 252; Whitlock *v.* Roth, 10 Barb. (N. Y.) 78; De Weerth *v.* Feldner, 16 Abb. Pr. (N. Y.) 295; Markey *v.* Diamond, 19 N. Y. Suppl. 181.

A statement by an attorney in an affidavit that his clients have informed him, etc., will not be considered where the parties themselves can make the affidavit. Pach *v.* Geoffroy, 19 N. Y. Suppl. 583.

Sufficient showing.— An affidavit for an order of arrest which states immaterial facts upon information and belief is not insufficient on that account where it states the sources from which the information is obtained, and shows that the places of residence of the informants are at such distance that it would

of documents, such contents should be set out or exhibited, so that the court may judge whether affiant's deductions are well founded.[35]

F. Signature of Affiant. It is generally held that, in the absence of any statute or rule of court requiring a signature, if it clearly appears who made the affidavit, and the fact of his swearing is certified by a proper officer, the affidavit is sufficient although not subscribed by the affiant,[36] but in some jurisdictions affiant's signature is deemed essential even though not expressly required by statute,[37] and in those states where signing is prescribed by statute its omission constitutes a fatal defect.[38] Where an affidavit is resworn it need not be signed again.[39]

G. Jurat — 1. NECESSITY. It has been held in some cases that the jurat is

be impracticable to procure their sworn statements in season to make a successful arrest. City Bank *v.* Lumley, 28 How. Pr. (N. Y.) 397.

35. Moore *v.* Becker, 13 N. Y. St. 567; Thompson *v.* Best, 4 N. Y. Suppl. 229.

Custody of documents.— Documents referred to in affidavits, and exhibited, must be handed in with the affidavits, and remain in court until the matter in respect of which the affidavits are sworn has been disposed of. Attenborough *v.* Clark, 2 H. & N. 588.

Certifying exhibit.— A commissioner before whom an affidavit is sworn ought to certify that any exhibit annexed is the document referred to in the affidavit. *In re* Allison, 10 Exch. 561.

36. *Alabama.*— Watts *v.* Womack, 44 Ala. 605.

Arkansas.— Mahan *v.* Owen, 23 Ark. 347; Gill *v.* Ward, 23 Ark. 16. See also Fortenheim *v.* Claflin, 47 Ark. 49, 14 S. W. 462.

Indiana.— Turpin *v.* Eagle Creek, etc., Gravel Road Co., 48 Ind. 45.

Iowa.— Bates *v.* Robinson, 8 Iowa 318.

Massachusetts.— Farrar *v.* Parker, 7 Metc. (Mass.) 43.

Michigan.— Wynkoop *v.* Grand Traverse Circuit Judge, 113 Mich. 381, 71 N. W. 640; Bloomingdale *v.* Chittenden, 75 Mich. 305, 42 N. W. 836; People *v.* Simondson, 25 Mich. 113.

Minnesota.— Norton *v.* Hauge, 47 Minn. 405, 50 N. W. 368.

Mississippi.— Brooks *v.* Snead, 50 Miss. 416; Redus *v.* Wofford, 4 Sm. & M. (Miss.) 579.

New Jersey.— Hitsman *v.* Garrard, 16 N. J. L. 124; Gaddis *v.* Durashy, 13 N. J. L. 324.

New York.— Millius *v.* Shafer, 3 Den. (N. Y.) 60; Jackson *v.* Virgil, 3 Johns. (N. Y.) 540; Haff *v.* Spicer, 3 Cai. (N. Y.) 190; Soule *v.* Chase, 1 Rob. (N. Y.) 222, 1 Abb. Pr. N. S. (N. Y.) 48.

North Carolina.— Alford *v.* McCormac, 90 N. C. 151.

South Carolina.— Armstrong *v.* Austin, 45 S. C. 69, 22 S. E. 763, 29 L. R. A. 772.

Tennessee.— West Tennessee Agricultural, etc., Assoc. *v.* Madison, 9 Lea (Tenn.) 407. *Compare* Watt *v.* Carnes, 4 Heisk. (Tenn.) 532, wherein the affidavit bore neither signature nor jurat.

Texas.— Crist *v.* Parks, 19 Tex. 234; Shelton *v.* Berry, 19 Tex. 154, 70 Am. Dec. 326; Alford *v.* Cochrane, 7 Tex. 485.

United States.— Noble *v.* U. S., Dev. Ct. Cl. 83.

Amendment.— The omission of affiant's signature may usually be rectified by amendment. See *infra*, VI, C.

Signature in illegible foreign characters.— An affidavit signed by a deponent in some foreign character, which is illegible, may be read in court. Nathan *v.* Cohen, 3 Dowl. P. C. 378, 1 Hurl. & W. 107.

Variance between signature and name in body.— Where an affidavit described affiant as "Edward Charles Pownall," but the signature at the end was "Charles E. Pownall," the affidavit was held sufficient. Hands *v.* Clements, 11 M. & W. 816, 1 Dowl. & L. 379, 7 Jur. 658, 12 L. J. Exch. 437.

37. Lynn *v.* Morse, 76 Iowa 665, 39 N. W. 203; Crenshaw *v.* Taylor, 70 Iowa 386, 30 N. W. 647; Hargadine *v.* Van Horn, 72 Mo. 370; Sedalia Third Nat. Bank *v.* Garton, 40 Mo. App. 113. And see Norman *v.* Horn, 36 Mo. App. 419.

Signature after the jurat.— The fact that the signature of affiant is by mistake placed below the jurat will not invalidate the certificate. Launius *v.* Cole, 51 Mo. 147; Kohn *v.* Washer, 69 Tex. 67, 6 S. W. 551, 5 Am. St. Rep. 28.

In chancery practice, where the verification of a pleading is in the form of an affidavit the name of affiant is required to be subscribed at the foot thereof. Pincers *v.* Robertson, 24 N. J. Eq. 348; Hathaway *v.* Scott, 11 Paige (N. Y.) 173. See also Laimbeer *v.* Allen, 2 Sandf. (N. Y.) 648, 2 Code Rep. (N. Y.) 15. But an objection on this ground comes too late when taken for the first time on appeal. Yeizer *v.* Burke, 3 Sm. & M. (Miss.) 439.

Signature to verified pleading.— Where a pleading is signed at the bottom by defendant and a magistrate appends a proper jurat, it is not necessary for defendant to sign such jurat as an affidavit separate from the pleading. Laswell *v.* Presbyterian Church, 46 Mo. 279; Smith *v.* Benton, 15 Mo. 371.

38. State *v.* Washoe County, 5 Nev. 317; Lanier *v.* Taylor, (Tex. Civ. App. 1897) 41 S. W. 516; Gordon *v.* State, 29 Tex. App. 410, 16 S. W. 337.

39. Liffin *v.* Pitcher, 1 Dowl. N. S. 767, 6 Jur. 537.

essential to the validity of an affidavit,[40] but the generally accepted doctrine seems to be that the jurat is not such a part of the affidavit proper that its omission will render the affidavit a nullity,[41] but is only *prima facie* evidence that the statements therein were sworn to by affiant as certified;[42] and it may be shown otherwise that the affidavit was in fact sworn to at the proper time and before the proper officer.[43]

2. Place of Jurat. It is not essential that the jurat be written at the foot of the affidavit. It may be embodied therein,[44] or written on the back of the instrument.[45]

3. Sufficiency — a. In General. The object of the jurat merely being to evidence the fact that affiant took oath to his affidavit before a duly authorized officer, but little formality is required of it;[46] and a jurat is usually sufficient which

40. Metcalf *v.* Prescott, 10 Mont. 283, 25 Pac. 1037; Gordon *v.* State, 29 Tex. App. 410, 16 S. W. 337; Cosner *v.* Smith, 36 W. Va. 788, 15 S. E. 977.

Neither signed nor certified.— In Watt *v.* Carnes, 4 Heisk. (Tenn.) 532, it was held that an affidavit neither signed nor certified was invalid.

The service of a copy affidavit, to be used as the foundation of a special motion, is good without the addition of the jurat if the facts stated are intelligible without it. Union Furnace Co. *v.* Shepherd, 2 Hill (N. Y.) 413. But if the jurat be essential to an intelligent understanding of the affidavit it must be included in the copy. Chase *v.* Edwards, 2 Wend. (N. Y.) 283.

41. *Alabama.*— McCartney *v.* Branch Bank, 3 Ala. 709.

Arkansas.— Fortenheim *v.* Claflin, 47 Ark. 49, 14 S. W. 462.

Georgia.— Smith *v.* Walker, 93 Ga. 252, 18 S. E. 830; Veal *v.* Perkerson, 47 Ga. 92.

Nebraska.— Bantley *v.* Finney, 43 Nebr. 794, 62 N. W. 213.

New Jersey.— Hitsman *v.* Garrard, 16 N. J. L. 124.

Tennessee.— Wiley *v.* Bennett, 9 Baxt. (Tenn.) 581.

Affidavit made before clerk who issues attachment.— In Alabama an affidavit for an attachment, made before the clerk who issues the writ, need not be certified by him. Hyde *v.* Adams, 80 Ala. 111.

42. Bantley *v.* Finney, 43 Nebr. 794, 62 N. W. 213; Hitsman *v.* Garrard, 16 N. J. L. 124; Crozier *v.* Cornell Steamboat Co., 27 Hun (N. Y.) 215, 15 N. Y. Wkly. Dig. 34.

The jurat is presumptive evidence of the facts stated therein, including the statement that affiant signed the affidavit. Smith *v.* Johnson, 43 Nebr. 754, 62 N. W. 217.

Sufficient evidence of swearing.— Under Ga. Code, § 3297, providing that a petitioner shall support "his petition by affidavit or testimony, if he can control the same," it was held that the signature of the petitioner or witness and the jurat of the magistrate, annexed to the petition, were sufficient evidence that the oath was taken by the one and administered by the other.

Presumption on appeal.— Where, on appeal, it was objected that an affidavit was not sworn to, but it purported to be an affidavit and was so treated in the lower court, it was presumed to have been sworn to although not bearing a jurat. The court held that it might have been sworn to in open court, and, if so, needed no jurat as evidence that it had been duly sworn to by affiant. Cleveland *v.* Stanley, 13 Ind. 549.

43. Williams *v.* Stevenson, 103 Ind. 243, 2 N. E. 728; Cook *v.* Jenkins, 30 Iowa 452; Bantley *v.* Finney, 43 Nebr. 794, 62 N. W. 213.

Amendment.— The omission may usually be supplied by amendment. See *infra*, VI, D.

Appearing from the record.— The failure of the officer to attest the jurat will not vitiate the affidavit where the record shows that it was in fact properly taken and sworn to. Pottsville *v.* Curry, 32 Pa. St. 443.

44. Hanson *v.* Cochran, 9 Houst. (Del.) 184, 31 Atl. 880.

In Kleber *v.* Block, 17 Ind. 294, 295, an affidavit, "Personally came before the undersigned, a notary public of said county, Christopher Kleber, who upon his oath saith," etc., which was signed by the said Christopher Kleber, below which signature came the words, "Witness my hand and seal, February 19, 1859," signed and sealed by the notary, was held to be sufficient.

45. Noble *v.* U. S., Dev. Ct. Cl. (U. S.) 83.

Jurat partly on each side of paper.— Part of the jurat was written on one side of the paper, and below it the words, "a commissioner for taking affidavits in this court," were erased; the remainder of the jurat was written on the other side of the paper. It was held that the affidavit was not vitiated thereby. Wills *v.* Dawson, 10 M. & W. 662, 2 Dowl. N. S. 465, 6 Jur. 1068, 12 L. J. Exch. 24.

46. **For sufficient forms of jurats** see Hosea *v.* State, 47 Ind. 180; Barhydt *v.* Alexander, 59 Mo. App. 188; Sargent *v.* Townsend, 2 Disney (Ohio) 472.

Need not certify as to affiant's identity.— The officer who takes an affidavit need not allege that he knew or had satisfactory evidence that the person making the oath was the individual described in, and who executed, the instrument, as in the case of a certificate of acknowledgment. Ross *v.* Wigg, 34 Hun (N. Y.) 192.

Clerical error — "National" seal.— Where, in a jurat, the officer stated that he had thereto affixed his "national" seal, it was held to be an evident clerical error, the word

shows in any way that affiant[47] swore to the affidavit[48] before the officer,[49] giving the date[50] and place of administering the oath,[51] and signed by the officer,[52] with a statement of his official character.[53] Under the English practice, where an affidavit is made by an insane or illiterate person, the jurat is required to show, according to the circumstances of the case, that affiant had a sufficient understanding of the nature of his act and was competent to make the affidavit.[54]

b. Name of Affiant. While it is always the better practice to state in the jurat the name of affiant, yet, where there is no statute requiring this, its omission is not a material defect if affiant's name and signature appear in the affidavit proper.[55]

c. Appearance of Affiant. In some cases it has been held that a jurat omitting the words "before me" is a nullity on account of such omission,[56] but usually these words are not regarded as essential, and any form is sufficient from which the inference may fairly be drawn that affiant personally appeared before the officer who administered the oath.[57]

d. Oath. The jurat must show that the affidavit was sworn to by affiant in the officer's presence.[58] A mere statement that affiant was sworn is sufficient,

"notarial" being clearly intended. Schwartz *v.* Baird, 100 Ala. 154, 13 So. 947.

Omission of word "dollars."— Where, in the jurat of an affidavit for attachment, the word "dollars" was omitted in stating the amount claimed, but the omission was supplied by the warrant of attachment, it was held that the affidavit was not invalidated thereby. De Bebian *v.* Gola, 64 Md. 262, 21 Atl. 275.

47. Naming affiant.— As to the necessity of naming affiant see *infra*, V, G, 3, b.

48. See *infra*, V, G, 3, d.

49. See *infra*, V, G, 3, c.

50. See *infra*, V, G, 3, e.

51. See *infra*, V, G, 3, f.

52. See *infra*, V, G, 3, g.

53. See *infra*, V, G, 3, h.

54. See Spittle *v.* Walton, L. R. 11 Eq. 420; Wilson *v.* Blakely, 9 Dowl. P. C. 352, 5 Jur. 367; Savage *v.* Hutchinson, 24 L. J. Ch. 232; Fernyhough *v.* Naylor, 23 Wkly. Rep. 228; Bose *v.* Solliers, 6 D. & R. 514, 4 B. & C. 358, 10 E. C. L. 614.

55. Stoddard *v.* Sloan, 65 Iowa 680, 22 N. W. 924.

As to necessity for naming affiant in body of the instrument see *supra*, V, E, 2.

In Kirby *v.* Gates, 71 Iowa 100, 32 N. W. 191, where an affidavit began: "I, Frank Pierce, do on oath say," etc., and was signed "Frank Pierce," it was held that a jurat, "Subscribed and sworn to by ———, before me," etc., was sufficient to show that the affidavit was sworn to by Frank Pierce.

Affidavit by several.— Where an affidavit was signed by several persons the following jurat was held to be sufficient: "I do hereby certify that the persons whose names are signed above were duly sworn to it before me," etc. Taylor *v.* State, 48 Ala. 180, 183. But, by rule of court in England, where there are several affiants the names of all must be written in the jurat. Luckington *v.* Atherton, 7 Scott N. R. 240, 2 Dowl. N. S. 904; Pardoe *v.* Terrett, 6 Scott N. R. 273, 5 M. & G. 291, 44 E. C. L. 159; Cobbett *v.* Oldfield, 4 Dowl. & L. 492, 16 M. & W. 469; *Ex p.* Smith, 2 Dowl. P. C. 607.

56. Smart *v.* Howe, 3 Mich. 590; Reg. *v.* Bloxham, 6 Q. B. 528, 51 E. C. L. 528; Graham *v.* Ingleby, 1 Exch. 651, 5 Dowl. & L. 737; Reg. *v.* Norbury, 2 N. Sess. Cas. 344, 15 L. J. Q. B. 264; Archibald *v.* Hubley, 18 Quebec Super. Ct. 116; Hayden *v.* Goodstein, 34 Can. L. J. 639.

57. Clement *v.* Bullens, 159 Mass. 193, 34 N. E. 173 ("then personally appeared"); Com. *v.* Keefe, 7 Gray (Mass.) 332 ("received and sworn to"); Trice *v.* Jones, 52 Miss. 138 ("Given under my hand and seal").

No express averment of appearance.— An affidavit of sale under the eighth section of the New York statute concerning mortgages is sufficient if certified thus: "Sworn before me this 1st day of June, 1839," etc., without expressly certifying that deponent appeared before the officer. Jackson *v.* Gumaer, 2 Cow. (N. Y.) 552.

Where a complaint shows that it was taken on oath before the proper justice the omission from the jurat of the words "before me" is not ground for reversal. Cross *v.* People, 10 Mich. 24.

Where an affidavit is used before the officer who took it the omission from the jurat of the words "before me" will not vitiate it. Matter of Teachout, 15 Mich. 346.

58. Palmer *v.* McCarthy, 2 Colo. App. 422, 31 Pac. 241; Hitsman *v.* Garrard, 16 N. J. L. 124; Gordon *v.* State, 29 Tex. App. 410, 16 S. W. 337.

As to necessity for statement in body of the affidavit that it was made on oath see *supra*, V, E, 3.

Insufficient jurat.— A jurat, "Subscribed in my presence and sworn to by Freedom Way," was held to be insufficient for not showing that the affidavit was sworn to before the officer. Way *v.* Lamb, 15 Iowa 79.

"Sworn and affirmed."— A jurat stating that affiants were "sworn and affirmed" and upon their "oaths and affirmations say," etc., is too indefinite to sustain a charge of perjury, and is therefore insufficient. State *v.* Browning, 27 N. J. L. 527. But an affidavit reciting that affiant does "swear (or affirm)," and containing at the bottom the

without stating the language in which the oath was administered;[59] and where affiant is allowed to affirm instead of taking an oath in the usual form the jurat need not state that he was conscientiously scrupulous as to swearing, it being presumed that the officer was satisfied on that point.[60]

e. Date. Under the English practice the jurat must state the day on which the oath was administered,[61] but in a New York case it was held that the omission of the date was not fatal where it was shown, on objection raised, that the oath was taken in due season.[62]

f. Place of Administering Oath — (1) *Necessity of Showing.* It has been held in some cases that an affidavit containing no evidence that it was sworn to within the jurisdiction of the officer who administered the oath is fatally defective, no presumption arising as to where it was taken if no place is mentioned;[63] but, under the modern practice in most jurisdictions, where it appears that the oath was administered by an officer authorized to perform such acts, it is presumed that he acted within his jurisdictional limits, in the absence of any showing to the contrary.[64] If,

words, "Affirmed before me, one of the justices," etc., is sufficient as an affirmation, and the word "swear" may be rejected as surplusage. State *v.* Shreve, 4 N. J. L. 341.

Where several affiants.— Where a magistrate certifies that more persons than one took an oath it is not necessary for him to certify that they "severally" swore, the use of that word not affecting the sense. Randall *v.* Baker, 20 N. H. 335.

59. Colvin *v.* People, 166 Ill. 82, 46 N. E. 737.

Where no statute prescribes the form of the attestation any form which shows that affiant took the oath will be deemed sufficient. Thus an attestation, "Sworn to and subscribed before me," etc., was held sufficient under the Texas act of 1840, p. 89, § 9. Chevallier *v.* Williams, 2 Tex. 239.

Presumption that oath properly taken.— A bill in chancery prayed that defendants, being Jews, should swear to their answer according to their creed, setting forth the oath and ceremony which alone was supposed to bind their conscience. The jurat to their answer was in the ordinary form, the officer certifying therein that defendants had been "duly sworn." A motion to strike the answer off the files was refused, there being no proof to show that defendants were not sworn according to their creed where the officer certified they had been "duly" sworn. Fryatt *v.* Lindo, 3 Edw. (N. Y.) 239. See also Wolseley *v.* Worthington, 14 Ir. Ch. 369.

60. Loney *v.* Bailey, 43 Md. 10.

61. Doe *v.* Roe, 1 Chit. 228, 18 E. C. L. 133; *Re* Lloyd, 1 L. M. & P. 545, 15 Q. B. 682, 69 E. C. L. 682, 14 Jur. 621, 19 L. J. Q. B. 457; Brunswick *v.* Harmer, 1 L. M. & P. 505, 4 Jur. 620, 19 L. J. Q. B. 456; Wood *v.* Stephens, 3 Moore C. P. 236, 4 E. C. L. 547; Blackwell *v.* Allen, 7 M. & W. 146; Frost *v.* Heywood, 6 Jur. 1045.

Not cured by reference in another affidavit. — The want of a date in the jurat of an affidavit is not cured by a reference to it in another affidavit as "an affidavit of A B, sworn on such a day." Brunswick *v.* Slowman, 8 C. B. 617, 65 E. C. L. 617, 7 Dowl. & L. 251.

62. Schoolcraft *v.* Thompson, 7 How. Pr. (N. Y.) 446. And see Freas *v.* Jones, 15 N. J. L. 20.

63. Barhydt *v.* Alexander, 59 Mo. App. 188; People *v.* De Camp, 12 Hun (N. Y.) 378; Clement *v.* Ferenback, 1 N. Y. City Ct. 57; Lane *v.* Morse, 6 How. Pr. (N. Y.) 394; Smith *v.* Collier, 3 N. Y. St. 172; Smith *v.* Richardson, 1 Utah 194; U. S. *v.* Burr, 25 Fed. Cas. No. 14,692*c*. And see Hart *v.* Grigsby, 14 Bush (Ky.) 542; and *supra*, V, C.

In England affidavits in answer to a rule sworn must contain in the jurat the place sworn; otherwise they cannot be read. Cass *v.* Cass, 1 Dowl. & L. 698, 7 Jur. 1087, 13 L. J. Q. B. 52.

64. Young *v.* Young, 18 Minn. 90; Crosier *v.* Cornell Steamboat Co., 27 Hun (N. Y.) 215; Barnard *v.* Darling, 1 Barb. Ch. (N. Y.) 218; Parker *v.* Baker, 8 Paige (N. Y.) 428; State *v.* Henning, 3 S. D. 492, 54 N. W. 536; Brown *v.* Jowett, 4 Brit. Col. 44.

In Dennison *v.* Story, 1 Oreg. 272, the court said: "It has been a rule of practice in this country for the courts to take official knowledge of the existence and qualifications of the officers having authority to administer oaths within the particular judicial district in which such officer resided and had authority; and the court are of opinion that when a verification to a pleading is taken by a known and recognized officer, having authority within the district, in a cause pending in such district, it is to be presumed that such verification was taken within the local jurisdiction of such officer; for otherwise we must presume that such officer has violated his official obligations by exercising his functions without his jurisdiction."

Entitled in court in which action pending. — Where an affidavit in an action, though not containing a formal venue, was entitled in the court in which the action was pending and was sworn to before the clerk thereof, who affixed his seal, it was held that the presumption was that, in the discharge of his duty, he administered the oath within the jurisdiction in which he was authorized to act. Ormsby *v.* Ottman, 85 Fed. 492, 56 U. S. App. 510, 29 C. C. A. 295.

however, the affidavit shows on its face that it was taken outside the jurisdiction of the officer who certified it, it is insufficient.[65]

(II) *Where Venue Appears Otherwise.* Where a venue is given in the caption of an affidavit it is not a material defect if the jurat fails to state the county or state in which the officer is commissioned to act, it being presumed that he is authorized to act in the county named.[66] And so the absence of any direct statement of the venue is not material where the affidavit bears the officer's seal, containing the name of his county,[67] or where the venue is given in another paper to which the affidavit is attached.[68]

g. Signature of Officer. In order for the jurat to serve as evidence of the fact that the affidavit was sworn to it must be signed by the officer, and without such signature the affidavit is *prima facie* invalid;[69] but where it is otherwise

65. Byrd *v.* Cochran, 39 Nebr. 109, 58 N. W. 127; Snyder *v.* Olmsted, 2 How. Pr. (N. Y.) 181; Sandland *v.* Adams, 2 How. Pr. (N. Y.) 127; Davis *v.* Rich, 2 How. Pr. (N. Y.) 86.

Variance between caption and jurat.— An affidavit commencing, "State of Indiana, Marion County ss.," and certified as having been sworn to before a notary public in Ohio, is presumed to have been made in Ohio, as the court will presume that the notary acted within his jurisdiction. Teutonia Loan, etc., Co. *v.* Turrell, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419.

Where an affidavit was entitled "State of Iowa, County of Webster," but appeared to have been sworn to before a notary public in Dubuque county, it was held that in the absence of evidence to the contrary it would be presumed that the notary took the affidavit in his own county. Goodnow *v.* Litchfield, 67 Iowa 691, 25 N. W. 882 [*followed* in Goodnow *v.* Oakley, 68 Iowa 25, 25 N. W. 912].

66. *Illinois.*— Palmer *v.* Nassau Bank, 78 Ill. 380; Dyer *v.* Flint, 21 Ill. 80, 74 Am. Dec. 73.

Iowa.— Stoddard *v.* Sloan, 65 Iowa 680, 22 N. W. 924; Stone *v.* Miller, 60 Iowa 243, 14 N. W. 781.

Michigan.— Smith *v.* Runnells, 94 Mich, 617, 54 N. W. 375.

Minnesota.— Rahilly *v.* Lane, 15 Minn. 447.

New Jersey.— Perkins *v.* Collins, 3 N. J. Eq. 482.

New York.— People *v.* Cady, 105 N. Y. 299, 11 N. E. 810.

England.— Grant *v.* Fry, 8 Dowl. P. C. 234.

As to statement of venue in caption of the affidavit see *supra*, V. C.

In Barnard *v.* Darling, 1 Barb. Ch. (N. Y.) 218, the jurat was as follows: "State of New York, ——— county, ss." The oath was signed "O O, comm'r of deeds," without specifying the county or city for whom the person signing it was a commissioner. It appeared, however, that he was in fact a commissioner of deeds for the city of Albany. It was held that the affidavit was not invalid, since affiants could be convicted of perjury thereon if they had sworn falsely.

Need not state officer's place of residence. — It is presumed that the notary who takes an affidavit performs that act where the venue of the affidavit is laid, and that he resides there. Consequently it is unnecessary to add to his signature his place of residence. Mosher *v.* Heydrick, 30 How. Pr. (N. Y.) 161, 1 Abb. Pr. N. S. (N. Y.) 258, 45 Barb. (N. Y.) 549. But see People *v.* Dutchess County, 20 N. Y. Suppl. 329.

Sufficient showing of place.— A jurat to an affidavit bearing the caption, "State of West Virginia, County of Summers, to wit," and concluding, "Taken, subscribed, and sworn to before me this 22d day of December, 1896, in Summers county. T. N. Read, Notary Public," sufficiently shows that such person is a notary of Summers county. Quesenberry *v.* People's Bldg., etc., Assoc., 44 W. Va. 512, 30 S. E. 73.

An affidavit containing the usual venue, the signature of the notary, and his official designation, and the seal of the notary showing the city of his residence, sufficiently shows that the affidavit was taken in the county of the notary's residence. Mackie *v.* Central R. Co., 54 Iowa 540, 6 N. W. 723.

Where the caption was "City of St. Louis," it was presumed that the notary before whom the affidavit was made was a notary for that city. Remington Sewing Mach. Co. *v.* Cushen, 8 Mo. App. Rep. 528.

67. Reavis *v.* Cowell, 56 Cal. 588; Cox *v.* Stern, 170 Ill. 442, 48 N. E. 906, 62 Am. St. Rep. 385; Englehart-Davison Mercantile Co. *v.* Burrell, 2 Mo. App. 1324.

68. Snell *v.* Eckerson, 8 Iowa 284.

Venue appearing from other proceedings.— An affidavit was signed "S. Fee, J. P." It appeared from other proceedings that such affidavit was sworn to in a certain county. It was held that it would be presumed that the affidavit was taken before the person named, and that such person was justice of the peace of the county where it was sworn to. Larimer *v.* Knoyle, 43 Kan. 338, 23 Pac. 487.

69. *Arkansas.*— Guy *v.* Walker, 35 Ark. 212; State Bank *v.* Hinchcliffe, 4 Ark. 444.

Iowa.— Tunis *v.* Withrow, 10 Iowa 305, 77 Am. Dec. 117.

Michigan.— Calvert *v.* McNaughton, 2 Mich. N. P. 8; Knapp *v.* Duclo, 1 Mich. N. P. 189.

Missouri.— Sedalia Third Nat. Bank *v.* Garton, 40 Mo. App. 113.

Nebraska.— Holmes *v.* Crooks, 56 Nebr. 466, 76 N. W. 1073.

New Jersey.— Westerfield *v.* Bried, 26 N.

shown that affiant in fact swore to the affidavit the failure of the officer to affix his signature will usually not be allowed to vitiate the proceedings based thereon.[70] When the objection is raised the officer may be allowed to sign the jurat *nunc pro tunc*;[71] and if he fail to appear voluntarily and attach his signature he may be compelled to do so by rule of court.[72]

h. Showing Officer's Authority — (1) *In General.* It should appear on the face of the affidavit that the person by whom it was certified was one authorized to administer the oath,[73] and the officer's signature should properly be followed by his official description.[74] The omission to affix such official description is not

J. Eq. 357; Hitsman *v.* Garrard, 16 N. J. L. 124.

New York.— Ladow *v.* Groom, 1 Den. (N. Y.) 429.

South Carolina.— Doty *v.* Boyd, 46 S. C. 39, 24 S. E. 59.

Texas.— Morris *v.* State, 2 Tex. App. 502.

England.— Bill *v.* Bament, 8 M. & W. 317, 9 Dowl. P. C. 810, 5 Jur. 510.

Using initial of christian name.— Where the officer in signing the jurat used only the initial of his christian name it was held that the signature was sufficient. Rice *v.* People, 15 Mich. 9.

The copy of an affidavit served on the opposite attorney need not contain the name of the magistrate before whom it was sworn. Livingston *v.* Cheetham, 2 Johns. (N. Y.) 479.

Several instruments on same sheet.— Where a statement of appeal, affidavit, and recognizance were all on the same sheet of paper, and the officer subscribed his name at the foot of the recognizance, it was held that such signature could not be referred to the affidavit. Shortle *v.* Stockton, 7 Watts (Pa.) 526.

Signature presumed genuine.— The signature of the county clerk or his deputy to the jurat to an oath lawfully filed in his office is presumed to be genuine, and no proof on that point *prima facie* is required. Merriam *v.* Coffee, 16 Nebr. 450, 20 N. W. 389.

Offer to prove signature not in officer's handwriting.— It is not error to exclude evidence offered to prove that the signature of the clerk to a jurat is not in his handwriting, that not being the equivalent to an offer to prove the signature a forgery. Etter *v.* Dugan, 1 Tex. Unrep. Cas. 175.

70. Cook *v.* Jenkins, 30 Iowa 452; English *v.* Wall, 12 Rob. (La.) 132; Maples *v.* Hicks, Brightly (Pa.) 56; Farmers' Bank *v.* Gittinger, 4 W. Va. 305.

Not ground for collateral attack.— Where an affidavit for attachment was sufficient in every respect except that the jurat was not signed by the officer, but affiant testified on the trial that he signed and swore to the affidavit before the deputy clerk, and an attachment writ, issued on the same day that the affidavit was filed, recited that the affiant named in the affidavit had complained on oath to the clerk issuing the writ, etc., it was held that the affidavit could not be assailed by defendant in attachment, in a subsequent action of ejectment brought by him to recover the land sold under the attachment proceedings. Kruse *v.* Wilson, 79 Ill. 233.

Not ground for dismissing injunction.— Where an injunction bill had been actually sworn to it was held that the injunction would not be dismissed because the master who took the affidavit had omitted to sign the jurat. Capner *v.* Flemington Min. Co., 3 N. J. Eq. 467.

71. Veal *v.* Perkerson, 47 Ga. 92; Peterson *v.* Fowler, 76 Mich. 258, 43 N. W. 10; People *v.* Simondson, 25 Mich. 113; State *v.* Cordes, 87 Wis. 373, 58 N. W. 771. And see *infra*, VI, D.

Amendment on due proof.— Where the affidavit was properly taken, but the officer neglected to subscribe the jurat, it was held that the defect could be cured and the affidavit amended upon due proof. Cusick's Election, 136 Pa. St. 459, 20 Atl. 574, 10 L. R. A. 228. But see Shortle *v.* Stockton, 7 Watts (Pa.) 526.

72. Guy *v.* Walker, 35 Ark. 212; People *v.* Simondson, 25 Mich. 113.

73. Hart *v.* Grigsby, 14 Bush (Ky.) 542; Knight *v.* Elliott, 22 Minn. 551; Blanchard *v.* Bennett, 1 Oreg. 328; Reg. *v.* Bloxham, 6 Q. B. 528, 51 E. C. L. 528, 14 L. J. Q. B. 12; Howard *v.* Brown, 4 Bing. 393, 13 E. C. L. 556, 1 M. & P. 22. And see *supra*, III, A, 1.

Must appear in some way.— Where a certain affidavit was required by statute to be taken by a justice of the peace, it was held that unless it appeared, either upon the face of the affidavit or in some other way, that the person before whom the oath was taken was a justice of the peace the proceedings would be set aside. State *v.* Hutchinson, 10 N. J. L. 242.

Insufficient affidavit.— Where an affidavit was entitled "State of Arkansas, County of Sebastian, ss.," and was certified by "John F. Wheeler, Mayor," it was held to be insufficient, as not purporting to be taken before an officer authorized by law to take it. Edmondson *v.* Carnall, 17 Ark. 284.

Objection not available on appeal.— An objection that the affidavit does not show that the officer was one authorized to take the affidavit will not be considered for the first time on appeal. Snell *v.* Eckerson, 8 Iowa 284.

74. Jackson *v.* Stiles, 3 Cai. (N. Y.) 128, Col. & C. Cas. (N. Y.) 468. But see People *v.* Rensselaer County, 6 Wend. (N. Y.) 543; Hunter *v.* Le Conte, 6 Cow. (N. Y.) 728, in which cases affidavits were held sufficient although the title of office was not appended to the signature.

Date of expiration of commission.— The fact that a notary public, before whom a

usually deemed material, however, where it is shown that, in fact, the oath was taken before a duly authorized person,[75] as where the official character is given elsewhere in the affidavit,[76] or sufficiently appears from other papers in the cause.[77]

(II) *Judicial Notice of Official Character.* In some jurisdictions the courts will judicially notice the official character of officers authorized to take affidavits;[78] and where the affidavit is made in the county in which the cause is tried it will be presumed on appeal that the lower court was satisfied that the person who took the affidavit was authorized to do so.[79]

(III) *Use of Abbreviations.* Abbreviations in general use and commonly understood may be used to indicate the officer's official character.[80]

i. Seal. Under some statutes the officer's official seal must be attached to affidavits taken by him,[81] but, in the absence of any statute requiring it, the jurat

claim of mechanic's lien is verified, fails to add after his official signature the date of the expiration of his commission does not render such lien void, since the statute requiring such addition on the part of the notary does not attempt to avoid the affidavit on account of such omission, but simply subjects the notary to a penalty therefor. Phelps, etc., Windmill Co. *v.* Baker, 49 Kan. 434, 30 Pac. 472.

75. Jackman *v.* Gloucester, 143 Mass. 380, 9 N. E. 740.

Amendment.— The failure of the jurat to contain the official designation may be cured by amendment. See *infra*, VI, D.

76. Heffernan *v.* Harvey, 41 W. Va. 766, 24 S. E. 592.

Appearing in title.— An affidavit for an appeal from a justice of the peace contained in its title the name of the justice before whom the cause was tried. The jurat was subscribed with the same name, but without any official designation. It was held that from the identity of names it would be presumed that the person before whom it was sworn was the justice, and that the affidavit sufficiently showed his official character. Bandy *v.* Chicago, etc., R. Co., 33 Minn. 380, 23 N. W. 547.

77. Branch *v.* Branch, 6 Fla. 314; Singleton *v.* Wofford, 4 Ill. 576.

Misdescription.— When the affidavit by mortgagees that the debt secured is *bona fide* and justly due is made at the same time as the acknowledgment and before "Henry Reaver," who takes the acknowledgment as a commissioner of deeds for the state of Maryland, the fact that "Henry Reaver" designates himself in his signature to the affidavit as a justice of the peace by affixing the letters "J. P.," instead of describing himself as commissioner of deeds, does not invalidate the affidavit. Stanhope *v.* Dodge, 52 Md. 483.

78. In California judicial notice will be taken of the official character of a justice of the peace, and an affidavit is valid although such official character does not appear therein. Ede *v.* Johnson, 15 Cal. 53.

In Illinois the circuit court takes judicial notice of the officers authorized to take affidavits in the county in which it sits. Schaefer *v.* Kienzel, 123 Ill. 430, 15 N. E. 164; Dyer *v.* Flint, 21 Ill. 80, 74 Am. Dec. 73; Rowley *v.* Berrian, 12 Ill. 198; Shattuck *v.* People, 5 Ill. 477. But if the oath is taken in a county other than that in which the suit is brought the authority of the person administering it must be established by competent evidence. Rowley *v.* Berrian, 12 Ill. 198.

79. Buell *v.* State, 72 Ind. 523; Brooster *v.* State, 15 Ind. 190.

Clerk of court in which cause tried.— A court may take judicial notice of the names and signatures of its own officers. Therefore, where the officer's signature is followed merely by the word "clerk," it will be presumed on appeal that he was clerk of the court in which the cause was tried. Mountjoy *v.* State, 78 Ind. 172; Hipes *v.* State, 73 Ind. 39; Buell *v.* State, 72 Ind. 523; Allen *v.* Gillum, 16 Ind. 234; Simon *v.* Stetter, 25 Kan. 155; Etter *v.* Dugan, 1 Tex. Unrep. Cas. 175.

In Russell *v.* Oliver, 78 Tex. 11, 14 S. W. 264, it was held that an affidavit purporting to be taken in a proceeding in the probate court of Montgomery county, and sworn to before one who added to his signature "Clk. P. C. M. C.," without affixing any seal, was sufficient.

80. The letters "J. P." are a well-known and commonly-used abbreviation for justice of the peace, and sufficiently indicate that office.

California.— Ede *v.* Johnson, 15 Cal. 53.

Indiana.— Hawkins *v.* State, 136 Ind. 630, 36 N. E. 419.

Michigan.— Green *v.* Kindy, 1 Mich. N. P. 41.

Missouri.— Sieckman *v.* Arwein, 10 Mo. App. 259.

New Jersey.— Scudder *v.* Scudder, 10 N. J. L. 340.

The characters "N. P." clearly indicate the office of notary public, being in common use and generally understood. Rowley *v.* Berrian, 12 Ill. 198.

Commr.— In Hill *v.* Royston, 7 Jur. 930, a jurat attested "A B. Commr.." was held to show sufficiently that the officer was a commissioner.

81. Bayonne Knife Co. *v.* Umbenhauer, 107 Ala. 496, 18 So. 175; Alabama Nat. Bank *v.* Chattanooga Door, etc., Co., 106 Ala. 663, 18 So. 74; Miller *v.* State, 122 Ind. 355, 24 N. E. 156; Chase *v.* Street, 10 Iowa 593; Tunis *v.* Withrow, 10 Iowa 305, 77 Am. Dec. 117; Boyd *v.* Spriggins, 17 Ont. Pr. 331.

need not be sealed.[82] Usually an affidavit sworn to before the clerk of the court in which it is to be used need not bear the clerk's seal.[83]

VI. AMENDMENTS.

A. In General. The right to amend an affidavit is a question depending for the most part upon the statutes.[84] Under the practice in most jurisdictions amendments are very freely allowed,[85] except in cases where the opposite party would be prejudiced thereby;[86] but it has been held that after a material amendment the affidavit must be resworn, since affiant could not otherwise be convicted of perjury if, as amended, it were false.[87]

82. Jowers *v.* Blandy, 58 Ga. 379; Rosenstein *v.* State, 9 Ind. App. 290, 36 N. E. 652; Clement *v.* Bullens, 159 Mass. 193, 34 N. E. 173.

Illinois — Affidavits for use within county. — In Illinois an affidavit taken by a notary for use in his own county need not bear the notarial seal (Schaefer *v.* Kienzel, 123 Ill. 430, 15 N. E. 164; Dyer *v.* Flint, 21 Ill. 80, 74 Am. Dec. 73; Stout *v.* Slattery, 12 Ill. 162); but if to be used outside that county his official character must be shown either by his seal or in some other way (Stout *v.* Slattery, 12 Ill. 162).

Iowa — Jurat to pleading. — In Iowa the jurat appended to a pleading need not be authenticated by the clerk's official seal. Finn *v.* Rose, 12 Iowa 565.

83. Mountjoy *v.* State, 78 Ind. 172; Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823; Merriam *v.* Coffee, 16 Nebr. 450, 20 N. W. 389; Etter *v.* Dugan, 1 Tex. Unrep. Cas. 175. And see Simon *v.* Stetter, 25 Kan. 155.

84. **Georgia — Not amendable as pleadings.** — Affidavits of the parties, to protect landowners against intruders, etc., were not amendable as pleadings under the Georgia amendment act of 1854. Perry *v.* Martin, 26 Ga. 436.

Kentucky — Not amendable after judgment. — An affidavit for a continuance cannot be amended after the court has passed judgment on it and held it to be insufficient. Smalley *v.* Anderson, 4 T. B. Mon. (Ky.) 367; Singleton *v.* Carr, 1 Bibb (Ky.) 554.

Maryland — Cannot strike out a defendant. — Under Md. Code, art. 75, §§ 23, 27, the circuit court cannot amend an affidavit in attachment by striking out the name of one of defendants named therein. Halley *v.* Jackson, 48 Md. 254.

85. *Georgia.* — Reese *v.* Walker, 89 Ga. 72, 14 S. E. 888; Bryant *v.* Mercier, 82 Ga. 409, 9 S. E. 166.

Michigan. — Emerson *v.* Detroit Steel, etc., Co., 100 Mich. 127, 58 N. W. 659.

Missouri. — Stewart *v.* Cabanne, 16 Mo. App. 517.

New Jersey. — Den *v.* Fen, 12 N. J. L. 321.

New York. — Cutler *v.* Rathbone, 1 Hill (N. Y.) 204.

North Carolina. — State *v.* Giles, 103 N. C. 391, 9 S. E. 433; Weaver *v.* Roberts, 84 N. C. 493.

Tennessee. — Lucas *v.* Sevier, 1 Overt. (Tenn.) 105.

West Virginia. — Bohn *v.* Zeigler, 44 W. Va. 402, 29 S. E. 983; Anderson *v.* Kanawha Coal Co., 12 W. Va. 526.

United States. — Fitzpatrick *v.* Flannagan, 106 U. S. 648, 1 S. Ct. 369, 27 L. ed. 211.

England. — Larkin *v.* Bovill, 2 Tyrw. 746; Marriott *v.* Chapman, 1 W. W. & H. 309; Boskay *v.* Lister, W. W. & D. 216; Cooper *v.* Talbot, 7 Scott 345, 2 Arn. 50; Rex *v.* Warwickshire, 5 Dowl. P. C. 382; Anderson *v.* Ell, 3 Dowl. P. C. 73. But see Rowbotham *v.* Dupree, W. W. & D. 215; Saunderson *v.* Westley, 8 Dowl. P. C. 652; Robinson *v.* Gardner, 7 Dowl. P. C. 716.

Canada. — McGregor-Gourlay Co. *v.* Labelle, 2 Ont. Pr. 93.

Supplying omitted words. — In Stewart *v.* Cabanne, 16 Mo. App. 517, an affidavit in attachment, as follows: "The defendant —— about fraudulently to convey and assign —— property and effects so as to hinder and delay —— creditors," was allowed to be amended by inserting the word "is" in the first blank and the word "his" in the other two, it not appearing that defendant would be prejudiced thereby.

Showing authority of officer in another state. — An affidavit taken in another state may be amended by adding a certificate showing the authority of the officer to take the affidavit. Goldie *v.* McDonald, 78 Ill. 605; Bohn *v.* Ziegler, 44 W. Va. 402, 29 S. E. 983.

Defect supplied by reference to another affidavit. — A defect in an affidavit for publication may be supplied by reference to an affidavit for attachment. Miller *v.* Eastman, 27 Nebr. 408, 43 N. W. 179.

Admission of defect. — Where a party conceded that his affidavit was defective, by obtaining time to amend the same, it was held that he could not on appeal assert that the affidavit was sufficient. McKichan *v.* Follett, 87 Ill. 103.

86. Foreman *v.* Carter, 9 Kan. 674.

Discretion of court. — The practice of allowing the amendment of affidavits for continuance, where the case desired to be shown by the party has not been made out, is one which should be permitted only with great caution; and it is within the discretion of the trial court to refuse leave to amend such an affidavit. Widner *v.* Hunt, 4 Iowa 355.

87. Atlantic Bank *v.* Frankford, 61 N. C. 199. But see *In re* Grantham, 10 Jur. 1038, wherein affidavits, amended by permission of the court, were allowed to be read without the addition of fresh jurats.

B. Venue. Generally, in furtherance of justice, the omission of a venue may be supplied by amendment.[88]

C. Signature of Affiant. Where affiant has sworn to his affidavit, but, through inadvertence, has failed to sign it, the defect may be cured by amendment.[89]

D. Jurat. Where an affidavit has been properly made and sworn to, and is correct in every respect except that a proper jurat is not annexed, such defect may usually be cured by amendment.[90] Thus, where the officer neglects to affix his signature to the jurat, he may be allowed to sign the same *nunc pro tunc*.[91]

VII. USE AS EVIDENCE.

A. In General. The chief service as evidence performed by *ex parte* affidavits is as the basis of some interlocutory or preliminary action,[92] or of a provisional

88. Avery *v.* Good, 114 Mo. 290, 21 S. W. 815; Babcock *v.* Kuntzsch, 85 Hun (N. Y.) 33, 32 N. Y. Suppl. 587, 1 N. Y. Annot. Cas. 300; Clement *v.* Ferenback, 1 N. Y. City Ct. 57; Smith *v.* Collier, 3 N. Y. St. 172.

As to necessity for venue see *supra*, V, C.

89. *Alabama.*— Watts *v.* Womack, 44 Ala. 605.

Arkansas.— Fortenheim *v.* Claflin, 47 Ark. 49, 14 S. W. 462.

Iowa.— Stout *v.* Folger, 34 Iowa 71, 11 Am. Rep. 138.

Mississippi.— Johnson *v.* Tuggle, 27 Miss. 836.

Pennsylvania.— Schumann *v.* Schumann, 6 Phila. (Pa.) 318.

Tennessee.— West Tennessee Agricultural, etc., Assoc. *v.* Madison, 9 Lea (Tenn.) 407.

But see Cohen *v.* Manco, 28 Ga. 27, wherein it was held that the failure of plaintiff in attachment to sign his affidavit could not be rectified by amendment.

As to necessity for affiant's signature see *supra*, V, F.

90. *Arkansas.*— Fortenheim *v.* Claflin, 47 Ark. 49, 14 S. W. 462.

Illinois.— Pierson *v.* Hendrix, 88 Ill. 34.

Kansas.— Buckland *v.* Goit, 23 Kan. 327.

Missouri.— Laswell *v.* Presbyterian Church, 46 Mo. 279; Bergesch *v.* Keevil, 19 Mo. 127.

Tennessee.— Wiley *v.* Bennett, 9 Baxt. (Tenn.) 581.

Texas.— May *v.* Ferrell, 22 Tex. 340.

Adding official title.— A jurat may be amended by inserting after the name of the officer the title of his office where it is not denied that the oaths were properly taken before the officer referred to, nor that the omissions were mere clerical errors. Smith *v.* Walker, 93 Ga. 252, 18 S. E. 830; Dickson *v.* Thurmond, 57 Ga. 153; Stone *v.* Miller, 60 Iowa 243, 14 N. W. 781; Hudson *v.* Fishel, 17 R. I. 69, 20 Atl. 100.

Omission to refer to notarial seal.— An omission of the jurat to refer to the notarial seal of the notary before whom the affidavit was made may be cured by amendment, the affidavit in fact bearing the seal. Hallett *v.* Chicago, etc., R. Co., 22 Iowa 259, 92 Am. Dec. 393.

Montana — Absence of jurat not cured by evidence aliunde.— An affidavit, made by a locator of a mining claim, to which there is no jurat showing it to have been subscribed and verified as prescribed by statute, cannot be cured by evidence *aliunde* to show that the affidavit was in fact sworn to. Metcalf *v.* Prescott, 10 Mont. 283, 25 Pac. 1037.

91. *Georgia.*— Veal *v.* Perkerson, 47 Ga. 92.

Iowa.— Stout *v.* Folger, 34 Iowa 71, 11 Am. Rep. 138.

Michigan.— Peterson *v.* Fowler, 76 Mich. 258, 43 N. W. 10; People *v.* Simondson, 25 Mich. 113.

New York.— Fawcett *v.* Vary, 59 N. Y. 597.

Pennsylvania.— Cusick's Election, 136 Pa. St. 459, 20 Atl. 574, 10 L. R. A. 228; Hart *v.* Jones, 6 Kulp (Pa.) 326.

Texas.— Sims *v.* Redding, 20 Tex. 386.

Wisconsin.— State *v.* Cordes, 87 Wis. 373, 58 N. W. 771; Lederer *v.* Chicago, etc., R. Co., 38 Wis. 244.

As to necessity for officer to sign the jurat see *supra*, V, G, 3, *g*.

92. Baldwin *v.* Flagg, 43 N. J. L. 495; Cooper *v.* Galbraith, 24 N. J. L. 219. As to the use of affidavits on the argument of motions see MOTIONS.

Use in code practice.— In Blatchford *v.* New York, etc., R. Co., 7 Abb. Pr. (N. Y.) 322, the court, in speaking of the use of affidavits in code practice, said: "Affidavits are used to bring to the knowledge of the court facts not appearing by the pleadings, or, if appearing in pleadings not verified, that such facts may be stated under the sanction of an oath."

Motion to set aside verdict.— In New Jersey an *ex parte* affidavit has been allowed to be read on a motion to set aside a verdict. Harwood *v.* Smethurst, 30 N. J. L. 230.

Motion for production of books and writings.— The affidavit of an interested party, taken without cross-examination, is competent evidence on a motion for an order to the opposite party to produce books and writings, under the act of congress of Sept. 24, 1789. U. S. *v.* Twenty-eight Packages of Pins, Gilp. (U. S.) 306, 28 Fed. Cas. No. 16,561.

Motion to dissolve injunction.— In Ohio, on appeal from an interlocutory order dissolving an injunction, affidavits are competent testimony in the district court on a motion to dissolve the injunction. Keys *v.* Williamson, 31 Ohio St. 561.

On motion to enter satisfaction of judg-

remedy.[93] Sometimes they are received in judicial proceedings as evidence of collateral or ancillary matters not directly in issue[94] — as, for instance, to establish the loss or destruction of a document in order to prepare the way for secondary evidence,[95] or to prove the identity of a person as respects his marriage or pedigree.[96] Where an affidavit is required to be made as a preliminary step in a proceeding, it is admissible merely for the purpose of showing the fact that it was made.[97]

B. As Proof of Facts in Issue. *Ex parte* affidavits rank in the scale of evidence in equal grade with hearsay testimony,[98] and, in the absence of any statute or rule of court expressly authorizing it,[99] such affidavits can never be admitted in evidence to prove the truth of facts directly in controversy,[1] unless received by

ment affidavits of the parties are admissible. Faulkner *v.* Chandler, 11 Ala. 725.

Petition for review.— The affidavit of a petitioner for a review may be used on the hearing of the petition to prove facts known only to himself. Coffin *v.* Abbot, 7 Mass. 252.

Objection to entering award.— *Ex parte* affidavits may be read against or in support of objections to the entering of an award as the judgment of the court, especially where they are not objected to in such court, but they should be given much less weight than testimony taken in court or on notice, subject to cross-examination. Tennant *v.* Divine, 24 W. Va. 387.

Should be filed on entering rule.— The affidavit upon which a rule to show cause is had should be filed upon entering the rule; if not filed, or lost by the fault of the party or his attorney, its contents cannot be shown and the rule will be discharged as improvidently granted. Cooper *v.* Galbraith, 24 N. J. L. 219.

Affidavits not applicable to any proceeding in case.— The court will not consider affidavits read and filed in the case upon which nothing is asked, and which are not applicable to any motion, issue, or proceeding in the case. State *v.* Allen, 5 Kan. 213.

93. As to use of affidavits as the basis of provisional remedies see ATTACHMENT; INJUNCTIONS; REPLEVIN; and other specific titles.

94. Tennant *v.* Divine, 24 W. Va. 387.

To establish boundary.— In Sturgeon *v.* Waugh, 2 Yeates (Pa.) 476, it was said that affidavits might be read to establish a boundary, or by way of corroboration of other testimony.

95. Taylor *v.* McIrvin, 94 Ill. 488; Tayloe *v.* Riggs, 1 Pet. (U. S.) 591, 7 L. ed. 275, wherein it was said that if the court refused to receive an affidavit of the loss of a written contract, the contents of which were known to others or a copy of which could be proved, a party might be completely deprived of his rights, at least in a court of law.

To let in other evidence.— The affidavit of a party to the cause may be received to prove the death of one of the subscribing witnesses to a writing and that the other cannot be found, so as to let in other evidence of the execution of such writing. McDowell *v.* Hall, 2 Bibb (Ky.) 610.

96. Winder *v.* Little, 1 Yeates (Pa.) 152. See also Douglass *v.* Sanderson, 2 Dall. (Pa.) 116.

97. Pickering *v.* Townsend, 118 Ala. 351, 23 So. 703; Plume, etc., Mfg. Co. *v.* Caldwell, 35 Ill. App. 492 [*affirmed* in 136 Ill. 163, 26 N. E. 599].

To show compliance with condition.— Where a condition of an insurance policy sued on required the insured to deliver an account of their loss, with their oath or affirmation declaring the account to be true, etc., it was held that the affidavit of the insured was admissible to prove a compliance with such condition, but for no other purpose, and that the court should so inform the jury. Phœnix Ins. Co. *v.* Lawrence, 4 Metc. (Ky.) 9, 81 Am. Dec. 521.

98. Manny *v.* Stockton, 34 Ill. 306; Patterson *v.* Maryland Ins. Co., 3 Harr. & J. (Md.) 71, 5 Am. Dec. 419; Clutch *v.* Clutch, 1 N. J. Eq. 474. See, generally, EVIDENCE.

99. In Pittsburg's Appeal, 79 Pa. St. 317, 323, the court said: "*Ex parte* affidavits are, at best, but a very weak kind of evidence, and, generally, form but the ground of some preliminary or interlocutory action, but are never, unless it be especially so provided by act of assembly or rule of court, the foundation for final judgment or decree."

Affidavit of publication.— Under the Wisconsin statute an affidavit of publication is admissible in evidence and is *prima facie* proof of the facts stated therein. Hill *v.* Hoover, 5 Wis. 354.

Not amounting to adjudication of facts.— An affidavit made by a ministerial officer, in pursuance of a statute requiring certain facts to be sworn to by him, does not amount to an adjudication of such facts. It is merely *prima facie* evidence thereof and may be rebutted by competent evidence. Lane *v.* Schomp, 20 N. J. Eq. 82.

1. *Alabama.*— Pickering *v.* Townsend, 118 Ala. 351, 23 So. 703.

Georgia.— Maples *v.* Hoggard, 58 Ga. 315.

Illinois.— Plume, etc., Mfg. Co. *v.* Caldwell, 35 Ill. App. 492 [*affirmed* in 136 Ill. 163, 26 N. E. 599].

Indiana.— Ohio, etc., R. Co. *v.* Levy, 134 Ind. 343, 34 N. E. 20, 32 N. E. 815.

Kentucky.— Phœnix Ins. Co. *v.* Lawrence, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; Newton *v.* West, 3 Metc. (Ky.) 24; Morton *v.* Sanders, 2 J. J. Marsh. (Ky.) 192, 19 Am. Dec. 128.

consent, or without opposition where such opposition might have been made.[2] As to such matters the testimony of witnesses must be taken in open court or upon deposition, so as to afford an opportunity for cross-examination.[3]

C. As Admissions. Affidavits signed by a party may be introduced in evidence by the opposite party as admissions,[4] and, where the proper foundation is laid, may be used to impeach the testimony of affiant.[5] Where an affidavit is used for such a purpose it is proper to allow affiant to explain the circumstances under which it was made.[6]

D. When Made in Other Proceedings. As a general rule affidavits cannot be used in a proceeding other than that in which they were made,[7] but they have been allowed to be so used in some cases.[8]

New Jersey.— Baldwin *v.* Flagg, 43 N. J. L. 495; Cooper *v.* Galbraith, 24 N. J. L. 219.

Pennsylvania.— Sturgeon *v.* Waugh, 2 Yeates (Pa.) 476; Plankinson *v.* Cave, 2 Yeates (Pa.) 370; Lilly *v.* Kitzmiller, 1 Yeates (Pa.) 28.

West Virginia.— Peterson *v.* Ankrom, 25 W. Va. 56.

The affidavits of persons who are competent witnesses in a suit are inadmissible as evidence. Patterson *v.* Fagan, 38 Mo. 70; Layton *v.* Cooper, 2 N. J. L. 61. But the affidavit made by a prosecuting witness before a magistrate may be read at the trial, either to support or destroy his testimony. State *v.* Lazarus, 1 Mill (S. C.) 33.

The records of courts cannot be proved by affidavit. Kellogg *v.* Sutherland, 38 Ind. 154.

Affidavit part of files in case.— In Quinn *v.* Rawson, 5 Ill. App. 130, it was said that the fact that an affidavit was part of the files in the case did not change its character nor make it competent evidence.

2. Braxton *v.* Lee, 4 Hen. & M. (Va.) 376. And see Quinn *v.* Rawson, 5 Ill. App. 130.

3. Taylor *v.* McIrvin, 94 Ill. 488; Baldwin *v.* Flagg, 43 N. J. L. 495; Cooper *v.* Galbraith, 24 N. J. L. 219. But see Noble *v.* U. S., Dev. Ct. Cl. 83.

Affidavits taken on notice admissible.— On a petition to vacate the levy of an execution, the testimony being taken simply in the form of affidavits, with notice to the adverse party, who was present at the taking of such affidavits, it was held that the affidavits were admissible. Briggs *v.* Green, 33 Vt. 565.

4. *Alabama.*— Hallett *v.* O'Brien, 1 Ala. 585.

Delaware.— Hall *v.* Cannon, 4 Harr. (Del.) 360.

Iowa.— Asbach *v.* Chicago, etc., R. Co., 86 Iowa 101, 53 N. W. 90.

New York.— Forrest *v.* Forrest, 6 Duer (N. Y.) 102; Morrell *v.* Cawley, 17 Abb. Pr. (N. Y.) 76.

Texas.— Wyser *v.* Calhoun, 11 Tex. 323.

See, generally, as to this question, EVIDENCE.

On trial of another issue.— Where an affidavit was filed by defendant for the purpose of obtaining an order requiring plaintiff to give security for costs on the ground of non-residence, it was held that such affidavit was competent evidence against defendant on the trial of another issue; and the fact that it was sworn to on information and belief affected only its weight, and not its competency. Chicago, etc., R. Co. *v.* Ohle, 117 U. S. 123, 6 S. Ct. 632, 29 L. ed. 837.

Facts stated different from those proved.— Where a party put in an affidavit, required to be filed by law, for the purpose of showing that such affidavit was in compliance with the statute, it was held that the adverse party might read such affidavit in argument to show that the facts stated therein were different from those proved, it being essential that they should be the same. Hasler *v.* Schumacher, 10 Wis. 419.

Affidavit of third person read by party.— An *ex parte* affidavit of a person who was present as a witness at the trial was held not to be evidence against plaintiff, although contained in a record read by said plaintiff on the trial. Hargis *v.* Price, 4 Dana (Ky.) 79.

5. Gardner *v.* Granniss, 57 Ga. 539; Barnes *v.* Parker, 15 L. T. Rep. N. S. 218.

Waiver of objection.— Where an affidavit made by a witness out of court, after his examination had been taken, had been offered to impeach such testimony, it was held that a failure to object in the lower court that the affidavit was not proper evidence of the facts it purported to state waived the objection, and it came too late when taken for the first time on appeal. McGinnis *v.* Grant, 42 Conn. 77.

6. Snydacker *v.* Brosse, 51 Ill. 357, 99 Am. Dec. 551; Yale *v.* Edgerton, 14 Minn. 194.

Denial of affidavit.— On the trial of an action for the recovery of the amount of a life-insurance policy, an affidavit of the beneficiary, which tended to show that, contrary to the representation of the assured in his application, said insured had been subject to epileptic fits, having been introduced, it was proper to permit such affiant to show that she never knowingly subscribed to or made the statements in the affidavit contained. Bankers L. Assoc. *v.* Lisco, 47 Nebr. 340, 66 N. W. 412.

7. Thompson *v.* San Francisco, 119 Cal. 538, 51 Pac. 863; Hunt *v.* Langstroth, 9 N. J. L. 223; Anonymous, 8 N. J. L. 176; Black *v.* Nease, 37 Pa. St. 433.

Not available for other purpose.— An affidavit of merits made and used for one purpose in a cause cannot be used for another. Thus, an affidavit for a change of venue will not be received as the foundation of a motion to set aside a default for want of a plea. Cutler *v.* Biggs, 2 Hill (N. Y.) 409.

8. In Barnard *v.* Heydrick, 49 Barb. (N. Y.) 62, 2 Abb. Pr. N. S. (N. Y.) 47, affidavits

E. Counter-Affidavits. Usually counter-affidavits may be received in opposition to a motion,[9] and in some jurisdictions supplementary affidavits may be offered in reply to such counter-affidavits.[10]

VIII. Compelling Making of Affidavit.

In some jurisdictions it is provided by statute that, on proper application, a refractory person may be compelled to make his affidavit as to facts within his knowledge;[11] and a refusal to obey a subpœna for this purpose is a contempt for which such person can be committed.[12]

AFFILARE. To Affile,[1] *q. v.*

AFFILE. To put on file.[2]

AFFILIATION. The assignment of a child to a parent, by legal authority.[3] (Affiliation: Of Bastards, see Bastards.)

AFFINER. To put an end to.[4]

AFFINIS MEI, AFFINIS NON EST MIHI AFFINIS. A maxim meaning "A per-

made and entitled in another cause were allowed to be read on a motion for an order of publication. And in Montgomery *v.* Palmer, 100 Mich. 436, 59 N. W. 148, it was held that affidavits used on the hearing of a motion for a new trial, one of the grounds of which was the alleged action of an officer of defendant corporation, in whose favor judgment had been rendered, in inducing witnesses for plaintiff to leave the state during the trial of the cause, might be made the basis of proceedings against the offending officer for contempt.

Another proceeding between same parties. — An affidavit filed to support a motion for the discharge of a garnishee, which motion was sustained, may afterward be filed to support a similar motion in another proceeding between the same parties. Scholes *v.* Murray Iron Works Co., 44 Iowa 190.

9. Planters, etc., Bank *v.* Smith, 14 Ala. 416; Finch *v.* Green, 16 Minn. 355; Campbell *v.* Grove, 2 Johns. Cas. (N. Y.) 105.

Indiana — Not allowed on motion for continuance.—Counter-affidavits are not allowed on a motion for a continuance. Eslinger *v.* East, 100 Ind. 434.

Including in motion papers.— On a motion by commissioners in a proceeding to open a street for a final order confirming their report it is within the discretion of the court to include in the motion papers on which the order is granted an affidavit presented in opposition to the granting of the order. *In re* Board of Street Opening, etc., 20 N. Y. Suppl. 563.

10. Young *v.* Rollins, 85 N. C. 485. But see Campbell *v.* Grove, 2 Johns. Cas. (N. Y.) 105, in which it was held that a party could not support his motion by any affidavits except those on which it was grounded.

11. Huston *v.* Vail, 51 Ind. 299; Rater *v.* State, 49 Ind. 507; State *v.* Seaton, 61 Iowa 563, 16 N. W. 736; Robb *v.* McDonald, 29 Iowa 330, 4 Am. Rep. 211; Hodgman *v.* Barker, 60 Hun (N. Y.) 156, 14 N. Y. Suppl. 574.

When application not allowable.— An affidavit by the claim-agent of a railroad, filed with the justice of the peace, stating that the company had a claim whereby it was necessary to have papers served on the fourth day of July in order to get service on defendant in an action named, is not sufficient to authorize the justice to issue a subpœna for a witness where no action is pending, under Iowa Code (1873), § 3692, providing that when a person desires to obtain the affidavit of another who is unwilling to make the same he may apply by petition to any officer authorized to take depositions, stating the object for which he desires such affidavit. Chambers *v.* Oehler, 107 Iowa 155, 77 N. W. 853.

Affidavit on which to base civil action.— Under Iowa Code, §§ 3962, 3963, a person is not bound to make an affidavit which is sought only as information on which to base a civil action. Therefore, where a person was committed by a justice of the peace for refusing to obey a subpœna commanding him to appear before the justice to make an affidavit for such a purpose, it was held that he should be discharged on habeas corpus. Dudley *v.* McCord, 65 Iowa 671, 22 N. W. 920 [*distinguishing* Robb *v.* McDonald, 29 Iowa 330, 4 Am. Rep. 211; State *v.* Seaton, 61 Iowa 563, 16 N. W. 736].

In the absence of statutory authority it seems that a court has no power to compel the making of an affidavit. Bacon *v.* Magee, 7 Cow. (N. Y.) 515. But see Huston *v.* Vail, 51 Ind. 299, wherein it was said that the court had the same power over a person to compel him to make an affidavit that it had to compel a witness to appear in a suit and testify orally.

12. Robb *v.* McDonald, 29 Iowa 330, 4 Am. Rep. 211.

It is no excuse for refusing to make an affidavit, when required under a statute, that the affidavit when made will not be admissible in the proceeding in which it is intended to be used. Robb *v.* McDonald, 29 Iowa 330, 4 Am. Rep. 211.

1. Burrill L. Dict.
2. Black L. Dict.
3. Burrill L. Dict.
4. Kelham Dict.

son related by affinity to one who is related to me by affinity is not related to me by affinity."[5]

AFFINITAS. Affinity,[6] *q. v.*

AFFINITAS AFFINITATIS. The connection between parties, arising from marriage, which is neither consanguinity nor affinity.[7]

AFFINITY. The tie which arises from the marriage between the husband and the blood relations of the wife, and between the wife and the blood relations of the husband.[8] (Affinity: Affecting — Capacity to Marry, see Marriage; Credibility of Witness, see Witnesses; Right to Inherit, see Descent and Distribution. As Element of Incest, see Incest. Causing Disqualification — Of Judge, see Judges; Of Juror, see Juries.)

AFFINS. Kindred by marriage.[9]

AFFIRM. To assert or declare;[10] to ratify or confirm;[11] to confirm a judgment, decree, or order, brought before an appellate court for review.[12]

AFFIRMANCE. The confirmation of a voidable act.[13] (Affirmance: Of Judgment, Decree, or Order, see Admiralty; Appeal and Error; Criminal Law.)

AFFIRMANT. A person who affirms in place of making oath.[14]

AFFIRMANTI, NON NEGANTI, INCUMBIT PROBATIO. A maxim meaning "The burden of proof rests on the party affirming, not on the party denying."[15]

AFFIRMARE. To confirm; to ratify; to affirm.[16]

AFFIRMATION. See Oaths and Affirmations.

AFFIRMATIVE. Asserting as true; positive.[17] (Affirmative: Allegations in Pleading, see Pleading. Defense, see Pleading. Of Issue at Trial, see Trial.)

AFFIRMATIVE PREGNANT. An affirmative allegation implying some negative in favor of the adverse party.[18]

AFFIRMATIVE STATUTE. A statute in affirmative language; a statute directing some act to be done or declaring what shall be done.[19]

AFFIRMATIVUM NEGATIVUM IMPLICAT. A maxim meaning "An affirmative implies a negative."[20]

5. Hume *v.* Commercial Bank, 10 Lea (Tenn.) 1, 43 Am. Rep. 290; Waterhouse *v.* Martin, Peck (Tenn.) 373, 389.

6. Stimson L. Gloss.

7. Bouvier L. Dict.

8. *Alabama.*— Kirby *v.* State, 89 Ala. 63, 69, 8 So. 110.

Arkansas.— Kelly *v.* Neely, 12 Ark. 657, 56 Am. Dec. 288.

Maine.— Spear *v.* Robinson, 29 Me. 531, 545 [*citing* Webster Dict.].

New York.— Paddock *v.* Wells, 2 Barb. Ch. (N. Y.) 331, 333; Higbe *v.* Leonard, 1 Den. (N. Y.) 186, 187; Carman *v.* Newell, 1 Den. (N. Y.) 25, 26; Solinger *v.* Earle, 45 N. Y. Super. Ct. 80, 84.

Ohio.— Chinn *v.* State, 47 Ohio St. 575, 579 [*quoting* Erskine Inst. bk. I, tit. 6, § 8.]

Tennessee.— Hume *v.* Commercial Bank, 10 Lea (Tenn.) 1, 43 Am. Rep. 290. But see Waterhouse *v.* Martin, Peck (Tenn.) 373, 389 [*quoting* Cooper's Justinian], where it is said that affinity is "the connection between the husband and his wife's parents, and the wife and her husband's parents."

Distinguished from "consanguinity."— The term is used in contradistinction to "consanguinity," which signifies a relation by blood. Kelly *v.* Neely, 12 Ark. 657, 56 Am. Dec. 288; Spear *v.* Robinson, 29 Me. 531, 545 [*citing* Webster Dict.]; Carman *v.* Newell, 1 Den. (N. Y.) 25, 26; Hume *v.* Commercial Bank, 10 Lea (Tenn.) 1, 43 Am. Rep. 290.

"A husband is related by affinity to all the *consanguinei* of his wife, and *vice versa*, the wife to the husband's *consanguinei*; for the husband and wife being considered one flesh, those who are related to the one by blood, are related to the other by affinity." Higbe *v.* Leonard, 1 Den. (N. Y.) 186, 187; Chinn *v.* State, 47 Ohio St. 575, 579.

There is no affinity between the blood relatives of the husband and the blood relatives of the wife. Kirby *v.* State, 89 Ala. 63, 69, 8 So. 110; Oneal *v.* State, 47 Ga. 229, 248.

The degrees of affinity are computed in the same way as those of consanguinity. Kelly *v.* Neely, 12 Ark. 657, 56 Am. Dec. 288. See, generally, Descent and Distribution.

9. Kelham Dict.

10. Burrill L. Dict.

11. Planters Bank *v.* Calvit, 3 Sm. & M. (Miss.) 143, 194, 41 Am. Dec. 616.

12. Abbott L. Dict.

13. Wharton L. Lex.

14. Burrill L. Dict.

15. Abbott L. Dict.

16. Stimson L. Gloss.

17. Anderson L. Dict.

18. Fields *v.* State, 134 Ind. 46, 53, 32 N. E. 780.

19. Burrill L. Dict.

Affirmative acts of parliament are those "wherein justice is directed to be done according to the law of the land." 1 Bl. Comm. 142.

20. Morgan Leg. Max.

AFFIXING. See FIXTURES ; SEALS.
AFFORATUS. Appraised ; valued.[21]
AFFORCE. To add force to ; to increase the strength of.[22]
AFFORCER. To strengthen ; to add to.[23]
AFFORCIARE. To AFFORCE,[24] *q. v.*
AFFOREST. To turn into a forest.[25]
AFFORESTARE or **AFORESTARE.** To AFFOREST,[26] *q. v.*
AFFRANCHIR. To AFFRANCHISE,[27] *q. v.*
AFFRANCHISE. To make free.[28]

21. Wharton L. Lex.
22. Abbott L. Dict.
Afforce the assize.— A method, in old English practice, of securing a verdict, where the jury disagreed, by adding other jurors to the panel until twelve could be found who were unanimous in their opinion. Black L. Dict.
23. Kelham Dict.
24. Burrill L. Dict. [*citing* Bracton, fol. 185*b*].
25. Wharton L. Lex.
26. Burrill L. Dict.
27. Stimson L. Gloss.
28. Wharton L. Lex.

AFFRAY

EDITED BY CHARLES L. LEWIS
Associate Justice of Supreme Court of Minnesota

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Unlawful Assembly, see UNLAWFUL ASSEMBLY.
For General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW.

I. WHAT CONSTITUTES.

A. Generally. "Affray" is said to be derived from the French word "*effrayer*" [1] or "*effraier*," [2] to affright [3] or terrify,[4] but Lord Coke says that the word is English, and that the offense is so called because it "affrighteth and maketh men afraid." [5] In a legal sense it signifies a public offense to the terror of the people.[6]

B. Commission by Fighting — 1. AT COMMON LAW. An affray at common law [7] is defined to be the fighting of two or more persons in a public place, to the terror of the people.[8]

1. Burn, *verbo* Affray [*cited* in State *v.* Huntly, 25 N. C. 418, 40 Am. Dec. 416]; Jacob L. Dict.; 1 Russell Crimes (9th ed.) c. 26, p. 406.
2. 1 Hawkins P. C. c. 63, § 1; Com. *v.* Simmons, 6 J. J. Marsh. (Ky.) 614, in which case the word is spelled "*affraier*."
3. State *v.* Huntly, 25 N. C. 418, 40 Am. Dec. 416; Jacob L. Dict.
4. 1 Hawkins P. C. c. 63, § 1; Com. *v.* Simmons, 6 J. J. Marsh. (Ky.) 614.
5. 3 Coke Inst. 158.
6. 1 Hawkins P. C. c. 63, § 1.
7. See also *infra*, I, C.
8. 1 Russell Crimes (9th ed.) c. 26, p. 406; 1 Bishop Crim. L. § 535; 4 Bl. Comm. 144; 3 Coke Inst. 158; 1 Hawkins P. C. c. 63, § 1; Burn Just. tit. Affray, 1.

Alabama.— Thompson *v.* State, 70 Ala. 26; McClellan *v.* State, 53 Ala. 640; O'Neill *v.* State, 16 Ala. 65.
Arkansas.— State *v.* Brewer, 33 Ark. 176; Childs *v.* State, 15 Ark. 204.
Indiana.— Supreme Council, etc. *v.* Garrigus, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298.
Kentucky.— Com. *v.* Simmons, 6 J. J. Marsh. (Ky.) 614.
North Carolina.— State *v.* Davis, 65 N. C. 298; State *v.* Perry, 50 N. C. 9, 69 Am. Dec. 768; State *v.* Stanly, 49 N. C. 290; State *v.* Woody, 47 N. C. 335; State *v.* Allen, 11 N. C. 356.
South Carolina.— State *v.* Sumner, 5 Strobh. (S. C.) 53.
Tennessee.— State *v.* Priddy, 4 Humphr.

2. Statutory Provisions. In states where the statutory offense consists of the same elements as those which constitute the offense at common law, the statutory language is in substantial conformity to the common-law definition of the offense.[9] In some of the states, however, agreement or mutual consent has been added as an element.[10]

3. Elements of Offense — a. Number Who May Commit. The commission of an offense of this character requires the participation of two or more persons.[11] But although two are engaged in the affray, unless consent is an element,[12] the offense may be committed by one,[13] as where the other offers no resistance,[14] or acts in self-defense,[15] or, not being the aggressor, employs only sufficient force to defend himself.[16] However, it would seem that in such a case the offense would be assault and battery and not affray.[17]

b. Fighting — (I) *Necessity for and Extent of.* Fighting is an essential ingredient of this form of the offense.[18] It is not necessary, however, that there should be an interchange of blows. One blow will be sufficient;[19] or all the injury may be inflicted by one party,[20] as where the other attempts to use a weapon.[21] Nor is it important who strikes the first blow,[22] or that deadly weapons were used.[23]

(II) *Provoking Words.* Quarrelsome or threatening words will not of themselves amount to an affray, because insufficient to create the terror to the public which the law regards as the obnoxious feature of the offense.[24] But

(Tenn.) 429; Simpson *v.* State, 5 Yerg. (Tenn.) 356.

Texas.— Saddler *v.* Republic, Dall. (Tex.) 610.

Virginia.— Wilkes *v.* Jackson, 2 Hen. & M. (Va.) 355.

Distinguished from assault and battery.— Although assault and battery is involved in the offense of affray by fighting, it differs from it in that it may be committed in a private place, and lacks the ingredient of terror.

Alabama.— Thompson *v.* State, 70 Ala. 26; McClellan *v.* State, 53 Ala. 640.

Arkansas.— Childs *v.* State, 15 Ark. 204.

Kentucky.— Com. *v.* Simmons, 6 J. J. Marsh. (Ky.) 614.

North Carolina.— State *v.* Stanly, 49 N. C. 290; State *v.* Woody, 47 N. C. 335.

South Carolina.— State *v.* Sumner, 5 Strobh. (S. C.) 53.

Tennessee.— State *v.* Heflin, 8 Humphr. (Tenn.) 84; Simpson *v.* State, 5 Yerg. (Tenn.) 356; Cash *v.* State, 2 Overt. (Tenn.) 198.

Texas.— Saddler *v.* Republic, Dall. (Tex.) 610.

Virginia.— Wilkes *v.* Jackson, 2 Hen. & M. (Va.) 355.

England.— 1 Hawkins P. C. c. 63, § 1; 1 Russell Crimes (9th ed.) c. 26, p. 406.

See, generally, Assault and Battery.

Distinguished from riot.— Affray is distinguished from riot in that the latter offense must be committed by three or more persons and is of a somewhat more public nature. People *v.* Judson, 11 Daly (N. Y.) 1; State *v.* Allen, 11 N. C. 356.

The offense may be an affray and not a riot although many persons engage in it, as where the meeting is innocent and lawful, and the breach of the peace happened unexpectedly and without previous intention. 1 Hawkins P. C. c. 65, § 3; 1 Russell Crimes (9th ed.) c. 26, p. 406.

See, generally, Riot.

9. See the statutes cited in Hawkins *v.* State, 13 Ga. 322, 58 Am. Dec. 517; Pollock *v.* State, 32 Tex. Crim. 29, 22 S. W. 19.

10. See the statutes cited in Supreme Council, etc. *v.* Garrigus, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298; Fritz *v.* State, 40 Ind. 18; State *v.* Foy, Tappan (Ohio) 103.

11. See *supra*, I, B, 1, 2.

12. Fritz *v.* State, 40 Ind. 18.

13. Cash *v.* State, 2 Overt. (Tenn.) 198.

14. O'Neill *v.* State, 16 Ala. 65; Pollock *v.* State, 32 Tex. Crim. 29, 22 S. W. 19.

15. State *v.* Sumner, 5 Strobh. (S. C.) 53. And see People *v.* Moore, 3 Wheel. Crim. (N. Y.) 82.

16. State *v.* Wilson, 61 N. C. 237.

17. State *v.* Wilson, 61 N. C. 237, holding that where the grand jury returned a true bill for affray against one defendant, it was in legal effect an indictment for assault and battery. See, generally, Assault and Battery.

18. State *v.* Foy, Tappan (Ohio) 103; Simpson *v.* State, 5 Yerg. (Tenn.) 356.

19. State *v.* Gladden, 73 N. C. 150; Piper *v.* State, (Tex. Crim. 1899) 51 S. W. 1118.

20. State *v.* Downing, 74 N. C. 184.

21. State *v.* Davis, 80 N. C. 351, 30 Am. Rep. 86.

22. State *v.* Sumner, 5 Strobh. (S. C.) 53; Pollock *v.* State, 32 Tex. Crim. 29, 22 S. W. 19.

23. State *v.* Glenn, 119 N. C. 804, 25 S. E. 789.

24. O'Neill *v.* State, 16 Ala. 65; Hawkins *v.* State, 13 Ga. 322, 58 Am. Dec. 517; State *v.* Sumner, 5 Strobh. (S. C.) 53; Pollock *v.* State, 32 Tex. Crim. 29, 22 S. W. 19; 1 Hawkins P. C. c. 63, § 4; 1 Russell Crimes (9th ed.) c. 26, p. 407.

where one person uses abusive or offensive language, which is calculated and intended to provoke and bring on a fight, and the other is induced to strike or injure him, the former may be guilty of an affray whether he does or does not return the blow.[25] In such a case he cannot be said to act in self-defense,[26] especially if he was ready and willing to fight.[27] Thus the use of language which evinces a design to precipitate trouble, accompanied by the drawing of weapons and their attempted use, will constitute the offense.[28]

(III) *In Public Place*—(A) *In General.* It is absolutely necessary that the fighting should have occurred in a public place.[29]

(B) *What Constitutes.* What will constitute a public place in this connection seems to have been fairly well settled. Thus a public highway[30] or a public street[31] will ordinarily be regarded as a public place so that fighting therein will make the offense of affray; and it has been held that a place in close proximity to a public street, and open and visible to passers-by, was within the definition,[32] but it has also been held that a place out of the sight or hearing of the general public, and considerably distant from a highway, will not lose its private character by the casual presence of persons other than the combatants.[33]

(C) *Commencement in Private Place.* It is not material that the fighting commenced in a private place, if it was continued in a public place,[34] or was carried thereto by flight and pursuit,[35] or the commencement and continuation of the fighting were so intimately blended as to constitute but one transaction.[36]

c. Consent. Consent to fight is not an element of the common-law offense,[37] but is made an element by statute in some of the states,[38] and when it is so made an element its existence is necessary to complete the offense.[39] The consent may be indicated by words or gestures, and it is not necessary that there should be any form of words or a writing.[40] A party at first unwilling, who is forced into a quarrel, cannot be said to have consented;[41] nor can a person be presumed to have consented from the mere fact that he engaged in a fight.[42]

d. Incitement of Terror. The object of denouncing the offense is to prevent the disturbance of the public peace and quiet.[43] The injury to the people is the

25. State *v.* Fanning, 94 N. C. 940, 55 Am. Rep. 653; State *v.* Davis, 80 N. C. 351, 30 Am. Rep. 86; State *v.* Downing, 74 N. C. 184; State *v.* Perry, 50 N. C. 9, 69 Am. Dec. 768; State *v.* Sumner, 5 Strobh. (S. C.) 53.

Intent to fight.— Actual intent that there should be a combat is immaterial. One who has provoked a fight cannot insist that he did not believe that his adversary would resent the provocation, but will be deemed to have intended the natural result of his acts. State *v.* King, 86 N. C. 603.

Presumption.— All persons engaging in an affray, whether it ensue on a sudden quarrel or otherwise, are presumed to engage in it with the design of fighting and disturbing the peace. Childs *v.* State, 15 Ark. 204.

26. State *v.* Sumner, 5 Strobh. (S. C.) 53.

27. State *v.* Sumner, 5 Strobh. (S. C.) 53; Pollock *v.* State, 32 Tex. Crim. 29, 22 S. W. 19.

28. Hawkins *v.* State, 13 Ga. 322, 58 Am. Dec. 517.

29. *Alabama.*— McClellan *v.* State, 53 Ala. 640.

Arkansas.— Childs *v.* State, 15 Ark. 204.

Missouri.— State *v.* Warren, 57 Mo. App. 502.

North Carolina.— State *v.* Woody, 47 N. C. 335.

South Carolina.— State *v.* Sumner, 5 Strobh. (S. C.) 53.

Tennessee.— Simpson *v.* State, 5 Yerg. (Tenn.) 356; State *v.* Heflin, 8 Humphr. (Tenn.) 84.

Texas.— Shelton *v.* State, 30 Tex. 431.

England.— Reg. *v.* Hunt, 1 Cox C. C. 177; 4 Bl. Comm. 146.

30. State *v.* Davis, 80 N. C. 351, 30 Am. Rep. 86.

31. Carwile *v.* State, 35 Ala. 392.

32. Carwile *v.* State, 35 Ala. 392.

33. Taylor *v.* State, 22 Ala. 15; Reg. *v.* Hunt, 1 Cox C. C. 177; 1 Hawkins P. C. c. 63, § 1; 1 Russell Crimes (9th ed.) c. 26, p. 406.

34. State *v.* Billings, 72 Mo. 662.

35. Wilson *v.* State, 3 Heisk. (Tenn.) 278.

36. State *v.* Billings, 72 Mo. 662.

37. Supreme Council, etc. *v.* Garrigus, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298; Cash *v.* State, 2 Overt. (Tenn.) 198; Pollock *v.* State, 32 Tex. Crim. 29, 22 S. W. 19; Saddler *v.* Republic, Dall. (Tex.) 610.

38. See *supra*, I, B, 2.

39. Duncan *v.* Com., 6 Dana (Ky.) 295; State *v.* Foy, Tappan (Ohio) 103.

40. State *v.* Foy, Tappan (Ohio) 103.

41. State *v.* Foy, Tappan (Ohio) 103.

42. Klum *v.* State, 1 Blackf. (Ind.) 377; Duncan *v.* Com., 6 Dana (Ky.) 295.

43. State *v.* Sumner, 5 Strobh. (S. C.) 53.

terror and alarm produced and the evil example,[44] both of which are presumed.[45] That no actual terror resulted is immaterial, it being enough that it might have resulted,[46] and it is for this reason that fighting in a private place does not constitute an affray.[47]

4. AIDERS AND ABETTORS. Persons aiding, abetting, and assisting those engaged in an affray become affrayers themselves, and are punishable as principals.[48]

C. Commission by Going About Armed — 1. IN GENERAL. There may be an affray though there is no actual violence, as where one or more persons armed with dangerous and unusual weapons publicly ride or go about offensively, and in such a manner as naturally to cause terror to the people.[49] This is said to have been an offense at common law.[50] But if the mere carrying and wearing of dangerous arms and weapons is not unlawful, such carrying and wearing in a public street will not constitute an offense.[51]

2. NUMBER WHO MAY COMMIT. One may be guilty of this offense, since the terror is not predicated of the number of persons, but on the carrying of weapons and the demeanor of the offender or offenders.[52]

3. POSSESSION OF ARMS NECESSARY. The possession of arms is a necessary ingredient of this form of the offense.[53]

II. JURISDICTION OF JUSTICES OF THE PEACE.

A. Constitutionality of Statutes Conferring. A statute providing for the summary punishment by justices of the peace of affrays and kindred offenses is not repugnant to a constitutional provision that all criminal prosecutions should be on presentment or indictment, and that the accused should be entitled to a jury trial.[5]

B. In What Cases. Where final jurisdiction can be acquired only on complaint of the injured party, the only case which can be entertained is where an affray by fighting is charged, as in other cases of affray there is no party so particularly injured as to authorize him to complain.[55]

III. THE INDICTMENT OR INFORMATION.

A. Number Who May Be Indicted. It is not necessary that all the participants in the affray should be indicted, even though a fighting by mutual

44. State *v.* Weekly, 29 Ind. 206; State *v.* Huntly, 25 N. C. 418, 40 Am. Dec. 416; 3 Coke Inst. 158, 160; 1 Hawkins P. C. c. 28, § 1.

45. Carwile *v.* State, 35 Ala. 392; Childs *v.* State, 15 Ark. 204; State *v.* Warren, 57 Mo. App. 502; State *v.* Sumner, 5 Strobh. (S. C.) 53.

46. Carwile *v.* State, 35 Ala. 392; State *v.* Sumner, 5 Strobh. (S. C.) 53.

47. State *v.* Sumner, 5 Strobh. (S. C.) 53.

48. Hawkins *v.* State, 13 Ga. 322, 58 Am. Dec. 517; Curlin *v.* State, 4 Yerg. (Tenn.) 143.

One who intermingles with persons about to commence an affray becomes a party thereto, unless his object is to suppress it. People *v.* Moore, 3 Wheel. Crim. (N. Y.) 82. Or he may be deemed in some measure guilty, if he looks on without attempting to suppress the affray. People *v.* Moore, 3 Wheel. Crim. (N. Y.) 82.

49. State *v.* Griffin, 125 N. C. 692, 34 S. E. 513; State *v.* Huntly, 25 N. C. 418, 40 Am. Dec. 416; State *v.* Washington, 19 Tex. 128, 70 Am. Dec. 323.

50. 1 Hawkins P. C. c. 63, § 4; 1 Russell Crimes (9th ed.) 407; Knight's Case, 3 Mod. 117; O'Neill *v.* State, 16 Ala. 65; State *v.* Lanier, 71 N. C. 288; State *v.* Woody, 47 N. C. 335; State *v.* Huntly, 25 N. C. 418, 40 Am. Dec. 416.

Originally the word "affray" meant no more than to affright, as where persons appeared with armor or weapons not usually worn, to the terror of others, and this was particularly prohibited by 2 Edw. III, c. 3. 4 Bl. Comm. [*cited* in State *v.* Huntly, 25 N. C. 418, 40 Am. Dec. 416]; Knight's Case, 3 Mod. 117.

Riding unarmed through a court-house, when the court is not in session and most of the people have gone home, is not necessarily an affray of this character. State *v.* Lanier, 71 N. C. 288.

51. Simpson *v.* State, 5 Yerg. (Tenn.) 356.

52. State *v.* Woody, 47 N. C. 335; State *v.* Huntly, 25 N. C. 418, 40 Am. Dec. 416; 1 Hawkins P. C. c. 63, § 4.

53. State *v.* Lanier, 71 N. C. 288.

A gun is an unusual weapon when carried in such a manner as to alarm or terrify the people. State *v.* Huntly, 25 N. C. 418, 40 Am. Dec. 416.

54. State *v.* Ledford, 3 Mo. 102.

55. State *v.* Davis, 65 N. C. 298.

consent is charged. An indictment of one alone will warrant a conviction of assault.[56]

B. Charging the Offense — 1. In General. The common-law offense must be charged with that degree of certainty and precision which is required by the common-law rules of criminal pleading. Every fact and circumstance necessary to establish the offense must be set forth.[57] If the prosecution is on information, that accusation must contain all the substantial requisites of an indictment at common law.[58] Where the offense is defined by statute the indictment must be framed in reference to the statute and conform to either its letter or its substance.[59] It need not be in the form of the common-law precedents.[60]

2. Particular Averments — a. As to Jurisdiction. The indictment need not contain averments of the existence of conditions which are precedent to the jurisdiction of the court and which are matters of defense going to the jurisdiction.[61]

b. As to Fighting. The fact of fighting must be averred where fighting is an ingredient of the offense sought to be charged.[62] It will be sufficient to state that defendants fought together;[63] unlawfully and willingly fought together;[64] did make an affray by fighting;[65] or to use other similar expressions of an actual conflict.

c. As to Consent. If consent is an ingredient of the offense, the fact that the fighting was by consent should be averred directly or by such language as will warrant a fair inference of that fact. An allegation which will bear the construction that but one of the defendants agreed to fight fails to charge the offense.[66]

d. As to Place of Fighting. It is absolutely necessary to aver that the fighting was in a public place,[67] and it is not enough to allege merely that an affray was

56. State *v.* Wilson, 61 N. C. 237.

57. State *v.* Heflin, 8 Humphr. (Tenn.) 84; Archbold Crim. L. 41, 42.

The statement of a mere conclusion, as that defendant "made an affray," is insufficient without specifying the acts and circumstances relied on to establish the offense. State *v.* Woody, 47 N. C. 335; State *v.* Priddy, 4 Humphr. (Tenn.) 429; Simpson *v.* State, 5 Yerg. (Tenn.) 356. And see Supreme Council, etc. *v.* Garrigus, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298, holding that in an answer an allegation that insured "was engaged in an affray" was the statement of a conclusion, and not sufficient to meet the averments in the complaint that insured received a wound without any agency, fault, or negligence on his part.

But it has been held that a charge that defendants, being unlawfully assembled together in a public place, to the great terror, etc., "did quarrel and fight and make an affray," was sufficient without the averments of fighting and quarreling, which *eo nomine* were not offenses at common law and might be rejected as surplusage. Saddler *v.* Republic, Dall. (Tex.) 610. And see State *v.* Washington, 19 Tex. 128, 70 Am. Dec. 323, sustaining an indictment charging that defendants, "being so unlawfully assembled together, and arrayed in a warlike manner, then and there did make an affray," etc.

For forms of indictments see Childs *v.* State, 15 Ark. 204; State *v.* Allen, 11 N. C. 356; State *v.* Benthal, 5 Humphr. (Tenn.) 519.

58. State *v.* Vanloan, 8 Ind. 182.

59. Skains *v.* State, 21 Ala. 218; State *v.* Dunn, 73 Mo. 586.

For forms of indictments: Under the Alabama statutes see McClellan *v.* State, 53 Ala. 640; under Wagner's Stat. Mo. see State *v.* Dunn, 73 Mo. 586.

60. State *v.* Billingsley, 43 Tex. 93.

61. State *v.* Moore, 82 N. C. 659; State *v.* Hooper, 82 N. C. 663.

62. State *v.* Priddy, 4 Humphr. (Tenn.) 429; State *v.* Woody, 47 N. C. 335, wherein the indictment was held defective because failing to state among other things that defendants fought to and with each other.

63. Thompson *v.* State, 70 Ala. 26.

64. State *v.* Billingsley, 43 Tex. 93.

65. State *v.* Benthal, 5 Humphr. (Tenn.) 519. But see State *v.* Vanloan, 8 Ind. 182, wherein a statement that defendants "fought" was held insufficient, the information containing no other statement as to "whom or what they fought."

66. Fritz *v.* State, 40 Ind. 18.

67. State *v.* Woody, 47 N. C. 335; State *v.* Sumner, 5 Strobh. (S. C.) 53; State *v.* Heflin, 8 Humphr. (Tenn.) 84; State *v.* Priddy, 4 Humphr. (Tenn.) 429.

For form of indictment held defective because among other things it failed to allege the commission of the offense in a public place see State *v.* Woody, 47 N. C. 335.

Plea of guilty as waiver of defect.— An omission to charge that the fighting was in a public place, or a defective statement relative thereto, is unimportant where defendant has pleaded guilty. Shelton *v.* State, 30 Tex. 431.

made.[68] However, a direct statement that the offense was committed in a public place will be sufficient, and a particular description of the place is unnecessary.[69] A designation of the place of conflict as a street,[70] public road, or highway[71] sufficiently characterizes it as a public place, though it has been held that an allegation of the commission of the offense in a highway is not necessarily equivalent to a charge that it was committed in a public place, inasmuch as a highway which has been laid out but not opened is not a public place.[72] It has been held sufficient to allege that the fighting took place in a certain county without specifying the particular locality within the county wherein it occurred,[73] but it has also been held that a statement that the fighting was in a designated town would not necessarily imply that it was at a public place therein.[74]

e. As to Going About Armed. Alleging that defendants were unlawfully assembled at a certain time and place, and, being so unlawfully assembled together and arrayed in a warlike manner, then and there did make an affray, is sufficient to charge an affray by going about armed.[75]

f. As to Terror. While there is no direct adjudication as to the necessity of an averment as to terror, it is said to be the better form to include such averment,[76] and in most precedents an allegation that the offense was "to the great terror and disturbance of divers good citizens" is included.[77]

g. As to Assault and Battery. Affray by fighting, as defined by the common law and by statutes which substantially denounce the common-law offense, necessarily includes assault and battery.[78] An indictment for the former offense is, in effect, merely for the several assaults and batteries — one bill being used to avoid several trials for the same offense.[79] It may, in addition to charging the affray, charge each defendant in separate counts with an assault and battery,[80] or when charging affray it may be so drawn as to allege the specific elements of assault and battery.[81] But where there is a statutory requirement that an indictment shall charge but one offense, except as to offenses committed in different modes and by different means, counts for affray and for assault and battery cannot be joined.[82]

IV. DEFENSES.

One who takes part in an affray cannot justify by showing the existence of facts explaining the motive for his engaging therein, where he entered upon it willingly. The offense is a public one, and guilt or innocence cannot be deter-

68. State *v.* Woody, 47 N. C. 335; State *v.* Priddy, 4 Humphr. (Tenn.) 429.

69. State *v.* Warner, 4 Ind. 604; State *v.* Baker, 83 N. C. 649; Wilson *v.* State, 3 Heisk. (Tenn.) 278; Shelton *v.* State, 30 Tex. 431.

Statutory language.— The allegation that the place where the offense was committed was a public place may be set out in the language of the statute, or the facts necessary to show that it was a public place may be set out. State *v.* Warren, 57 Mo. App. 502.

70. Carwile *v.* State, 35 Ala. 392.

71. State *v.* Warren, 57 Mo. App. 502.

72. State *v.* Weekly, 29 Ind. 206. And see Williams *v.* State, 64 Ind. 553, 31 Am. Rep. 135, which was an indictment for notorious lewdness in a public place and which followed the principal case.

73. State *v.* Warner, 4 Ind. 604.

74. State *v.* Heflin, 8 Humphr. (Tenn.) 84.

75. State *v.* Washington, 19 Tex. 128, 70 Am. Dec. 323.

For forms of indictments for this form of the offense see State *v.* Huntly, 25 N. C. 418, 40 Am. Dec. 416; State *v.* Washington, 19 Tex. 128, 70 Am. Dec. 323.

76. Bishop Crim. Proc. § 23.

77. Archbold Crim. Pl. (18th ed.) 886; Bishop Crim. Proc. § 23; Bishop Directions & F. § 925; Wharton Prec. Indictments 847; Childs *v.* State, 15 Ark. 204; State *v.* Benthal, 5 Humphr. (Tenn.) 519; State *v.* Washington, 19 Tex. 128, 70 Am. Dec. 323.

78. Thompson *v.* State, 70 Ala. 26; State *v.* Brewer, 33 Ark. 176; State *v.* Baker, 83 N. C. 649; State *v.* Brown, 82 N. C. 585; State *v.* Wilson, 61 N. C. 237; State *v.* Stanly, 49 N. C. 290; State *v.* Allen, 11 N. C. 356.

79. Thompson *v.* State, 70 Ala. 26; State *v.* Griffin, 125 N. C. 692, 34 S. E. 513; State *v.* Wilson, 61 N. C. 237.

80. Childs *v.* State, 15 Ark. 204; Com. *v.* Perdue, 2 Va. Cas. 227.

81. Thompson *v.* State, 70 Ala. 26.

82. State *v.* Brewer, 33 Ark. 176.

For form of indictment held bad for joinder of counts for affray and assault and battery see State *v.* Brewer, 33 Ark. 176.

mined by the existence of matters of difference between the parties which culminate in an altercation, but which are not directly connected with the offense charged. Thus one defendant cannot justify by showing that his co-defendant had persuaded his wife to separate from him ;[83] or had threatened him at a time prior to the affray ;[84] or had previously attempted to assault him with a dangerous weapon and had threatened his life,[85] nor can one who engages in an affray willingly defend on the ground that he had a reasonable belief that his adversary intended to do him grievous bodily harm ;[86] and one who admits the use of a deadly weapon has the burden of showing facts to justify his conduct.[87]

V. The Trial.

A. Rights of Joint Defendants. Where defendants are tried together, for the purposes of the trial and in making their defense they are to be considered as having one common interest. Each defendant will not be allowed the full number of peremptory challenges, and if one of the defendants has introduced evidence in his behalf the state has a right to conclude the argument to the jury, although the other defendant has introduced no evidence.[88]

B. Examination of Witnesses. The witnesses on one side stand, as to the parties on the other, in the relation of prosecuting witnesses and defendants. Hence it is the practice to compel them to submit to cross-examination, with all the rights which are incident thereto, when they are examined in chief on behalf of the state ; consequently a defendant who testifies in his own behalf may be impeached by his co-defendant as though he had been introduced by the state. This right to impeach is co-extensive with that of the prosecution.[89]

C. Proof to Sustain Accusation. The accusation must be sustained by competent proof, and evidence to that end is proper. To sustain a charge of going about armed, the state may introduce evidence of threats to kill, because a constituent part of the affray, and to explain and characterize the acts charged.[90] Likewise the prosecution may prove that after the termination of the fighting defendants pursued their adversaries and urged them to renew the conflict,— this to show a willingness to fight and to prolong the combat.[91] A charge that defendants fought together is sustained by proof that they fought in common against a person not indicted, and it is not necessary to show that they fought against each other.[92] An averment that the fighting was in a public place must be established by proof of the character of the locality,[93] and proof of the use of a deadly weapon and the infliction of a serious injury is competent to sustain an indictment in the usual form, in which neither fact is charged.[94] But a charge of assault and battery is not sustained by proof of facts showing the commission of an affray, as that the defendant indicted fought by agreement.[95]

D. Instructions — 1. As to Elements of Offense — a. In General. The jury must be informed as to what constitutes the offense, and should be instructed

83. State *v.* Weathers, 98 N. C. 685, 4 S. E. 512.

84. State *v.* Goff, 117 N. C. 755, 23 S. E. 355.

85. Skains *v.* State, 21 Ala. 218.

86. State *v.* Harrell, 107 N. C. 944, 12 S. E. 439.

Removing trespasser.— One who trespasses by remaining upon and creating a disturbance in a highway in front of a dwelling cannot defend on the ground that the occupant, his co-defendant, used unnecessary force. State *v.* Davis, 80 N. C. 351, 30 Am. Rep. 86.

87. State *v.* Barringer, 114 N. C. 840, 19 S. E. 275.

88. Hawkins *v.* State, 13 Ga. 322, 58 Am. Dec. 517.

89. State *v.* Goff, 117 N. C. 755, 23 S. E. 355.

Co-defendant as witness.— One defendant who has pleaded guilty cannot be a witness for or against his co-defendant. State *v.* Foy, Tappan (Ohio) 103.

90. State *v.* Huntly, 25 N. C. 418, 40 Am. Dec. 416.

91. State *v.* Harrell, 107 N. C. 944, 12 S. E. 439.

92. Thompson *v.* State, 70 Ala. 26.

93. Shelton *v.* State, 30 Tex. 431.

94. State *v.* Moore, 82 N. C. 659.

95. Champer *v.* State, 14 Ohio St. 437.

that they cannot convict unless the existence of all the elements of the offense has been proved.[96]

b. Statutory Elements. The jury should not be instructed, however, as to a statutory element which the indictment does not aver.[97]

2. As to Justification. It is not necessary to instruct as to the justification of defendant when the evidence does not warrant such an instruction.[98]

3. As to Mutual Assaults. There is no error in charging the law as to mutual assaults without instructing the jury as to the specific law concerning affrays.[99]

4. As to Self-Defense. In charging as to self-defense it is sufficient to inform the jury as to the rights of defendant to fight in his own defense, without explaining when he should retreat and when not, or when justified in taking life.[1]

5. As to Punishment. It is improper on trial of an indictment drawn in the common-law form, and with no intent to conform to a statute creating a new and cognate offense, to instruct the jury as to their right to inflict the statutory punishment.[2]

6. Effect of Giving Undue Prominence to Testimony of Witness. An instruction will not be deemed erroneous because giving undue prominence to the testimony of one witness, where it appears that the court told the jury the effect of the testimony, including that of defendants, and said if they accepted as true the evidence of the witness in question they might convict, and, further, that all the evidence must be considered.[3]

7. Effect of Unnecessary Instructions. Unnecessary instructions upon an abstract question which was not presented by the evidence, though possibly erroneous, will not be deemed prejudicial.[4]

E. Province of Jury. Where the evidence does not make out the offense as a matter of law, the jury are to determine the guilt or innocence of defendant under the circumstances.[5]

F. Verdict. A verdict that an affray was committed as charged and that defendant aided and assisted in its commission is sufficient as a verdict of conviction.[6]

G. Effect of Acquittal of One Defendant — 1. In General. One defendant may be convicted and the other acquitted,[7] but it has been held that the successful defense of one will operate as an acquittal of both.[8]

2. Where Agreement to Fight Is Essential. Where an agreement to fight is an essential ingredient of the offense, if one is acquitted the other must also be acquitted, even though he pleaded guilty.[9]

H. Conviction of Assault and Battery. If an indictment is so framed as to charge assault and battery or simple assault,[10] either as a separate offense[11] or as involved and included in the charge of affray;[12] or if the indictment is insufficient

96. As, for example, the commission of the offense in a public place, to the terror and disturbance of others. State *v.* Warren, 57 Mo. App. 502.

97. As the doing of wilful mischief by defendant. State *v.* Warren, 57 Mo. App. 502.

98. State *v.* Weathers, 98 N. C. 685, 4 S. E. 512.

99. State *v.* Griffin, 125 N. C. 692, 34 S. E. 513 [*citing* State *v.* Perry, 50 N. C. 9].

1. State *v.* Harrell, 107 N. C. 944, 12 S. E. 439.

2. Skains *v.* State, 21 Ala. 218.

3. State *v.* Weathers, 98 N. C. 685, 4 S. E. 512.

4. As unnecessarily stating what might constitute a public place. Wilson *v.* State, 3 Heisk. (Tenn.) 278.

5. State *v.* Lanier, 71 N. C. 288.

6. Curlin *v.* State, 4 Yerg. (Tenn.) 143.

7. McClellan *v.* State, 53 Ala. 640; State *v.* Baker, 83 N. C. 649; State *v.* Allen, 11 N. C. 356; Cash *v.* State, 2 Overt. (Tenn.) 198; Saddler *v.* Republic, Dall. (Tex.) 610.

8. Hawkins *v.* State, 13 Ga. 322, 58 Am. Dec. 517.

9. State *v.* Foy, Tappan (Ohio) 103.

10. McClellan *v.* State, 53 Ala. 640.

11. Childs *v.* State, 15 Ark. 204; Com. *v.* Perdue, 2 Va. Cas. 227.

12. Thompson *v.* State, 70 Ala. 26; State *v.* Davis, 65 N. C. 298; State *v.* Wilson, 61 N. C. 237; State *v.* Allen, 11 N. C. 356.

as a charge of affray, but is good as charging assault and battery,[13] if warranted by the evidence, one or all of the defendants may be convicted of the latter offense.[14] But it has been held that, if assault and battery is not charged expressly or by implication, one cannot be convicted of this offense where both are acquitted of the affray,[15] as where the indictment fails to disclose the name or a description of the person assaulted.[16]

VI. PUNISHMENT.

At common law the punishment of common affrays is by fine and imprisonment, the measure of which must be regulated by the circumstances; for if there is any material aggravation the punishment may be increased.[17] When the matter has not been made the subject of statutory regulation the punishment will be that prescribed by the common law.[18]

VII. SUPPRESSION.

A. In General. The suppression of affrays is dependent in a great measure on the right to arrest without warrant, a subject which will be treated in detail in another part of this work.[19]

B. Affray in Progress. All persons present when an affray is in progress are bound to use their best endeavors to suppress it and to apprehend the offenders: a peace officer because specially charged with that duty; a private person because of the legal obligation to do so. A private person may apprehend and detain an offender until his passion has subsided and his desire to break the peace has ended, and then deliver him to a peace officer;[20] and it has been said that any private person may stop those whom he sees going to participate in an affray in progress.[21]

C. Threatened Renewal. The arrest may be made without a warrant not only during the actual breach of the peace, but so long as there is a reasonable ground for apprehending a renewal of the conflict, as where a combatant, by remaining on the spot or otherwise, shows a disposition to renew the disturbance. So long as there is danger of renewal the affray itself must be said to continue.[22]

D. Degree of Force. If either party to an affray sustains a dangerous wound, a bystander who, in endeavoring to arrest the party who inflicted the injury, necessarily hurts or wounds him, will not be liable.[23]

E. Suppression by Peace Officer. A peace officer may arrest without warrant not only on his own view, but also on the information and complaint of another, or he may receive an offender from the hands of one who has appre

13. State *v.* Woody, 47 N. C. 335.
14. State *v.* Brown, 82 N. C. 585.
15. Com. *v.* Perdue, 2 Va. Cas. 227.
16. Childs *v.* State, 15 Ark. 204.
17. 1 Russell Crimes (9th ed.) 411; 4 Bl. Comm. 145; 1 Hawkins P. C. c. 63, § 20; Duncan *v.* Com., 6 Dana (Ky.) 295; Com. *v.* Simmons, 6 J. J. Marsh. (Ky.) 614.
18. Childs *v.* State, 15 Ark. 204.
19. See, generally, ARREST.
20. Taylor *v.* Strong, 3 Wend. (N. Y.) 384; Phillips *v.* Trull, 11 Johns. (N. Y.) 486; City Council *v.* Payne, 2 Nott & M. (S. C.) 475; U. S. *v.* Pignel, 1 Cranch C. C. (U. S.) 310, 27 Fed. Cas. No. 16,049; Timothy *v.* Simpson, 1 C. M. & R. 757, 6 C. & P. 499, 5 Tyrw. 244; Cook *v.* Nethercote, 6 C. & P. 741; 1 Russell Crimes (9th ed.) 408–410; 1 Hawkins P. C. c. 63, § 11.
21. 1 Russell Crimes (9th ed.) 408; 1 Hawkins P. C. c. 63, § 11.
22. Timothy *v.* Simpson, 1 C. M. & R. 757, 6 C. & P. 499, 5 Tyrw. 244; Price *v.* Seeley, 10 Cl. & F. 28, 1 Benn. & H. Crim. Cas. 143; 1 Russell Crimes (9th ed.) 408.

Justification of arrest without warrant.— A plea justifying an arrest for an affray without a warrant must aver directly that there was an affray or breach of the peace continuing at the time of the arrest. Price *v.* Seeley, 10 Cl. & F. 28, 1 Benn. & H. Crim. Cas. 143.

23. 1 Russell Crimes (9th ed.) 410; 1 Hawkins P. C. c. 63, § 12; 3 Coke Inst. 158.

Unnecessary use of firearms.— In case of a mere affray committed by beating, it is not necessary for one who interferes to protect one of the combatants to resort to firearms, and if he should unnecessarily take life in such a case he would be deemed guilty of manslaughter. People *v.* Cole, 4 Park. Crim. (N. Y.) 35.

hended him.[24] He may summon others to his assistance;[25] or he may take in custody for an affray committed in the presence of another officer, and on his information after it is ended;[26] and while he may be allowed a reasonable time to make the arrest, he must not delay too long.[27] It is said that a constable may break the doors of a house in which there is an affray, and that if affrayers fly to a house he may break the doors to take them.[28]

F. Affray Ended — Probability of Felony. Except in the cases mentioned neither a private person nor an officer can make an arrest after the affray is ended, unless a felony has been committed or is likely to ensue.[29]

AFFRECTAMENTUM. An AFFREIGHTMENT,[1] *q. v.*

AFFREIGHTMENT. The contract by which a vessel, or the use of it, is let out to hire.[2] (See ADMIRALTY; CARRIERS; SHIPPING.)

AFFRI. In old English law, bullocks or beasts of the plow.[3]

AFFURARE. See AFFERARE.

AFORE. Before; formerly; previously.[4]

AFORESAID. Before-mentioned, recited, or said.[5]

AFORESTARE. See AFFORESTARE.

AFORETHOUGHT. Premeditated; prepense.[6]

AFRICAN. Of or belonging to the black race of Africa; characteristic of or peculiar to negroes.[7] (See CIVIL RIGHTS; CONSTITUTIONAL LAW.)

AFTER. Later in point of time;[8] upon;[9] subject to.[10]

AFTER-ACQUIRED. Acquired after a particular date or event.[11] (After-Acquired: Property, see ASSIGNMENTS; CHATTEL MORTGAGES; DEEDS; JUDGMENTS; MORTGAGES; WILLS. Title, see CHATTEL MORTGAGES; ESTOPPEL; JUDGMENTS; MORTGAGES; VENDOR AND PURCHASER.)

AFTER-BORN CHILDREN. See DESCENT AND DISTRIBUTION; WILLS.

AFTERMATH. The second mowing or crop of hay.[12]

AFTERNOON. That part of the day which extends from noon to evening.[13]

24. Timothy *v.* Simpson, 1 C. M. & R. 757, 6 C. & P. 499, 5 Tyrw. 244; 1 Russell Crimes (9th ed.) 409; 2 Hale P. C. 89.

25. Charge to Grand Jury, 5 C. & P. 261.

26. Main *v.* McCarty, 15 Ill. 441.

27. Taylor *v.* Strong, 3 Wend. (N. Y.) 384.

28. 1 Russell Crimes (9th ed.) 410; 1 Hawkins P. C. c. 63, §§ 13, 16.

Justice Russell doubts if the officer would be justified in breaking the doors without a warrant, unless there were circumstances of extraordinary violence.

Doors unfastened.—A constable may, without a warrant, enter a house the door of which is unfastened and in which there is a noise amounting to a breach of the peace, and may arrest any person engaged in the affray. Com. *v.* Tobin, 108 Mass. 426, 11 Am. Rep. 375.

29. 1 Russell Crimes (9th ed.) 411; Coupey *v.* Henley, 2 Esp. 540; Price *v.* Seeley, 10 Cl. & F. 28, 1 Benn. & H. Crim. Cas. 143; Phillips *v.* Trull, 11 Johns. (N. Y.) 486.

1. Burrill L. Dict.

2. Bouvier L. Dict.

3. Jacob L. Dict.

4. Anderson L. Dict.

5. Burrill L. Dict. [*citing* Dive *v.* Maningham, Plowd. 60, 67].

Variable meaning of word.— Although the word "aforesaid" generally means "next before," yet a different signification will be given to it if required by the context and facts of the case. Simpson *v.* Robert, 35 Ga. 180.

6. Edwards *v.* State, 25 Ark. 444, 446; People *v.* Ah Choy, 1 Ida. 317, 319 [*citing* Webster Dict.]; State *v.* Curtis, 70 Mo. 594, 598; Brannigan *v.* People, 3 Utah 488, 493, 24 Pac. 767.

7. Century Dict.

8. Century Dict.

Exclusive and inclusive character of word. — The word "after" is susceptible of different significations, and is used in different senses and with an exclusive or inclusive meaning, according to the subject to which it is applied. Sands *v.* Lyon, 18 Conn. 18, 27.

9. Thus a contract to pass a title to a chattel "after" payment of its purchase-price is by law regarded as if it read "upon" such payment. Hawley *v.* Kenoyer, 1 Wash. Terr. 609.

10. Thus the word "after," used in wills in such expressions as "after providing for," etc., is often and properly construed to mean "subject to." Hooper *v.* Hooper, 9 Cush. (Mass.) 122, 128.

11. Black L. Dict.

12. Burrill L. Dict.

13. People *v.* Husted, 52 Mich. 624, 626, 18 N. W. 388 [*citing* Webster Dict.; Worcester Dict.].

The word has two senses, however. It may

AFTERWARD or **AFTERWARDS.** In later or subsequent time;[14] thereafter.[15]

AGAINST. In opposition to; adverse or hostile to;[16] without.[17]

AGARD. An award.[18]

AGARDER. To award; to adjudge; to determine.[19]

AGE. The length of time during which a person has lived;[20] the time at which one attains full personal rights and capacities;[21] the time at which a person is enabled to do certain acts which before, through want of years and judgment, he was prohibited from doing.[22] (Age: As Affecting — Capacity to Marry, see MARRIAGE; Competency of Witness, see WITNESSES; Criminal Responsibility, see INFANTS; RAPE; Testamentary Capacity, see WILLS. As Element of Crimes against Children, see ABDUCTION; KIDNAPPING; RAPE. As Qualification of Voter, see ELECTIONS. Evidence of, see EVIDENCE. Time of Attaining, see INFANTS.)

AGENCY. See PRINCIPAL AND AGENT.

AGENCY, DEED OF. A revocable and voluntary trust for payment of debts.[23]

AGENS. An actor or doer; a plaintiff.[24]

AGENT. See PRINCIPAL AND AGENT.

AGENT AND PATIENT. A term applied to a person who is both the doer of a thing and the person to whom it is done.[25]

AGENTES ET CONSENTIENTES PARI PŒNA PLECTENTUR. A maxim meaning "Acting and consenting parties are liable to the same punishment."[26]

AGE-PRIER or **AGE-PRAYER.** A suggestion of nonage by an infant defendant in a real action, with a prayer that the action may stay till his full age.[27]

AGER. Land or soil in the abstract, without regard to any idea of property or to any particular form, size, or shape.[28]

AGGRAVATED. Increased in severity or enormity.[29] (Aggravated Assault, see ASSAULT AND BATTERY; HOMICIDE; RAPE; ROBBERY.)

AGGRAVATION. Something connected with a crime or wrong, additional to its essential elements and enhancing its guilt or injurious consequences.[30] (Aggravation: Of Damages, see ASSAULT AND BATTERY; DAMAGES; FALSE IMPRISONMENT; LIBEL AND SLANDER; TRESPASS.)

AGGREGATE. Composed of several.[31] (Aggregate Corporations, see CORPORATIONS.)

AGGREGATIO MENTIUM. Literally, "the meeting of the minds." The moment when a contract is complete.[32]

AGGREGATION. See PATENTS.

AGGRESSOR. One who begins a quarrel or dispute.[33]

mean the whole time from noon to midnight, or it may mean the earlier part of that time as distinguished from the evening. Reg. *v.* Knapp, 2 E. & B. 447, 451, 75 E. C. L. 447.

14. Century Dict.

15. Sleigh *v.* Strider, 5 Call (Va.) 439, 442.

16. Century Dict.

Meaning dependent upon context. — In State *v.* Prather, 54 Ind. 63, 64, the court said: "The particular meaning of the word 'against' depends, to a very considerable extent, on the connection in and the purposes for which it is used. To push or run against a person implies, in common parlance, a coming in contact or in collision with the person so pushed or run against. To say that a stone was hurled at and against a person would, very naturally, make the impression that such person was hit by the stone."

17. Thus the word "against" is sometimes used in the sense of "without," as in the expression "to marry against one's consent." Long *v.* Ricketts, 2 Sim. & St. 179, 183; Creagh *v.* Wilson, 2 Vern. 572.

18. Tayler L. Gloss.

19. Burrill L. Dict.

20. Jacob L. Dict.

21. Abbott L. Dict.

22. Jacob L. Dict.

23. Wharton L. Lex.

24. Burrill L. Dict.

25. Jacob L. Dict.

26. Morgan Leg. Max.

27. Jacob L. Dict.

28. Municipality No. 2 *v.* Orleans Cotton Press Co., 18 La. 122, 36 Am. Dec. 624.

29. Anderson L. Dict.

30. Abbott L. Dict.

31. Burrill L. Dict.

32. Black L. Dict.

33. Wharton L. Lex.

AGIO. A commercial term used to distinguish the value of bank-notes and other paper currency from that of the coin of the country.[34]

AGIST. To take in cattle to feed, or pasture, at a certain rate of compensation.[35] (See ANIMALS.)

AGISTAMENTUM. AGISTMENT,[36] *q. v.*

AGISTARE. To AGIST,[37] *q. v.*

AGISTMENT. See ANIMALS.

AGISTOR or **AGISTER.** One who agists.[38] (See ANIMALS.)

AGNATES or **AGNATI.** Relatives whose relationship can be traced exclusively through males.[39]

AGNATIC. Derived from or through males.[40]

AGNOSTIC. See JURIES; OATHS AND AFFIRMATIONS; OFFICERS; WITNESSES.

AGRARIAN. Relating to land or to a distribution or division of land.[41]

AGREAMENTUM. An AGREEMENT,[42] *q. v.*

AGREE. To promise;[43] to contract;[44] to assent;[45] to find.[46]

AGREEANCE. An AGREEMENT,[47] *q. v.*

AGREED CASE. See APPEAL AND ERROR; ARBITRATION AND AWARD; SUBMISSION OF CONTROVERSY; TRIAL.

AGREEMENT. A contract;[48] the concord of two or more minds; mutual assent;[49] understanding.[50] (Agreement: For Insurance, see INSURANCE. See also CONTRACTS.)

AGRICULTURAL. Pertaining to, connected with, or engaged in agriculture.[51] (Agricultural: Bounties, see BOUNTIES. Colleges, see COLLEGES AND UNIVERSITIES. Fixtures, see FIXTURES. Lands, see MUNICIPAL CORPORATIONS; PUBLIC LANDS; TAXATION. Liens, see AGRICULTURE. Societies, see AGRICULTURE.)

34. Rapalje & L. L. Dict.

35. Black L. Dict.

36. Adams Gloss.

37. Burrill L. Dict.

38. Burrill L. Dict. [*citing* Story Bailm. § 443].

39. Abbott L. Dict.

40. Burrill L. Dict.

41. Burrill L. Dict.

42. Bouvier L. Dict.

43. Bodley *v.* Roop, 6 Blackf. (Ind.) 158, 159; Avery *v.* Tyringham, 3 Mass. 160, 3 Am. Dec. 105; Newcomb *v.* Clark, 1 Den. (N. Y.) 226, 229; Corbett *v.* Packington, 6 B. & C. 268, 273; Mountford *v.* Horton, 2 B. & P. N. R. 62.

Distinguished from "bargain."— "A man may 'agree' to pay money, or to perform some other act; and the word is then used synonymously with 'promise' or 'engage.' But the word 'bargain' is seldom used, unless to express a mutual contract or undertaking." Packard *v.* Richardson, 17 Mass. 122, 131, 9 Am. Dec. 123.

44. McKisick *v.* McKisick, Meigs (Tenn.) 427, 433.

45. Thornton *v.* Kelly, 11 R. I. 498, 499, where it is said that the word "agree" is sometimes used to signify an offer merely, but properly speaking it embraces concurrence or assent.

46. Benedict *v.* State, 14 Wis. 423, 428, where it is said that while the word "find" is more commonly used, the word "agree," when employed with reference to the verdict of a jury, particularly in criminal cases, means precisely the same thing.

47. Burrill L. Dict.

48. Durham *v.* Taylor, 29 Ga. 166, 176; Sherburne *v.* Shaw, 1 N. H. 157, 8 Am. Dec. 47; Mactier *v.* Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262: Broadwell *v.* Getman, 2 Den. (N. Y.) 87, 89.

Distinguished from "promise" or "undertaking."— Agreement is distinguished from a mere promise or undertaking, a sense in which it is sometimes used, in Wain *v.* Warlters, 5 East 10.

Comprehensiveness of term.— The term "agreement" is sufficiently comprehensive to embrace all forms of stipulations, written or verbal. Wharton *v.* Wise, 153 U. S. 155, 168, 14 S. Ct. 783, 38 L. ed. 669: Holmes *v.* Jennison, 14 Pet. (U. S.) 540, 572, 10 L. ed. 579.

49. Sage *v.* Wilcox, 6 Conn. 81, 86.

50. Barkow *v.* Sanger, 47 Wis. 500, 3 N. W. 16.

51. Century Dict.

AGRICULTURE

EDITED BY GILBERT COLLINS
Associate Justice of Supreme Court of New Jersey

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CROSS-REFERENCES

For Matters Relating to:
Cattle, see ANIMALS.
Farming on Shares, see LANDLORD AND TENANT.
Irrigation, see WATERS.
Laborer's Liens, see LIENS.
Landlord's Lien for Advances and Rent, see LANDLORD AND TENANT.
Leases of Agricultural Lands, see LANDLORD AND TENANT.
Mortgage of Crops, see CHATTEL MORTGAGES.
Ownership of Crops, see CROPS.

I. DEFINITION.

The term "agriculture" has been defined to be the "art or science of cultivating the ground, especially in fields or in large quantities, including the preparation of the soil, the planting of seeds, the raising and harvesting of crops, and the rearing, feeding, and management of live stock; tillage; husbandry; and farming."[1]

II. AGRICULTURAL LIENS.

A. Kinds of Liens — 1. For Advances — a. In General — (I) *What Constitutes* — **(A)** *Generally.* While the parties may bargain for other liens, the statutory lien cannot be extended beyond its terms,[2] and it must be shown that the articles advanced were such as were contemplated by the statute,[3] no matter how essential such articles may be to make a crop.[4] The advance, however, of any one or more of the articles mentioned will meet the requirements of the statute.[5]

(B) *Supplies.* Where the statute provides for a lien for those who have "furnished necessary supplies" the term includes such supplies only as are essential to the subsistence and management of the plantation,[6] and the question of what is necessary depends upon the customs or usages of agricultural pursuits, taking into account the system of agriculture as it exists at the time.[7]

1. Dillard *v.* Webb, 55 Ala. 468; Simons *v.* Lovell, 7 Heisk. (Tenn.) 510; Binzel *v.* Grogan, 67 Wis. 147, 150, 29 N. W. 895 [*quoting* Webster Dict.].

Comprehensiveness of term.—"The variety of products of the earth, of agricultural implements, and of domestic animals, invited and put on exhibition at agricultural fairs, attests the comprehensiveness of the term 'agriculture.' It refers to the field, or farm, with all its wants, appointments, and products, as horticulture refers to the garden, with its less important, though varied products." Dillard *v.* Webb, 55 Ala. 468, 474.

Agricultural holding.— Under a statute entitling an agricultural tenant to a reduction in rent it was held that where the land owned consisted of twenty-five acres, ten of which consisted of a residence, outbuildings, and ornamental grounds, and the other fifteen of pasture lands, the holding was not "agricultural or pastural, or partly agricultural and partly pastural," within the meaning of the act. Doyne *v.* Campbell, 9 Ir. R. C. L. 95.

Product of agriculture.— The product of agriculture is that which is the direct result of husbandry and culture of the soil. It embraces the product in its natural, unmanufactured condition. Getty *v.* C. R. Barnes Milling Co., 40 Kan. 281, 19 Pac. 617. The term "agricultural product" does not include beef cattle. Davis *v.* Macon, 64 Ga. 128, 37 Am. Rep. 60.

2. Watson *v.* Auerbach, 57 Ala. 353.

3. Bell *v.* Hurst, 75 Ala. 44; Comer *v.* Daniel, 69 Ala. 434; Schuessler *v.* Gains, 68 Ala. 556; Watson *v.* Auerbach, 57 Ala. 353; McLester *v.* Somerville, 54 Ala. 670; Saulsbury *v.* Eason, 47 Ga. 617; Stewart *v.* Hollins, 47 Miss. 708; Clark *v.* Farrar, 74 N. C. 686.

Rent for lands is not included by the terms or intendment of the lien law of 1867, which was intended to secure, by a prior lien on the crops, animals, and implements, payment of all debts for advances of money for stock or implements used in the cultivation of crops. Stewart *v.* Hollins, 47 Miss. 708.

4. Boyett *v.* Potter, 80 Ala. 476, 2 So. 534.

5. Schuessler *v.* Gains, 68 Ala. 556.

6. Shaw *v.* Knox, 12 La. Ann. 41.

Neither by statute or common law has a merchant any lien for supplies and advances to make a crop. Franklin *v.* Meyer, 36 Ark. 96.

7. Herman *v.* Perkins, 52 Miss. 813.

Coal is a necessary supply for making a sugar crop. Laloire *v.* Wiltz, 31 La. Ann. 436.

Dry goods sold to laborers on a plantation

(c) *Money.* Where the statute expressly provides therefor a lien may be had for advances of money,[8] but money is not included in the term "provisions" or "supplies."[9]

(II) *By and To Whom Made.* The advances must be made by[10] and to[11] persons within the contemplation of the statute.

give no privilege to the vendor on the crops of that year grown on the place. Wallace *v.* Urquhart, 23 La. Ann. 469.

Fertilizers are not included under the term in Ala. Civ. Code, § 3286 (Boyett *v.* Potter, 80 Ala. 476, 2 So. 534), but a lien for advances of fertilizers is especially provided for by Ga. Code, § 1978 (Hardwick *v.* Burtz, 59 Ga. 773).

Molasses-barrels are a "necessary supply" within La. Civ. Code, art. 3184. McRae *v.* His Creditors, 16 La. Ann. 305.

Money.— See *infra*, II, A, 1, a, (I), (C).

Mules have been held to be necessary supplies. Trimble *v.* Durham, 70 Miss. 295, 12 So. 207; McCaslan *v.* Nance, 46 S. C. 568, 24 S. E. 812. This was denied, however, in McCullough *v.* Kibler, 5 S. C. 468. Compare also Branch *v.* Galloway, 105 N. C. 193, 10 S. E. 911. See also Farrar *v.* Rowley, 3 La. Ann. 276, wherein it was held that where the price of mules purchased for the use of a plantation, and paid for by a third person, is reimbursed by a draft on the factors of the planter, the advances will be a privileged claim under La. Civ. Code, art. 3184, the mules being necessary supplies. But in Shaw *v.* Grant, 13 La. Ann. 52, 53, the court, speaking of this case, said: "Whether the court would now feel disposed to go as far as it did in that case, it is not necessary to determine. Certain it is, we do not think the doctrine can be extended beyond the very case the court then had before it."

A team used in raising crops gives rise to no claim for a lien unless the labor of such team is included in a contract for the labor of a person. Essency *v.* Essency, 10 Wash. 375, 38 Pac. 1130.

Whisky and tobacco are not necessary supplies. Marcus *v.* Robinson, 76 Ala. 550.

To defeat the lien, evidence should be adduced that the things were not needed for farm purposes or that they are of themselves of such a nature as to be unfit for such purposes. Herman *v.* Perkins, 52 Miss. 813.

8. Airey *v.* Weinstein, 54 Ark. 443, 16 S. W. 123; Laloire *v.* Wiltz, 31 La. Ann. 436; Benton *v.* Mahan, 30 La. Ann. 1401; Bank of America *v.* Fortier, 27 La. Ann. 243; Moore *v.* Gray, 22 La. Ann. 289; Smith *v.* Williams, 22 La. Ann. 268; The Steamer General Quitman *v.* Packard, 22 La. Ann. 70; Reese *v.* Cole, 93 N. C. 87; Clark *v.* Farrar, 74 N. C. 686.

Goods deemed equivalent of money.— In Herman *v.* Perkins, 52 Miss. 813, it was held that where a planter indebted to laborers for wages pays them off in goods obtained from a merchant, the purchase will be protected by the agricultural lien provided for by the act of Feb. 18, 1867, whether the goods be of the class embraced in the provisions of that act or not, the payment and purchase in such case being equivalent to advancing the money to pay off the hands. See also Benton *v.* Mahan, 30 La. Ann. 1401, to the effect that advances by a factor to a planter, whether of money or of goods, if used in paying the laborers who make the crop, constitute privileged debts on the crop.

9. McLester *v.* Somerville, 54 Ala. 670; Saulsbury *v.* Eason, 47 Ga. 617; Howe *v.* Whited, 21 La. Ann. 495; Wood *v.* Calloway, 21 La. Ann. 471; Shaw *v.* Grant, 13 La. Ann. 52 [*following* Shaw *v.* Knox, 12 La. Ann. 41].

Payment by a factor of debts due by his principal are considered as money advanced and are not "necessary supplies" within article 3184 of the Civil Code providing for a lien for advances. Shaw *v.* Knox, 12 La. Ann. 41.

10. Shields *v.* Kimbrough, 64 Ala. 504; Whitmore *v.* Poindexter, 7 Baxt. (Tenn.) 248; Dunlap *v.* Aycock, 10 Heisk. (Tenn.) 561.

Advances by third person on credit of tenant alone are not entitled to protection under a statute giving a landlord a lien on the tenant's crop "for advances, . . . whether made directly by him, or at his instance and request by any other person, or for which he has assumed the legal responsibility." Bell *v.* Hurst, 75 Ala. 44, 46.

Agreement to raise crop on shares.— Neither party to an agreement to raise a crop on shares has a lien for advances made by him. Dunlap *v.* Aycock, 10 Heisk. (Tenn.) 561. See also Shields *v.* Kimbrough, 64 Ala. 504, to the effect that prior to the act of Feb. 9, 1877, the contract between the lessee of lands and his laborers, for the cultivation of land on shares, did not give the lessee any lien on the crops for advances made by him to the laborers during the year.

11. Clark *v.* Farrar, 74 N. C. 686; Richey *v.* Du Pre, 20 S. C. 6; Carpenter *v.* Strickland, 20 S. C. 1.

A mortgagor in possession after condition broken cannot, as against the mortgagee, create a lien in favor of the person advancing supplies. Brewer *v.* Chappell, 101 N. C. 251, 7 S. E. 670.

An agreement to take part of crop for services constitutes one a laborer for hire, and such a one cannot give a lien for advances. Richey *v.* Du Pre, 20 S. C. 6; Carpenter *v.* Strickland, 20 S. C. 1.

Premises in possession of receiver.— Pending a real action, a receiver of the rents and profits was appointed, but up to the time of such appointment plaintiffs were in possession under claim of title, and had executed an agricultural lien to A for advances. A was entitled to recover for advances made to plaintiffs up to the time the receiver entered, but the advances made after such entry would depend upon the circumstances under which they were made. McNair *v.* Pope, 104 N. C. 350, 10 S. E. 252.

(III) *Articles Must Be Actually Furnished.* The advances must be actually furnished to the debtor,[12] and the creation of an agricultural lien to secure an antecedent indebtedness[13] or contemplated future advances[14] is not authorized.

(IV) *Must Be to Promote Crop*—(A) *In General.* The particular advances must be made for, and should be entirely devoted to, the raising and perfection of the particular crop.[15]

(B) *What Constitutes Promotion.* Money advanced for necessary repairs on the farm[16] or to machinery[17] is considered money advanced to make a crop, and a balance remaining due to a landlord at the end of a year, the tenancy continuing for another year, is regarded as advances made on the crop of that year.[18]

(C) *Effect of Misapplying Advances.* While it has been said that one making advances is not bound to see to the proper application of such advances,[19] and in consequence is not responsible for any misapplication thereof to which he has not assented or of which he had no knowledge,[20] it has also been held that advances clearly proved to have been diverted to other than plantation purposes cannot be allowed a lien.[21]

b. To Prevent Waste. One who has a lien on a growing crop may advance what is necessary to preserve it from waste and destruction, and may retain the advances thus made out of the proceeds of sale before crediting any portion of his debt.[22]

2. For Services — a. In General. In the absence of statute no lien exists for labor and services performed,[23] but farm-laborers have been held entitled to a preference under general statutes providing for the protection of mechanics, clerks,

12. Warder-Bushnell, etc., Co. *v.* Minnesota, etc., Elevator Co., 44 Minn. 390, 46 N. W. 773.

What constitutes "furnishing."—A mortgagee of wheat, entitled to the immediate possession of the same for the purpose of foreclosure, who in good faith permits the mortgagor to retain a portion of the mortgaged wheat for seed and takes a "seed-grain" note therefor, may avail himself of Minn. Gen. Stat. (1894), § 4155, providing that a party who furnishes seed to another and takes a note therefor may have a lien for such note on the crop raised from such seed. O'Brien *v.* Findeisen, 48 Minn. 213, 50 N. W. 1035; Warder-Bushnell, etc., Co. *v.* Minnesota, etc., Elevator Co., 44 Minn. 390, 46 N. W. 773.

13. Carter *v.* Wilson, 61 Ala. 434; Clark *v.* Farrar, 74 N. C. 686. But see Barrett *v.* Chaler, 2 La. Ann. 874, holding that the privilege granted by the act of March 23, 1843, amending La. Civ. Code, art. 3184, attaches to the crop of the current year for supplies furnished during that and the preceding year.

14. Boyett *v.* Potter, 80 Ala. 476, 2 So. 534.

15. Bank of America *v.* Fortier, 27 La. Ann. 243; Howe *v.* Whited, 21 La. Ann. 495; Wallace *v.* Palmer, 36 Minn. 126, 30 N. W. 445; Woodlief *v.* Harris, 95 N. C. 211; Clark *v.* Farrar, 74 N. C. 686.

Payment of premiums on life-insurance policy.—No lien on crops exists for money paid by a borrower as premiums on a life-insurance policy, under an agreement with the lender, out of a sum advanced for supplies of a plantation. Hewitt *v.* Williams, 47 La. Ann. 742, 17 So. 269.

16. Airey *v.* Weinstein, 54 Ark. 443, 16 S. W. 123.

17. Laloire *v.* Wiltz, 31 La. Ann. 436.

18. Thompson *v.* Powell, 77 Ala. 391.

19. Watson *v.* Auerbach, 57 Ala. 353; Boswell *v.* Carlisle, 55 Ala. 554; Hewitt *v.* Williams, 47 La. Ann. 742, 17 So. 269.

20. Watson *v.* Auerbach, 57 Ala. 353; Boswell *v.* Carlisle, 55 Ala. 554. See also Laloire *v.* Wiltz, 31 La. Ann. 436, to the effect that a factor's pledge under the Louisiana act of 1874 covers all advances of money and necessary supplies that may be required by the planter, unless it be shown that the factor knowingly advanced money or supplies for other purposes than making the crop.

21. Osborn's Succession, 40 La. Ann. 615, 4 So. 580. See also Nash *v.* Brewster, 39 Minn. 530, 41 N. W. 105, 2 L. R. A. 409, holding that where the seed grain described in a seed-grain note is actually and in good faith furnished to the maker for seeding purposes, and a portion of the seed is subsequently sold or otherwise appropriated by him, and not sown upon the land designated, that fact will not defeat the lien of the seller, under the Minnesota statute, for the price of that portion of such seed grain actually sown upon the land, upon the crop grown therefrom.

22. Caldwell *v.* Hall, 49 Ark. 508, 1 S. W. 62, 4 Am. St. Rep. 64; Fry *v.* Ford, 38 Ark. 246.

Disbursements made through the sheriff, by order of court, to gather, manufacture, and ship the crops on a plantation in the keeping of the sheriff, are debts incurred for the preservation of the crops, and therefore privileged. Benton *v.* Mahan, 30 La. Ann. 1401.

23. Hunt *v.* Wing, 10 Heisk. (Tenn.) 139. See also Moore *v.* Gray, 22 La. Ann. 289, holding that since before the passage of the act of 1867 the laborers on the plantation had no privilege on the crop to secure their wages, when the crop was made in the year 1866, no lien or privilege could be set up on the crop or its proceeds by the laborers who made it.

laborers, and others.[24] Where the statute expressly provides for a lien for services performed, the services must be rendered by one of the class enumerated therein.[25]

b. Covers What Services. Where the statute provides for a lien in favor of any person who shall do labor, etc.,[26] this does not give one a lien for the labor of other persons than himself,[27] but it does give him a lien for his wages for all services performed by him, including such as had no reference to the crop.[28] An overseer who has served for one year and part of a second has a lien for the whole amount due him.[29]

B. How Created — 1. By Contract — a. Time for Making Contract. The instrument by which the lien is created must be made prior to[30] or contemporaneously with the advance made.[31]

24. Dano *v.* M. O. & R. R. Co., 27 Ark. 564; John's Estate, 2 Chest. Co. Rep. (Pa.) 458; Purefoy *v.* Brown, 13 Pa. Co. Ct. 281; Wiand *v.* Himmelwright, 8 Pa. Co. Ct. 663; Buckwalter's Estate, 3 Pa. Co. Ct. 315; Alderfer *v.* Beyer, 2 Pa. Co. Ct. 425; Topper *v.* Krise, 1 Pa. Co. Ct. 300; Hogue *v.* Sheriff, 1 Wash. Terr. 172. *Contra*, Schilling *v.* Carter, 35 Minn. 287, 28 N. W. 658; Hohman *v.* Carter, 35 Minn. 287 note; Schwartz *v.* Rhoades, 6 Pa. Co. Ct. 385; Fendrick *v.* Henry, 5 Pa. Co. Ct. 265; Jacobs *v.* Woods, 14 Wkly. Notes Cas. (Pa.) 237.

In the absence of a special contract creating it, to be followed by an actual and physical change of possession in the nature of a pledge, a laborer who has been employed by a farmer to harvest a crop is not entitled to a lien upon it for the value of his work and services under such a general statute. McDearmid *v.* Foster, 14 Oreg. 417, 12 Pac. 813. And a provision in a lease that the crop should remain the property of the lessor till payment of all expenses necessary to care for the crop, and to put the third thereof, reserved as rent, in sacks, and to cover any liens incurred in caring for, harvesting, or threshing the crop, does not create a lien on the crop in favor of a harvest-hand. Lawrence *v.* Phy, 27 Oreg. 506, 41 Pac. 671.

A blacksmith who shoes horses and repairs implements for a farmer is not a farm-laborer and is not entitled to a preference. Baldwin *v.* Baldwin, 10 Pa. Co. Ct. 194.

One who merely clears land and prepares it for cultivation is not entitled to a lien for his wages. Taylor *v.* Hathaway, 29 Ark. 597.

Persons hiring a hay-press and threshing-machine, and operating them wherever they can find employment, are contractors, and not farm-laborers, within the act of 1872, entitling the latter to a lien for wages. Wilson *v.* Gibson, 10 Pa. Co. Ct. 191.

25. Saloy *v.* Dragon, 37 La. Ann. 71; Hester *v.* Allen, 52 Miss. 162.

The necessary relation of debtor and creditor does not exist where plaintiff agrees to work on defendant's farm, the latter to furnish the mules and implements necessary therefor, the profits, after paying expenses, to be divided equally. Grissom *v.* Pickett, 98 N. C. 54, 3 S. E. 921. But see Burgie *v.* Davis, 34 Ark. 179, to the effect that one who raises a crop on land of another under contract for a particular part of it is a mere cropper and not a tenant, and has a lien upon the crop for whatever is due him.

A laborer who cuts and carries grass has a lien on the hay for the price or value of his labor (Emerson *v.* Hedrick, 42 Ark. 263), but the fact that a person in service on one place, for a few days supervises laborers sent therefrom to another place, does not entitle him to the character of a laborer on the latter place, and, as such, to a lien on the crops thereon (Terry *v.* Groves, 71 Miss. 539, 14 So. 451).

An overseer has a lien under a statute giving "every employee, laborer, part-owner, or other person" such a lien (Weise *v.* Rutland, 71 Miss. 933, 15 So. 38 [*distinguishing* Hester *v.* Allen, 52 Miss. 162]), but the word "laborer" does not embrace an overseer (Whitaker *v.* Smith, 81 N. C. 340, 31 Am. Rep. 503; Isbell *v.* Dunlap, 17 S. C. 581. See also Wickham *v.* Nalty, 42 La. Ann. 423, 7 So. 609, holding that a party claiming a privilege for salary due him as overseer cannot recover under proof that he was merely a laborer), and an overseer who has ceased to act as such has no lien for services rendered by him as agent (Johnson's Succession, 3 Rob. (La.) 216).

A repairer of carts, wagons, etc., has no privilege on the proceeds of the sale of a plantation on which they were used. McRae *v.* His Creditors, 16 La. Ann. 305.

26. An implied contract is sufficient to entitle one to a lien for labor and services under Ala. Civ. Code, § 3078. Wilson *v.* Taylor, 89 Ala. 368, 8 So. 149.

27. Mohr *v.* Clark, 3 Wash. Terr. 440, 19 Pac. 28, holding this to be so even though the claimant was present directing the work of such persons.

28. Lumbley *v.* Thomas, 65 Miss. 97, 5 So. 823.

29. Farrar *v.* Rowley, 3 La. Ann. 276; Welsh *v.* Shields, 6 Rob. (La.) 484; Johnson's Succession, 3 Rob. (La.) 216.

30. Lowdermilk *v.* Bostick, 98 N. C. 299, 3 S. E. 844; Clark *v.* Farrar, 74 N. C. 686.

Advances made prior to execution of the agreement are not protected. Lowdermilk *v.* Bostick, 98 N. C. 299, 3 S. E. 844. But a recital in the contract that it is made to secure advances heretofore made, where no advances in fact have been made before the execution of the lien, will not affect its validity. Wooten *v.* Hill, 98 N. C. 48, 3 S. E. 846.

31. Smith *v.* Roberts, 43 Minn. 342, 46 N. W. 336; Kelly *v.* Seely, 27 Minn. 385, 7 N. W. 821, holding that no seed-grain lien can be acquired where the seeds for which the note or contract was given are furnished some time after the note or contract is given.

b. Requisites of Contract — (I) *In General.* To constitute a valid statutory agricultural lien the contract must strictly pursue the language of the statute.[32] An instrument may be so framed, however, as to operate in one part as a mortgage and in another as an agricultural lien;[33] and an instrument totally insufficient to create a valid crop lien may be valid as a chattel mortgage.[34]

(II) *Necessity for Writing.* A statutory lien can be created only by instrument in writing, whether it be to secure advances[35] or the wages of a laborer.[36]

Transaction a single one.— Under N. C. Code, § 1799, relating to liens for advances in making a crop, which provides that an agreement in writing shall be entered into before an advance is made, if the transaction is a single one it is immaterial which act is done first. Reese *v.* Cole, 93 N. C. 87.

32. *Alabama.*— Boyett *v.* Potter, 80 Ala. 476, 2 So. 534; Tison *v.* People's Sav., etc., Assoc., 57 Ala. 323; McLester *v.* Somerville, 54 Ala. 670; Dawson *v.* Higgins, 50 Ala. 49.

Louisiana.— Payne *v.* Spiller, 23 La. Ann. 248.

Minnesota.— Wallace *v.* Palmer, 36 Minn. 126, 30 N. W. 445; Kelly *v.* Seely, 27 Minn. 385, 7 N. W. 821.

Mississippi.— Newman *v.* Greenville Bank, 66 Miss. 323, 5 So. 753 [*following* Allen *v.* Montgomery, 48 Miss. 101], holding that a mere contract by one indebted to a merchant, to deliver to such merchant all cotton grown by him, does not create a lien on the cotton in favor of the merchant.

North Carolina.— Rawlings *v.* Hunt, 90 N. C. 270.

South Dakota.— Anderson *v.* Alseth, 6 S. D. 566, 62 N. W. 435.

Tennessee.— Dunlap *v.* Aycock, 10 Heisk. (Tenn.) 561.

Where the intent to create an agricultural lien is obvious, the fact that the instrument contains words purporting to convey the crop will not alter its character as such. Evington *v.* Smith, 66 Ala. 398; Alexander *v.* Glenn, 39 Ga. 1; Townsend *v.* McKinnon, 98 N. C. 103, 3 S. E. 836.

The erasure of printed provisions, in an agricultural lien for rent, for advances in money or supplies to be used in the cultivation of the leased land, and the addition of a covenant that the lienor should return in kind all of the cotton-seed used, the lienee being given, in printed words, a lien for rent and advances, show an intent not to create a lien for advances and the lien created does not cover the cotton-seed. Segler *v.* Coward, 24 S. C. 119.

For forms of instruments held sufficient to create a statutory lien see the following cases:

Alabama.— Connor *v.* Jackson, 74 Ala. 464; Evington *v.* Smith, 66 Ala. 398; Grady *v.* Hall, 59 Ala. 341; Watson *v.* Auerbach, 57 Ala. 353; Boswell *v.* Carlisle, 55 Ala. 554; McKinney *v.* Benagh, 48 Ala. 358.

Arkansas.— Sentell *v.* Moore, 34 Ark. 687.

Georgia.— Usry *v.* Saulsbury, 62 Ga. 179; Alexander *v.* Glenn, 39 Ga. 1.

North Carolina.— Lowdermilk *v.* Bostick, 98 N. C. 299, 3 S. E. 844; Townsend *v.* McKinnon, 98 N. C. 103, 3 S. E. 836; Wooten *v.* Hill, 98 N. C. 48, 3 S. E. 846; Reese *v.* Cole, 93 N. C. 87.

South Carolina.— Sternberger *v.* McSween, 14 S. C. 35.

See also Haden *v.* Lindsay, (Ky. 1896) 34 S. W. 1065; Whilden *v.* Pearce, 27 S. C. 44, 2 S. E. 709, for forms set out in substance which were held insufficient to create an agricultural lien.

33. Levystein *v.* Whitman, 59 Ala. 345; Stewart *v.* Hollins, 47 Miss. 708; Weil *v.* Flowers, 109 N. C. 212, 13 S. E. 761; Wooten *v.* Hill, 98 N. C. 48, 3 S. E. 846; Rawlings *v.* Hunt, 90 N. C. 270.

An instrument including supplies and rent will be held valid as a lien to the extent of the supplies, and as a mortgage subject to priorities to the extent of the rent. Stewart *v.* Hollins, 47 Miss. 708.

34. Boyett *v.* Potter, 80 Ala. 476, 2 So. 534; Hamilton *v.* Maas, 77 Ala. 283; Evans *v.* English, 61 Ala. 416; Tison *v.* People's Sav., etc., Assoc., 57 Ala. 323; McLester *v.* Somerville, 54 Ala. 670; Gafford *v.* Stearns, 51 Ala. 434; Dawson *v.* Higgins, 50 Ala. 49; Brown *v.* Miller, 108 N. C. 395, 13 S. E. 167 [*following* Rawlings *v.* Hunt, 90 N. C. 270]. But see Clark *v.* Farrar, 74 N. C. 686, to the effect that an agreement in writing, or a deed which purports on its face to be an agricultural lien for advances, cannot be supported as a mortgage for a different purpose, and founded on a consideration not expressed, but concealed or disguised in the deed.

For forms of instruments held insufficient to create statutory liens, but valid as chattel mortgages, see Boyett *v.* Potter, 80 Ala. 476, 2 So. 534; Tison *v.* People's Sav., etc., Assoc., 57 Ala. 323; McLester *v.* Somerville, 54 Ala. 670; Gafford *v.* Stearns, 51 Ala. 434; Dawson *v.* Higgins, 50 Ala. 49.

35. Tison *v.* People's Sav., etc., Assoc., 57 Ala. 323; Powell *v.* Weaver, 56 Ga. 288; Ware *v.* Simmons, 55 Ga. 94; Seago *v.* Freeman, 54 Ga. 102; Bain *v.* Brooks, 46 Miss. 537; Cureton *v.* Gilmore, 3 S. C. 46. *Contra*, Lewis *v.* Mahon, 9 Baxt. (Tenn.) 374, holding that under Tenn. Acts (1875), c. 116, a written contract is not essential to a lien for necessary supplies of food and clothing furnished a tenant, if an account thereof is kept and duly proved before enforcement. And see Gafford *v.* Stearns, 51 Ala. 434, to the effect that a verbal agreement for a lien on the crop for supplies furnished is not obnoxious to the statute of frauds, but is valid and operative against all except *bona fide* purchasers.

A parol agreement unaccompanied by transfer of possession is insufficient to create a lien for supplies furnished to produce a crop. Alexander *v.* Pardue, 30 Ark. 359.

36. Hair *v.* Blease, 8 S. C. 63. *Contra*, Leak *v.* Cook, 52 Miss. 799; Buck *v.* Payne, 52 Miss. 271.

(III) *Particular Specifications*—(A) *Consideration.* It must appear on the face of the instrument that the consideration therefor was the advances,[37] and that these were of the character,[38] and for the purpose,[39] mentioned in the statute.

(B) *Amount of Advances.* The instrument by which the lien is created must stipulate the amount to be secured thereby,[40] and no further sum can be covered[41] without a specific provision therefor.[42]

(C) *Description of Land.* The instrument should describe the land on which the crop is to be grown.[43]

(D) *Stipulation for Lien.* The agreement must stipulate for a lien.[44]

(IV) *Signature.* In some states the agreement must be signed both by the one who is to make the advances and by the borrower.[45]

c. Recording—(I) *When Necessary.* When the statute so provides,[46] the instrument by which the lien is created must be recorded to be effective against third persons.[47]

37. Saulsbury *v.* Eason, 47 Ga. 617, holding that a note given for money, which upon its face recites that the money is to be used to purchase provisions, does not create a debt securable by the lien given by the act of 1866 to merchants and factors upon growing crops for provisions and commercial supplies furnished.

38. Boyett *v.* Potter, 80 Ala. 476, 2 So. 534; Comer *v.* Daniel, 69 Ala. 434; Schuessler *v.* Gains, 68 Ala. 556.

A crop lien for advances is vitiated as a statutory crop lien by including in the items of the claim articles for which the statute gives no lien, where such articles are knowingly and intentionally included and constitute a material portion of the consideration. Comer *v.* Daniel, 69 Ala. 434.

39. McLester *v.* Somerville, 54 Ala. 670; Dawson *v.* Higgins, 50 Ala. 49; Speer *v.* Hart, 45 Ga. 113.

It is insufficient, under a statute requiring a note to recite that the advances were obtained "*bona fide* for the purpose of making a crop," to use the words, "which advances were made me to enable me to make a crop the present year." Dawson *v.* Higgins, 50 Ala. 49.

The consideration is properly expressed, under Ala. Civ. Code (1876), § 3286, as "necessary advances in horses, mules, oxen, and necessary provisions, farming tools and implements, and money to procure the same, obtained by me *bona fide* for the purpose of making a crop the present year," and declaring that "without such advancements it would not be in my power to procure the necessary teams," etc., "to make a crop the present year." Connor *v.* Jackson, 74 Ala. 464.

40. Gay *v.* Pike, 30 La. Ann. 1332; Carpenter *v.* Strickland, 20 S. C. 1.

41. Gay *v.* Pike, 30 La. Ann. 1332. See also Franklin *v.* Meyer, 36 Ark. 96, holding that if one who has a first mortgage on a crop for a specified amount of supplies furnished to make it exceeds in his advances the amount specified, he has no lien for such excess.

42. Thurman *v.* Jenkins, 2 Baxt. (Tenn.) 426. And see Bell *v.* Radcliff, 32 Ark. 645, where a deed of trust recited that it was executed to secure a given sum for supplies furnished and to be advanced during the year to raise a crop on certain premises, and it was held that equity, if necessary, would protect and uphold additional advances over and above the sum named in the deed. But see Collier *v.* Faulk, 69 Ala. 58, holding that such a stipulation is void.

43. Perry *v.* Bragg, 109 N. C. 303, 14 S. E. 97; Gwathney *v.* Etheridge, 99 N. C. 571, 6 S. E. 411; Martin *v.* Hawthorn, 3 N. D. 412, 57 N. W. 87; Parker *v.* Lisbon First Nat. Bank, 3 N. D. 87, 54 N. W. 313; Lavin *v.* Bradley, 1 N. D. 291, 47 N. W. 384. *Contra*, under Ala. Civ. Code (1876), §§ 3286–3288, Griel *v.* Lehman, 59 Ala. 419.

It is sufficient to describe the land as "a tract of land in Granville County, known as the 'C. H. Dement, Dec'd,'" as this description may be aided by parol proof. Perry *v.* Bragg, 109 N. C. 303, 14 S. E. 97. But describing the land as "any other lands he may cultivate during the year" is insufficient. Perry *v.* Bragg, 109 N. C. 303, 14 S. E. 97; Weil *v.* Flowers, 109 N. C. 212, 13 S. E. 761; Gwathney *v.* Etheridge, 99 N. C. 571, 6 S. E. 411.

44. Bain *v.* Brooks, 46 Miss. 537; Dunlap *v.* Aycock, 10 Heisk. (Tenn.) 561.

45. Sease *v.* Dobson, 33 S. C. 234, 11 S. E. 728.

46. Recording unnecessary.—Under La. Const. (1879), art. 177, privileges on movables do not require to be recorded, but have the same validity and effect, with or without registry. Flower *v.* Skipwith, 45 La. Ann. 895, 13 So. 152 [*followed* in Hewitt *v.* Williams, 47 La. Ann. 742, 17 So. 269]. See also Welsh *v.* Shields, 6 Rob. (La.) 484 (holding that an overseer's privilege need not be recorded), and Tedford *v.* Wilson, 3 Head (Tenn.) 311 (holding that an agreement that the future products of the farm, not then in existence, shall be first subject to the satisfaction of the employee's wages, does not fall within the letter or spirit of the registration act).

When made for less than one year, as in case of a contract to make a crop, the laborer's lien need not be recorded. Watson *v.* May, 62 Ark. 435, 35 S. W. 1108.

47. Fargason *v.* Johnson, 26 La. Ann. 501; Beard *v.* Chappell, 23 La. Ann. 694; White *v.* Bird, 23 La. Ann. 270; Howard *v.* Simmons, 43 Miss. 75; Martin *v.* Hawthorn, 3 N. D.

(II) *Place of Recording.* The instrument must be recorded in the county or other prescribed division where the property lies.[48]

(III) *Time for Recording.* The instrument should be recorded within the time prescribed by the statute,[49] although it will be good between the parties if not recorded within such time.[50]

(IV) *Effect of Withdrawing from Files.* An instrument which is withdrawn from the files after being filed is invalid as against a *bona fide* purchaser.[51]

2. By Filing Statement of Claim. Where the statute provides for filing a notice of lien-claim such notice must be certain to a reasonable intent and be sufficient to guide an intelligent investigation,[52] and must also be filed within the time allowed by statute.[53] Several claimants may join in one claim.[54]

C. Property Affected — 1. In General. The lien which the statute authorizes does not attach to the land,[55] nor to property owned before advances were made and not procured therewith,[56] but extends only to the crop of the year pro-

412, 57 N. W. 87; Whaley *v.* Jacobson, 21 S. C. 51.

Employer and laborer tenants in common. — An employer is required by the Arkansas act of March 6, 1875, to file a copy of the contract in the recorder's office, in order to secure his lien for advances and supplies, only when the laborer is a tenant in common with the employer in the crop raised by him. Sentell *v.* Moore, 34 Ark. 687.

Amount of indebtedness. — The third section of the Mississippi act of Feb. 18, 1867, provides that in the enrolment the amount of indebtedness shall be set down in one column, and that the party agreeing to advance a specific sum during the year may enroll his contract. A subsequently recorded mortgage specifying the amount will take precedence over an earlier one not so doing. French *v.* Picard, 49 Miss. 320.

Proof of execution. — The privilege acquired by one who furnishes supplies to a planter is not affected by the failure of the recorder of mortgages to register, with the contract for the supplies, the proof of its execution, under La. Civ. Code, art. 3367, providing that mortgages under private signature may be registered, without previous acknowledgment by the party or proof by subscribing witnesses, where the recorder, on his own responsibility and knowledge, is willing to do so. Elliott *v.* Elliott, 31 La. Ann. 31.

48. Griel *v.* Lehman, 59 Ala. 419; Gay *v.* Bovard, 27 La. Ann. 290; Adams *v.* Adams, 27 La. Ann. 275; Fargason *v.* Johnson, 26 La. Ann. 501; White *v.* Bird, 23 La. Ann. 270.

49. Gafford *v.* Stearns, 51 Ala. 434; Gay *v.* Daigre, 30 La. Ann. 1007; Gay *v.* Bovard, 27 La. Ann. 290; Adams *v.* Adams, 27 La. Ann. 275; Bank of America *v.* Fortier, 27 La. Ann. 243; Beard *v.* Chappell, 23 La. Ann. 694.

Recording an account current for advances made by a factor to a planter, running through several months, the day after the date of the closing of the account, is not recording the evidence of the debt on the day on which a contract for making the advances was entered into. Gay *v.* Daigre, 30 La. Ann. 1007.

50. Gay *v.* Nash, 78 N. C. 100; Loyns *v.* Tedder, 7 S. C. 69.

51. Sternberger *v.* McSween, 14 S. C. 35.

52. Brown *v.* McFadden, 5 Pa. Co. Ct. 9; Alderfer *v.* Beyer, 2 Pa. Co. Ct. 425.

Insufficient claim. — Plaintiff filed a laborer's lien, specifying as follows:

"1886.	William Cook to James W. Cook, Dr.	
"Dec. 8.	For labor on farm for 8 months and 4 days, $10 per month	$81 46
	Cr., by cash	5 00
		$76 46"

This was held insufficient in that it did not show where the labor was performed, nor on what farm, nor that the claimant labored on the crop of his employer on which he intended to obtain a lien. Cook *v.* Cobb, 101 N. C. 68, 7 S. E. 700, holding further that such a claim cannot be cured by allegations in the complaint to protect the alleged lien against a third party.

For forms of lien-claims see Brown *v.* McFadden, 5 Pa. Co. Ct. 9; Alderfer *v.* Beyer, 2 Pa. Co. Ct. 425.

53. Pain *v.* Isaacs, 10 Wash. 173, 38 Pac. 1038, where the lien-claim filed by farm-laborers on October 14 recited that claimants commenced work on August 10 and finished September 16. One of the claimants testified merely that he worked fifteen and a half days. It was held that since the presumption was that he worked continuously from August 10, thereby making August 28 his last day, his claim was not filed within forty days after the labor was performed, as required by statute.

54. Pain *v.* Isaacs, 10 Wash. 173, 38 Pac. 1038, holding that a lien-claim for services rendered by several farm-laborers is good, though not signed by all the claimants, provided the body of the instrument shows who the claimants are. See also Wiand *v.* Himmelwright, 8 Pa. Co. Ct. 663, holding that a claim for a farm-laborer's lien by husband and wife, under the acts of April 9, 1879, and June 13, 1883, is not rendered invalid by the fact that only one notice of such claim was given, signed by the husband alone.

55. Taylor *v.* Hathaway, 29 Ark. 597.

56. Evans *v.* English, 61 Ala. 416; Howe *v.* Whited, 21 La. Ann. 495.

duced by reason of the advances,[57] or services,[58] or to property bought with the money advanced.[59] But where a lien has been foreclosed, and levy made upon the crop, and, by reason of an injunction and appointment of a receiver, the crop has been exhausted and used by the receiver in making subsequent crops, equity will enforce such crop lien upon the subsequent rents, issues, and profits of the plantation.[60]

2. Effect of Sale or Other Disposition — a. Right to Follow Crop. Except to a purchaser for value without notice[61] a sale or other disposition of the crop[62] or plantation[63] will not defeat the lien, which adheres to the thing and may be

In Louisiana the laborer's privilege is given by La. Civ. Code, art. 3217, par. 3, "on everything which serves to the working of the farm." This is construed to apply only to such things as serve to the working of the farm, but do not constitute a part of the farm itself; that is, to movables by nature and destination,— movables serving to the making of the farm, but not belonging to the owner. Rogers *v.* Walker, 24 Fed. 344, wherein it was further held that since the services of laborers on a plantation enure directly to the benefit of those having liens or privileges upon the crop, in preserving the thing on which their mortgage and privilege rested, they are entitled to an equitable as well as a statutory lien on the proceeds of the crop; but they in no wise benefit the owner of the land, and their wages have no equitable lien whatever against him and a very doubtful statutory privilege.

57. *Alabama.*— Evans *v.* English, 61 Ala. 416.

Georgia.— Dubose *v.* McDonald, 46 Ga. 471; Speer *v.* Hart, 45 Ga. 113.

Louisiana.— Waddell's Succession, 44 La. Ann. 361, 10 So. 808; Bank of America *v.* Fortier, 27 La. Ann. 243; Given *v.* Alexander, 25 La. Ann. 71; Wallace *v.* Urquhart, 23 La. Ann. 469; Martin *v.* Lastrapes, 22 La. Ann. 380; Shaw *v.* Grant, 13 La. Ann. 52; McCutchon *v.* Wilkinson, 12 La. Ann. 483; Carter *v.* Baker, 7 La. Ann. 547.

Minnesota.— Wallace *v.* Palmer, 36 Minn. 126, 30 N. W. 445.

North Carolina.— Wooten *v.* Hill, 98 N. C. 48, 3 S. E. 846; Clark *v.* Farrar, 74 N. C. 686.

Partnership plantation.— Where a plantation has been worked in partnership, a commission merchant who has made advances and furnished supplies to one of the partners has no privilege on the portion of the crop which belongs to the other partner. Smith *v.* Williams, 22 La. Ann. 268.

Remainder of debt for one year cannot be satisfied out of the proceeds of the next year's crop to the prejudice of another commercial firm who made all their advances in that year, and in whose possession part of the crop has been put by consignment, and under a regular bill of lading, before the issuing of a writ of sequestration. Given *v.* Alexander, 25 La. Ann. 71.

Wife's liability for advances to husband.— Where a wife, with her husband's consent, rents land, hires a man to cultivate it, furnishes and feeds the horses out of her own separate estate, the crop is not subject to a factor's lien given by her husband on his crop made the same year, for provisions furnished, none of the provisions being used by the wife in making her crop. Dubose *v.* McDonald, 46 Ga. 471.

Portion of sugar-cane crop covered.— The privilege of the furnisher of supplies on the growing sugar-cane crop, under the Louisiana act of 1874, covers only that portion of the crop which was, in the ordinary sense of the word, to become "merchantable,"— not the seed reservation, nor the corn grown for the next sugar crop. Citizens' Bank *v.* Wiltz, 31 La. Ann. 244.

58. Dano *v.* M. O. & R. R. Co., 27 Ark. 564; McRae *v.* His Creditors, 16 La. Ann. 305; Hunt *v.* Wing, 10 Heisk. (Tenn.) 139. See also Welsh *v.* Shields, 12 Rob. (La.) 527, holding that where the owner sells the plantation, and the overseer is employed by the purchaser for the rest of the year, receiving his wages for that period from the latter, and continues with him for the succeeding year, he has no privilege on the crop of the second year, made by the purchaser, for wages due by the former owner for the preceding year.

Employer's interest limited.— A laborer, under a cropper, has a lien on the crop only to the extent of the latter's claim against the landowner. Burgie *v.* Davis, 34 Ark. 179.

59. Evans *v.* English, 61 Ala. 416.

60. Ball *v.* Vason, 56 Ga. 264.

61. Townsend *v.* Brooks, 76 Ala. 308; Sternberger *v.* McSween, 14 S. C. 35.

One is not a bona fide purchaser, but is charged with constructive notice of the existence of a lien who purchases with knowledge of the relation between the landlord and superintendent, and of the fact that the crop purchased was raised or grown on the particular premises where such superintendent was employed. Townsend *v.* Brooks, 76 Ala. 308.

62. Bank of America *v.* Fortier, 27 La. Ann. 243; Bres *v.* Cowan, 22 La. Ann. 438; Scarborough *v.* Stinson, 15 La. Ann. 665.

63. Flower *v.* Skipwith, 45 La. Ann. 895, 13 So. 152; Farrar *v.* Rowley, 3 La. Ann. 276; Welsh *v.* Shields, 6 Rob. (La.) 484.

Subsequent lease of premises.— Where a plantation is held by a party under a conditional agreement of sale, with authority from the owner to cultivate the same, but under no contract of lease or rent, a merchant who makes advances to the vendee and acquires a privilege on the crop under such conditions cannot be affected by a subsequent change of arrangements and the execution of a lease creating a lessor's privilege. Flower *v.* Skipwith, 45 La. Ann. 895, 13 So. 152.

Only services rendered protected.— In case

enforced by the creditor against any third person having the property in his possession.[64]

b. Right to Follow Proceeds. The lien may in some cases be executed on the proceeds of the crop after it has been sold.[65]

D. Rights of Lien-Holder — 1. In General. A crop lien gives no right of property in the products covered, but only a privilege to pursue the things and subject them to the payment of the debts secured,[66] and the claimant cannot support trespass, trover, or detinue.[67]

2. Assignment. A lien may be assignable,[68] and the assignment of the debt under which the lien was acquired passes the lien with it.[69]

3. Priority of Lien — a. For Advances — (I) *In General.* The priority of an agricultural lien for advances is fixed by the statutes creating them. They are generally held superior to all liens[70] except the landlord's lien for rent.[71] Such a

of a forced alienation of a plantation, with the crop in the ground, the overseer has not a privilege on such crop for his whole year's salary, but simply for the proportion of the year elapsed at the date of such sale. Scarborough *v.* Stinson, 15 La. Ann. 665.

64. McLemore *v.* Cole, 43 Ala. 620; Bres *v.* Cowan, 22 La. Ann. 438; Garcia *v.* Garcia, 7 La. Ann. 525 [*following* Welsh *v.* Barrow, 3 La. Ann. 133]; Farrar *v.* Rowley, 3 La. Ann. 276; Welsh *v.* Shields, 6 Rob. (La.) 484; Cloud *v.* State, 53 Miss. 662.

Where property is sold on execution, with notice of the existence of the lien, the lien-holder has no cause of action against the officer, his remedy being to prevent the sale or to follow the cotton into the hands of the purchaser and subject it to his lien. Cloud *v.* State, 53 Miss. 662.

65. Johnson's Succession, 3 Rob. (La.) 216. But see McLemore *v.* Cole, 43 Ala. 620, holding that while the crop can be followed into the hands of third persons the remedy cannot apply to any other property, debt, or obligation; and Branch *v.* Galloway, 105 N. C. 193, 10 S. E. 911, where it was held that the fact that a tenant pays for a mule sold to him by his landlord out of crops on which he had previously executed agricultural liens to plaintiffs does not operate to pass title to the mule to plaintiffs, though the landlord had no lien on the crops for the price of the mule.

66. Wilson *v.* Stewart, 69 Ala. 302; Stern *v.* Simpson, 62 Ala. 194; Cloud *v.* State, 53 Miss. 662.

67. Stern *v.* Simpson, 62 Ala. 194. See also Kennedy *v.* Reames, 15 S. C. 548, holding that a lien-holder cannot sue for conversion by a creditor of the lienor, who, in good faith, accepted a part of the crop and applied it to the payment of his demand.

After condition of seed-grain note broken, the Minnesota statute authorizes the holder of such note to take possession of the crop, and he may enforce his lien as against the holder of a subordinate lien thereon who has taken possession, and may maintain an action against him for the conversion thereof. Nash *v.* Brewster, 39 Minn. 530, 41 N. W. 105, 2 L. R. A. 409.

68. Kerr *v.* Moore, 54 Miss. 286, holding that an assignee may assert and enforce the lien in the same manner and to the same extent as the laborer.

69. Duncan *v.* Hawn, 104 Cal. 10, 37 Pac. 626.

70. To attachment, judgment, or execution.— The lien for advances is superior to a lien acquired by attachment (Carter *v.* Wilson, 61 Ala. 434), general judgment (Stallings *v.* Harrold, 60 Ga. 478), or execution (Laloire *v.* Wiltz, 31 La. Ann. 436; Richardson *v.* Weiner, 5 La. Ann. 646).

To mortgage lien.— The lien for advances is superior to that of a prior mortgage.

Alabama.— Hamilton *v.* Maas, 77 Ala. 283; Lovelace *v.* Webb, 62 Ala. 271.

Arkansas.— Airey *v.* Weinstein, 54 Ark. 443, 16 S. W. 123.

Minnesota.— McMahan *v.* Lundin, 57 Minn. 84, 58 N. W. 827.

Mississippi.— Herman *v.* Perkins, 52 Miss. 813.

North Carolina.— Carr *v.* Dail, 114 N. C. 284, 19 S. E. 235; Wooten *v.* Hill, 98 N. C. 48, 3 S. E. 846.

The act operates against the landlord and all other persons interested in agricultural products. It takes effect as a limitation or restriction upon the power of the employer, by contract, mortgage, or other act, to defeat this first lien created by law to secure to the laborer his wages out of the fruits of his industry, and the employer can create no other lien that will be paramount to it. Buck *v.* Paine, 50 Miss. 648.

Rule changed by contract.— Where an agricultural lien on crops to be grown provides that a debt due by the owner of the crops, and secured by a prior recorded mortgage on the same crops, is to be paid out of the crops, the lienor will hold the crops or their proceeds, to the amount of such debt, as trustee for its payment. Brasfield *v.* Powell, 117 N. C. 140, 23 S. E. 106.

71. Flexner *v.* Dickerson, 65 Ala. 129; Lovelace *v.* Webb, 62 Ala. 271; Stern *v.* Simpson, 62 Ala. 194; McLester *v.* Somerville, 54 Ala. 670; Brewer *v.* Chappell, 101 N. C. 251, 7 S. E. 670; Wooten *v.* Hill, 98 N. C. 48, 3 S. E. 846. *Contra*, Visanska *v.* Bradley, 4 S. C. 288, where it was held that a lien, to secure advances for agricultural purposes, given by a tenant of rented land, has preference over a prior contract to pay the landlord

lien has been held, also, to be superior to the homestead right of the debtor's wife.[72]

(II) *How Overcome.* Such priority may be overcome by proof that the lien was in fact given to secure an antecedent debt,[73] and does not extend to advances made in excess of the amount specified in the agreement.[74]

b. For Services. A crop lien for services is superior to that of the holder of a chattel mortgage,[75] the furnisher of supplies,[76] a judgment debtor,[77] or the lessor,[78] but this superiority over the lien of the lessor extends only to the crop.[79]

E. Waiver or Loss of Lien — 1. How Effected — a. In General — (I) *Whether Orally or in Writing.* Where an agricultural lien is created verbally it may generally be waived orally,[80] but in some states it is provided that evidence of the waiver must be in writing by indorsement on the instrument creating the lien.[81]

(II) *By What Acts* — (A) *Bringing Suit and Obtaining Judgment.* The right to enforce a laborer's lien on crops by attachment is not taken away by a previous suit and judgment on the debt.[82]

(B) *Death and Insolvency of Tenant.* A crop lien created by contract of the parties is not lost by the death of debtor and the insolvency of his estate.[83]

(C) *Failure to Enforce.* A lien may be lost unless the required proceeding to enforce the same is taken within the time allowed by statute.[84]

for the use of the land, from the first makings of the crop, one fourth of all that is made.

Rule changed by contract.— Where A agreed to make statutory advances to B's tenant on B's guaranty and assignment of his rent contracts as collateral, and furnished all the supplies according to agreement, he was held entitled to payment out of the crops in preference to B's claim for rent. Foster *v.* Napier, 74 Ala. 393.

In Alabama a landlord's lien for advances is placed by statute on the same basis of equality as his lien for rent. Thompson *v.* Powell, 77 Ala. 391.

In Louisiana the privilege of the lessor on the crop made on the plantation for the year and that of the furnisher of supplies to make the crop are concurrent. Moore *v.* Gray, 22 La. Ann. 289.

72. Cook *v.* Roberts, 69 Ga. 742.

73. Boswell *v.* Carlisle, 55 Ala. 554.

74. Franklin *v.* Meyer, 36 Ark. 96.

75. Watson *v.* May, 62 Ark, 435, 35 S. W. 1108; Irwin *v.* Miller, 72 Miss. 174, 16 So. 678; Buck *v.* Paine, 50 Miss. 648; Sitton *v.* Dubois, 14 Wash. 624, 45 Pac. 303.

76. Bouligny *v.* Lacour, 24 La. Ann. 76; Hogue *v.* Sheriff, 1 Wash. Terr. 172. But see Moore *v.* Gray, 22 La. Ann. 289, holding that the lien of a laborer who has made a crop under contract for a portion thereof is inferior to that of the furnisher of supplies.

77. Jones' Appeal, 102 Pa. St. 285, holding that under the Pennsylvania act of April 9, 1872, growing crops go to wage claimants in preference to one having a judgment lien on the land, there having been a severance, by sale or otherwise, before the sale of the land.

78. Saloy *v.* Dragon, 37 La. Ann. 71; Tanner *v.* Tanner, 6 Rob. (La.) 35.

79. Saloy *v.* Dragon, 37 La. Ann. 71, holding that as to the residue of property subject to two privileges the privilege of a laborer and the lessor are concurrent.

80. Buck *v.* Payne, 52 Miss. 271, holding that a laborer's lien, being so created, the laborer may waive it in favor of a mortgagee of his employer, thus giving the mortgagee a paramount lien.

81. Tinsley *v.* Craige, 54 Ark. 346, 16 S. W. 570 [*affirming* 15 S. W. 897], holding that the Arkansas act of April 6, 1885, had no effect to repeal Mansfield Dig. § 4452, requiring this.

Contracts construed.— Under an agreement between A, a landlord, claiming a lien on his tenants' crops for rent and advances, and B, a merchant, claiming a lien for advances, providing that "B is to get to-day three bales of cotton (two from X and one from Y), less the rents, and, out of the next lot of said X and Y, A is to get two thirds, provided it does not exceed their indebtedness to him for the year 1881, and so on, until both claims are settled," it was held that A's lien for the rent was expressly reserved, and his lien for advances abandoned as to the three bales, but that two thirds of the residue was subject to both liens, though only for 1881. Coleman *v.* Siler, 74 Ala. 435. But where the factors of a planter keep two separate accounts, one in the name of the plantation, and the other in the name of its owner, and the balance on the latter is in favor of the owner, but the factors are creditors on the plantation account, the balance due the latter, with the privilege attached to it, will not be extinguished by that due the owner on his private account, where there is no fraud or violation on the rights of mortgage creditors on the crop on which the balance against the plantation is a lien. Farrar *v.* Rowley, 3 La. Ann. 276.

82. Wilson *v.* Taylor, 89 Ala. 368, 8 So. 149.

83. McKinney *v.* Benagh, 48 Ala. 358.

84. Hume *v.* Simmons, 34 Fla. 584, 16 So. 552, holding that the lien created by Fla. Acts

(D) *Leaving Harvested Crop in Owner's Hands.* One having a lien on grain which he has harvested and threshed on the owner's premises does not lose his lien, as against one attaching the grain with notice, by having left it there in charge of a third person.[85]

(E) *Taking Additional Security.* A party does not waive his right to a statutory lien by taking other security for the debt [86] unless the security taken or credit extended is such as to evidence an intent to waive the lien and rely exclusively on the security given.[87]

b. When Tenant Abandons Cultivation. An advancer who, on the tenant's abandoning the cultivation, fails to avail himself of the landlord's permission to enter and finish the same relinquishes his lien on the crops, and cannot afterward have them attached as the property of the tenant.[88]

2. Effect on Assignee. Where, prior to assignment, a laborer has waived his lien the assignee cannot disclaim the waiver on the ground that he did not know of it.[89]

F. Proceedings to Enforce — 1. By Action — a. Parties. A landlord is not a necessary party to a suit to enforce a laborer's lien on crops grown on his land on shares.[90]

b. Requisites of Complaint. The necessary allegations in the complaint will depend on the particular statute involved.[91]

c. Evidence. The general rules of evidence are applicable, and it has been held that a party seizing grain under a thresher's lien must establish that the grain was grown on the land described in the statement for lien.[92] And on an issue between one claiming a lien on crops for labor bestowed thereon, and another claiming the crops by virtue of a sale made before they were raised, evidence that the former was a partner of the person raising the crops, and as such had been fully paid for his labor, has been held admissible.[93]

d. Filing Record of Sale. While, under the North Dakota statutes,[94] an officer

(1887), c. 3747, § 3, in favor of persons laboring on any farm, etc., is lost by the limit of section 17 unless an action to enforce the same is commenced within six months from the last day on which the labor was performed, though the notice of lien was filed within such time.

85. Hogue *v.* Sheriff, 1 Wash. Terr. 172.

86. Grady *v.* Hall, 59 Ala. 341; Story *v.* Flournoy, 55 Ga. 56; Laloire *v.* Wiltz, 31 La. Ann. 436; Joslyn *v.* Smith, 2 N. D. 53, 49 N. W. 382.

Subrogation to the rights of laborers whose wages a factor has paid does not exclude him from claiming the sum thus paid as an advance embraced by the recorded contract of pledge between him and the planter. Laloire *v.* Wiltz, 31 La. Ann. 436.

That same instrument contains a mortgage on the same property to secure the same debt does not impair a lien for advances. Grady *v.* Hall, 59 Ala. 341.

87. Joslyn *v.* Smith, 2 N. D. 53, 49 N. W. 382.

88. Wheat *v.* Watson, 57 Ala. 581.

89. Buck *v.* Payne, 52 Miss. 271.

90. Pain *v.* Isaacs, 10 Wash. 173, 38 Pac. 1038.

91. **For form of complaint** in action to enforce a seed lien see Lavin *v.* Bradley, 1 N. D. 291, 47 N. W. 384.

Failure to allege that account was made.— A complaint for a threshing lien, under S. D. Laws (1889), c. 88, alleging that "the said S. J. Flynn [plaintiff's assignor] duly executed his claim for a lien upon the said grain hereinbefore described, for threshing the same, . . . and caused the said claim to be filed in the office of the register of deeds," without alleging that an account had been made, stating the kind of grain threshed and the number of bushels, with a description of the land on which it was grown, as required by section 3 of the act, is sufficient in absence of a formal demurrer or motion to make more definite and certain. Anderson *v.* Alseth, 6 S. D. 566, 62 N. W. 435.

Allegation as to use of seed.— Thus in an action to foreclose the seed lien given by the statute it has been held not necessary to allege in the complaint that the seed was sold to be sown on any particular tract of land, but it is sufficient if the complaint shows that the seed was sown on land "owned, used, occupied, or rented" by the purchaser. Joslyn *v.* Smith, 2 N. D. 53, 49 N. W. 382.

Allegation that plaintiff owned machine.— A complaint to enforce a threshing lien should allege that claimant owned and operated the threshing-machine. Parker *v.* Lisbon First Nat. Bank, 3 N. D. 87, 54 N. W. 313, holding an allegation that plaintiff was "running and operating a threshing-machine" demurrable.

92. Martin *v.* Hawthorne, 5 N. D. 66, 63 N. W. 895.

93. Essency *v.* Essency, 10 Wash. 375, 38 Pac. 1130.

94. N. D. Laws (1889), c. 26, § 7; c. 88.

making the sale on foreclosure of a thresher's lien should file a record of the same with the register of deeds, failure to do so within the prescribed time will not invalidate the sale.[95]

2. By Attachment — a. In General. A common method of enforcing statutory agricultural liens is by attachment.[96]

b. Who May Enforce. Unless otherwise provided the right to enforce the lien by attachment exists in favor of the advancer only, and not of his assignee.[97]

c. Time to Commence. After the crop belonging to a tenant has been sequestered and bonded it is too late for a third party to intervene, claiming a privilege for supplies furnished by him to the tenant for the purpose of raising the crop.[98]

d. Jurisdiction. Jurisdiction in a proceeding to enforce an agricultural lien is determined by the amount demanded and not by the amount seized.[99]

e. Requisites of Affidavit — (I) *In General.* An affidavit for an attachment to enforce a lien for advances is sufficient if it sets forth with substantial accuracy the general jurisdictional facts, either expressly or by necessary implication.[1]

(II) *Particular Averments* — (A) *As to Advances.* The affidavit must state the nature or kind of articles furnished,[2] and where the statute makes a balance due for advances of the preceding year a new advance toward making the crop of the succeeding year it is the better practice to state the facts respecting such balance.[3]

(B) *Grounds for Attachment.* The separate grounds for attachment must not be stated in the affidavit in the disjunctive.[4]

(C) *Parties Claimant.* Where some of the joint owners of the interest claimed are minors, the affidavit may be amended by adding their names by affiant as next friend.[5]

(III) *Signature* — (A) *Of Affiant.* Attachment may issue on an affidavit

95. Martin *v.* Hawthorne, 5 N. D. 66, 63 N. W. 895.

96. Wilson *v.* Stewart, 69 Ala. 302; Grady *v.* Hall, 59 Ala. 341; McKinney *v.* Benagh, 48 Ala. 358.

Exclusive remedy.— For the enforcement of the lien for advances on crops, the statutory remedy by attachment is exclusive. Stern *v.* Simpson, 62 Ala. 194.

97. Carter *v.* Wilson, 61 Ala. 434.

98. Phifer *v.* Maxwell, 28 La. Ann. 862.

The lien of laborers cannot be defeated by the lessor by his bonding property provisionally seized for rent, where they have intervened in the suit prior to the bonding, asserting their privilege. Nor need they demand a separate appraisement of the crops seized prior to the bonding or to judgment rendered. Saloy *v.* Dragon, 37 La. Ann. 71.

99. May *v.* Williams, 61 Miss. 125, 48 Am. Rep. 80.

1. Gunter *v.* Du Bose, 77 Ala. 326.

The "matters of substance" which must be stated or shown in an affidavit for attachment under Ala. Civ. Code, § 3315, are that advances were made in horses, mules, oxen, necessary provisions, or farming tools and implements, or in money to purchase the same (the amount being stated), to enable defendant to make a crop; that a written note or obligation was taken, declaring that such advances were made *bona fide* for the purpose of enabling defendant to make such crop, and that without them it would not be in his power to procure the necessary teams, provisions, etc., for that purpose; also, the registration of the writing, as required by the statute, and the existence of one of the causes for which an attachment may be sued out. Flexner *v.* Dickerson, 65 Ala. 129, holding that an affidavit which states that defendant is indebted to plaintiffs in a specified sum "for advances made to him to make a crop in said county for the year 1878, and that he has removed a part of the crop made by him, on which the lien was given, without the consent of said plaintiffs," does not show compliance with the statute and is fatally defective.

For form of an affidavit for attachment to enforce an agricultural lien see Gunter *v.* Du Bose, 77 Ala. 326.

2. Beard *v.* Woodard, 78 Ala. 317, holding that a general averment that plaintiff made advances to enable defendant to make a crop for the current year is insufficient.

Failure to state for what year furnished.— Where an attachment is sued out on the last day of December for advances made to enable a tenant to make a crop on lands rented from plaintiff, but not stating for what year, it will be inferred that the advances were made during the year just expired. Gunter *v.* Du Bose, 77 Ala. 326.

3. Gunter *v.* Du Bose, 77 Ala. 326.

4. Watson *v.* Auerbach, 57 Ala. 353, 358, holding that an affidavit that defendant "has removed, or is about to remove, a portion of the crop from the premises without the consent of the said Auerbach" was bad.

5. May *v.* Williams, 61 Miss. 125, 48 Am. Rep. 80.

sworn to before an officer authorized to administer it, though it be not subscribed by the party making it.[6]

(B) *Of Officer.* If the justice before whom the affidavit is sworn to has failed to sign the jurat, he may affix his signature in open court after motion to dismiss.[7]

f. Filing Statement. Where defendant has answered plaintiff's affidavit and concluded to the country, thereby waiving the filing of the statement upon the return-day, plaintiff should be allowed to amend by filing the statement.[8]

g. Defenses — (I) *Defective Affidavit.* Defects in an affidavit of attachment should be taken advantage of by plea in abatement.[9]

(II) *Failure to Furnish Supplies.* The fact that the limit to which supplies might have been required according to contract was not reached does not amount to a violation of, or a refusal to comply with, the contract where there is no evidence that plaintiff was called on and refused to furnish more than is claimed by him in his suit.[10]

h. Judgment. Unless otherwise provided no personal judgment can be rendered: the proceeding is *in rem.*[11]

3. By Summary Warrant or Fieri Facias — a. In General. The mode of enforcing a crop lien by summary warrant or fieri facias must be strictly observed.[12]

b. Requisites of Affidavit — (I) *In General.* The affidavit necessary to enforce a crop lien must state all the facts necessary to constitute a valid lien.[13]

(II) *Particular Averments* — (A) *Amount Due.* The affidavit must state the amount due.[14]

(B) *Completion of Contract.* An averment that plaintiff has fully completed and worked out the time is a sufficient allegation that the contract of labor has been completed.[15]

(C) *Demand.* Where plaintiff fails to show a demand his right to enforce the lien fails.[16] An affidavit showing demand on the day of maturity is sufficient,[17] and an allegation that defendant has been absent from the county from the time of making the contract until the time of making the affidavit, and that he is likely to be absent for a considerable time, shows a sufficient excuse.[18]

(D) *Grounds for Issuance.* The affidavit must state what is about to be done

6. Watts *v.* Womack, 44 Ala. 605.

7. Hartsell *v.* Myers, 57 Miss. 135.

8. Allen *v.* Standifer, 57 Miss. 612.

Where the claim is on contract by the month at a fixed and definite sum no itemized account need or can be filed by plaintiff. Baldwin *v.* Morgan, 73 Miss. 276, 18 So. 919.

9. Johnston *v.* Hannah, 66 Ala. 127, holding that it could not be assigned for the first time as error on appeal that the affidavit failed to state that the labor was performed under a contract, or that the attachment was levied on property which was not a part of the crop subject to the lien.

10. Lalanne *v.* Goodbee, 25 La. Ann. 481.

11. Mitchell *v.* Drake, 57 Miss. 605. In Hartsell *v.* Myers, 57 Miss. 135, it was held that no personal judgment for the debt could be rendered in excess of the property seized. But by a later statute (Miss. Code (1880), c. 52) a general judgment may be rendered against the person liable. May *v.* Williams, 61 Miss. 125, 48 Am. Rep. 80.

12. Stallings *v.* Harrold, 60 Ga. 478; Sternberger *v.* McSween, 14 S. C. 35.

Mere delivery of the crop to the factor, to be applied in part payment of the lien, will not vest title in the lienor as against an older general judgment lien postponed by the statute in favor of the crop lien. Stallings *v.* Harrold, 60 Ga. 478.

13. Powell *v.* Weaver, 56 Ga. 288.

The affidavit must show that plaintiff is either a factor or a merchant, and that as such he has furnished either provisions or commercial manures, or both, upon such terms as may have been agreed upon by the parties; and an execution based upon an affidavit not containing the above allegations is void. Gunn *v.* Pattishal, 48 Ga. 405.

For form of affidavit for warrant to enforce a crop lien see Owens *v.* Gentry, 30 S. C. 490, 9 S. E. 525.

14. Segler *v.* Coward, 24 S. C. 119.

15. Lindsay *v.* Lowe, 64 Ga. 438.

16. Moore *v.* Martin, 58 Ga. 411.

17. Favors *v.* Johnson, 79 Ga. 553, 4 S. E. 925.

That demand was made on owner sufficiently appears from an averment that payment has been demanded of the said A where the fact of A's ownership appears elsewhere in the affidavit to foreclose the lien. Usry *v.* Saulsbury, 62 Ga. 179.

18. Lindsay *v.* Lowe, 64 Ga. 438.

which would defeat the lien,"[19] and in doing this must follow the language of the statute.[20]

(E) *Property Grown under Contract.* An averment that plaintiff made a crop of wheat and corn on the land under the contract is a sufficient allegation that it was raised under the contract and during the time of his employment.[21]

(F) *That Contract Was in Writing.* It must appear from the affidavit that the lien was created by special contract in writing.[22]

(G) *That Work Was Done by Plaintiff.* The affidavit must allege that the work for which the lien is claimed was done by plaintiff.[23]

(H) *Time of Commencing Proceeding.* The affidavit is sufficient if it shows from all its allegations that the proceeding has been commenced within the time allowed by the statute.[24]

c. Issuance and Execution of Warrant. A warrant to enforce an agricultural lien can be issued only by the clerk of court and executed only by the sheriff.[25]

d. Summons. It is not necessary to the regularity of a summary proceeding for the enforcement of an agricultural lien, under the statute, that a summons should be issued to defendant.[26]

e. Counter-Affidavit — (I) *In General.* The affidavit required of the debtor to raise an issue for trial is sufficient if it denies indebtedness under the lien.[27] Defendant may in his affidavit traverse an averment of demand in plaintiff's affidavit.[28]

(II) *Second Affidavit.* A second counter-affidavit to an execution based on an agricultural lien cannot be filed without an allegation that the facts therein set forth were unknown to defendant at the time the first was filed.[29]

f. Vacating Warrant — (I) *In General.* A warrant to enforce an agricultural lien, if issued unlawfully, may be vacated on motion.[30]

(II) *Who May Vacate.* The clerk of the superior court may revoke and supersede a warrant issued to secure agricultural advances, where it was improvidently issued;[31] and a circuit judge has jurisdiction on motion to vacate, whether the warrant were issued by the clerk or by a trial justice.[32]

19. Segler *v.* Coward, 24 S. C. 119.

20. Brogden *v.* Privett, 67 N. C. 45, 46, holding that an affidavit which stated that defendant was removing and disposing of his crop without regard to the lien, but failed to state that it was removed "without the permission, or with intent to defraud the laborer of his lien," was insufficient.

An affidavit was sufficient to authorize the issuance of the lien warrant which recited that the affiant was informed and believed that the husband was disposing of his crops in order to defeat the said lien, and which gave as reasons for such belief that the husband had sold a portion of his crop without applying any of the proceeds to the satisfaction of the lien, and that he had failed to keep his promises with reference to payment. Owens *v.* Gentry, 30 S. C. 490, 9 S. E. 525.

21. Lindsay *v.* Lowe, 64 Ga. 438.

22. Powell *v.* Weaver, 56 Ga. 288.

23. Mabry *v.* Judkins, 66 Ga. 732.

24. Moore *v.* Martin, 58 Ga. 411, where an affidavit made Nov. 25, 1874, to foreclose a merchant's lien for fertilizers, showed that the contract was made Feb. 27, 1874, for fertilizers furnished that year, and that it fell due Nov. 1, 1874, and was held sufficient to show that the prosecution of the lien began within one year from the time the debt fell due.

25. Jones *v.* Clarkson, 16 S. C. 628.

26. Thomas *v.* Campbell, 74 N. C. 787.

27. Warren *v.* Lawton, 14 S. C. 476.

28. Moore *v.* Martin, 58 Ga. 411.

29. Story *v.* Flournoy, 55 Ga. 56.

30. Segler *v.* Coward, 24 S. C. 119.

Such motion is analogous to one to vacate an attachment, and the time within which it may be filed is not limited by section 2518 of the Revised Statutes of South Carolina, which provides for an application to the trial justice, within ten days after the seizure, to have tried the single question of the amount justly due under the lien; the remedy under section 2519 being broader, and permitting the lienor to attack both the lien and the issuance of the warrant. Kennedy *v.* Dunbar, 46 S. C. 517, 24 S. E. 383.

Motion not necessary to contest.— One against whom is issued a warrant to enforce a lien on crops need not move to vacate it, in order to contest the validity of the lien, but may proceed under S. C. Gen. Stat. (1882), § 2398, providing that, on notice that the amount claimed is not justly due, an issue shall be made and set down for trial. Sease *v.* Dobson, 33 S. C. 234, 11 S. E. 728.

31. Cottingham *v.* McKay, 86 N. C. 241.

32. Kennedy *v.* Dunbar, 46 S. C. 517, 24 S. E. 383.

g. Evidence. On the question whether the clerk was justified by the affidavit in issuing the warrant to enforce an agricultural lien, a supplementary affidavit made at the hearing before the judge cannot be considered.[33]

h. Setting aside Verdict. Irregularities in proceedings to enforce a crop lien constitute no ground for setting aside a verdict rendered thereon.[34]

III. Illegal Trading in Farm Products.

A. Between Sunset and Sunrise — 1. Who Liable. Under a statute prohibiting trading in certain farm products after the hour of sunset and before the hour of sunrise of the next day, an agent who does one of the prohibited acts is liable.[35]

2. The Indictment. An indictment for this offense should contain the name, either of the owner of the product, or of the person from whom the purchase was made,[36] and should state the name of the person to whom the product was disposed of.[37]

3. Defense. The fact that the owner of the product consented to the sale is no defense to a charge of buying it.[38]

4. Evidence. On the indictment of a principal for the act of his agent, declarations made by the agent at the time of the purchase, that he was buying for his principal, are inadmissible without bringing home to the principal the criminal design of the agent.[39]

B. Within Certain Boundaries — 1. Constitutionality. A statute making it unlawful for any person to sell cotton in the seed within certain counties specified,[40] or to transport such cotton within such counties by night,[41] is not unconstitutional.

2. Indictment. An indictment for transporting cotton in the seed by night within a prohibited county should aver that the act was knowingly done in violation of the law.[42]

IV. Inspection and Branding of Fertilizers.

A. Constitutionality of Statutes. Statutes regulating the sale of fertilizers, and providing for a method of inspecting, branding, and tagging the same, have been held to be within the range of legitimate police regulation and are constitutional[43] even where the seller is a resident of another state.[44]

B. Nature of Inspection. Where the statute provides for such inspection and branding of fertilizers it contemplates a personal inspection and branding under the immediate supervision of the inspector or subinspector,[45] and the inspection cannot be performed beyond the limits of the state.[46]

C. Requisites of Label. Where the statute requires the label to state the name of the manufacturer and seller, with their places of business and the constituent elements of the fertilizer, a label bearing simply the name, location, and trade-mark of the manufacturer is insufficient.[47]

33. Segler *v.* Coward, 24 S. C. 119.

34. Wicker *v.* Woods, 55 Ga. 647.

Failure to assess damages, after a general verdict for plaintiff, is no ground for denying judgment. Gay *v.* Nash, 84 N. C. 333.

35. Reese *v.* State, 73 Ala. 18, holding liable an agent of a mortgagee, who receives from the mortgagor, within the prohibited hours, cotton subject to the mortgage.

36. Grattan *v.* State, 71 Ala. 344; Russell *v.* State, 71 Ala. 348.

37. Russell *v.* State, 71 Ala. 348.

For form of an indictment for buying a farm product after sunset and before sunrise see Gilliam *v.* State, 71 Ala. 10.

38. Gilliam *v.* State, 71 Ala. 10.

39. Russell *v.* State, 71 Ala. 348.

40. Mangan *v.* State, 76 Ala. 60.

41. Davis *v.* State, 68 Ala. 58, 44 Am. Rep. 128 [*followed* in Mangan *v.* State, 76 Ala. 60].

42. Davis *v.* State, 68 Ala. 58, 44 Am. Rep. 128.

For form of indictment for buying cotton in the seed in a county where such buying is forbidden see Mangan *v.* State, 76 Ala. 60.

43. Steiner *v.* Ray, 84 Ala. 93, 4 So. 172.

44. Brown *v.* Adair, 104 Ala. 652, 16 So. 439.

45. Pacific Guano Co. *v.* Dawkins, 57 Ala. 115, holding that an analysis of a few samples, and a branding with the inspector's stamp by the guano-dealer, constitute no compliance therewith.

46. Hammond *v.* Wilcher, 79 Ga. 421, 5 S. E. 113.

47. McConnell *v.* Kitchens, 20 S. C. 430, 47 Am. Rep. 845.

D. Effect of Non-Compliance with Statute on Contract — 1. When Made Within State — a. In General. Where the statute makes a failure to inspect, brand, or tag fertilizers a penal offense, or expressly so provides, there can be no recovery of the price of the fertilizer sold within the state which was not inspected, branded, or tagged as required by the statute,[48] and no waiver or undertaking in the contract for purchase will bar or estop a purchaser from pleading such defense.[49] The subsequent repeal of a statute directing inspection of fertilizers will not vitalize a contract made in violation of provisions during the time it was in force,[50] and the fact that the seller is a non-resident, or that the fertilizer was manufactured without the state, has no effect on the validity of a sale.[51]

b. Pleading. An answer, in an action to recover the purchase-price of fertilizer, that it was not inspected by the state inspector, without alleging that it was not properly branded, is insufficient;[52] but a plea alleging that the fertilizer had not been inspected, stamped, or branded, as required by the statute, is not objectionable for vagueness or indefiniteness, nor as averring legal conclusions instead of facts.[53]

c. Burden of Proof. Where defendant attempts to show that a note is void because the fertilizer has been sold without being branded according to law, the burden is on him to show that the sacks were not so branded.[54]

d. Instructions. Where the evidence does not show that the tags required by statute were not detached after sale and delivery, and there is evidence that the sacks were tagged before sale, an instruction that if the jury believe that the fertilizer did not have inspection-tags on the sacks at the time of sale, plaintiffs cannot recover, is properly refused.[55]

2. When Made Without State. Statutes relating to inspection of fertilizers

The component parts are sufficiently stated in a label on bags containing a fertilizer in the words "Ammoniated Bone, Superphosphate of Lime." Atlantic, etc., Fertilizing Co. *v.* Kishpaugh, 32 Gratt. (Va.) 578.

Tax on tags.— In Blanton *v.* Southern Fertilizing Co., 77 Va. 335, it was held that the act establishing the department of agriculture, and empowering the commissioner to make all necessary rules and regulations for carrying out the intentions of the act, did not authorize him to levy a tax on fertilizer, sold within the state, for the purposes of his department.

48. Kirby *v.* Huntsville Fertilizer, etc., Co., 105 Ala. 529, 17 So. 38; Brown *v.* Adair, 104 Ala. 652, 16 So. 439; Merriman *v.* Knox, 99 Ala. 93, 11 So. 741; Johnson *v.* Hanover Nat. Bank, 88 Ala. 271, 6 So. 909; Campbell *v.* Segars, 81 Ala. 259, 1 So. 714; Renfro *v.* Loyd, 64 Ala. 94; Woods *v.* Armstrong, 54 Ala. 150, 25 Am. Rep. 671; Faircloth *v.* De Leon, 81 Ga. 158, 7 S. E. 640; Allen *v.* Pearce, 80 Ga. 417, 7 S. E. 82; Hammond *v.* Wilcher, 79 Ga. 421, 5 S. E. 113; Leman *v.* Saunders, 72 Ga. 202; Conley *v.* Sims, 71 Ga. 161; Kleckley *v.* Leyden, 63 Ga. 215; McConnell *v.* Kitchens, 20 S. C. 430, 47 Am. Rep. 845.

Mere promise of inspection insufficient.— The fact that the seller procured a subinspector to visit a warehouse where the guano was deposited, gave him samples, and was promised an inspection, stamping, and certificate, if none was in fact made, will not validate a contract. Woods *v.* Armstrong, 54 Ala. 150, 25 Am. Rep. 671.

Tags required at time of sale.— Where the statute requires the tags to be attached at the time of sale, the fact that tags have been attached prior thereto and have been lost or destroyed does not affect the applicability of a statutory provision declaring sales of fertilizer void unless each package is tagged in accordance with its requirements. Kirby *v.* Huntsville Fertilizer, etc., Co., 105 Ala. 529, 17 So. 38; Brown *v.* Adair, 104 Ala. 652, 16 So. 439; Clark's Cove Guano Co. *v.* Dowling, 85 Ala. 142, 4 So. 604. But where the tags were omitted from some bags at the request of the purchaser, who received tags for the balance, promising to affix them, the statute is not violated, and a note given for the fertilizer is valid. Steiner *v.* Ray, 84 Ala. 93, 4 So. 172 [*distinguishing* Campbell *v.* Segars, 81 Ala. 259, 1 So. 714, where the agricultural department failed to realize its fees for tags, and the purchasers failed to receive the statutory guaranty.]

49. Faircloth *v.* De Leon, 81 Ga. 158, 7 S. E. 640.

50. Pacific Guano Co. *v.* Dawkins, 57 Ala. 115 [*following* Woods *v.* Armstrong, 54 Ala. 150, 25 Am. Rep. 671].

51. Merriman *v.* Knox, 99 Ala. 93, 11 So. 741.

52. Martin *v.* Moore, 63 Ga. 531.

53. Renfro *v.* Loyd, 64 Ala. 94.

For forms of pleas that the statute relating to fertilizers has not been complied with see Johnson *v.* Hanover Nat. Bank, 88 Ala. 271, 6 So. 909; Campbell *v.* Segars, 81 Ala. 259, 1 So. 714.

54. Lorentz *v.* Conner, 69 Ga. 761.

55. Hamlin *v.* Rogers, 78 Ga. 631, 3 S. E. 259.

have no extraterritorial effect, and non-compliance with their provisions does not affect the validity of a sale made in another state.[56]

E. Criminal Liability. Attaching a false certificate is not an offense under a statute directed against a failure to attach to packages of fertilizer the required certificate, and an indictment for the latter offense must allege the name of the person to whom an offer of sale was made, or allege that his name was unknown.[57]

F. Effect of Compliance with Statute on Warranty as to Quality. The inspector's brand upon sacks of fertilizer will not preclude the purchaser thereof from showing that it was worthless, unless he has expressly stipulated in his contract that it should have that effect.[58]

V. AGRICULTURAL SOCIETIES.

A. Definition and Nature—1. DEFINITION. An agricultural society has been defined as "a society for promoting agricultural interests, such as the improvement of land, of implements, of the breeds of cattle, etc." [59]

2. NATURE OF CORPORATION. Such societies and organizations have been variously held to be private,[60] public,[61] or quasi-public corporations.[62]

56. Johnson *v.* Hanover Nat. Bank, 88 Ala. 271, 6 So. 909; Renfro *v.* Loyd, 64 Ala. 94; Stokes *v.* Culver, 57 Ala. 412; Atlantic Phosphate Co. *v.* Ely, 82 Ga. 438, 9 S. E. 170; Martin *v.* Upshur Guano Co., 77 Ga. 257.

57. People *v.* Stone, 85 Hun (N. Y.) 130, 32 N. Y. Suppl. 519.

58. Wiggins *v.* Cleghorn, 61 Ga. 364.

Statements in a note that "the inspector is hereby constituted and recognized as ——— agent, and ——— agree to be bound by his inspection" (Wiggins *v.* Cleghorn, 61 Ga. 364) and "this fertilizer is sold under the inspection and analysis of Dr. A. Means, inspector at Savannah, and the Department of Agriculture at Atlanta" (Austin *v.* Cox, 60 Ga. 520) do not cut off any defense depending upon warranty of quality, express or implied; but where the fertilizer was accepted with warranty "as to its effect on crops only as to the analysis of the state inspector, as evidenced by his brand on each and every package," the purchaser cannot avoid paying therefor if the packages were actually branded in the way contemplated by the contract (Jackson *v.* Langston, 61 Ga. 392).

59. Downing *v.* Indiana State Board of Agriculture, 129 Ind. 443, 451, 28 N. E. 123, 614, 12 L. R. A. 664 [*quoting* Century Dict.].

An agricultural fair is a place where the industrial products of a people, in agriculture, manufacturing, and the arts, are received and placed on exhibition for the purpose of displaying them and awarding premiums as a reward for excellence, even though such organization may exist for the sake of profit. State *v.* Long, 48 Ohio St. 509, 28 N. E. 1038.

60. *Indiana.*— Downing *v.* Indiana State Board of Agriculture, 129 Ind. 443, 28 N. E. 123, 614, 12 L. R. A. 664.

Iowa.— Thompson *v.* Lambert, 44 Iowa 239.

Kentucky.— Com. *v.* Bacon, 13 Bush (Ky.) 210, 26 Am. Rep. 189.

Maine.— Brown *v.* South Kennebec Agricultural Soc., 47 Me. 275, 74 Am. Dec. 484.

Minnesota.— Lane *v.* Minnesota State Agricultural Soc., 62 Minn. 175, 64 N. W. 382, 29 L. R. A. 708.

Ohio.— Dunn *v.* Brown County Agricultural Soc., 46 Ohio St. 93, 18 N. E. 496, 15 Am. St. Rep. 556, 1 L. R. A. 754.

Statute impairing contract.— The Indiana act of March 4, 1891, abolishing the state board of agriculture and transferring all its property to another institution, is unconstitutional, because the Indiana State Board of Agriculture, though organized under the act of Feb. 14, 1851, for the public benefit, is, nevertheless, a private corporation. Downing *v.* Indiana State Board of Agriculture, 129 Ind. 443, 28 N. E. 125, 614, 12 L. R. A. 664. See also Thompson *v.* Lambert, 44 Iowa 239, holding that the fact that an agricultural society is not organized chiefly for profit does not constitute it a public corporation within the rule that the legislature can control the property of public corporations, but not that of private ones.

61. Dillard *v.* Webb, 55 Ala. 468; Livingston County Agricultural Soc. *v.* Hunter, 110 Ill. 155; State *v.* Stovall, 103 N. C. 416, 8 S. E. 900; Stewart *v.* Hardin County Agricultural Soc., 7 Am. L. Rec. (Ohio) 668, 6 Ohio Dec. (Reprint) 751.

Reorganization on joint-stock plan does not render the corporation one for private gain or profit, or change the public character of the institution. Its property can still be applied only to the payment of its debts and the promotion of the general objects of the association as expressed in its constitution. Livingston County Agricultural Soc. *v.* Hunter, 110 Ill. 155.

62. Kent County Agricultural Soc. *v.* Houseman, 81 Mich. 609, 46 N. W. 15, holding that, on this account, art. 15, § 10, of the Michigan constitution, providing that "no corporation, except for municipal purposes, or for the construction of railroads, plank roads, and canals, shall be created for a longer time than thirty years," did not apply to such societies, and that hence their charters do not expire at the end of thirty years by force of the constitutional limitation.

B. Organization and Powers. An agricultural society, being duly organized,[63] has power to do any act not inconsistent with the charter or statute by virtue of which it exists.[64]

C. Right to Public Aid. Agricultural societies are agencies of the state, created for the purpose of assisting in promoting a most important industry,[65] and acts authorizing appropriations of public money in their behalf are not unconstitutional, although such appropriations to private corporations are forbidden.[66]

63. When organized.— In Martin *v.* Argenteuil Corp., 7 Montreal Leg. N. 139, it was held that such a society was duly organized under 32 Vict. c. 15, § 41, when the declaration prescribed by the statute has been signed by forty persons, and that persons becoming members subsequently need not sign such declaration, and that it is unnecessary to designate the particular site for the permanent buildings of the society; a designation in the words "Lachute, in the parish of St. Jerusalem d' Argenteuil," being sufficient.

64. Borrowing money and executing mortgage.—Where the statute under which the association was created gave the corporators the right to assume any and all powers necessary and proper to carry out the objects of the corporation, it was held that the power to borrow money and execute notes and mortgages for carrying out the objects of the corporation impliedly existed. Aurora Agricultural, etc., Soc. *v.* Paddock, 80 Ill. 263; Thompson *v.* Lambert, 44 Iowa 239; Preston *v.* Loughran, 58 Hun (N. Y.) 210, 12 N. Y. Suppl. 313. But see Stewart *v.* Hardin County Agricultural Soc., 7 Am. L. Rec. 668, 6 Ohio Dec. (Reprint) 751, where it was held that a county agricultural society is a public corporation, and that a mortgage of fair-grounds, executed by it, was void; and *In re* Rockwood Electoral Div. Agricultural Soc., 12 Manitoba 655, where it was held that a society incorporated under 55 Vict. c. 22, has no implied authority to borrow money or mortgage real estate belonging to it, notwithstanding the provision of section 9 of the act prohibiting a sale, mortgage, lease, or other disposition of any real property of the society unless authorized at a general meeting thereof.

Erection of seats and charge therefor.— An agricultural society holding a fair may erect seats upon its grounds and charge for their use. Magoverning *v.* Staples, 7 Lans. (N. Y.) 145, holding that before the society can exclude from such seats a person who had the right to enter on the grounds it must be shown that compensation for their use had been exacted, and that the occupant knew of the requirement, and, with knowledge thereof and after demand of it, he refused to pay.

Holding fairs.— Even where authority is not in terms conferred on such society to hold fairs, the power to "perform all such acts as they deem best calculated to promote the agricultural and household manufacturing interests" of the county appears to be ample for that purpose. Dunn *v.* Brown County Agricultural Soc., 46 Ohio St. 93, 98, 18 N. E. 496, 15 Am. St. Rep. 556, 1 L. R. A. 754. Where a state society is required to hold a fair and has extended the time during which it shall be kept open, exhibitors are not bound to keep their goods on exhibition during such additional time; but persons making entries for the exhibition of the speed of horses, subject to a rule especially applicable thereto, which allows such exhibition to be continued, in case of storms, to the next fair day, and, if necessary, beyond the time fixed for the regular fair, are bound by such extension. Farrier *v.* State Agricultural Soc., 36 Minn. 478, 32 N. W. 554.

Horse-racing.— A county agricultural society may offer premiums for the winner of a horse-race to be held on its grounds during its annual fair as a means of improving the stock of horses. Delier *v.* Plymouth County Agricultural Soc., 57 Iowa 481, 10 N. W. 872. But the law will not tolerate any shift or device upon the part of such an association, whereby, under pretense of bettering the condition or developing and improving stock, gambling is intended or permitted. West *v.* Carter, 129 Ill. 249, 21 N. E. 782.

Preservation of order.— An agricultural society may employ persons to preserve order upon its grounds during one of its fairs. Magoverning *v.* Staples, 7 Lans. (N. Y.) 145, holding that persons so employed have authority to expel from the grounds persons who persist in causing disorder after they have been requested to desist therefrom, and to enforce the lawful regulations of the society which have been made known to those admitted to the grounds.

Selling real estate.— A sale of real estate is sufficiently authorized under a statute requiring the vote of five directors, where five directors who, in the absence of a regular annual election, have held over, vote for such sale. Kent County Agricultural Soc. *v.* Houseman, 81 Mich. 609, 46 N. W. 15.

It is not lawful for such an association to define and fix bounds for purposes not enumerated in the statute, within which no person may enter unless in conformity with regulations of the association. Com. *v.* Ruggles, 6 Allen (Mass.) 588, holding that the power conferred on such associations, being a statutory one, must be exercised within the exact limits prescribed by law.

Licensing gambling-tables is foreign to the objects and purposes of a fair association. Cope *v.* District Fair Assoc., 99 Ill. 489, 39 Am. Rep. 30, holding that in absence of proof of pecuniary injury to complainant or the association, such action will not be enjoined at suit of a stockholder.

65. State *v.* Robinson, 35 Nebr. 401, 53 N. W. 213, 17 L. R. A. 383.

66. Nemaha Fair Assoc. *v.* Myers, 44 Kan. 132, 24 Pac. 71, holding that Kan. Gen. Stat.

Under some statutes the number of societies in each county entitled to aid is not limited,[67] while under others only one in each year is entitled to aid,[68] and under others only the society first duly organized.[69] The power to aid must be strictly construed,[70] the society must have been duly organized,[71] and must have performed all the conditions prescribed by the statute.[72]

D. Duties and Liabilities — 1. Of Association — a. Duty to Prevent Infringement of Privilege. Where a society has sold the exclusive right to a privilege, it is bound to protect the purchaser against infringement by others.[73]

b. Liability — (I) *For Breach of Contract* — (A) *To Pay Premium.* Where a society is authorized to offer premiums, as, for example, upon horse races or other contests, the winner may maintain an action therefor.[74]

(1889), § 6256, which authorizes the chairman of the board of county commissioners, under certain conditions, to issue an order on the county treasurer in favor of the county or district agricultural society, is not unconstitutional as being in contravention of a constitutional provision that no tax should be levied except in pursuance of a law which shall distinctly state the object of the same, to which object only such tax shall be applied, the court holding that the amount permitted to be drawn from the county treasury would be paid out of the general county fund, levied and collected for the payment of current expenses of the county.

67. Poweshiek County Cent. Agricultural Soc. *v.* Shaffer, 86 Iowa 377, 53 N. W. 304.

68. Com. *v.* Crawford County, 1 Pennyp. (Pa.) 403.

Where a county has paid annually to one of several societies the authorized amount, it will not be compelled to pay the amount for those years to another society, though the latter was prior in organization, and it seems that the act contemplates the possible existence of more than one such organization in a county, and it is within the discretion of the county commissioners to divide the annual appropriation equally among several societies or to make equitable alternate payments of the specified sum to them. Com. *v.* Crawford County, 1 Pennyp. (Pa.) 403.

69. Iroquois Agricultural Soc. *v.* Bates, 61 Ill. 490.

The fact that another society in the same county has complied with the conditions necessary to entitle it to demand payment from the county will not justify the board of supervisors in failing to include in the estimate of expenses for the current year the amount payable to an agricultural society under a provision of the statute, it not appearing that such society is making any claim upon the county for funds. State *v.* Robinson, 35 Nebr. 401, 53 N. W. 213, 17 L. R. A. 383.

70. Thus, under an act authorizing the county commissioners to purchase land for fair purposes on petition of a majority of the citizens of the county, the board is not authorized to make an appropriation to an agricultural society, out of the county fund, to enable the society to pay its debts. Warren County Agricultural Joint Stock Co. *v.* Barr, 55 Ind. 30.

71. Dutchess, etc., County Agricultural Soc. *v.* McIntyre, 17 Johns. (N. Y.) 87, holding that the society must be formed after due public notice to all the inhabitants of the county to meet for that purpose.

72. **Certificate of society's officers.**— Under Mich. Comp. Laws, § 1687, a tax to be raised for agricultural societies can be raised only by order of the supervisors, when they have been informed, by the sworn certificate of the proper officers of the society, that the society has raised at least one hundred dollars. Hall *v.* Kellogg, 16 Mich. 135. This certificate must be signed by both the president and secretary of the society. Hogelskamp *v.* Weeks, 37 Mich. 422. But a tax having been levied, and the county clerk testifying that he could not find such a certificate in his office, it will be presumed to have been made and presented, and the testimony of a member of the board to the effect that he did not recollect whether it was presented or not will not rebut such presumption. Silsbee *v.* Stockle, 44 Mich. 561, 7 N. W. 160, 367.

Time of holding fair.— Where, by separate enactments, money was appropriated to two agricultural societies, it being provided in each enactment that their fairs should not be held at the same time, neither was entitled to the appropriation where their fairs were held at the same time. State *v.* Timme, 56 Wis. 423, 14 N. W. 604.

Where monthly reports of the condition of crops, etc., in the county or district are necessary to entitle a county or district agricultural society to representation in the state board of agriculture, and to share in the fund provided for the encouragement of agriculture, the fact that the secretary of the state board of agriculture notified the county society that its reports were sufficient to entitle it to representation in the state board, and failed to require it to comply with the statute, is no excuse for such non-compliance. Nemaha Fair Assoc. *v.* Thummel, 47 Kan. 182, 27 Pac. 832.

73. Robinson *v.* Clark, 53 Ill. App. 368.

74. Delier *v.* Plymouth County Agricultural Soc., 57 Iowa 481, 10 N. W. 872; Moshier *v.* La Crosse County Agricultural Soc., 90 Wis. 37, 62 N. W. 932. *Contra* if the offer is illegal. Bronson Agricultural, etc., Assoc. *v.* Ramsdell, 24 Mich. 441.

For form of petition to recover premium see Delier *v.* Plymouth County Agricultural Soc., 57 Iowa 481, 10 N. W. 872.

Effect of agreement to scale premium.— Where, in an action to recover a premium, it appeared that a rule of defendant association

(B) *To Protect Exhibit.* A society which advertises for exhibits and promises to keep an efficient police force to protect the same is liable for a breach of such promise and for the loss of property which is stolen.[75]

(II) *For Torts*—(A) *In General.* Where the society is not a public corporation it is responsible for injuries resulting from a want of ordinary care and foresight,[76] provided they are a direct and natural consequence thereof.[77]

(B) *Acts Ultra Vires.* An agricultural society is not liable for acts not within the scope of the purpose for which it was created.[78]

(C) *Of Servants.* An agricultural society is liable for the act of an authorized servant in wrongfully ejecting or maliciously injuring one upon its grounds.[79]

(D) *Unsafe Premises.* An agricultural society is liable to one lawfully in attendance at its public exhibitions for injuries caused by its grounds not being reasonably safe.[80]

(E) *Trial.* The general rules of law as to evidence and conduct of trial are applicable. Thus in an action for ejecting plaintiff from the defendant society's grounds for failure to pay an additional charge for a seat, evidence of a custom of the society to make such charge is inadmissible in the absence of evidence that plaintiff knew of such custom or was chargeable with such knowledge,[81] and so it

permitted its officers to scale down the premiums in case of bad weather, and the court charged that if the conditions authorizing them to scale down existed there would be a liability only for the reduced amount, it was held proper to further charge that no agreement by any of the exhibitors to accept a less sum than the whole premium earned would be binding if made without other consideration than the payment of such reduced sum. Murray *v.* Walker, 83 Iowa 202, 48 N. W. 1075.

75. Vigo Agricultural Soc. *v.* Brumfiel, 102 Ind. 146, 1 N. E. 382, 52 Am. Rep. 657.

The designation of a person to receive exhibits, where such person is the local secretary of the society, and, as such, aids in the preparations for the fair, is to be understood as meaning that no charge would be made to owners or exhibitors for their services. O'Neil *v.* New York State Agricultural Soc., 19 Barb. (N. Y.) 162.

76. Brown *v.* South Kennebec Agricultural Soc., 47 Me. 275, 74 Am. Dec. 484; Lane *v.* Minnesota State Agricultural Soc., 62 Minn. 175, 64 N. W. 382, 29 L. R. A. 708, holding a society liable where it engaged plaintiff to ride in a running race for horses, which was promoted and controlled by it, and, knowing a certain horse was dangerous and unsafe to run in a race, owing to a vicious habit of track-bolting, of which plaintiff was ignorant, it negligently permitted such horse to run in the race in which plaintiff rode under engagement with defendant, without warning her of the unusual danger to which she was thus exposed, and, by the bolting of such horse from the track during the race, plaintiff was thrown from her own horse and injured.

77. Barton *v.* Pepin County Agricultural Soc., 83 Wis. 19, 52 N. W. 1129, 46 Alb. L. J. 371, where a fair association, having permitted private teams to be driven around the race-course after the races had been run, the driver of a team of young horses whipped them into running away, and they ran off the track and injured a visitor at the fair. It was held that, the injury being proximately caused by the driver's wrongful act, and not being a direct or natural consequence of the permission given owners of teams to use the track, the association was not liable.

78. Hern *v.* Iowa State Agricultural Soc., 91 Iowa 97, 58 N. W. 1092, 24 L. R. A. 655; Bathe *v.* Decatur County Agricultural Soc., 73 Iowa 11, 34 N. W. 484, 5 Am. St. Rep. 651.

Employing persons to convey people to fair.—Such a society is not authorized to employ persons to convey people in their own conveyances to a fair, and is not liable for an injury to a horse caused by such persons negligently driving against it while they were so employed. Bathe *v.* Decatur County Agricultural Soc., 73 Iowa 11, 34 N. W. 484, 5 Am. St. Rep. 651.

Wrongful arrests by officers and agents of such a society are acts not within the scope of the purpose for which it is created, and the society is not liable therefor. Hern *v.* Iowa State Agricultural Soc., 91 Iowa 97, 58 N. W. 1092, 24 L. R. A. 655.

79. Oakland City Agricultural, etc., Soc. *v.* Bingham, 4 Ind. App. 545, 31 N. E. 383. But see *supra*, V, D, 1, b, (II), (B).

80. Brown *v.* South Kennebec Agricultural Soc., 47 Me. 275, 74 Am. Dec. 484; Selinas *v.* Vermont State Agricultural Soc., 60 Vt. 249, 15 Atl. 117, 6 Am. St. Rep. 114.

For form of petition for personal injuries from fall of seats see Dunn *v.* Brown County Agricultural Soc., 46 Ohio St. 93, 18 N. E. 496, 15 Am. St. Rep. 556, 1 L. R. A. 754.

Negligent construction of seats.—A county agricultural society, which had constructed seats on its fair-grounds for the use of its patrons, is liable, in its corporate capacity, to a person who, while attending a fair held by it, and rightfully in the occupation of one of the seats, sustains an injury in consequence of negligence in the construction of that seat. Dunn *v.* Brown County Agricultural Soc., 46 Ohio St. 93, 18 N. E. 496, 15 Am. St. Rep. 556, 1 L. R. A. 754.

81. Magoverning *v.* Staples, 7 Lans. (N. Y.) 145.

is a question of fact for the jury to determine whether a society has been guilty of negligence.[82]

2. Of Officer — a. Right to Eject. An officer of an agricultural society has the right to eject from its fair-grounds, without an order from the board of directors, or express provisions contained in its by-laws, all persons found therein exercising privileges not paid for by them.[83]

b. Criminal Liability — (I) *Assault and Battery.* Officers of an agricultural society who have unlawfully fixed and defined bounds for the purpose of exhibiting horses in a public highway may be convicted of assault and battery if, without legal process, they arrest a person within such bounds.[84]

(II) *Gambling.* An indictment charging the officers of an association with leasing a portion of its grounds for gambling purposes need not allege that the society is a county fair, agricultural society, or joint-stock association,[85] and charging defendants as "officers, managers, and directors" is sufficient under a statute inflicting a penalty upon any "officer or officers."[86]

E. Reorganization. The reorganization of a voluntary agricultural society on the joint-stock plan may constitute such association a distinct organization,[87] or not, according to circumstances.[88] If the society remains substantially the same it succeeds to all the rights and liabilities of the society as they existed at the time of the change;[89] but if a new society is created it does not succeed to the property rights of the old society.[90]

F. Revocation of Charter. The state may revoke the charter of an agricultural association for an abuse of its franchise.[91]

82. Phillips *v.* Wisconsin State Agricultural Soc., 60 Wis. 401, 19 N. W. 377 (holding, where plaintiff had been injured by a revolving shaft on defendant's fair-grounds, that, though the shafting was eighteen inches above ground, it was not error to refuse to instruct that it was negligent for the association to leave the shaft uncovered); Selinas *v.* Vermont State Agricultural Soc., 60 Vt. 249, 15 Atl. 117, 6 Am. St. Rep. 114 (holding that it was a question of fact for the jury to determine whether a society is guilty of negligence in permitting, during its exhibition, a striking-machine to be used on its grounds without a guard around it, whereby a person was injured; and that the court cannot assume as matter of law that such machine was not there by the society's permission, if it cannot be assumed that the machine was there by license; it is a question of fact whether it had been so long upon the grounds that the society ought, in the exercise of reasonable care, to have known of its presence).

83. Bower *v.* Robinson, 53 Ill. App. 370; Robinson *v.* Clark, 53 Ill. App. 368.

84. Com. *v.* Ruggles, 6 Allen (Mass.) 588.

85. State *v.* Johnson, 115 Ind. 467, 17 N. E. 910.

86. State *v.* Johnson, 115 Ind. 467, 17 N. E. 910.

For forms of indictments in substance against officers of a fair association for leasing grants for gambling purposes see State *v.* Johnson, 115 Ind. 467, 17 N. E. 910; State *v.* Darroch, 12 Ind. App. 527, 40 N. E. 639; State *v.* Howard, 9 Ind. App. 635, 37 N. E. 27.

87. Thus in Allen *v.* Long, 80 Tex. 261, 16 S. W. 43, 26 Am. St. Rep. 735, a voluntary agricultural association, organized as a joint-stock company, ceased to act, elect officers, or do any business for eight years, when some of the stockholders in the old association, with others, formed an association in the name of the old one. Many of the stockholders in the old association did not join the new, which increased its capital stock and went into partnership with a race-track association, thus introducing a feature unknown to the old association, and it was held that the new association was a distinct organization from the old.

88. Thus where the constitution of an agricultural society declared that its object should be "to improve the condition of agriculture, horticulture, and the mechanic and household arts," and provided for holding annual fairs, and on reorganization as a joint-stock company the new constitution declared that the object should be "to improve the condition of agriculture, horticulture, floriculture, mechanic and household arts," and also provided for holding annual fairs and exhibitions, and the name was changed by substituting the word "board" in place of the word "society," it was held that there was no essential change in the object of the society resulting from its reorganization, and that the new board was not a separate and independent society from the old one, but the same under a slight change in the name. Livingston County Agricultural Soc. *v.* Hunter, 110 Ill. 155.

89. Livingston County Agricultural Soc. *v.* Hunter, 110 Ill. 155, holding that the old creditors of such a society have the same right to sue the society under its new name as they had to sue it as it was originally organized.

90. Allen *v.* Long, 80 Tex. 261, 16 S. W. 43, 26 Am. St. Rep. 735.

91. Cope *v.* District Fair Assoc., 99 Ill. 489, 39 Am. Rep. 30, wherein it was said that

AGRICULTURIST. A student of the science of agriculture.[1]

AID. To support, either by furnishing strength or means to help success.[2]

AID AND COMFORT. See TREASON.

AID BONDS. See MUNICIPAL CORPORATIONS.

AIDER. See CRIMINAL LAW; INDICTMENTS AND INFORMATIONS.

AIDER BY VERDICT. See INDICTMENTS AND INFORMATIONS; PLEADING.

AIDERS AND ABETTORS. See CRIMINAL LAW; INDICTMENTS AND INFORMATIONS.

AID-PRAYER. A petition to the court, by a tenant in real actions, for the aid of another person, interested in the property demanded, to help him defend the action.[3]

AIDS. Grants of money to the sovereign in support of his person and government.[4]

AID SOCIETIES. See BENEFICIAL SOCIETIES.

AIEL or **AILE.** See AYLE.

AINSI. Thus; so; after the same manner.[5]

AIR. The respirable fluid which surrounds the earth and forms its atmosphere.[6] (Air: Easement of, see EASEMENTS. Obstruction of, see ADJOINING LANDOWNERS.)

AIRE. In old Scotch law, the court of the justices itinerant, corresponding with the English eyre. Also, heir.[7]

AIR-GUN. See WEAPONS.

AIR-TIGHT. So tight or close as to be impermeable to air.[8]

AIRWAY. A passage for the admission of air into a mine.[9]

AISEMENT. An easement.[10]

AISIAMENTUM. In old English law, an easement.[11]

AISNE. Eldest or first-born.[12]

AJUTAGE. A conical tube which greatly increases the flow of water when applied to an aperture through which the water passes.[13]

AKIN. Of kin.[14]

AL. In Law French a preposition meaning "at," "to," and "with."[15]

ALBUS LIBER. An ancient book containing a compilation of the laws and customs of the city of London.[16]

ALCALDE, ALCADE, or **ALCAID.** A juridical officer, with functions resembling those of a justice of the peace, known in Spain and in those parts of America which were settled under Spanish authority and adopted Spanish institutions.[17]

if the stockholders of a fair association authorized its officers to license a gambling-table upon the fair-grounds this would be such an abuse of the company's franchise as would warrant the state in reclaiming it.

1. Downing *v.* Indiana State Board of Agriculture, 129 Ind. 443, 452, 28 N. E. 123, 614 [*citing* A New English Dict.].

2. Synod of Dakota *v.* State, 2 S. D. 366, 374, 50 N. W. 632, 14 L. R. A. 418 [*citing* Webster Dict.].

"Aid or assistance is the doing of some act whereby the party is enabled, or it is made easier for him, to do the principal act, or effect some primary purpose." Wiley *v.* McRee, 47 N. C. 349, 351.

3. Burrill L. Dict.

4. Brown L. Dict.

5. Burrill L. Dict.

6. Century Dict.

7. Burrill L. Dict.

8. Century Dict.

Synonymous with "water-tight."— In Chicago Fruit House Co. *v.* Busch, 2 Biss. (U. S.) 472, 479, 5 Fed. Cas. No. 2,669, in considering the use of the word air-tight in specifications for a patent for the floor of an ice reservoir, the court said: "The term 'air-tight' . . . is to be understood the same as 'water-tight'; or, substantially, a tight floor through which the water would not run into the lower room to injure the articles stored there, nor the air escape into the upper room to melt the ice."

9. Wharton L. Lex.

10. Kelham Dict.

11. Bouvier L. Dict.

12. Burrill L. Dict.

13. Black L. Dict.

14. Burrill L. Dict.

15. Burrill L. Dict.

16. Wharton L. Lex.

17. Abbott L. Dict.: Strother *v.* Lucas, 12 Pet. (U. S.) 410, 442 note, 9 L. ed. 1137; U. S. *v.* Castillero, 2 Black (U. S.) 17, 194, 25 Fed. Cas. No. 14,746.

ALCOHOL. A volatile organic body, constantly formed during the fermentation of vegetable juices containing sugar in solution.[18]

ALCOHOLIC LIQUORS. See INTOXICATING LIQUORS.

ALCOHOLISM. See ACCIDENT INSURANCE; LIFE INSURANCE.

ALDERMAN. A member of the corporation or common council of a city or corporate town, elected by and representing the inhabitants of a ward, and having authority to act as a civil magistrate, and sometimes as a judge.[19] (See also JUSTICES OF THE PEACE; MUNICIPAL CORPORATIONS.)

ALDERMANNUS. An ALDERMAN,[20] *q. v.*

ALE. A liquor made from an infusion of malt by fermentation.[21] (See, generally, INTOXICATING LIQUORS.)

ALEATORY CONTRACT. A mutual agreement, of which the effects, with respect both to the advantages and losses, whether to all the parties or to one or more of them, depend on an uncertain event.[22] (See, generally, CONTRACTS; GAMING.)

ALE-CONNER, ALE-KENNER, ALE-FOUNDER, or **ALE-TASTER.** An officer appointed in every court leet, sworn to look to the assize and goodness of ale and beer within the precincts of the lordship.[23]

ALEGER. To relieve; to redress.[24]

ALE-HOUSE. A place where ale is sold to be drunk on the premises.[25]

ALE-KENNER. See ALE-CONNER.

ALER. To go.[26]

ALE SILVER. A rent or tribute paid annually to the lord mayor of London by those who sell ale within the liberty of the city.[27]

ALE-TASTER. See ALE-CONNER.

ALFET. The caldron containing the boiling water in which the accused dipped his arm up to the elbow in the ordeal by boiling water.[28]

18. Eureka Vinegar Co. *v.* Gazette Printing Co., 35 Fed. 570, 571.

Concerning the production of alcohol, the court in State *v.* Giersch, 98 N. C. 720, 723, 4 S. E. 193, 37 Alb. L. J. 200, said: "Alcohol, this essential element in all spirituous liquors, is a limpid, colorless liquid. To the taste it is hot and pungent, and it has a slight and not disagreeable scent. It has but one source — the fermentation of sugar and saccharine matter. It comes through fermentation of substances that contain sugar proper, or that contain starch, which may be turned into sugar. All substances that contain either sugar or starch, or both, will produce it by fermentation. It is a mistake to suppose, as many persons do, that it is really produced by distillation. It is produced only by fermentation, and the process of distillation simply serves to separate the spirit — the alcohol from the mixture, whatever it may be, in which it exists."

In popular language, alcohol is the intoxicating principle of fermented liquor. Eureka Vinegar Co. *v.* Gazette Printing Co., 35 Fed. 570, 571.

19. Burrill L. Dict.

Implies both legislative and judicial power. — "The term 'alderman' does not import legislative more than judicial power. We learn from ancient authorities that *comes*, *ældorman* and *carl* are equivalent words in the Latin, Saxon, and Danish-Saxon languages. In England this officer sat with the bishop at the trial of causes, and, while the latter expounded the ecclesiastical, it was the duty of the former to declare the common law. Aldermen sat as justices of assize, and exercised such powers of government as were conferred by the charters of the cities or towns where they resided, and, in that character, took cognizance of civil as well as criminal matters; at one time administering the laws which emanated from the British parliament, and at another acting under the code of the corporation laws." Purdy *v.* People, 4 Hill (N. Y.) 384, 409 [*citing* 1 Hume Hist. Eng. 69; Jacob L. Dict.].

20. Burrill L. Dict.

Aldermannus totius Angliæ was an officer among the Anglo-Saxons, supposed by Spelman to be the same as the chief justice in later times. Jacob L. Dict.

21. Nevin *v.* Ladue, 3 Den. (N. Y.) 43, 44, wherein it is said to differ from beer chiefly in having a smaller proportion of hops.

22. La. Rev. Civ. Code (1875), art. 2982; Moore v. Johnston, 8 La. Ann. 488.

A contract is aleatory or hazardous when the performance of that which is one of its objects depends on an uncertain event. La. Rev. Civ. Code (1875), art. 1776.

23. Wharton L. Lex.

24. Kelham Dict.

25. Wharton L. Lex.

26. Burrill L. Dict.

Aler a Dieu — Aler sans jour. — Phrases frequently used in old practice to signify a final dismissal of the cause. Black L. Dict.

27. Wharton L. Lex.

28. Jacob L. Dict.

ALIA ENORMIA. Literally, "other wrongs." Words used in old declarations in trespass after stating the particular trespass complained of.[29]

ALIAS DICTUS or **ALIAS.** Literally, "otherwise called" or "otherwise." A term used to denote a second or further description of a person who has gone by two or more names.[30] The single word "*alias*" is now commonly used.[31] (See, generally, CRIMINAL LAW; INDICTMENTS AND INFORMATIONS; PLEADING.)

ALIAS WRIT. A second or further writ which is issued after the first writ has expired.[32] (See, generally, ARREST; ATTACHMENT; EXECUTIONS; PROCESS.)

ALIBI. Literally, "elsewhere." A defense in criminal law in which the defendant shows that he was at another place at the time the crime charged was committed.[33] (See also CRIMINAL LAW.)

ALIEN or **ALIENE.** To ALIENATE,[34] *q. v.* (See also ALIENS.)

ALIENAGE or **ALIENISM.** The state of an alien.[35] (See, generally, ALIENS.)

ALIEN AND SEDITION LAWS. The acts of congress of July 6 and July 14, 1798.[36]

ALIENARE. To ALIENATE,[37] *q. v.*

ALIENATE. To convey or transfer to another.[38]

ALIENATION. The act whereby one man transfers the property and possession of lands, tenements, or other things, to another person.[39] (Alienation: Of Affections, see HUSBAND AND WIFE. Power of, see LIFE ESTATES; PROPERTY; WILLS. Restraint of, see CHARITIES; DEEDS; PERPETUITIES; RELIGIOUS SOCIETIES; WILLS.)

29. Burrill L. Dict.

30. Burrill L. Dict.

The true name is generally given first. Bouvier L. Dict.; Reid *v.* Lord, 4 Johns. (N. Y.) 118. But that this is not necessarily so see Kennedy *v.* People, 39 N. Y. 245.

Distinguished from "or" and "either."— In Kennedy *v.* People, 39 N. Y. 245, it was held that to give the word "*alias*" the meaning "or" or "either" was not according to its well-understood meaning as a term in law long used to avoid a variance or misnomer in pleadings.

In a colloquial sense the word "*alias*" is used to denote an assumed name. Century Dict.

31. Kennedy *v.* People, 39 N. Y. 245, 251, where Woodruff, J., said: "I apprehend that the use of the single word '*alias*,' to express the whole meaning, has so long obtained, that it is not uncertain what is the true meaning of the charge. . . . The term has become familiar as equivalent to 'otherwise called,' or 'otherwise known as,' and may properly be treated as having in use in pleadings in English acquired that import, as a technical term constantly employed in that sense without its former Latin companion."

32. Glenn *v.* Brush, 3 Colo. 26, 34; Farris *v.* Walter, 2 Colo. App. 450, 453, 31 Pac. 231; Roberts *v.* Church, 17 Conn. 142, 145.

"The writ is so called from the words, 'as we have formerly commanded you,' being inserted after the usual commencement, 'we command you.'" Farris *v.* Walter, 2 Colo. App. 450, 453, 31 Pac. 231 [*citing* Rapalje & L. L. Dict.].

33. Wisdom *v.* People, 11 Colo. 170, 174, 17 Pac. 519; State *v.* Maher, 74 Iowa 77, 80, 37 N. W. 2; State *v.* Fry, 67 Iowa 475, 478, 25 N. W. 738; McLain *v.* State, 18 Nebr. 154, 159, 24 N. W. 720.

34. Black L. Dict.

35. Wharton L. Lex. See also McDonel *v.* State, 90 Ind. 320, 323.

36. Abbott L. Dict.

37. Burrill L. Dict.

38. *Kansas.*— Vining *v.* Willis, 40 Kan. 609, 613, 20 Pac. 232.

Massachusetts.— Market Nat. Bank *v.* Belmont, 137 Mass. 407.

Nebraska.— Union Ins. Co. *v.* Barwick, 36 Nebr. 223, 235, 54 N. W. 519.

New Hampshire.— Burbank *v.* Rockingham Mut. F. Ins. Co., 24 N. H. 550, 557, 57 Am. Dec. 300.

New York.— Harty *v.* Doyle, 49 Hun (N. Y.) 410, 413, 3 N. Y. Suppl. 574 [*citing* Abbott L. Dict.; Wharton L. Dict.; Worcester Dict.].

United States.— Gould *v.* Head, 41 Fed. 240, 245.

Technical meaning of term.— "The term 'alienate' has a technical legal meaning, and any transfer of real estate, short of a conveyance of the title, is not an alienation of the estate. No matter in what form the sale may be made, unless the title is conveyed to the purchaser, the estate is not alienated." Masters *v.* Madison County Mut. Ins. Co., 11 Barb. (N. Y.) 624, 630 [*quoted* in Pollard *v.* Somerset Mut. F. Ins. Co., 42 Me. 221, 225].

39. Boyd *v.* Cudderback, 31 Ill. 113, 119; Coughlin *v.* Coughlin, 26 Kan. 116, 118; Hendrix *v.* Seaborn, 25 S. C. 481, 484, 60 Am. Rep. 520, 523 [*quoting* Bouvier L. Dict.].

Imports actual transfer of title.— It is uniformly true of the word "alienation," when properly employed, that it imports an actual transfer of title. Pollard *v.* Somerset Mut. F. Ins. Co., 42 Me. 221, 225; Marts *v.* Cumberland Mut. F. Ins. Co., 44 N. J. L. 478, 481; Hendrix *v.* Seaborn, 25 S. C. 481, 484, 60 Am. Rep. 520, in which last case the court

ALIENATION OFFICE. An office in England to which all writs of covenants and entries were carried for the recovery of fines levied thereon.[40]

ALIENATIO REI PRÆFERTUR JURI ACCRESCENDI. A maxim meaning "Alienation is favored by the law rather than accumulation."[41]

ALIENE. See ALIEN.

ALIENEE. One to whom property is transferred.[42]

ALIENI GENERIS. Of another sort.[43]

ALIENI JURIS. Under another's authority.[44]

ALIENISM. See ALIENAGE.

ALIENOR. One who transfers property.[45]

said: "It seems to us that the accurate and specific meaning of the word is to pass an estate from one to another, involving the idea of a perfected conveyance of title *inter vivos*."

"'**Alienation**' **differs from** '**descent**' in this, that 'alienation' is effected by the voluntary act of the owner of the property, while 'descent' is the legal consequence of the decease of the owner, and is not changed by any previous act of volition of the owner." Burbank *v.* Rockingham Mut. F. Ins. Co., 24 N. H. 550, 558, 57 Am. Dec. 300.

Alienation in mortmain, in its primary signification, is an alienation of lands or tenements to any corporation, aggregate, ecclesiastical, or temporal. Per Wayne, J., in Perin *v.* Carey, 24 How. (U. S.) 465, 495, 16 L. ed. 701.

40. Bouvier L. Dict.
41. Broom Leg. Max.
42. Anderson L. Dict.
43. Burrill L. Dict.
44. Abbott L. Dict.
45. Wharton L. Lex.

ALIENS

By Archibald C. Boyd

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CROSS-REFERENCES

For Alien as:
- Administrator, see EXECUTORS AND ADMINISTRATORS.
- An Enemy, see WAR.
- Attorney at Law, see ATTORNEY AND CLIENT.
- Ambassador, Minister, or Consul, see AMBASSADORS AND CONSULS.
- Director, see CORPORATIONS.
- Executor, see EXECUTORS AND ADMINISTRATORS.
- Guardian, see GUARDIAN AND WARD.
- Juror, see GRAND JURIES; JURIES.
- Master of Vessel, see SHIPPING.
- Shareholder, see CORPORATIONS.
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Bankruptcy, as Affecting an Alien's Rights, see BANKRUPTCY.
Citizenship, see CITIZENS.
Courts Having Jurisdiction of Actions By or Against Aliens, see ADMIRALTY; AMBASSADORS AND CONSULS; COURTS; CRIMINAL LAW.
Domicile of Alien, see DOMICILE.
Eligibility of Alien to Office, see OFFICERS.
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Insolvency, as Affecting an Alien's Rights, see INSOLVENCY.
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Rights and Privileges of Ambassador, Minister, or Consul, see AMBASSADORS AND CONSULS.
Status of Indian, see INDIANS.
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Taxation of Alien, see TAXATION.
Trade-Mark Rights of Aliens, see TRADE-MARKS AND TRADE-NAMES.
Treaties with Foreign Countries, Generally, see TREATIES.

I. DEFINITION AND CLASSIFICATION.

With respect to any country, an alien is a person[1] who is not a citizen or subject of the country,[2] or who does not owe it allegiance.[3] Aliens are classified

1. "Person" is construed to include "corporation," in respect to alienage, so that a corporation created by the laws of a foreign country is an alien. Barrowcliffe *v.* La Caisse Generale, etc., 58 How. Pr. (N. Y.) 131; Terry *v.* Imperial F. Ins. Co., 3 Dill. (U. S.) 408, 23 Fed. Cas. No. 13,838. See also State *v.* Hudson Land Co., 19 Wash. 85, 52 Pac. 574, 40 L. R. A. 430, construing a constitutional provision prohibiting alien ownership of lands, and declaring that every corporation, a majority of whose stock is owned by aliens, shall be deemed an alien for the purposes of such prohibition. But the fact that an alien holds stock in a corporation does not necessarily affect the rights of the corporation (Comyns Dig. 426; Princeton Min. Co. *v.* Butte First Nat. Bank, 7 Mont. 530, 19 Pac. 210; Reg. *v.* Arnaud, 9 Q. B. 806, 58 E. C. L. 806), as these rights are defined by the laws of the sovereignty under which it was created (State *v.* Hudson Land Co., 19 Wash. 85, 52 Pac. 574, 40 L. R. A. 430. See also, generally, CORPORATIONS).

2. Anderson L. Dict.; Rapalje & L. L. Dict.; 2 Kent Comm. 50; Milne *v.* Huber, 3 McLean (U. S.) 212, 17 Fed. Cas. No. 9,617. See also, generally, CITIZENS.

3. Abbott L. Dict., defining an alien to be one "who does not, either by nativity or voluntary adoption, owe allegiance to the government within whose territory he dwells."

as resident aliens[4] and non-resident aliens,[5] and as alien friends[6] and alien enemies.[7]

See also *infra*, II; and 2 Cent. Dig. tit. "Aliens," § 1.

"Alien, alienigena, is derived from the Latin word *alienus*, and, according to the etymology of the word, it signifieth one born in a strange country, under the obedience of a strange prince or country (and, therefore, Bracton saith that this exception, *propter defectum nationis*, should rather be *propter defectum subjectionis*), or, as Littleton saith (which is the surest), out of the liegeance of the king." *Ex p.* Dawson, 3 Bradf. Surr. (N. Y.) 130, 136 [*citing* Coke Litt. 128*b*; Bacon Abr.; Comyns Dig. 552; Calvin's Case, 7 Coke 16*a*; Doe *v.* Jones, 4 T. R. 300; Stanly *v.* Bernes, 3 Hagg. 373]; Rapalje & L. L. Dict. [*citing* Bracton 427*b*; Coke Litt. 128*b*]. See also *infra*, II.

Called "a legal term."— Burrill L. Dict. [*citing* Daubigny *v.* Davallon, 2 Anstr. 462).

"Foreigner" is a synonymous term.— Bouvier L. Dict.; Burrill L. Dict. [*citing* Spratt *v.* Spratt, 1 Pet. (U. S.) 343, 7 L. ed. 171]. The word "foreigner" is said to be "a person belonging to a foreign country, or without the country or jurisdiction under consideration." Matter of Guilford, 67 Cal. 380, 382, 7 Pac. 763.

As distinguished from denizens see Rapalje & L. L. Dict. [*citing* Coke Litt. 129*a*]. See also *infra*, V, I.

As distinguished from naturalized persons see Rapalje & L. L. Dict.; Spratt *v.* Spratt, 1 Pet. (U. S.) 343, 7 L. ed. 171. See also *infra*, note 11.

As distinguished from natural-born subjects see Jacob L. Dict.; Rapalje & L. L. Dict. "Natural-born subjects are such as are born within the dominions of the crown of England; that is, within the liegeance, or, as it is generally called, the allegiance of the king; and aliens, such as are born out of it." 1 Bl. Comm. 366. See also, generally, CITIZENS.

The terms "alien" and "alien-born," and "subject" or "citizen," are in their nature relative; and to what else can they have relation — what else is their correlative — but the sovereignty or government where the discussion is? Read *v.* Read, 5 Call (Va.) 160. "Alien-born" is a term sometimes applied to a naturalized citizen or subject. Anderson L. Dict. But it has been said that the terms "alien" and "alien-born" are used synonymously in the English law books. Read *v.* Read, 5 Call (Va.) 160.

4. Resident alien is one who resides in a country to which he is a foreigner; but the term does not include an alien who has become naturalized. Luhrs *v.* Eimer, 80 N. Y. 171; *In re* Wehlitz, 16 Wis. 443, 84 Am. Dec. 700.

5. Non-resident alien is one residing out of the country or state, the context showing the territorial limits with reference to which the term "resident" is used. *In re* Gill, 79 Iowa 296, 44 N. W. 553, 9 L. R. A. 126. In California the phrase "non-resident aliens," as used in Cal. Civ. Code (1897), § 672, has been construed to mean those persons who are neither citizens of the United States nor residents of the state. State *v.* Smith, 70 Cal. 153, 12 Pac. 121.

6. Alien friends of a country are those foreigners whose country is at peace with it. Abbott L. Dict.; 1 Bl. Comm. 372; Anderson L. Dict.; Black L. Dict.; Burrill L. Dict. (where it is said that Lord Bacon defined an alien friend to be "such a one as is born under the obeisance of such a king or state as is confederate with the King of England, or, at least, not in war with him):" Rapalje & L. L. Dict. [*citing* Coke Litt. 129*b*; Calvin's Case, 7 Coke 17]; Wharton L. Lex.

An alien in league has been defined to be a subject of one that is in league with the king. Adams Gloss.; Burrill L. Dict.; Coke Litt. 129*b*.

7. Alien enemies of a country are those foreigners whose country is at war with it. Abbott L. Dict.; Anderson L. Dict.; Burrill L. Dict. (where it is said that Lord Bacon defined an alien enemy to be "such a one as is born under the obeisance of such a king or state as is in hostility with the King of England);" Coke Litt. 239*b*; Rapalje & L. L. Dict.; Wharton L. Lex. Otherwise defined as "a person who, by reason of owing a permanent or temporary allegiance to a hostile power, becomes, in time of war, impressed with the character of an enemy." Burrill L. Dict. [*citing* 1 Kent Comm. 74; 2 Kent Comm. 63; Bell *v.* Chapman, 10 Johns. (N. Y.) 183; Sparenburgh *v.* Bannatyne, 1 B. & P. 163]. Usually said of one domiciled or residing here pending the war, or seeking relief of some kind from our courts or the general government. Abbott L. Dict.; Rapalje & L. L. Dict. See, generally, WAR, for the law relating to alien enemies.

All aliens who are not friends are enemies. Alien enemies are either (1) temporary, or such as may become friends again; or (2) specially permitted, or commorant, in the enemy's country at the time of the suspension of amity; or (3) perpetual enemies, or all savage and barbarian tribes who have no social, commercial, or diplomatic relations with other nations, and who do not recognize the obligations of international law and comity. Heirn *v.* Bridault, 37 Miss. 209.

Birth, domicile, or residence.— The mere circumstance of birth, however, is not now held to be of itself sufficient to give the character of an alien enemy. Domicile or residence more frequently has this effect. The lawful residence, *pro hac vice*, relieves the alien from the character of an enemy. Burrill L. Dict. [*citing* 2 Kent Comm. 63]; Fish *v.* Stoughton, 2 Johns. Cas. (N. Y.) 407.

Distinction between permanent and temporary alien enemy.— A man is said to be permanently an alien enemy when he owes a permanent allegiance to the adverse belligerent,

II. ALIENAGE — HOW DETERMINED.[8]

The determination of the status of a person as being an alien may depend upon the fact of the birth of such person out of the jurisdiction and allegiance of the country.[9] It may likewise depend, under some circumstances, upon the

and his hostility is commensurate in point of time with his country's quarrel. But he who does not owe a permanent allegiance to the enemy is an enemy only during the existence and continuance of certain circumstances. Burrill L. Dict. [*citing* 1 Kent Comm. 73].

8. In Canada, the question of who is an alien is to be decided by the law of England, but, when alienage is established, the consequences which result from it are to be determined by the law of Canada. Donegani *v.* Donegani, 1 L. C. Rep. 605.

9. An alien by birth, *alien née*, generally speaking, is a foreigner, a person born abroad in a foreign country, as distinguished from a native or natural-born subject or citizen. Abbott L. Dict.; Black L. Dict.; Bouvier L. Dict.; Burrill L. Dict.; Jacob L. Dict.; Rapalje & L. L. Dict.; Wharton L. Lex.; 2 Kent Comm. 50; and the following cases:

Maryland.— Brown *v.* Shilling, 9 Md. 74.

South Carolina.— *Ex p.* Dupont, Harp. Eq. (S. C.) 5 [*reversed* on other grounds in Shanks *v.* Dupont, 3 Pet. (U. S.) 242, 7 L. ed. 666].

Vermont.— Albany *v.* Derby, 30 Vt. 718.

Virginia.— Barzizas *v.* Hopkins, 2 Rand. (Va.) 276.

United States.— U. S. *v.* Wong Kim Ark, 169 U. S. 649, 18 S. Ct. 456, 42 L. ed. 890, where the subject-matter of alienage by birth is elaborately discussed, and where it was held that a child, born in the United States of Chinese parents, who were then residing permanently in the United States, carrying on business and not being employed in any diplomatic or official capacity by the Empress of China, was not an alien, but a citizen by birth. There is an elaborate dissenting opinion by Fuller, C. J. and Harlan, J.

England.— Calvin's Case, 7 Coke 18*a*.

See also *infra*, cases cited in this note.

In England, at the common law, an alien was a person born out of the allegiance of the king, and this still remains the law, subject, of course, to the English statute upon naturalization. Anderson L. Dict.: 1 Bl. Comm. 366, 373; Bouvier L. Dict.: Burrill L. Dict. [*citing* 2 Stephen Comm. 426]; Coke Litt. 128*b*, 129*a*; Comyns Dig. 421; Jacob L. Dict.; 2 Kent Comm. 50; Doe *v.* Acklam, 2 B. & C. 779, 9 E. C. L. 337; Calvin's Case, 7 Coke 18*a*; Doe *v.* Davis, 5 U. C. Q. B. O. S. 494; Lynch *v.* Clark, 1 Sandf. Ch. (N. Y.) 583; *Ex p.* Dawson, 3 Bradf. Surr. (N. Y.) 130. "Every writer on the common law states two circumstances which must concur in order to make a man an alien in England: (1) He must be born out of the allegiance of the crown. (2) He must be born of parents who are not entitled to the privileges of natural-born subjects." Den *v.* Brown, 7 N. J. L. 305, 335 [*citing* Bacon Abr. 125].

But it has been said that this definition must be understood with some restrictions. 1 Bl. Comm. 373. For a review of English statutes affecting this definition see Jacob L. Dict.

In the United States an alien is a person born out of the jurisdiction and allegiance of the United States, and who has not been made a naturalized citizen. Abbott L. Dict.: Burrill L. Dict.: Rapalje & L. L. Dict.: Bouvier L. Dict.; 2 Kent Comm. 50; and the following cases:

California.— Matter of Guilford, 67 Cal. 380, 7 Pac. 763.

Kansas.— Buffington *v.* Grosvenor, 46 Kan. 730, 27 Pac. 137, 13 L. R. A. 282.

Massachusetts.— Ainslie *v.* Martin, 9 Mass. 454.

New York.— Ludlam *v.* Ludlam, 26 N. Y. 356, 84 Am. Dec. 193; McGregor *v.* McGregor, 33 How. Pr. (N. Y.) 456; Jackson *v.* Wright, 4 Johns. (N. Y.) 75.

Virginia.— Read *v.* Read, 5 Call (Va.) 160.

United States.— Blight *v.* Rochester, 7 Wheat. (U. S.) 535, 5 L. ed. 516; Fairfax *v.* Hunter, 7 Cranch (U. S.) 603, 3 L. ed. 453; Dawson *v.* Godfrey, 4 Cranch (U. S.) 321, 2 L. ed. 634; Contee *v.* Godfrey, 1 Cranch C. C. (U. S.) 479, 6 Fed. Cas. No. 3,140; Milne *v.* Huber, 3 McLean (U. S.) 212, 17 Fed. Cas. No. 9,617.

This definition includes persons born in a country prior to its becoming an independent government. Manchester *v.* Boston, 16 Mass. 230; Palmer *v.* Downer, 2 Mass. 179 note; Den *v.* Brown, 7 N. J. L. 305; Kelly *v.* Harrison, 2 Johns. Cas. (N. Y.) 29, 1 Am. Dec. 154 [*citing* Calvin's Case, 7 Coke 27*b*]; Jones *v.* McMasters, 20 How. (U. S.) 8, 15 L. ed. 805; McKinney *v.* Saviego, 18 How. (U. S.) 235, 15 L. ed. 365; Hollingsworth *v.* Duane, Wall. C. C. (U. S.) 51, 12 Fed. Cas. No. 6,615. But *compare infra*, note 10.

Children of ambassadors, however, constitute an exception to the rule. Abbott L. Dict.; Anderson L. Dict. [*citing* New Hartford *v.* Canaan, 54 Conn. 39, 5 Atl. 360]; Bouvier L. Dict.; Jacob L. Dict.; Rapalje & L. L. Dict.; Comyns Dig.; Calvin's Case, 7 Coke 18*a*.

Foreign-born wives of naturalized men in some cases constitute an exception to the rule of alienage by birth. Abbott L. Dict.; Rapalje & L. L. Dict. See also *infra*, V, I, 4.

Persons born in a foreign country, of American parents who resided there but never renounced their citizenship, are citizens of the United States, and not aliens. Ware *v.* Wisner, 50 Fed. 310. But see 1 Bl. Comm. 373; Jacob L. Dict.; *Ex p.* Dupont, Harp. Eq. (S. C.) 5; Doe *v.* Jones, 4 T. R. 300. To the same effect see Salter *v.* Hughes, 6 Nova Scotia 409, wherein it is said that the children and grandchildren of natural-born British subjects,

election,[10] such election being either express or implied, of such person. It may

though born in a foreign country, are not aliens. See also, generally, CITIZENS. And *compare* Albany *v.* Derby, 30 Vt. 718, wherein it was held that the offspring of a citizen of Vermont, born subsequent to April 14, 1802, in a foreign government, to which their father had removed *animo manendi*, and who returned with their father to the United States after they had become of age, were aliens.

10. Rapalje & L. L. Dict.

Alienage by election may take place under various conditions, such as where a country is divided into two independent sovereign countries, or where a dependent country proclaims and establishes its independence, or the like. See Carter *v.* Territory, 1 N. M. 317; Quintana *v.* Tompkins, 1 N. M. 29; Moore *v.* Wilson, 10 Yerg. (Tenn.) 406; Republic *v.* Skidmore, 2 Tex. 261, and cases cited *infra*, this note.

The status of citizenship of the United States arose with the Declaration of Independence, and those within the jurisdiction of the American states who at that time adhered to them, either by an express or implied consent, were absolved from allegiance to the British crown and became citizens of the United States (Orser *v.* Hoag, 3 Hill (N. Y.) 79; U. S. *v.* Wong Kim Ark, 169 U. S. 649, 18 S. Ct. 456, 42 L. ed. 890; Inglis *v.* Sailor's Snug Harbor, 3 Pet. (U. S.) 99, 7 L. ed. 617; McIlvaine *v.* Coxe, 2 Cranch (U. S.) 280, 2 L. ed. 279, 4 Cranch (U. S.) 209, 2 L. ed. 598), and aliens with respect to England (The Providence, Stewart 186). The subjects of Great Britain resident in the colonies upon the Declaration of Independence had a reasonable opportunity to elect as to whether they would remain subjects of Great Britain or would become subjects of the new sovereignty then created; and this election would be shown or presumed from some overt act, such as residence in this country, declaration of adherence to its allegiance, or the like. Inglis *v.* Sailor's Snug Harbor, 3 Pet. (U. S.) 99, 7 L. ed. 617. See also Jackson *v.* White, 20 Johns. (N. Y.) 313. The period of time which was allowed a person to elect to become a citizen of the United States has been variously limited; thus, in New York, it was held that an English subject, born abroad, who emigrated to the United States in 1779, and lived and died there, was an alien. Jackson *v.* Wright, 4 Johns. (N. Y.) 75. In the United States this change of allegiance and citizenship was held to have taken place at the date of the Declaration of Independence; but in Great Britain this state of facts is treated as having arisen at the date of the treaty of 1783, by the terms of which all those, whether natives or otherwise, who at that time adhered to the United States were virtually absolved from allegiance to the British crown. See McGregor *v.* Comstock, 16 Barb. (N. Y.) 427 [*affirmed* in 17 N. Y. 162]; Brown *v.* Sprague, 5 Den. (N. Y.) 545, construing treaty of 1783; and Harden *v.* Fisher, 1 Wheat. (U. S.) 300, 4 L. ed. 96, construing the treaty of 1794. *Compare*, also, Shanks *v.* Dupont, 3 Pet. (U. S.) 242, 7 L. ed. 666. The rule in the United States is, therefore, to take the date of the Declaration of Independence as the time when we ceased to be British subjects; the English rule is to take the date as that of the treaty of peace in 1783; so that, during the *interim*, a person apparently might have had the property rights of a citizen in both countries. Den *v.* Brown, 7 N. J. L. 305. *Compare* Moore *v.* Wilson, 10 Yerg. (Tenn.) 406, where natives of Scotland, who became residents, domiciled in the United States before the close of the Revolutionary War, were deemed *prima facie* not to be aliens under the treaty of 1783.

Persons, born in colonies, who left before the Revolution.— The decisions of the courts of the various states, as to the status of those who were born in the American colonies of Great Britain before the Revolution, and who, before the Declaration of Independence, removed from them and never returned, are inconsistent. In Inglis *v.* Sailor's Snug Harbor, 3 Pet. (U. S.) 99, 121, 7 L. ed. 617, 625, it is said: "The settled doctrine of this country is that a person born here, who left the country before the Declaration of Independence and never returned here, became thereby an alien." And to the same effect see Stringer *v.* Phillis, 3 N. C. 342; *Ex p.* Dupont, Harp. Eq. (S. C.) 5; Clifton *v.* Haig, 4 Desauss. (S. C.) 330; Com. *v.* Bristow, 6 Call (Va.) 60. In Massachusetts the question was first raised in Gardner *v.* Ward, 2 Mass. 244 note [*affirmed* in Kilham *v.* Ward, 2 Mass. 236], where it was apparently held that a person born here before the Declaration of Independence would not become an alien even had he removed before the Declaration of Independence and never returned. And in Ainslie *v.* Martin, 9 Mass. 454, this was expressly decided to be the law, although the other two cases were not there referred to. *Compare*, also, Hollingsworth *v.* Duane, Wall. C. C. (U. S.) 51, 12 Fed. Cas. No. 6,615, wherein it was held that one who was born within the colony of New York, in the year 1760, and removed to Ireland in 1771, and at the Declaration of Independence was settled as an inhabitant within the British dominions, where he remained until 1795, when he returned to America, was to be considered an alien. To the same effect, with respect to the Texas declaration of independence. see Jones *v.* McMasters, 20 How. (U. S.) 8, 15 L. ed. 805.

Persons born abroad, who came to the United States after the Revolution.— While there is no question as to the alienage of a person who was born in England before the year 1775 and always resided there (Jackson *v.* Burns, 3 Binn. (Pa.) 75; Clifton *v.* Haig, 4 Desauss. (S. C.) 330; Dawson *v.* Godfrey, 4 Cranch (U. S.) 321, 2 L. ed. 634; Abbott L. Dict. [*citing* Blight *v.* Rochester, 7 Wheat.

also depend on operation of law, by which the status of such person is changed without regard to his volition.[11]

III. Evidence of Alienage.

A. Presumption.[12] Foreigners by birth are presumed to be aliens.[13] The status of a person as to alienage, when once established, is presumed to continue until the contrary is proven.[14]

B. Burden of Proof. The burden of proving alienage is upon him who asserts it.[15]

C. Admissibility. It has been held that a person's own statements are

(U. S.) 535, 5 L. ed. 516; Fairfax *v.* Hunter, 7 Cranch (U. S.) 603, 3 L. ed. 453; Contee *v.* Godfrey, 1 Cranch C. C. (U. S.) 479, 6 Fed. Cas. No. 3,140]), in Cummington *v.* Springfield, 2 Pick. (Mass.) 394, it was held that persons born abroad and coming into Massachusetts after 1776 and before 1783 were citizens. This decision was based upon an act passed in 1777. And the same rule was adopted in Connecticut, without being based upon any statute, and it was held that a British soldier who settled in Connecticut in 1778, having deserted from the British army, was a citizen. Hebron *v.* Colchester, 5 Day (Conn.) 169.

Expatriation and naturalization.— To this class of aliens belong those persons who have availed themselves of the right to become aliens by expatriation or by being naturalized as citizens of another country. Rapalje & L. L. Dict.

For naturalization see *infra*, V.

For expatriation see Citizens.

11. Alienage by operation of law arises where a person performs some act, or some change of dominion or sovereignty takes place, by which the status of the person is changed without regard to his volition. Thus, when a portion of a country is ceded to another country, the inhabitants of the ceded territory, generally speaking, become aliens to the sovereignty of which they formerly were subjects, and subjects of the sovereignty to which the territory is ceded. Abbott L. Dict. But *compare* on this point State *v.* Primrose, 3 Ala. 546; Com. *v.* Bristow, 6 Call (Va.) 60.

Alienage by marriage.— Whether a woman, who marries an alien and withdraws from her own country to reside with him, can by so doing, in the absence of statutory provision, become an alien and acquire allegiance to the sovereignty of her husband is not clear. The case of Kelly *v.* Harrison, 2 Johns. Cas. (N. Y.) 29, 1 Am. Dec. 154, proceeds upon the theory that this is so; but since the incapacities of the *feme covert* at common law do not reach her political rights, which stand upon the general principles of the law of nations, it seems doubtful whether this be the true construction of the law. White *v.* White, 2 Metc. (Ky.) 185; Alsberry *v.* Hawkins, 9 Dana (Ky.) 177, 33 Am. Dec. 546; Connolly *v.* Smith, 21 Wend. (N. Y.) 59; Priest *v.* Cummings, 16 Wend. (N. Y.) 617. *Compare* Headman *v.* Rose, 63 Ga. 458; Moore *v.* Tisdale, 5 B. Mon. (Ky.) 352. It has been held, however, that an alien woman who has once become an American citizen by operation of law — namely, by a marriage which is subsequently dissolved — may resume her alienage by a marriage to an unnaturalized native of her own country. Pequignot *v.* Detroit, 16 Fed. 211.

For matters relating to the alienage or citizenship of an alien woman who marries a citizen, as well as of a citizen woman who marries an alien, see, generally, Citizens.

12. See *infra*, III, D; V; and 2 Cent. Dig. tit. "Aliens," §§ 2, 3.

13. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; White *v.* White, 2 Metc. (Ky.) 185. *Compare* State *v.* Olin, 23 Wis. 309, wherein it was held that the fact that three years have expired since a person of foreign birth "declared his intention" does not raise a presumption that he has actually become a citizen. See also Trabing *v.* U. S., 32 Ct. Cl. 440, wherein it is held that an application for naturalization negatives any presumption of existing citizenship of the applicant.

14. Kadlec *v.* Pavik, 9 N. D. 278, 83 N. W. 5; Hauenstein *v.* Lynham, 100 U. S. 483, 25 L. ed. 628, wherein it was held that, in the absence of proof that an alien has become a citizen of the United States, his alienage is presumed to continue.

This presumption may be rebutted by proper evidence. Kadlec *v.* Pavik, 9 N. D. 278, 83 N. W. 5, wherein it was held that proof that the person voted in this country overcomes the presumption of alienage, and raises a presumption of naturalization. *Compare*, also, Ryan *v.* Egan, 156 Ill. 224, 40 N. E. 827; Boyd *v.* Nebraska, 143 U. S. 135, 12 S. Ct. 375, 36 L. ed. 103, on the question of voting as evidence of naturalization or citizenship. See also, generally, *infra*, V, H; and Citizens.

15. State *v.* Haynes, 54 Iowa 109, 6 N. W. 156; Moore *v.* Wilson, 10 Yerg. (Tenn.) 406, Richards *v.* Moore, 60 Vt. 449, 15 Atl. 119; Keenan *v.* State, 8 Wis. 132. But see White *v.* White, 2 Metc. (Ky.) 185, 190, wherein it was said that certain persons "being foreigners by birth, they were *prima facie* aliens, and the plaintiff was not bound to prove that they were aliens, although it was denied, but it was incumbent on the defendant to show that they were citizens of the United States, and not aliens." To the same effect see Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704 [*citing* Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; Beardstown *v.* Virginia, 81 Ill. 541].

admissible to establish his alienage.[16] Documentary evidence may be received to establish the alienage of a person.[17]

D. Weight and Sufficiency.[18] The sufficiency of the evidence is to be determined for each case.[19] The mere fact that a person is a consul of a foreign government and is residing in this country,[20] or that he resided abroad for a number of years,[21] has been held insufficient to establish a *prima facie* case of alienage.

IV. PRIVILEGES AND DISABILITIES.

A. In General.[22] While the rights of aliens depend entirely upon the municipal law of the state or nation, or the rights which are given aliens by international law,[23]

16. Groves *v.* Gordon, 3 Brev. (S. C.) 245, holding, however, that such is not the best evidence. But see Schuster *v.* State, 80 Wis. 107, 49 N. W. 30, where such declarations were held to be mere hearsay, and inadmissible. *Compare infra*, V, H.

The best evidence which the nature of the case admits must be produced to show alienage. Keenan *v.* State, 8 Wis. 132.

17. Newcomb *v.* Newcomb, (Ky. 1900) 57 S. W. 2 (where a certificate of naturalization in a foreign country was admitted in evidence for this purpose); Lacoste *v.* Odam, 26 Tex. 458 (wherein it was held that recitals in a deed that the vendees were residents of one of the states of the United States were admissible to establish the fact that they were aliens to the republic of Mexico).

18. See *supra*, III, A.

19. *California.*—Walther *v.* Rabolt, 30 Cal. 185.

Illinois.— Ryan *v.* Egan, 156 Ill. 224, 40 N. E. 827; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

Kentucky.— Moore *v.* Tisdale, 5 B. Mon. (Ky.) 352.

Massachusetts.—Dennis *v.* Brewster, 7 Gray (Mass.) 351.

Mississippi.— Torre *v.* Jeannin, 76 Miss. 898, 25 So. 860.

New Mexico.— Carter *v.* Territory, 1 N. M. 317.

New Jersey.— Coxe *v.* Gulick, 10 N. J. L. 328.

South Carolina.— Groves *v.* Gordon, 3 Brev. (S. C.) 245.

Texas.— Ferguson *v.* Johnson, 11 Tex. Civ. App. 413, 33 S. W. 138.

Vermont.—Gilman *v.* Thompson, 11 Vt. 643, 34 Am. Dec. 714.

Wisconsin.—Schuster *v.* State, 80 Wis. 107, 49 N. W. 30; Keenan *v.* State, 8 Wis. 132.

United States.— Boyd *v.* Nebraska, 143 U. S. 135, 12 S. Ct. 375, 36 L. ed. 103; Börs *v.* Preston, 111 U. S. 252, 4 S. Ct. 407, 28 L. ed. 419; Trabing *v.* U. S., 32 Ct. Cl. 440.

Canada.—Brannen *v.* Leavitt, 6 N. Brunsw. 220; Brannen *v.* Williams, 6 N. Brunsw. 221; Iler *v.* Elliott, 32 U. C. Q. B. 434.

See also, generally, CITIZENS.

Evidence should be conclusive.— Evidence of alienage, by which it is sought to disfranchise a party, should be clear and conclusive (Jones *v.* McCoy, 3 Tex. 349; Williams *v.* Myers, 2 Nova Scotia Dec. 157); and it is held that a person's own statements are not conclusive to establish his alienage or citizenship (Groves *v.* Gordon, 3 Brev. (S. C.) 245; Lacoste *v.* Odam, 26 Tex. 458; Schuster *v.* State, 80 Wis. 107, 49 N. W. 30). *Compare*, also, State *v.* Burnett, 9 Tex. 48, wherein it was decided that the admission of plaintiff (an *empresario*) that the parties in interest, for whose use he sued, at that time resided in the state of New York did not authorize the presumption that they were aliens when the statute authorizing aliens to sue was passed.

Preponderance of evidence.— Sufficiency of the evidence by which proof of change of status by naturalization or otherwise is sought to be established depends upon the ordinary rules of evidence, in most cases being dependent upon the presentation of such evidence as constitutes a preponderance for or against the fact of alienage. Thus, in Maloy *v.* Duden, 25 Fed. 673, it was held that an official passport, certifying to the naturalization of a person, was amply sufficient to establish *prima facie* that the requirements of the English naturalization statutes had been complied with; and in Walther *v.* Rabolt, 30 Cal. 185, it was held that proof that a German person, of German parentage, lived with his parents in Germany until six years old, that he came to the United States when seventeen or eighteen years old, and did not then speak English, and that his father had died in Germany when he was six or eight years old, is sufficient evidence to raise a presumption that he was alien-born.

20. Börs *v.* Preston, 111 U. S. 252, 4 S. Ct. 407, 28 L. ed. 419.

21. Ferguson *v.* Johnson, 11 Tex. Civ. App. 413, 33 S. W. 138; Gilman *v.* Thompson, 11 Vt. 643, 34 Am. Dec. 714. But see Moore *v.* Tisdale, 5 B. Mon. (Ky.) 352, wherein it was held that the removal of a wife, with her husband, from the United States, and her remaining abroad with her husband, who had renounced his citizenship in, and died out of, the United States, raised the presumption of alienage of the wife, which presumption, however, was rebutted by the fact that, within a short time after his death, she returned to the United States, with no intention of leaving the country.

22. See 2 Cent. Dig. tit. "Aliens," § 4.

23. Jacob L. Dict.; Heirn *v.* Bridault, 37 Miss. 209.

"It is . . . a legal and political axiom that 'protection and allegiance are reciprocal.' . . . Aliens resident, or sojourning here, do not owe the full measure of allegiance exacted from the citizen, nor can they enjoy

in the United States, except as to certain political and municipal rights[24] to which citizens only are entitled,[25] resident[26] alien friends[27] have practically all and the same rights and privileges as citizens.[28] These rights and privileges include both personal rights — such as the right to dwell safely in the country,[29] and the right of protection to person, reputation, and other relative rights[30] — and property rights.[31]

B. In Relation to Personalty. Aliens may take and hold personal property in the same manner as citizens,[32] this including taking by succession as

all the rights, privileges, and immunities of citizenship. Yet they owe a qualified, local, temporary allegiance. They are bound to obedience to all general laws for the maintenance of peace and the preservation of order. If guilty of any illegal act, or involved in any dispute with our citizens, or with each other, they are amenable to the ordinary tribunals of the country. In return for the qualified allegiance demanded of them a corresponding protection to life, liberty, and property is extended to them." Luke *v.* Calhoun County, 52 Ala. 115, 121. See also *infra*, IV, D.

Former citizens of the United States, who have by naturalization become British subjects, are, while domiciled in the United States, entitled by treaty to all the rights of native-born British subjects. Newcomb *v.* Newcomb, (Ky. 1900) 57 S. W. 2.

24. Political rights. — An alien has no political rights except those expressly conferred by the statutes or other laws of the country. Borst *v.* Beecker, 6 Johns. (N. Y.) 332; Opinion of Justices, 122 Mass. 594; Opinion of Justices, 7 Mass. 523.

For right of alien to vote see ELECTIONS.

For right of alien to hold office see OFFICERS.

25. Taylor *v.* Carpenter, 2 Woodb. & M. (U. S.) 1, 23 Fed. Cas. No. 13,785. See also, generally, GRAND JURIES; JURIES.

26. A statute cannot impose duties upon a non-resident alien, but it may confer rights upon him. Mulhall *v.* Fallon, 176 Mass. 266, 57 N. E. 386.

27. Alien enemies have no rights and no privileges, unless by the king's special favor during time of war. 1 Bl. Comm. 373. See also WAR.

28. Taylor *v.* Carpenter, 3 Story (U. S.) 458, 23 Fed. Cas. No. 13,784, Cox Am. Trade-Mark Cas. 14; Taylor *v.* Carpenter, 2 Woodb. & M. (U. S.) 1, 23 Fed. Cas. No. 13,785.

Like protection of their rights may be claimed by alien friends as by citizens. Taylor *v.* Carpenter, 3 Story (U. S.) 458, 23 Fed. Cas. No. 13,784, Cox Am. Trade-Mark Cas. 14. See also *infra*, IV, D.

May be taxed. — In return for the protection afforded an alien at common law with respect to his person, his property, his relative rights, and his reputation, he is required to pay taxes. Anderson L. Dict. See also, generally, TAXATION.

A mere license or privilege, however, that may be given to an alien, which license or privilege is personal and untransferable in its nature, is held at the will of the government, and is revocable at any time at its pleasure. Chae Chan Ping *v.* U. S., 130 U. S. 581, 9 S. Ct. 623, 32 L. ed. 1068.

29. Comyns Dig. 426.

30. Anderson L. Dict.

The fourteenth amendment of the federal constitution protects resident alien Chinese. Yick Wo *v.* Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. ed. 220; *In re* Ah Chong, 6 Sawy. (U. S.) 451, 2 Fed. 733; Ho Ah Kow *v.* Numan, 5 Sawy. (U. S.) 552, 12 Fed. Cas. No. 6,546 (holding unconstitutional an ordinance which declared that every male person imprisoned in the county jail, under the judgment of any court having jurisdiction in criminal cases in the city and county, should immediately upon his arrival at the jail have the hair of his head "cut or clipped to an uniform length of one inch from the scalp thereof);" *In re* Ah Fong, 3 Sawy. (U. S.) 144, 1 Fed. Cas. No. 102. See also Fong Yue Ting *v.* U. S., 149 U. S. 698, 13 S. Ct. 1016, 37 L. ed. 905, wherein it is said that Chinese laborers residing in the United States are entitled, like all other aliens, so long as they are permitted by the government to remain in the country, to all the safeguards of the constitution, and to the protection of the laws in regard to their rights of person and of property, and to their civil and criminal responsibility.

Treaties guaranteeing personal rights to aliens are paramount to statutes attempting to restrict these rights. People *v.* Warren, 13 Misc. (N. Y.) 615, 34 N. Y. Suppl. 942, 69 N. Y. St. 167: *In re* Quong Woo, 7 Sawy. (U. S.) 526, 13 Fed. 229; *In re* Ah Chong, 6 Sawy. (U. S.) 451, 2 Fed. 733; *In re* Parrott, 6 Sawy. (U. S.) 349, 1 Fed. 481; Baker *v.* Portland, 5 Sawy. (U. S.) 566, 2 Fed. Cas. No. 777 [*citing* Chapman *v.* Toy Long, 4 Sawy. (U. S.) 28, 5 Fed. Cas. No. 2,610]. But treaties securing general rights to aliens, on the same footing as citizens, do not take away from the government the right to make laws giving special rights of action to its own citizens, to the exclusion of aliens against itself (Valk *v.* U. S., 29 Ct. Cl. 62), or to constitutionally regulate and restrict alike the rights of all persons, alien or citizen (Baldwin *v.* Goldfrank, 88 Tex. 249, 31 S. W. 1064).

31. For the personal property rights of aliens see *infra*, IV, B.

For the real property rights of aliens see *infra*, IV, C.

32. Bouvier L. Dict. [*citing* Calvin's Case, 7 Coke 17]; Jacob L. Dict.; 1 Bl. Comm. 372; Comyns Dig. 428. See also to the same effect:

Connecticut. — Crosgrove *v.* Crosgrove, 69 Conn. 416, 38 Atl. 219; Evans' Appeal, 51 Conn. 435.

Georgia. — Kerr *v.* White, 52 Ga. 362.

Iowa. — Meier *v.* Lee, 106 Iowa 303, 76 N. W. 712.

next of kin or a distributive share.[33] An alien may make and enforce contracts in relation to his personal estate.[34]

C. In Relation to Real Property — 1. At Common Law — a. Acquired by Act of Parties — (1) *In General.* At common law an alien may take land by act of the parties,[35] and hold the same against all persons, subject only to the right of the state to claim it by escheat upon office found, or some act of the state equivalent to an office found;[36] and, until office found, he may either dispose of his

Louisiana.— Richmond *v.* Milne, 17 La. 312, 36 Am. Dec. 613, under the laws of Scotland.

Maryland.— Corrie's Case, 2 Bland (Md.) 488.

Missouri.— Greenia *v.* Greenia, 14 Mo. 526.

New York.— Ludlow *v.* Van Ness, 8 Bosw. (N. Y.) 178.

Pennsylvania.— Com. *v.* Detwiller, 131 Pa. St. 614, 18 Atl. 990, 7 L. R. A. 357.

Texas.— Franco-Texan Land Co. *v.* Chaptive, (Tex. 1886) 3 S. W. 31.

See 2 Cent. Dig. tit. "Aliens," § 59.

The reason for this has been said to be based upon the fact that "personal estate is of a transitory and movable nature; and, besides, this indulgence to strangers is necessary for the advancement of trade." 1 Bl. Comm. 372.

A chattel mortgage may be given to an alien. Comstock *v.* Harris, 13 Ont. 407.

"Real estate" has been held to include both real and personal property, under a statute giving aliens the capacity to take, recover, and transmit "real estate" as citizens. Corse *v.* Corse, 4 L. C. Rep. 310.

33. *Connecticut.*— Crosgrove *v.* Crosgrove, 69 Conn. 416, 38 Atl. 219; Evans' Appeal, 51 Conn. 435.

Iowa.— Greenheld *v.* Morrison, 21 Iowa 538.

Louisiana.—Richmond *v.* Milne, 17 La. 312, 36 Am. Dec. 613, under the laws of Scotland.

Missouri.— Harney *v.* Donohoe, 97 Mo. 141, 10 S. W. 191.

New York.—Meakings *v.* Cromwell, 5 N. Y. 136; Beck *v.* McGillis, 9 Barb. (N. Y.) 35; Bradwell *v.* Weeks, 1 Johns. Ch. (N. Y.) 206.

South Carolina.— Megrath *v.* Robertson, 1 Desauss. (S. C.) 445 [*citing* Slanning *v.* Style, 3 P. Wms. 336].

Tennessee.— Polk *v.* Ralston, 2 Humphr. (Tenn.) 537.

United States.— McLearn *v.* Wallace, 10 Pet. (U. S.) 625, 9 L. ed. 559; Craig *v.* Leslie, 3 Wheat. (U. S.) 563, 4 L. ed. 460.

England.—Fourdrin *v.* Gowdey, 3 Myl. & K. 383, 10 Eng. Ch. 383.

Canada.— Corse *v.* Corse, 4 L. C. Rep. 310.

Compare also Muus *v.* Muus, 29 Minn. 115, 12 N. W. 343.

As a rule real estate cannot be sold to enforce the payment of legacies to aliens (Atkins *v.* Kron, 37 N. C. 423), nor for the purpose of paying debts of the estate so as to preserve the personal property over to aliens to whom it has been bequeathed (Trezevant *v.* Howard, 3 Desauss. (S. C.) 87). But land may be conveyed or devised in trust to a citizen for the purpose of being sold, and the proceeds paid over to an alien. See *infra*, note 46.

Legacy to be invested in land for the benefit of aliens is void at common law. Beekman *v.* Bonsor, 23 N. Y. 298, 80 Am. Dec. 269.

A donation causa mortis, under Merrick's Civ. Code La. (1900), art. 1477, may be made in favor of a foreigner. Mager's Succession, 12 Rob. (La.) 584; Richmond *v.* Milne, 17 La. 312, 36 Am. Dec. 613.

34. Bouvier L. Dict. [*citing* Calvin's Case, 7 Coke 17]. See also Richmond *v.* Milne, 17 La. 312, 36 Am. Dec. 613, for the rule under the laws of Scotland. See also *infra*, IV, D.

35. Smith *v.* Zaner, 4 Ala. 99; Gray *v.* Kauffman, 82 Tex. 65, 17 S. W. 513; Orr *v.* Hodgson, 4 Wheat. (U. S.) 453, 4 L. ed. 613.

Act of parties distinguished from act of law.— By the common law an alien may take lands by purchase, though not by descent; in other words, while he cannot take by the act of the law he may take by the act of the party. But he has no capacity to hold lands, and they may be seized into the hands of the sovereign. Until so seized, the alien has complete dominion over them. In this regard alien friends and alien enemies are alike. Anderson L. Dict.

36. Bouvier L. Dict.; Comyns Dig. 425. To the same effect see the following cases:

Alabama.— Smith *v.* Zaner, 4 Ala. 99.

California.— Racouillat *v.* Sansevain, 32 Cal. 376; Norris *v.* Hoyt, 18 Cal. 217.

District of Columbia.— Johnson *v.* Elkins, 1 App. Cas. (D. C.) 430.

Montana.— Quigley *v.* Birdseye, 11 Mont. 439, 28 Pac. 741.

Nebraska.— Carlow *v.* Aultman, 28 Nebr. 672, 44 N. W. 873.

New York.— Wright *v.* Saddler, 20 N. Y. 320.

North Carolina.— Doe *v.* Horniblea, 3 N. C. 197; Bayard *v.* Singleton, 1 N. C. 42.

Texas.— Gray *v.* Kauffman, 82 Tex. 65, 17 S. W. 513; Williams *v.* Bennett, 1 Tex. Civ. App. 498, 20 S. W. 856.

Vermont.—See State *v.* Boston, etc., R. Co., 25 Vt. 433.

Washington.— Oregon Mortg. Co. *v.* Carstens, 16 Wash. 165, 47 Pac. 421, 35 L. R. A. 841.

United States.—Manuel *v.* Wulff, 152 U. S. 505, 14 S. Ct. 651, 38 L. ed. 532; Phillips *v.* Moore, 100 U. S. 208, 25 L. ed. 603; Governeur *v.* Robertson, 11 Wheat. (U. S.) 332, 6 L. ed. 488; Randall *v.* Jaques, 20 Fed. Cas. No. 11,553, 4 Quart. L. J. 218; Hammekin *v.* Clayton, 2 Woods (U. S.) 336, 11 Fed. Cas. No. 5,996.

See also cases cited *infra*, notes 39, 40; and 2 Cent. Dig. tit. "Aliens," § 6 *et seq.*

The state or government only can question the right of an alien to take and hold land.

California.— Norris *v.* Hoyt, 18 Cal. 217;

interest by conveyance,[37] or dispose of it by devise, notwithstanding the fact of his alienage.[38]

(II) *PURCHASE OR DEVISE.* Within the rule just stated the right of an alien to take title to real estate by purchase and hold till office found was recognized at common law;[39] and taking by purchase has been held to include taking by

People *v.* Folsom, 5 Cal. 373; Ramires *v.* Kent, 2 Cal. 558.

District of Columbia.— Johnson *v.* Elkins, 1 App. Cas. (D. C.) 430.

Montana.— Quigley *v.* Birdseye, 11 Mont. 439, 28 Pac. 741.

New York.— Belden *v.* Wilkinson, 33 Misc. (N. Y.) 659, 68 N. Y. Suppl. 205 [*citing* Munro *v.* Merchant, 28 N. Y. 9; Wadsworth *v.* Wadsworth, 12 N. Y. 376; People *v.* Conklin, 2 Hill (N. Y.) 67; Scott *v.* Thorpe, 1 Edw. (N. Y.) 512; Governeur *v.* Robertson, 11 Wheat. (U. S.) 332, 6 L. ed. 488].

Texas.— Gray *v.* Kauffman, 82 Tex. 65, 17 S. W. 513.

Vermont.— But see State *v.* Boston, etc., R. Co., 25 Vt. 433, wherein it is said that the right to interfere with aliens holding land belongs to the national, and not to the state, sovereignty.

Washington.— Goon Gan *v.* Richardson, 16 Wash. 373, 47 Pac. 762; Oregon Mortg. Co. *v.* Carstens, 16 Wash. 165, 47 Pac. 421, 35 L. R. A. 841.

United States.— Manuel *v.* Wulff, 152 U. S. 505, 14 S. Ct. 651, 38 L. ed. 532; Phillips *v.* Moore, 100 U. S. 208, 25 L. ed. 603; Airhart *v.* Massieu, 98 U. S. 491, 25 L. ed. 213. See also Jones *v.* McMasters, 20 How. (U. S.) 8, 15 L. ed. 805.

Under the civil law, it seems, the same rule obtains. Racouillat *v.* Sansevain, 32 Cal. 376.

Acts similar to office found may be sufficient to invest title of an alien acquired by purchase. McCreery *v.* Allender, 4 Harr. & M. (Md.) 409. Proceedings by office found are abolished and ejectment is provided by the code as the first remedy. Renner *v.* Muller, 57 How. Pr. (N. Y.) 229. An act of assembly, passed during a war and confiscating the property of an alien enemy by name, is at least as effectual in vesting the property in the state as any office found, according to the practice in England. Bayard *v.* Singleton, 1 N. C. 42. See also New York Indians *v.* U. S., 170 U. S. 1, 18 S. Ct. 531, 42 L. ed. 927 [*citing* Atlantic, etc., R. Co. *v.* Mingus, 165 U. S. 413, 17 S. Ct. 348, 41 L. ed. 770], where a legislative act directly taking lands was held equivalent to an office found.

For the procedure relating to office found see Atty.-Gen. *v.* Duplessis, 1 Bro. P. C. 415, 2 Ves. 286; Comyns Dig. 427.

Vested rights in real property in the United States, acquired by British subjects before the Revolution, may be held by them notwithstanding their alienage. Apthorp *v.* Backus, Kirby (Conn.) 407, 1 Am. Dec. 26; Jackson *v.* Lunn, 3 Johns. Cas. (N. Y.) 109. But *compare* U. S. *v.* De Repentigny, 5 Wall. (U. S.) 211, 18 L. ed. 627, *infra*, note 48.

37. Bouvier L. Dict.; and the following cases:

Arkansas.— Jones *v.* Minogue, 29 Ark. 637.

California.— Matter of Leopold, 67 Cal. 385, 7 Pac. 766.

Connecticut.— Whiting *v.* Stevens, 4 Conn. 44.

Indiana.— State *v.* Witz, 87 Ind. 190; Halstead *v.* Lake County, 56 Ind. 363.

Massachusetts.— Waugh *v.* Riley, 8 Metc. (Mass.) 290; Sheaffe *v.* O'Neil, 1 Mass. 256.

Montana.— Quigley *v.* Birdseye, 11 Mont. 439, 28 Pac. 741.

New Hampshire.— Montgomery *v.* Dorion, 7 N. H. 475.

New York.— Goodrich *v.* Russell, 42 N. Y. 177; Jackson *v.* Adams, 7 Wend. (N. Y.) 367.

South Carolina.— McCaw *v.* Galbraith, 7 Rich. (S. C.) 74; Kottman *v.* Ayer, 1 Strobh. (S. C.) 552; Jenney *v.* Laurens, 1 Speers (S. C.) 356; Groves *v.* Gordon, 3 Brev. (S. C.) 245.

Tennessee.—Baker *v.* Shy, 9 Heisk. (Tenn.) 85; Williams *v.* Wilson, Mart. & Y. (Tenn.) 248.

Texas.— Cryer *v.* Andrews, 11 Tex. 170.

Virginia.—Stephen *v.* Swann, 9 Leigh (Va.) 404; Marshall *v.* Conrad, 5 Call (Va.) 364.

United States.— De Franca *v.* Howard, 21 Fed. 774; Robertson *v.* Miller, 1 Brock. (U. S.) 466, 20 Fed. Cas. No. 11,926.

The state cannot convey or release to a stranger until after office found. Maynard *v.* Maynard, 36 Hun (N. Y.) 227.

38. Richmond *v.* Milne, 17 La. 312, 36 Am. Dec. 613 (under the laws of Scotland); Williams *v.* Wilson, Mart. & Y. (Tenn.) 248; Wallace *v.* Hewitt, 20 U. C. Q. B. 87; Wallace *v.* Adamson, 10 U. C. C. P. 338. See also Iler *v.* Elliott, 32 U. C. Q. B. 434, and Irwin *v.* McBride, 23 U. C. Q. B. 570.

39. Anderson L. Dict.; Jacob L. Dict.; 1 Bl. Comm. 372; Comyns Dig. 427; and the following cases:

Alabama.—Donovan *v.* Pitcher, 53 Ala. 411, 25 Am. Rep. 634; Harley *v.* State, 40 Ala. 689.

California.— Ferguson *v.* Neville, 61 Cal. 356.

Georgia.— Fitzgerald *v.* Garvin, T. U. P. Charlt. (Ga.) 281.

Illinois.— Wunderle *v.* Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84.

Indiana.—Halstead *v.* Lake County, 56 Ind. 363.

Iowa.— Purcell *v.* Smidt, 21 Iowa 540.

Kentucky.— Murray *v.* Fishback, 5 B. Mon. (Ky.) 403; Dudley *v.* Grayson, 6 T. B. Mon. (Ky.) 259; Elmondorff *v.* Carmichael, 3 Litt. (Ky.) 472, 14 Am. Dec. 86.

Louisiana.— Rabasse's Succession, 47 La. Ann. 1452, 17 So. 867, 49 Am. St. Rep. 433; Thompson's Succession, 9 La. Ann. 96.

Maine.— Mussey *v.* Pierre, 24 Me. 559.

Maryland.— Guyer *v.* Smith, 22 Md. 239,

devise.[40] Numerous authorities also hold that the word "purchase" includes

85 Am. Dec. 650; McCreery *v.* Allender, 4 Harr. & M. (Md.) 409; Cunningham *v.* Browning, 1 Bland (Md.) 299.

Massachusetts.— Piper *v.* Richardson, 9 Metc. (Mass.) 155; Scanlan *v.* Wright, 13 Pick. (Mass.) 523, 25 Am. Dec. 344; Com. *v.* André, 3 Pick. (Mass.) 224.

Michigan.— Crane *v.* Reeder, 21 Mich. 24, 4 Am. Rep. 430.

Montana.— Quigley *v.* Birdseye, 11 Mont. 439, 28 Pac. 741; Wulf *v.* Manuel, 9 Mont. 279, 23 Pac. 723; Tibbitts *v.* Ah Tong, 4 Mont. 536, 2 Pac. 759.

Nebraska.— Carlow *v.* Aultman, 28 Nebr. 672, 44 N. W. 873.

Nevada.— Courtney *v.* Turner, 12 Nev. 345.

New Hampshire.— Montgomery *v.* Dorion, 7 N. H. 475.

New York.— Munro *v.* Merchant, 28 N. Y. 9; Wright *v.* Saddler, 20 N. Y. 320; Heeney *v.* Brooklyn Benev. Soc., 33 Barb. (N. Y.) 360; Overing *v.* Russell, 32 Barb. (N. Y.) 263; Bradstreet *v.* Oneida County, 13 Wend. (N. Y.) 546; Goodell *v.* Jackson, 20 Johns. (N. Y.) 693, 11 Am. Dec. 351; Mooers *v.* White, 6 Johns. Ch. (N. Y.) 360; Matter of Windle, 2 Edw. (N. Y.) 585.

North Carolina.— University Trustees *v.* Miller, 14 N. C. 188; Doe *v.* Horniblea, 3 N. C. 197; Bayard *v.* Singleton, 1 N. C. 42.

South Carolina.—McClenaghan *v.* McClenaghan, 1 Strobh. Eq. (S. C.) 295, 47 Am. Dec. 532; Groves *v.* Gordon, 3 Brev. (S. C.) 245.

Tennessee.—Williams *v.* Wilson, Mart. & Y. (Tenn.) 248.

Texas.— Barrett *v.* Kelly, 31 Tex. 476; Clay *v.* Clay, 26 Tex. 24; Williams *v.* Bennett, 1 Tex. Civ. App. 498, 20 S. W. 856.

Vermont.— State *v.* Boston, etc., R. Co., 25 Vt. 433.

Virginia.— Sands *v.* Lynham, 27 Gratt. (Va.) 291, 21 Am. Rep. 348; Ferguson *v.* Franklins, 6 Munf. (Va.) 305.

Washington.— Oregon Mortg. Co. *v.* Carstens, 16 Wash. 165, 47 Pac. 421, 35 L. R. A. 841.

United States.— Osterman *v.* Baldwin, 6 Wall. (U. S.) 116, 18 L. ed. 730; Governeur *v.* Robertson, 11 Wheat. (U. S.) 332, 6 L. ed. 488; Hughes *v.* Edwards, 9 Wheat. (U. S.) 489, 6 L. ed. 142; Society, etc. *v.* New Haven, 8 Wheat. (U. S.) 464, 5 L. ed. 662; Hepburn *v.* Dunlop, 1 Wheat. (U. S.) 179, 4 L. ed. 65; Robertson *v.* Miller, 1 Brock. (U. S.) 466, 20 Fed. Cas. No. 11,926; Society, etc. *v.* Wheeler, 2 Gall. (U. S.) 105, 22 Fed. Cas. No. 13,156; Stokes *v.* Dawes, 4 Mason (U. S.) 268, 23 Fed. Cas. No. 13,477; Farmers' L. & T. Co. *v.* McKinney, 6 McLean (U. S.) 1, 8 Fed. Cas. No. 4,667.

England.— Burk *v.* Brown, 2 Atk. 397; Theobolds *v.* Duffoy, 9 Mod. 104.

Canada.— Irwin *v.* McBride, 23 U. C. Q. B. 570; Doe *v.* Cleveland, 6 U. C. Q. B. O. S. 117; Murray *v.* Heron, 7 Grant Ch. (U. C.) 177; Doe *v.* Dickson, 2 U. C. Jur. 326.

See 2 Cent. Dig. tit. "Aliens," § 11 *et seq.*

Mortgages of real estate are within the rule. Richmond *v.* Milne, 17 La. 312, 36 Am. Dec. 613; Goon Gan *v.* Richardson, 16 Wash. 373, 47 Pac. 762; Hughes *v.* Edwards, 9 Wheat. (U. S.) 489, 6 L. ed. 142.

Compare Oregon Mortg. Co. *v.* Carstens, 16 Wash. 165, 47 Pac. 421, 35 L. R. A. 841, wherein it was held that a constitutional provision declaring void "all conveyances of lands hereafter made to any alien, directly or in trust for such alien," does not apply to cases in which a citizen deeds to an alien mortgaged lands in satisfaction of a *bona fide* mortgage debt, since another section of the same constitutional provision excepts from the prohibition upon alien ownership lands acquired "under mortgage or in good faith in the ordinary course of justice in the collection of debts." See also Zundell *v.* Gess, (Tex. 1888) 9 S. W. 879, wherein it was held that while aliens cannot, in Texas, claim a resulting or constructive trust in lands purchased by a citizen partly with funds paid him by the aliens through mistake, yet they are entitled to a lien on the land for the amount so furnished, and which is superior to any homestead right acquired by the purchaser.

See 2 Cent. Dig. tit. "Aliens," § 14.

Trust deeds conveying real estate to aliens for the benefit of others are within the rule. Johnson *v.* Elkins, 1 App. Cas. (D. C.) 430; Cumberland *v.* Graves, 7 N. Y. 305; Randall *v.* Jaques, 20 Fed. Cas. No. 11,553, 4 Quart. L. J. 218. But *compare* Kay *v.* Webb, 5 N. C. 134; Sharp *v.* St. Sauveur, L. R. 7 Ch. 343; and see Comyns Dig. 427, wherein it is said: "So an alien cannot be seized to the use of another, for he cannot be decreed to execute it."

The rule obtains in equity.— So held in Cross *v.* De Valle, 1 Cliff. (U. S.) 282, 6 Fed. Cas. No. 3,430.

Under the Mexican law an alien grantee of land could hold and possess it as his own property, until deprived of it by the sovereign authority or the inquisition of denouncement. Merle *v.* Mathews, 26 Cal. 455.

Title by adverse possession.— Adverse possession by an alien for the statutory period was held to deprive the true owner of his remedy to eject the alien occupant, although the alien could not acquire title to the land against the owner. See ADVERSE POSSESSION, XI, E. But under statute in Kentucky (Dudley *v.* Grayson, 6 T. B. Mon. (Ky.) 259) and Massachusetts (Piper *v.* Richardson, 9 Metc. (Mass.) 155) it has been held that adverse possession by an alien might ripen into title even against the state.

40. *Alabama.*— Smith *v.* Zaner, 4 Ala. 99.

Arkansas.— Jones *v.* Minogue, 29 Ark. 637.

California.—People *v.* Folsom, 5 Cal. 373.

Indiana.— But see Eldon *v.* Doe, 6 Blackf. (Ind.) 341, which seems to be at variance with this rule.

New York.— Hall *v.* Hall, 81 N. Y. 130; Wadsworth *v.* Murray, 16 Barb. (N. Y.) 601; People *v.* Conklin, 2 Hill (N. Y.) 67.

North Carolina.— *Compare* Kay *v.* Webb, 5 N. C. 134; Gilmour *v.* Kay, 3 N. C. 265.

South Carolina.— Clifton *v.* Haig, 4 Desauss. (S. C.) 330.

"devise," both at common law[41] and under the provisions of statutes relating to and dealing with this subject.[42]

(III) *State Grants and Patents.* Aliens may, of course, take real estate from the state either by valid legislative grant or by valid patents issued by ministerial officers.[43] And where a grant, or a patent held tantamount to a grant, is, by its terms, to an alien, "his heirs and assigns," with warranty, it enables the alien to transmit the title by descent even to alien non-resident heirs;[44] but where the patent is issued by ministerial officers, upon ordinary purchases by aliens, the title of the alien has been held to be subject to escheat, as in the case of purchase from a citizen.[45]

(IV) *Uses and Trusts.* At the common law aliens are under the same disabilities as to uses and trusts arising out of real estate as they are in respect to the real estate itself, and the uses and trusts escheat to the state in the same way.[46]

Tennessee.—Baker *v.* Shy, 9 Heisk. (Tenn.) 85.

Texas.— Gray *v.* Kauffman, 82 Tex. 65, 17 S. W. 513.

Virginia.—Stephen *v.* Swann, 9 Leigh (Va.) 404; Marshall *v.* Conrad, 5 Call (Va.) 364.

United States.— Cross *v.* Del Valle, 1 Wall. (U. S.) 1, 17 L. ed. 515, declaring the existence of the rule in Rhode Island.

England.— But see Sharp *v.* St. Sauveur, L. R. 7 Ch. 343; Knight *v.* Duplessis, 2 Ves. 360; Collingwood *v.* Pace, 1 Keb. 65, 1 Vent. 413.

See 2 Cent. Dig. tit. "Aliens," § 11 *et seq.*

41. Jones *v.* Minogue, 29 Ark. 637; Fox *v.* Southack, 12 Mass. 143; Mooers *v.* White, 6 Johns. Ch. (N. Y.) 360; Vaux *v.* Nesbit, 1 McCord Eq. (S. C.) 352; Marshall *v.* Conrad, 5 Call (Va.) 364; Fairfax *v.* Hunter, 7 Cranch (U. S.) 603, 3 L. ed. 453.

42. Doehrel *v.* Hillmer, 102 Iowa 169, 71 N. W. 204; Burrow *v.* Burrow, 98 Iowa 400, 67 N. W. 287; Bennett *v.* Hibbert, 88 Iowa 154, 55 N. W. 93; Stamm *v.* Bostwick, 122 N. Y. 48, 25 N. E. 233, 9 L. R. A. 597.

Taking by descent is not taking by purchase.— So held in Callahan *v.* O'Brien, 72 Hun (N. Y.) 216, 25 N. Y. Suppl. 410, 55 N. Y. St. 201. See *infra*, IV, C, 1, b, (II).

Devises in trust for aliens have been upheld as being within the rule. See *infra*, note 46.

Even alien enemies have been held to be within the rule. Stephen *v.* Swann, 9 Leigh (Va.) 404; Craig *v.* Radford, 3 Wheat. (U. S.) 594, 4 L. ed. 467.

43. *Alabama.*— Etheridge *v.* Malempre, 18 Ala. 565.

Arkansas.—Wynn *v.* Morris, 16 Ark. 414.

Iowa.— King *v.* Ware, 53 Iowa 97, 4 N. W. 858.

Kentucky.— Elmondorff *v.* Carmichael, 3 Litt. (Ky.) 472, 14 Am. Dec. 86.

Massachusetts.— Com. *v.* André, 3 Pick. (Mass.) 224.

New York.— Jackson *v.* Etz, 5 Cow. (N. Y.) 314; Goodell *v.* Jackson, 20 Johns. (N. Y.) 693, 11 Am. Dec. 351.

South Carolina.— Meeks *v.* Richbourgh, 1 Mill (S. C.) 410.

Texas.— Hornsby *v.* Bacon, 20 Tex. 556.

United States.— Governeur *v.* Robertson, 11 Wheat. (U. S.) 332, 6 L. ed. 488, construing a patent, issued under laws of Virginia, subsequently confirmed by the legislature of Kentucky.

England.— Comyns Dig. 426.

Canada.— Iler *v.* Elliott, 32 U. C. Q. B. 434.

44. Etheridge *v.* Malempre, 18 Ala. 565; King *v.* Ware, 53 Iowa 97, 4 N. W. 858; Com. *v.* André, 3 Pick. (Mass.) 224; Jackson *v.* Etz, 5 Cow. (N. Y.) 314; Goodell *v.* Jackson, 20 Johns. (N. Y.) 693, 11 Am. Dec. 351.

45. Etheridge *v.* Malempre, 18 Ala. 565; Governeur *v.* Robertson, 11 Wheat. (U. S.) 332, 6 L. ed. 488.

46. Leggett *v.* Dubois, 5 Paige (N. Y.) 114, 28 Am. Dec. 413; Hubbard *v.* Goodwin, 3 Leigh (Va.) 492; Hammekin *v.* Clayton, 2 Woods (U. S.) 336, 11 Fed. Cas. No. 5,996; Burney *v.* Macdonald, 15 Sim. 6, 38 Eng. Ch. 6; Comyns Dig. 427.

"Express" distinguished from "implied" trusts.— Where the trust is an express one, there is no uncertainty as to the escheat to the state. Atkins *v.* Kron, 40 N. C. 207; McCaw *v.* Galbraith, 7 Rich. (S. C.) 74; Hubbard *v.* Goodwin, 3 Leigh (Va.) 492. And see Comyns Dig. 427 (wherein it is said: "An alien cannot enforce the execution of an use at common law, or of a trust now"), and McCarty *v.* Deming, 4 Lans. (N. Y.) 440 (wherein it was held that where executors were given power, by will, to sell and convey real estate, their authority to sell is not to be construed as a direction to convert the real into personal estate for distribution among testator's next of kin, some of whom were aliens, but the real estate descended as such to his heirs at law entitled to take as citizens). But when the trust is an implied one, it is not clearly established whether equity will raise a resulting trust in favor of the alien so that it will revert by escheat to the state or not. President Tucker, of the court of appeals of Virginia, in Hubbard *v.* Goodwin, 3 Leigh (Va.) 492, in an *obiter dictum*, thinks that, where there is no intent to evade the alien law, equity will not raise a trust to escheat to the state, but will simply declare the trust void; and in Hammekin *v.* Clayton, 2 Woods (U. S.) 336, 11 Fed. Cas. No. 5,996, where a deed was given apparently to evade the alien law of Mexico, Wood, C. J., says: "We think . . . that the most that could be

b. Acquired by Operation of Law—(I) *In General.* An alien cannot, at common law, acquire title to real estate by mere operation of law.[47]

(II) *Descent.* Within the rule just stated, an alien cannot inherit real property;[48] nor does he possess inheritable blood to transmit the same to a citi-

claimed was that the trust was void," but he does not say that it was void. The reasonable and equitable view seems to be that set out by Tucker, P., that equity will not raise a trust to the injury of the alien except where there has been an attempt to violate the alien law by the creation of an express or secret trust in the purchase of lands; and this opinion is further supported by Zundell *v.* Gess, 73 Tex. 144, 10 S. W. 693, where it was stated as an *obiter dictum* that a resulting trust would not be raised in favor of an alien whose money may be traced into real estate, purchased therewith without his connivance. It is clear that an agreement between an alien and a citizen to purchase lands for the purpose of evading the alien law does not work an escheat or forfeiture until the purchase has actually been made. Merle *v.* Andrews, 4 Tex. 200; Hubbard *v.* Goodwin, 3 Leigh (Va.) 492. *Compare* Mussey *v.* Pierre, 24 Me. 559.

In the absence of intent to avoid the alien law the alien is entitled to a sale of the real estate, and to have the proceeds paid to him. Thus, a conveyance or devise of land to a citizen, to sell it and pay the proceeds to an alien, will not work an escheat, as there is no vesting nor attempt to vest the title to the land in an alien, or to create in him any trust in the real estate as such; but the land is considered as personal estate.

New York.— Marx *v.* McGlynn, 88 N. Y. 357; Parish *v.* Ward, 28 Barb. (N. Y.) 328; Ludlow *v.* Van Ness, 8 Bosw. (N. Y.) 178; Anstice *v.* Brown, 6 Paige (N. Y.) 448; Matter of Windle, 2 Edw. (N. Y.) 585; Marx *v.* McGlynn, 4 Redf. Surr. (N. Y.) 455.

South Carolina.— Jenney *v.* Laurens, 1 Speers (S. C.) 356.

Texas.— Merle *v.* Andrews, 4 Tex. 200.

Virginia.— In the case of Com. *v.* Martin, 5 Munf. (Va.) 117, there was a devise of real estate to executors, to sell and pay the proceeds and the rents and profits meantime accruing to aliens, subject to payment of testator's debts and certain legacies. The testator left no lawful heirs, and his personal estate was sufficient to pay his debts and the legacies. The lower court had held the testator's real estate to be forfeited to the state, and this judgment stood upon appeal, the court of appeals being evenly divided, and giving elaborate opinions *pro* and *con*.

United States.— Taylor *v.* Benham, 5 How. (U. S.) 233, 12 L. ed. 130; Cross *v.* De Valle, 1 Cliff. (U. S.) 282, 6 Fed. Cas. No. 3,430.

England.— Sharp *v.* St. Sauveur, L. R. 7 Ch. 343; Fourdrin *v.* Gowdey, 3 Myl. & K. 383, 10 Eng. Ch. 383; Du Hourmelin *v.* Sheldon, 1 Beav. 79, 17 Eng. Ch. 79.

Canada.— Murray *v.* Heron, 7 Grant Ch. (U. C.) 177.

So, where there is a conversion of real estate into personal property before the alien acquires any title thereto, no escheat arises in favor of the state, as in the case of a bequest of money to be raised by the sale of real estate. Meakings *v.* Cromwell, 5 N. Y. 136; Com. *v.* Selden, 5 Munf. (Va.) 160; Craig *v.* Leslie, 3 Wheat. (U. S.) 563, 4 L. ed. 460.

Use limited to alien, with power of appointment.— In St. Philip *v.* Smith, 4 McCord (S. C.) 452, it was held that when, by deed, a use is limited to a person, an alien, for life, with a power of appointment, and, in case of failure of appointment, to her right heirs, she having made an appointment and died, before office found, the estate in the hands of the appointees (citizens) was not subject to escheat, office not having been found during her lifetime.

47. *Alabama.*— Smith *v.* Zaner, 4 Ala. 99.

California.— Farrell *v.* Enright, 12 Cal. 450.

Georgia.— Fitzgerald *v.* Garvin, T. U. P. Charlt. (Ga.) 281.

Maine.— Mussey *v.* Pierre, 24 Me. 559.

New York.— Heeney *v.* Brooklyn Benev. Soc., 33 Barb. (N. Y.) 360.

North Carolina.— Rouche *v.* Williamson, 25 N. C. 141.

England.— Calvin's Case, 7 Coke 25*a*.

See also Bouvier L. Dict.; and, generally, cases cited *infra*, notes 48, 49.

48. Abbott L. Dict.; 2 Bl. Comm. 249; 1 Comyns Dig.; and the following cases:

Alabama.— Donovan *v.* Pitcher, 53 Ala. 411, 25 Am. Rep. 634; Etheridge *v.* Malempre, 18 Ala. 565; Smith *v.* Zaner, 4 Ala. 99.

California.— McNeil *v.* Polk, 57 Cal. 323; Siemssen *v.* Bofer, 6 Cal. 250. *Compare* People *v.* Folsom, 5 Cal. 373.

Connecticut.— Crosgrove *v.* Crosgrove, 69 Conn. 416, 38 Atl. 219.

Illinois.— De Graff *v.* Went, 164 Ill. 485, 45 N. E. 1075.

Indiana.— Eldon *v.* Doe, 6 Blackf. (Ind.) 341.

Iowa.— Meier *v.* Lee, 106 Iowa 303, 76 N. W. 712; Brown *v.* Pearson, 41 Iowa 481; Rheim *v.* Robbins, 20 Iowa 45.

Kansas.— See Smith *v.* Lynch, 61 Kan. 609, 60 Pac. 329, under the Kansas alien land act.

Kentucky.— White *v.* White, 2 Metc. (Ky.) 185; Trimbles *v.* Harrison, 1 B. Mon. (Ky.) 140; Fry *v.* Smith, 2 Dana (Ky.) 38; Elmondorff *v.* Carmichael, 3 Litt. (Ky.) 472, 14 Am. Dec. 86; Hunt *v.* Warnicke, Hard. (Ky.) 61.

Louisiana.— But see Richmond *v.* Milne, 17 La. 312, 36 Am. Dec. 613; Phillips *v.* Rogers, 5 Mart. (La.) 700.

Maryland.— Buchanan *v.* Deshon, 1 Harr. & G. (Md.) 280.

Massachusetts.— Scanlan *v.* Wright, 13 Pick. (Mass.) 523, 25 Am. Dec. 344; Sheaffe *v.* O'Neil, 1 Mass. 256.

Missouri.—Utassy *v.* Giedinghagen, 132 Mo.

zen.[49] Upon the death of an alien intestate, or of a citizen intestate leaving only

53, 33 S. W. 444; Harney *v.* Donohoe, 97 Mo. 141, 10 S. W. 191; Wacker *v.* Wacker, 26 Mo. 426.

New Hampshire.— Montgomery *v.* Dorion, 7 N. H. 475.

New York.— Ettenheimer *v.* Heffernan, 66 Barb. (N. Y.) 374; Heeney *v.* Brooklyn Benev. Soc., 33 Barb. (N. Y.) 360; Larreau *v.* Davignon, 5 Abb. Pr. N. S. (N. Y.) 367; Bradley *v.* Dwight, 62 How. Pr. (N. Y.) 300; Renner *v.* Müller, 57 How. Pr. (N. Y.) 229; Leary *v.* Leary, 50 How. Pr. (N. Y.) 122; Kennedy *v.* Wood, 20 Wend. (N. Y.) 230; Bradstreet *v.* Oneida County, 13 Wend. (N. Y.) 546; Jackson *v.* White, 20 Johns. (N. Y.) 313; Jackson *v.* Lunn, 3 Johns. Cas. (N. Y.) 109; Mooers *v.* White, 6 Johns. Ch. (N. Y.) 360; Lynch *v.* Clarke, 1 Sandf. Ch. (N. Y.) 583.

North Carolina.— Harman *v.* Ferrall, 64 N. C. 474; Paul *v.* Ward, 15 N. C. 247. The contrary perhaps was held in the case of Bayard *v.* Singleton, 1 N. C. 42, but the decision in that case turned also upon an act of the legislature which was declared to be as effective as an office found to work the forfeiture.

Ohio.— Kay *v.* Watson, 17 Ohio 27.

Pennsylvania.— Jackson *v.* Burns, 3 Binn. (Pa.) 75.

South Carolina.— McClenaghan *v.* McClenaghan, 1 Strobh. Eq. (S. C.) 295, 47 Am. Dec. 532; Jenney *v.* Laurens, 1 Speers (S. C.) 356; Descottes *v.* Talvande, 2 McMull. (S. C.) 300; Vaux *v.* Nesbit, 1 McCord Eq. (S. C.) 352; Davis *v.* Hall, 1 Nott & M. (S. C.) 292; Groves *v.* Gordon, 3 Brev. (S. C.) 245; Trezevant *v.* Osborn, 3 Brev. (S. C.) 29; Ennas *v.* Franklin, 2 Brev. (S. C.) 398; Sebben *v.* Trezevant, 3 Desauss. (S. C.) 213; Halyburton *v.* Kershaw, 3 Desauss. (S. C.) 105.

Tennessee.— Baker *v.* Shy, 9 Heisk. (Tenn.) 85.

Texas.— Pettus *v.* Dawson, 82 Tex. 18, 17 S. W. 714; McGahan *v.* Baylor, 32 Tex. 789; Barrett *v.* Kelly, 31 Tex. 476; Lacoste *v.* Odam, 26 Tex. 458; Cryer *v.* Andrews, 11 Tex. 170; Yates *v.* Iams, 10 Tex. 168; Williams *v.* Bennett, 1 Tex. Civ. App. 498, 20 S. W. 856.

Virginia.— Barzizas *v.* Hopkins, 2 Rand. (Va.) 276; Read *v.* Read, 5 Call (Va.) 160.

United States.— Middleton *v.* McGrew, 23 How. (U. S.) 45, 16 L. ed. 403; McKinney *v.* Saviego, 18 How. (U. S.) 235, 15 L. ed. 365; Taylor *v.* Benham, 5 How. (U. S.) 233, 12 L. ed. 130; McLearn *v.* Wallace, 10 Pet. (U. S.) 625, 9 L. ed. 559; Blight *v.* Rochester, 7 Wheat. (U. S.) 535, 5 L. ed. 516; Craig *v.* Leslie, 3 Wheat. (U. S.) 563, 4 L. ed. 460; Fairfax *v.* Hunter, 7 Cranch (U. S.) 603, 3 L. ed. 453; Dawson *v.* Godfrey, 4 Cranch (U. S.) 321, 2 L. ed. 634; Contee *v.* Godfrey, 1 Cranch C. C. (U. S.) 479, 6 Fed. Cas. No. 3,140; Ware *v.* Wisner, 50 Fed. 310.

England.— Doe *v.* Acklam, 2 B. & C. 779, 9 E. C. L. 337; Doe *v.* Jones, 4 T. R. 300; Calvin's Case, 7 Coke 25*a*.

Canada.— Doe *v.* Clarke, 1 U. C. Q. B. 37. But see Donegani *v.* Donegani, 1 L. C. Rep. 605.

See 2 Cent. Dig. tit. "Aliens," § 21 *et seq.*

Extent of rule.— The common-law rule upon this subject was held to be good in equity in the case of Cross *v.* De Valle, 1 Cliff. (U. S.) 282, 6 Fed. Cas. No. 3,430. The rule applies as well to those who, upon the conquest by one nation of another and surrender of the soil, do not become citizens of the new sovereign, but adhere to their old allegiance, by which adherence they deprive themselves of protection to their property, except so far as it may be secured by treaty. U. S. *v.* De Repentigny, 5 Wall. (U. S.) 211, 18 L. ed. 627.

49. *Alabama.*— Smith *v.* Zaner, 4 Ala. 99. See also Bartlett *v.* Morris, 9 Port. (Ala.) 266.

Arkansas.— Jones *v.* Minogue, 29 Ark. 637.

Illinois.— De Graff *v.* Went, 164 Ill. 485, 45 N. E. 1075.

Indiana.— Doe *v.* Lazenby, Smith (Ind.) 203, 1 Ind. 234.

Iowa.— Purcell *v.* Smidt, 21 Iowa 540.

Kentucky.— Stevenson *v.* Dunlap, 7 T. B. Mon. (Ky.) 134.

Louisiana.— Richmond *v.* Milne, 17 La. 312, 36 Am. Dec. 613.

Massachusetts.— Slater *v.* Nason, 15 Pick. (Mass.) 345.

Missouri.— Farrar *v.* Dean, 24 Mo. 16.

New York.— Renner *v.* Müller, 57 How. Pr. (N. Y.) 229.

Pennsylvania.—Rubeck *v.* Gardner, 7 Watts (Pa.) 455.

Rhode Island.— De Wolf *v.* Middleton, 18 R. I. 814, 26 Atl. 44, 31 Atl. 271, 31 L. R. A. 146.

South Carolina.— *Ex p.* Dupont, Harp. Eq. (S. C.) 5 [*reversed* on other grounds in Shanks *v.* Dupont, 3 Pet. (U. S.) 242, 7 L. ed. 666].

Tennessee.— Hinkle *v.* Shadden, 2 Swan (Tenn.) 46.

Vermont.— But see Lenehan *v.* Spaulding, 57 Vt. 115, wherein the right to transmit was not allowed to be raised in a collateral proceeding for distribution under a special statute.

Virginia.— Sands *v.* Lynham, 27 Gratt. (Va.) 291, 21 Am. Rep. 348.

United States.— Blight *v.* Rochester, 7 Wheat. (U. S.) 535, 5 L. ed. 516.

Canada.— Montgomery *v.* Graham, 31 U. C. Q. B. 57. See also Donegani *v.* Donegani, 1 L. C. Rep. 605.

See 2 Cent. Dig. tit. "Aliens," § 21 *et seq.*

Alienage of any one in a chain of persons necessary to constitute a chain of title interrupts the descent and makes it invalid to pass the title.

Alabama.—Bartlett *v.* Morris, 9 Port. (Ala.) 266.

Connecticut.— But see, *contra*, Campbell's Appeal, 64 Conn. 277, 29 Atl. 494, 24 L. R. A. 667.

District of Columbia.— Walker *v.* Potomac Ferry Co., 3 MacArthur (D. C.) 440.

Illinois.— Beavan *v.* Went, 155 Ill. 592, 41 N. E. 91, 31 L. R. A. 85.

alien heirs, his real estate, as a necessary result of the general operation of this rule, escheats.[50]

(III) *Dower or Curtesy.* Under the common-law rule that an alien cannot acquire a title to real estate by descent or other mere operation of law,[51] where such rule has not been changed by statute or otherwise,[52] an alien cannot take

Iowa.— Furenes *v.* Mickelson, 86 Iowa 508, 53 N. W. 416.

New York.— McLean *v.* Swanton, 13 N. Y. 535; Larreau *v.* Davignon, 5 Abb. Pr. N. S. (N. Y.) 367, Sheld. (N. Y.) 128; People *v.* Irvin, 21 Wend. (N. Y.) 128; Banks *v.* Walker, 3 Barb. Ch. (N. Y.) 438; Wright *v.* Methodist Episcopal Church, Hoffm. (N. Y.) 202; Redpath *v.* Rich, 3 Sandf. (N. Y.) 79.

South Carolina.— But see McKellar *v.* McKellar, 1 Speers (S. C.) 536, wherein it was held that a remote collateral kinsman, who is a citizen notwithstanding that his relationship to the intestate is traced through aliens, will take as his heir in exclusion of living nearer kindred.

United States.— Levy *v.* McCartee, 6 Pet. (U. S.) 102, 8 L. ed. 334; Contee *v.* Godfrey, 1 Cranch C. C. (U. S.) 479, 6 Fed. Cas. No. 3,140.

For statutory modifications and changes of this rule see the following cases and the statutes therein referred to:

Illinois.— Meadowcroft *v.* Winnebago County, 181 Ill. 504, 54 N. E. 949.

Kansas.— Smith *v.* Lynch, 61 Kan. 609, 60 Pac. 329.

Massachusetts.—Palmer *v.* Downer, 2 Mass. 179 note, referring to 11 & 12 Wm. III, c. 6, as in force in Massachusetts.

New York.— Jackson *v.* FitzSimmons, 10 Wend. (N. Y.) 9, 24 Am. Dec. 198; Jackson *v.* Green, 7 Wend. (N. Y.) 333.

North Carolina.— Campbell *v.* Campbell, 58 N. C. 246.

Tennessee.—Starks *v.* Traynor, 11 Humphr. (Tenn.) 291.

United States.— McCreery *v.* Somerville, 9 Wheat. (U. S.) 354, 6 L. ed. 109, referring to 11 & 12 Wm. III, c. 6, as in force in Maryland.

England.— Comyns Dig. 425; Jacob L. Dict. [*citing* Collingwood *v.* Pace, 1 Vent. 413].

See also *supra*, note 48, and 2 Cent. Dig. tit. "Aliens," § 33 *et seq.*

Direct descent distinguished.— It has been held that while a person cannot take title by representation from an alien, as a grandson from his grandfather through an alien father; yet one brother may inherit from another, or one cousin from another, or the like, although the father or other common ancestor be alien, it being held that here the derivation or descent is direct, and not through the ancestor, Beavan *v.* Went, 155 Ill. 592, 41 N. E. 91, 31 L. R. A. 85; Wilcke *v.* Wilcke, 102 Iowa 173, 71 N. W. 201 (construing an Iowa statute); McGregor *v.* Comstock, 3 N. Y. 408; Luhrs *v.* Eimer, 15 Hun (N. Y.) 399, 80 N. Y. 171; Parish *v.* Ward, 28 Barb. (N. Y.) 328; Renner *v.* Müller, 44 N. Y. Super. Ct. 535, 57 How. Pr. (N. Y.) 229; Smith *v.* Mulligan, 11 Abb. Pr. N. S. (N. Y.) 438; 2 Bl. Comm. 251; Comyns Dig. 425.

50. *Kentucky.*— Fry *v.* Smith, 2 Dana (Ky.) 38.

Massachusetts.— Wilbur *v.* Tobey, 16 Pick. (Mass.) 177; Slater *v.* Nason, 15 Pick. (Mass.) 345.

Missouri.— Farrar *v.* Dean, 24 Mo. 16.

New Hampshire.— Montgomery *v.* Dorion, 7 N. H. 475.

New York.— Heeney *v.* Brooklyn Benev. Soc., 33 Barb. (N. Y.) 360; Wright *v.* Methodist Episcopal Church, Hoffm. (N. Y.) 202.

Pennsylvania.— Rubeck *v.* Gardner, 7 Watts (Pa.) 455.

Virginia.— Sands *v.* Lynham, 27 Gratt. (Va.) 291, 21 Am. Rep. 348.

United States.— Fairfax *v.* Hunter, 7 Cranch (U. S.) 603, 3 L. ed. 453.

Canada.— Donegani *v.* Donegani, 1 L. C. Rep. 605.

See also 2 Bl. Comm. 249; 2 Kent Comm. 55; and, generally, Escheat.

To prevent an escheat (University Trustees *v.* Miller, 14 N. C. 188), next of kin who have inheritable blood take by descent as against the alien issue of a deceased person.

Arkansas.— Jones *v.* Minogue, 29 Ark. 637.

New York.— Renner *v.* Müller, 44 N. Y. Super. Ct. 535; Jackson *v.* Jackson, 7 Johns. (N. Y.) 214.

South Carolina.— Keenan *v.* Keenan, 7 Rich. (S. C.) 345; McKellar *v.* McKellar, 1 Speers (S. C.) 536; Scott *v.* Cohen, 2 Nott & M. (S. C.) 293.

Texas.— Hardy *v.* De Leon, 5 Tex. 211.

United States.— Orr *v.* Hodgson, 4 Wheat. (U. S.) 453, 4 L. ed. 613.

Canada.— Salter *v.* Hughes, 6 Nova Scotia 409; Donegani *v.* Donegani, 1 L. C. Rep. 605, wherein it was held that if the alien leaves children, some born in Canada, and others not, the former exclude the crown, and then all the children inherit as if they were natural-born subjects.

See also Comyns Dig. 425; 2 Kent Comm. 55.

51. See *supra*, IV, C, 1, b, (I).

52. State laws have generally modified dower and curtesy rights of aliens.

Iowa.— *In re* Gill, 79 Iowa 296, 44 N. W. 553, 9 L. R. A. 126.

Kentucky.— White *v.* White, 2 Metc. (Ky.) 185.

Maryland.— Buchanan *v.* Deshon, 1 Harr. & G. (Md.) 280.

Missouri.— Stokes *v.* O'Fallon, 2 Mo. 32.

New York.— Burton *v.* Burton, 1 Abb. Dec. (N. Y.) 271; Burton *v.* Burton, 26 How. Pr. (N. Y.) 474; Greer *v.* Sankston, 26 How. Pr. (N. Y.) 471; Priest *v.* Cummings, 16 Wend. (N. Y.) 617; Mick *v.* Mick, 10 Wend. (N. Y.) 379; Forgey *v.* Sutliff, 5 Cow. (N. Y.) 713; Sutliff *v.* Forgey, 1 Cow. (N. Y.) 89.

Pennsylvania.— Ondis *v.* Banta, 7 Kulp (Pa.) 390.

dower or curtesy in the real estate of the spouse;[53] neither could the wife or husband of an alien have dower or curtesy in the spouse's real estate, since an alien could not transmit real estate by descent.[54]

2. Under Treaties and Statutes.[55] The right to take, hold, and dispose of real estate may be granted to aliens by the United States by treaty[56] or by stat-

Tennessee.— Emmett *v.* Emmett, 14 Lea (Tenn.) 369.

Wisconsin.— Bennett *v.* Harms, 51 Wis. 251, 8 N. W. 222.

Such statutes are not retroactive in their operation. Priest *v.* Cummings, 20 Wend. (N. Y.) 338.

53. 2 Bl. Comm. 131; Comyns Dig. 424; and the following cases:

Connecticut.— Sistare *v.* Sistare, 2 Root (Conn.) 468.

Kentucky.— White *v.* White, 2 Metc. (Ky.) 185; Moore *v.* Tisdale, 5 B. Mon. (Ky.) 352.

Maine.— Mussey *v.* Pierre, 24 Me. 559 (curtesy); Potter *v.* Titcomb, 22 Me. 300.

Maryland.— Buchanan *v.* Deshon, 1 Harr. & G. (Md.) 280.

Massachusetts.— Foss *v.* Crisp, 20 Pick. (Mass.) 121 (curtesy).

New York.— Greer *v.* Sankston, 26 How. Pr. (N. Y.) 471; Currin *v.* Finn, 3 Den. (N. Y.) 229; Connolly *v.* Smith, 21 Wend. (N. Y.) 59; Sutliff *v.* Forgey, 1 Cow. (N. Y.) 89.

North Carolina.— Copeland *v.* Sauls, 46 N. C. 70 (curtesy); Paul *v.* Ward, 15 N. C. 247.

Oregon.— Quinn *v.* Ladd, (Oreg. 1899) 59 Pac. 457 (curtesy).

Pennsylvania.— Reese *v.* Waters, 4 Watts & S. (Pa.) 145 (curtesy); Ondis *v.* Banta, 7 Kulp (Pa.) 390.

Wisconsin.— Bennett *v.* Harms, 51 Wis. 251, 8 N. W. 222.

England.— Calvin's Case, 1 Coke 25*a*.

See 2 Cent. Dig. tit. "Aliens," §§ 18–20.

The extent and limits of this rule are discussed in Davis *v.* Darrow, 12 Wend. (N. Y.) 65 (wherein it was held that the native-born widow of an alien is entitled to recover dower against a party whose title is derived from her husband, though her husband was not entitled to hold real estate when he took the conveyance, and such conveyance was not afterward confirmed by statute), and in Kelly *v.* Harrison, 2 Johns. Cas. (N. Y.) 29, 1 Am. Dec. 154 (wherein it was held that, where the wife was a subject of Great Britain prior to the Revolution, and always continued such, but the husband resided in this country both before and after that period, she was entitled to dower out of those lands of which he was seized before the Revolution, but not of those of which he was afterward seized). See also Larreau *v.* Davignon, 5 Abb. Pr. N. S. (N. Y.) 367, Sheld. (N. Y.) 128.

Where a right of dower or curtesy has become vested, a subsequent change of allegiance, as by the creation of a new government independent of the old, would probably not work a defeat of the right of dower or curtesy. Alsberry *v.* Hawkins, 9 Dana (Ky.) 177, 33 Am. Dec. 546. Thus, in Jackson *v.* Lunn, 3 Johns. Cas. (N. Y.) 109, where a woman was married to a British subject who owned lands in the colonies before the Declaration of Independence, her right of dower in the lands was held not to be defeated even where she remained a subject of Great Britain and the husband resided in the United States.

54. Mobile Cong. Church *v.* Morris, 8 Ala. 182; Coxe *v.* Gulick, 10 N. J. L. 328.

The widow of a man who was banished from the state, and whose estate was confiscated, by the act of 1782, for adhering to the British in the course of the Revolutionary War, is, notwithstanding, entitled to her dower in all his lands. Wells *v.* Martin, 2 Bay (S. C.) 20. To the same effect see Sewall *v.* Lee, 9 Mass. 363.

55. See 2 Cent. Dig. tit. "Aliens," §§ 5–58.

56. Regulation of rights of aliens is within the treaty-making power of the United States, and a treaty made in pursuance of it will suspend any provisions in state laws which are inconsistent so far as is necessary to give effect to the treaty. Blythe *v.* Hinckley, 127 Cal. 431, 59 Pac. 787; People *v.* Gerke, 5 Cal. 381; Wunderle *v.* Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84; Doehrel *v.* Hillmer, 102 Iowa 169, 71 N. W. 204; Opel *v.* Shoup, 100 Iowa 407, 69 N. W. 560, 37 L. R. A. 583; Yeaker *v.* Yeaker, 4 Metc. (Ky.) 33, 81 Am. Dec. 530.

Treaties, between foreign countries and the United States, have, from time to time, been made empowering aliens to take, hold and dispose of real estate. Much adjudication has arisen as to the rights growing out of the various provisions of these treaties. See *infra*, cases cited in this note; and 2 Cent. Dig. tit. "Aliens," § 47 *et seq.*

Under the treaty of 1853 with the French Republic see Baker *v.* Shy, 9 Heisk. (Tenn.) 85; De Geofroy *v.* Riggs, 133 U. S. 258, 10 S. Ct. 295, 33 L. ed. 642 [*reversing* 7 Mackey (D. C.) 331]; Bahuaud *v.* Bize, 105 Fed. 485.

Under the treaty of 1871 with the German Empire see Wunderle *v.* Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84.

Under the treaties of 1857 and 1870 with the Grand Duchy of Baden see Wunderle *v.* Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84.

Under the treaty of 1845 with the Grand Duchy of Hesse see Bollermann *v.* Blake, 94 N. Y. 624, 24 Hun (N. Y.) 187.

Under the treaty of 1827 with the Hanseatic Republic of Bremen see Schultze *v.* Schultze, 144 Ill. 290, 33 N. E. 201, 36 Am. St. Rep. 432, 19 L. R. A. 90.

Under the treaty with the Hanseatic towns of Lübeck, Bremen, and Hamburg see Siemssen *v.* Bofer, 6 Cal. 250.

Under the treaty with the King of Hanover see Ford *v.* Husman, 7 Rich. (S. C.) 165.

ute,[57] and by the states by statute,[58] or this right may be regulated or modi-

Under the treaty of 1845 with the Kingdom of Bavaria see Opel *v.* Shoup, 100 Iowa 407, 69 N. W. 560, 37 L. R. A. 583.

Under the treaties of 1798 and 1800 with the Kingdom of France see Carneal *v.* Banks, 10 Wheat. (U. S.) 181, 6 L. ed. 297; Chirac *v.* Chirac, 2 Wheat. (U. S.) 259, 4 L. ed. 234. See also Foster *v.* Neilson, 2 Pet. (U. S.) 253, 7 L. ed. 415, referring to a treaty of 1803.

Under the treaty of 1783 with the Kingdom of Great Britain see Munro *v.* Merchant, 28 N. Y. 9; Brown *v.* Sprague, 5 Den. (N. Y.) 545; Moore *v.* Wilson, 10 Yerg. (Tenn.) 406; Society, etc. *v.* New Haven, 8 Wheat. (U. S.) 464, 5 L. ed. 662; Blight *v.* Rochester, 7 Wheat. (U. S.) 535, 5 L. ed. 516; Orr *v.* Hodgson, 4 Wheat. (U. S.) 453, 4 L. ed. 613; Fisher *v.* Harnden, 1 Paine (U. S.) 55, 9 Fed. Cas. No. 4,819.

Under the treaty of 1794 with the Kingdom of Great Britain, known as Jay's Treaty, see:

Kentucky.— Trimbles *v.* Harrison, 1 B. Mon. (Ky.) 140.

Maryland.— Owings *v.* Norwood, 2 Harr. & J. (Md.) 96.

Massachusetts.— Fox *v.* Southack, 12 Mass. 143; Com. *v.* Sheafe, 6 Mass. 441.

Michigan.— Crane *v.* Reeder, 21 Mich. 24, 4 Am. Rep. 430.

New York.— People *v.* Snyder, 51 Barb. (N. Y.) 589; Watson *v.* Donnelly, 28 Barb. (N. Y.) 653; Munro *v.* Merchant, 26 Barb. (N. Y.) 383; Jackson *v.* Decker, 11 Johns. (N. Y.) 418; Jackson *v.* Wright, 4 Johns. (N. Y.) 75; Jackson *v.* Lunn, 3 Johns. Cas. (N. Y.) 109.

South Carolina.— Duncan *v.* Beard, 2 Nott & M. (S. C.) 400; Love *v.* Hadden, 3 Brev. (S. C.) 1; Megrath *v.* Robertson, 1 Desauss. (S. C.) 445.

Virginia.— Fiott *v.* Com., 12 Gratt. (Va.) 564; Com. *v.* Bristow, 6 Call (Va.) 60; Foxwell *v.* Craddock, 1 Patt. & H. (Va.) 250.

United States.— Shanks *v.* Dupont, 3 Pet. (U. S.) 242, 7 L. ed. 666 [*reversing Ex p.* Dupont, Harp. Eq. (S. C.) 51]; Hughes *v.* Edwards, 9 Wheat. (U. S.) 489, 6 L. ed. 142; Craig *v.* Radford, 3 Wheat. (U. S.) 594, 4 L. ed. 467; Harden *v.* Fisher, 1 Wheat. (U. S.) 300, 4 L. ed. 96.

Under the treaty of 1783 with the Kingdom of Prussia see People *v.* Gerke, 5 Cal. 381; Wilcke *v.* Wilcke, 102 Iowa 173, 71 N. W. 201; Doehrel *v.* Hillmer, 102 Iowa 169, 71 N. W. 204; Stamm *v.* Bostwick, 40 Hun (N. Y.) 35; Matter of Beck, 2 Connoly Surr. (N. Y.) 355, 11 N. Y. Suppl. 199, 31 N. Y. St. 965; Hart *v.* Hart, 2 Desauss. (S. C.) 57.

Under the treaty of 1783 with the Kingdom of Sweden see Adams *v.* Akerlund, 168 Ill. 632, 48 N. E. 454; Meier *v.* Lee, 106 Iowa 303, 76 N. W. 712.

Under the treaty of 1844 with the Kingdom of Würtemberg see Scharpf *v.* Schmidt, 172 Ill. 255, 50 N. E. 182; Kull *v.* Kull, 37 Hun (N. Y.) 476; Wieland *v.* Renner, 65 How. Pr. (N. Y.) 245.

Under the treaty of 1848 with the Republic of Mexico, known as the treaty of Guadalupe Hidalgo, see Baldwin *v.* Goldfrank, 88 Tex. 249, 31 S. W. 1064.

Under the treaty of 1832 with the Russian Empire see Maynard *v.* Maynard, 36 Hun (N. Y.) 227.

Under the treaty of 1782 with the States-General of the United Netherlands see University Trustees *v.* Miller, 14 N. C. 188.

Under the treaties of 1848, 1850, and 1855 with the Swiss Confederation see Jost *v.* Jost, 1 Mackey (D. C.) 487; Yeaker *v.* Yeaker, 4 Metc. (Ky.) 33, 81 Am. Dec. 530; Hauenstein *v.* Lynham, 100 U. S. 483, 25 L. ed. 628 [*reversing* 28 Gratt. (Va.) 62].

For vested rights as affected by treaties see McGregor *v.* Comstock, 16 Barb. (N. Y.) 427 [*affirmed* in 17 N. Y. 162]; Chae Chan Ping *v.* U. S., 130 U. S. 581, 9 S. Ct. 623, 32 L. ed. 1068; Society, etc. *v.* New Haven, 8 Wheat. (U. S.) 464, 5 L. ed. 662; Harden *v.* Fisher, 1 Wheat. (U. S.) 300, 4 L. ed. 96.

57. United States.— 29 U. S. Stat. at L. c. 618, U. S. Rev. Stat. Suppl. (1899), p. 573, c. 618 [*amending* 24 U. S. Stat. at L. c. 340, U. S. Rev. Stat. Suppl. (1891), p. 556, c. 340], defining and regulating the rights of aliens to hold and own real estate in the territories. See Beard *v.* Rowan, 1 McLean (U. S.) 135, 2 Fed. Cas. No. 1,181, construing the meaning of the words, "Who shall have resided within the state two years," with reference to the persons benefited by the statute.

58. Nearly all the states have provisions regulating the rights of aliens. Anderson L. Dict.; Rapalje & L. L. Dict. See 2 Cent. Dig. tit. "Aliens," § 33 *et seq.*; and *infra*, notes 59–64.

Alabama.— All disabilities removed. Ala. Const. (1875), art. 1, § 36; Ala. Civ. Code (1896), § 419. See Nicrosi *v.* Phillipi. 91 Ala. 299, 8 So. 561; Etheridge *v.* Malempre, 18 Ala. 565.

Arizona.— Ariz. Rev. Stat. (1887), § 1472, removing liabilities so as to extend same privileges to aliens as our citizens have in the alien's country. See *supra*, note 57, for United States statutes.

Arkansas.— All disabilities removed. Sandels & H. Dig. Ark. (1894), § 247.

California.— Aliens may take, hold, and dispose of real property; and they may also take by succession; but a non-resident alien taking by succession must appear and claim the property within five years, etc. The alienage of a relative does not preclude persons who might otherwise succeed to an estate under the statute of descent. Cal. Civ. Code (1897), §§ 671, 1404. See Blythe *v.* Hinckley, 127 Cal. 431, 59 Pac. 787; State *v.* Smith, 70 Cal. 153, 12 Pac. 121; Matter of Billings, 65 Cal. 593, 4 Pac. 639; Griffith *v.* Godey, 113 U. S. 89, 5 S. Ct. 383, 28 L. ed. 934.

Colorado.— All disabilities removed. Mills' Anno. Stat. Suppl. Colo. (1896), § 100; Mills' Anno. Stat. Colo. (1891), § 99.

Connecticut.— Any alien resident of the United States, any citizen of France (so long as the same right is accorded to the citizens

fied by statute or treaty. Arising out of the interpretation of such treaties

of the United States by France), may purchase, hold, inherit, or transmit real estate as fully as native-born citizens. Other non-resident aliens can hold and transmit lands only for quarrying or mining purposes. Conn. Gen. Stat. (1888), § 15.

Delaware.— A resident alien, having declared his intention to become a citizen of the United States, may take real property by deed or will, and hold and alienate it. Del. Rev. Stat. (1893), p. 617, c. 81, § 1. Conveyances and devises of lands made before Feb. 1, 1893, to persons then aliens, vest the same title in them as if they had been naturalized. Del. Laws (1893), c. 769.

District of Columbia.— The principal rights of aliens are regulated by the act of congress of March 3, 1887, the act of Maryland of 1791 (see Spratt *v.* Spratt, 4 Pet. (U. S.) 393, 7 L. ed. 897; Spratt *v.* Spratt, 1 Pet. (U. S.) 343, 7 L. ed. 171), and by 11 & 12 Wm. III, c. 6 (see McCreery *v.* Somerville, 9 Wheat. (U. S.) 354, 6 L. ed. 109; U. S. Rev. Stat. (1878), § 1068). See also 25 U. S. Stat. at L. c. 30, U. S. Rev. Stat. Suppl. (1891), p. 582, c. 30; 24 U. S. Stat. at L. c. 340, U. S. Rev. Stat. Suppl. (1891), p. 556, c. 340.

Florida.— All disabilities removed. Fla. Const. (1887), Declaration of Rights, § 18.

Georgia.— All disabilities removed as to the subjects of governments at peace with the United States. 2 Ga. Code (1895), § 1816.

Idaho.— Ida. Laws (1891), pp. 108, 118; Ida. Laws (1899), p. 98.

Illinois.— The matter is regulated in this state by the act of May 14, 1897, which repealed the act of 1887. This act, among other things, allows aliens to hold land for six years. Ill. Rev. Stat. (1899), c. 6.

Indiana.— Disabilities practically removed, except in certain specified cases. Thornton's Stat. Ind. (1897), § 3451 *et seq.*

Indian Territory.— Aliens may remain in the territory but can acquire and hold only lots and parcels of lands in town-sites; the widow of an alien is entitled to dower. Carter's Stat. Ind. Terr. (1889), § 1860. Alienage of ancestor in line of descent is no bar. Carter's Stat. Ind. Terr. (1889), § 1825.

Iowa.— By Iowa Const. art. 1, § 22, resident aliens are given the same rights as native-born citizens. By Iowa Code, tit. 14, c. 1, non-resident aliens are prohibited from acquiring title to or holding real estate, certain exceptions being enumerated. See Purcell *v.* Smidt, 21 Iowa 540.

Kansas.— See Kan. Laws (1891), c. 3, § 1. Resident aliens who have declared intention of becoming citizens, or *bona fide* resident female aliens, may take and hold for six years. Dassler's Gen. Stat. Kan. (1899), §§ 99, 1194–1202.

Kentucky.— In case of an alien not an enemy, and who has declared his intention to become a citizen of the United States, all disabilities removed; resident alien may take and hold for actual residence, occupation, or business for twenty-one years; non-resident alien may take by descent or devise, but must alienate within eight years, and within that period he may transmit title to it by descent or devise. Barbour & C. Stat. Ky. (1894), §§ 334, 337, 338, 339. See Com. *v.* Newcomb, (Ky. 1900) 58 S. W. 445.

Maine.—All disabilities removed. Me. Rev. Stat. (1883), c. 73, § 2.

Maryland.— All friends may take and dispose of property in same manner as native-born citizens. Md. Code (1888), art. 3, § 1.

Massachusetts.— Aliens may hold and convey real estate as citizens. Mass. Pub. Stat. (1882), c. 126, § 1.

Michigan.— Aliens hold and transmit real estate as citizens; alien woman not barred of dower. Mich. Comp. Laws (1897), §§ 9258, 9259, 8938; Mich. Const. art. 18, § 13.

Minnesota.— Restrictions removed as to resident aliens who have declared intent to become citizens, and as to actual farm settlers; other aliens may take and transmit plats not exceeding three hundred feet square in incorporated city. Minn. Stat. (1894), §§ 5874, 5875; Minn. Laws (1897), p. 197; Minn. Laws (1889), p. 210; Minn. Laws (1887), p. 323.

Mississippi.—All disabilities removed as to resident aliens; non-resident aliens may take liens on lands, purchase at foreclosure, and have a good title for twenty years. Miss. Anno. Code (1892), § 2439.

Missouri.— Aliens who have not declared their intention to become citizens cannot hold real estate except such as acquired by inheritance, or as security for obligations. Mo. Rev. Stat. (1889), § 342. See Burke *v.* Adams, 80 Mo. 504, 50 Am. Rep. 510.

Montana.— Resident aliens may take by succession as citizens, and alienage of relative in line of descent is not a bar. Non-resident aliens must appear and claim succession within five years, etc. No provisions as to conveyance *inter vivos*. Mont. Civ. Code (1895), §§ 1867, 1868. See Territory *v.* Lee, 2 Mont. 124.

Nebraska.— No distinction shall ever be made between resident aliens and citizens, in reference to the possession, enjoyment, or descent of property. Nebr. Const. art. 1, § 25. Non-residents, in general, are unable to take or hold, except those owning lands on March 16, 1899, who may dispose of them during their life, and aliens purchasing land for manufacturing purposes. Nebr. Comp. Stat. (1895), § 4161.

Nevada.— All disabilities removed, except as to Chinese. Nev. Comp. Laws (1900), § 2725.

New Hampshire.— All disabilities removed as to resident aliens; special rights given to resident wife of non-resident alien; escheats of resident alien's property discharged. N. H. Pub. Stat. (1901), c. 137, §§ 16, 17; c. 176, § 8.

New Jersey.— All disabilities removed. N. J. Gen. Stat. (1895), p. 23. See Colgan *v.* McKeon, 24 N. J. L. 566, construing the term "heirs," used in the statute.

and the construction of such statutes — many of which have now been repealed

New Mexico.— All disabilities removed. N. M. Comp. Laws (1897), § 3936. See *supra*, note 57, for United States statutes.

New York.— The rights of aliens are governed by various statutes, modifying the common law. Resident aliens who have declared intention to remain residents of United States and citizens thereof may, for six years thereafter, take, hold, convey and devise real property. N. Y. Laws (1897), c. 756. See also Birdseye's Rev. Stat. N. Y. (1896), p. 2601 *et seq.* for other provisions relating to an alien's real property rights. See Ettenheimer *v.* Heffernan, 66 Barb. (N. Y.) 374; Cumberland *v.* Graves, 9 Barb. (N. Y.) 595.

North Carolina.— All disabilities removed. N. C. Code (1883), § 7.

North Dakota.— All disabilities removed; alienage of relative in chain of title no bar. N. D. Rev. Codes (1899), §§ 3277, 3758.

Ohio.— All disabilities removed; alienage of ancestors no bar. Bates' Anno. Stat. (1900), § 4173.

Oklahoma.—All disabilities removed. Okla. Laws (1897), c. 8, §§ 1, 36.

Oregon.— All disabilities removed. Hill's Anno. Laws Oreg. (1892), § 2988.

Pennsylvania.— Aliens may buy lands to not exceeding five thousand acres or twenty thousand dollars in annual income, and hold the same as citizens. Aliens may take by descent or devise, without limit. Conveyance before escheat by office found passes good title. 1 Pepper & L. Dig. Pa. p. 119, § 11. See 1 Brightly Purd. Dig. Pa. (1894), p. 9.

Rhode Island.— All disabilities removed. R. I. Gen. Laws (1896), c. 201, § 4.

South Carolina.— S. C. Civ. Stat. (1893), §§ 1879, 1880, 1981, 1982.

South Dakota.— All disabilities removed. Grantham's Anno. Stat. S. D. (1899), §§ 3598, 4606.

Tennessee.— All disabilities removed, and escheats abolished. Tenn. Anno. Code (1896), §§ 3659–3662.

Texas.— Sayles' Tex. Civ. Stat. (1897), arts. 10 *et seq.*, 1701. See Hanrick *v.* Hanrick, 63 Tex. 618, 61 Tex. 596, 54 Tex. 101; Sabriego *v.* White, 30 Tex. 576.

Utah.—All disabilities removed; agent may be appointed to represent non-resident alien. Utah Rev. Stat. (1898), §§ 2847, 3970–3972.

Vermont.— No laws have been passed restricting aliens' right to hold real estate; and the state has practically never attempted to enforce any right of escheat, although it may strictly have such a power. State *v.* Boston, etc., R. Co., 25 Vt. 433.

Virginia.— All disabilities removed as to alien friends. Va. Code (1887), § 43.

Washington.— Aliens other than those who have, *bona fide*, declared intentions to become citizens of United States are prohibited from holding lands, except such as are acquired by inheritance, under mortgage, or in ordinary collection of debt; conveyances made otherwise to aliens are void. A corporation whose stock is held by aliens is declared to be an alien corporation. Lands containing valuable deposits of mineral, ores, or fire-clay are not covered by these restrictions. Corporations of which majority of stock is owned by aliens is made an alien for this purpose. Wash. Const. art. 2, § 33. Statutes passed after the adoption of the constitution [Ballinger's Codes & Stat. Wash. (1897), §§ 4548–4552] removed all disabilities except so far as the constitution makes that impossible.

West Virginia.—All disabilities removed as to alien friends. W. Va. Code (1899), c. 70; W. Va. Acts (1872), c. 48; W. Va. Acts (1892), c. 56.

Wisconsin.—All disabilities removed as to resident aliens; restrictions on non-resident aliens. An alien widow is not barred of dower. Wis. Stat. (1898), §§ 2200, 2200*a*, 2201, 2160.

Wyoming.— All disabilities removed as to resident aliens. Wyo. Const. art. 1, § 29.

British Columbia.—All disabilities removed and titles then existing not to be affected by having come through alien. Rev. Stat. (1897), c. 6.

Manitoba.— All disabilities removed. Rev. Stat. (1891), c. 3.

Ontario.— All disabilities, past and future, removed, except that no rights vested prior to Nov. 23, 1849, should be impaired or affected. Rev. Stat. (1897), c. 118.

Quebec.— Corse *v.* Corse, 4 L. C. Rep. 310, construing 12 Vict. c. 197.

Authority of state to pass enabling acts has been expressly upheld. Etheridge *v.* Malempre, 18 Ala. 565; State *v.* Smith, 70 Cal. 153, 12 Pac. 121; State *v.* Rogers, 13 Cal. 159; Montgomery *v.* Dorion, 7 N. H. 475; Beard *v.* Rowan, 1 McLean (U. S.) 135, 2 Fed. Cas. No. 1,181. Provisions in the state constitutions are strictly construed as respects their taking away from the legislature the right to regulate this subject-matter, so that grants in the constitution, or a clause prohibiting the taking away of certain rights, will not be construed as preventing the conference of additional rights or privileges upon aliens. State *v.* Smith, 70 Cal. 153, 12 Pac. 121; Matter of Billings, 65 Cal. 593, 4 Pac. 639; State *v.* Rogers, 13 Cal. 159; Purczell *v.* Smidt, 21 Iowa 540.

Conditions, compliance with which is required to enable the alien to take advantage of its provisions, are often incorporated in the enabling act, such as: That the alien must appear and claim his inheritance. State *v.* Smith, 70 Cal. 153, 12 Pac. 121. That the alien must be a resident. Norris *v.* Hoyt, 18 Cal. 217; Siemssen *v.* Bofer, 6 Cal. 250; Furenes *v.* Mickelson, 86 Iowa 508, 53 N. W. 416; Yeaker *v.* Yeaker, 4 Metc. (Ky.) 33, 81 Am. Dec. 530; Louisville *v.* Gray, 1 Litt. (Ky.) 146; Utassy *v.* Giedinghagen, 132 Mo. 53, 33 S. W. 444; State *v.* Preble, 18 Nev. 251; Larreau *v.* Davignon, 5 Abb. Pr. N. S. (N. Y.) 367; McClenaghan *v.* McClenaghan, 1 Strobh. Eq. (S. C.) 295, 47 Am. Dec. 532; Sullivan *v.* Burnett, 105 U. S. 334, 26 L. ed. 1124. That the alien must become a citizen,

or modified — there are various decisions, in the reports of the United States

or dispose of his property within a certain time. McCarty *v.* Deming, 4 Lans. (N. Y.) 440; Richards *v.* McDaniel, 2 Mill (S. C.) 18; Wiederanders *v.* State, 64 Tex. 133; Hanrick *v.* Hanrick, 61 Tex. 596; Andrews *v.* Spear, 48 Tex. 567; Barclay *v.* Cameron, 25 Tex. 232; Hanrick *v.* Patrick, 119 U. S. 156, 7 S. Ct. 147, 30 L. ed. 396. That the alien must have declared his intention of becoming a naturalized citizen. State *v.* Beackmo, 8 Blackf. (Ind.) 246; Hall *v.* Hall, 81 N. Y. 130; McKellar *v.* McKellar, 1 Speers (S. C.) 536; Sullivan *v.* Burnett, 105 U. S. 334, 26 L. ed. 1124. [But see Dusenberry *v.* Dawson, 9 Hun (N. Y.) 511; Smith *v.* Reilly, 31 Misc. (N. Y.) 701, 66 N. Y. Suppl. 40]. That the alien must not demise or charge with rent the property. Ellice *v.* Winn, 12 Wend. (N. Y.) 342; Troup *v.* Mullender, 9 Johns. (N. Y.) 303. [But see Jackson *v.* Britton, 4 Wend. (N. Y.) 507]. That the alien must take possession of his property within a certain time. Hornsby *v.* Bacon, 20 Tex. 556; Blythe *v.* Easterling, 20 Tex. 565; McKinney *v.* Saviego, 18 How. (U. S.) 235, 15 L. ed. 365. That the alien's intestate must have left no citizen heirs. Burnett *v.* Noble, 8 Rich. Eq. (S. C.) 58. That the conveyance to the alien must be made and recorded within a certain time. People *v.* Snyder, 41 N. Y. 397. That the alien cannot transmit by descent to resident aliens. Larreau *v.* Davignon, 5 Abb. Pr. N. S. (N. Y.) 367; Branagh *v.* Smith, 46 Fed. 517.

Interpretation of such statutes.— Enabling acts are not extraterritorial when granting rights to non-resident aliens. State *v.* Smith, 70 Cal. 153, 12 Pac. 121. Exceptions should not be construed so as to include other persons than those specifically designated. Mobile Cong. Church *v.* Morris, 8 Ala. 182; Wunderle *v.* Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84 [*citing* Luhrs *v.* Eimer, 80 N. Y. 171]; Doe *v.* Lazenby, 1 Ind. 234.

As to when such acts should be considered as operating — retrospectively, prospectively, or both retrospectively and prospectively — see:

Illinois.—Meadowcroft *v.* Winnebago County, 181 Ill. 504, 54 N. E. 949.

Kentucky.— Com. *v.* Newcomb, (Ky. 1900) 58 S. W. 445.

New Jersey.—Colgan *v.* McKeon, 24 N. J. L. 566.

New York.— Hall *v.* Hall, 81 N. Y. 130; Wainwright *v.* Low, 57 Hun (N. Y.) 386, 10 N. Y. Suppl. 888, 32 N. Y. St. 1044; Heeney *v.* Brooklyn Benev. Soc., 33 Barb. (N. Y.) 360; Brown *v.* Sprague, 5 Den. (N. Y.) 545.

Texas.— Warnell *v.* Finch, 15 Tex. 163.

United States.— U. S. *v.* Jung Ah Lung, 124 U. S. 621, 8 S. Ct. 663, 31 L. ed. 591; Chew Heong *v.* U. S., 112 U. S. 536, 5 S. Ct. 255, 28 L. ed. 770; Airhart *v.* Massieu, 98 U. S. 491, 25 L. ed. 213; Beard *v.* Rowan, 9 Pet. (U. S.) 301, 9 L. ed. 135.

See 2 Cent. Dig. tit. "Aliens," § 42.

For dower and curtesy rights of aliens as affected by statute see *supra*, IV, C, 1, b, (III).

Acts restricting the rights of aliens have been passed in some states, the interpretation and effect of which have been the subject of adjudication.

District of Columbia.— Johnson *v.* Elkins, 1 App. Cas. (D. C.) 430, construing an act prohibiting aliens from acquiring land in the District of Columbia.

Illinois.— Scharpf *v.* Schmidt, 172 Ill. 255, 50 N. E. 182; De Graff *v.* Went, 164 Ill. 485, 43 N. E. 1075; Ryan *v.* Egan, 156 Ill. 224, 40 N. E. 827; Beavan *v.* Went, 155 Ill. 592, 41 N. E. 91, 31 L. R. A. 85; Schaefer *v.* Wunderle, 154 Ill. 577, 39 N. E. 623; Schultze *v.* Schultze, 144 Ill. 290, 33 N. E. 201, 36 Am. St. Rep. 432, 19 L. R. A. 90; Wunderle *v.* Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 94 — construing an act prohibiting aliens from taking lands by devise, or otherwise, except under certain circumstances.

Iowa.— Burrow *v.* Burrow, 98 Iowa 400, 67 N. W. 287; Easton *v.* Huott, 95 Iowa 473, 64 N. W. 408, 31 L. R. A. 177; Furenes *v.* Mickelson, 86 Iowa 508, 53 N. W. 416 — construing an act prohibiting non-resident aliens from holding lands by descent, devise, purchase, or otherwise, except under certain conditions. See also King *v.* Ware, 53 Iowa 97, 4 N. W. 858, construing an act prohibiting non-resident children from inheriting land.

Kansas.— Smith *v.* Lynch, 61 Kan. 609, 60 Pac. 329, construing the Kansas alien land act.

Maine.— Boies *v.* Blake, 13 Me. 381, construing an act prohibiting any alien from purchasing, cutting, or carrying away trees, timber or grass growing on certain Indian lands.

Missouri.—Harney *v.* Donohoe, 97 Mo. 141, 10 S. W. 191, construing an act prohibiting non-resident aliens of the United States from acquiring title by descent or purchase.

New York.— Marx *v.* McGlynn, 88 N. Y. 357; Wadsworth *v.* Wadsworth, 12 N. Y. 376; Van Cortlandt *v.* Laidley, 59 Hun (N. Y.) 161, 11 N. Y. Suppl. 148, 32 N. Y. St. 585; Beck *v.* McGillis, 9 Barb. (N. Y.) 35; Mick *v.* Mick, 10 Wend. (N. Y.) 379 — construing an act declaring void devises to aliens.

Nebraska.— Carlow *v.* Aultman, 28 Nebr. 672, 44 N. W. 873, construing an act prohibiting non-resident aliens from holding land within the state.

North Carolina.— Rutherford *v.* Wolfe, 10 N. C. 272, construing an act prohibiting alien relatives from inheriting.

Texas.— Baker *v.* Westcott, 73 Tex. 129, 11 S. W. 157; Barclay *v.* Cameron, 25 Tex. 232 — construing an act of the Republic of Texas providing that no alien shall hold land in Texas, except upon certain conditions. See also Gray *v.* Kauffman, 82 Tex. 65, 17 S. W. 513.

Washington.— State *v.* Hudson Land Co., 19 Wash. 85, 52 Pac. 574, 40 L. R. A. 430; State *v.* Morrison, 18 Wash. 664, 52 Pac. 228, — construing Wash. Const. art. 2, § 33, prohibiting ownership of lands by aliens, etc.

United States.— Airhart *v.* Massieu, 98 U. S. 491, 25 L. ed. 213, construing the con-

and of the different states, discussing, defining and fixing the rights of aliens to take title to land by either descent,[59] or by act of the parties, as

stitution of the Republic of Texas; Brigham *v.* Kenyon, 76 Fed. 30, construing Wash. Const. art. 2, § 33 [see *supra*, Washington cases]; Ware *v.* Wisner, 50 Fed. 310, construing an Iowa act prohibiting non-resident aliens from taking lands by descent or devise [see *supra*, Iowa cases].

See 2 Cent. Dig. tit. "Aliens," § 30 *et seq.*

Such acts are not retroactive. Johnson *v.* Elkins, 1 App. Cas. (D. C.) 430.

A lease of lands to an alien for forty-nine years is void under the constitutional prohibition against alien ownership of lands, since such persons cannot be allowed to accomplish indirectly that which they are forbidden to do directly. State *v.* Hudson Land Co., 19 Wash. 85, 52 Pac. 574, 40 L. R. A. 430; State *v.* Morrison, 18 Wash. 664, 52 Pac. 228, where the term of the lease was for ninety-nine years.

59. As to alien's right to inherit as affected by treaty see:

California.— Blythe *v.* Hinckley, 127 Cal. 431, 59 Pac. 787; People *v.* Gerke, 5 Cal. 381.

District of Columbia.— De Geoffroy *v.* Riggs, 7 Mackey (D. C.) 331; Jost *v.* Jost, 1 Mackey (D. C.) 487.

Illinois.— Scharpf *v.* Schmidt, 172 Ill. 255, 50 N. E. 182; Adams *v.* Akerlund, 168 Ill. 632, 48 N. E. 454; Schultze *v.* Schultze, 144 Ill. 290, 33 N. E. 201, 36 Am. St. Rep. 432, 19 L. R. A. 90; Wunderle *v.* Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84.

Iowa.— Meier *v.* Lee, 106 Iowa 303, 76 N. W. 712; Wilcke *v.* Wilcke, 102 Iowa 173, 71 N. W. 201; Doehrel *v.* Hillmer, 102 Iowa 169, 71 N. W. 204; Opel *v.* Shoup, 100 Iowa 407, 69 N. W. 560, 37 L. R. A. 583.

Kentucky.—Yeaker *v.* Yeaker, 4 Metc. (Ky.) 33, 81 Am. Dec. 530.

New York.— Bollermann *v.* Blake, 94 N. Y. 624, 24 Hun (N. Y.) 187; Munro *v.* Merchant, 28 N. Y. 9; Kull *v.* Kull, 37 Hun (N. Y.) 476; Wieland *v.* Renner, 65 How. Pr. (N. Y.) 245; Orser *v.* Hoag, 3 Hill (N. Y.) 79; Jackson *v.* Wright, 4 Johns. (N. Y.) 75; Matter of Beck, 2 Connoly Surr. (N. Y.) 355, 11 N. Y. Suppl. 199, 31 N. Y. St. 965.

North Carolina.— University Trustees *v.* Miller, 14 N. C. 188.

South Carolina.— Duncan *v.* Beard, 2 Nott & M. (S. C.) 400; Megrath *v.* Robertson, 1 Desauss. (S. C.) 445.

United States.— De Geofroy *v.* Riggs, 133 U. S. 258, 10 S. Ct. 295, 33 L. ed. 642 [*reversing* 7 Mackey (D. C.) 331]; Hauenstein *v.* Lynham, 100 U. S. 483, 25 L. ed. 628 [*reversing* 28 Gratt. (Va.) 62]; Shanks *v.* Dupont, 3 Pet. (U. S.) 242, 7 L. ed. 666 [*reversing Ex p.* Dupont, Harp. Eq. (S. C.) 5]; Blight *v.* Rochester, 7 Wheat. (U. S.) 535, 5 L. ed. 516; Orr *v.* Hodgson, 4 Wheat. (U. S.) 453, 4 L. ed. 613; Chirac *v.* Chirac, 2 Wheat. (U. S.) 259, 4 L. ed. 234; Bahuaud *v.* Bize, 105 Fed. 485; Fisher *v.* Harnden, 1 Paine (U. S.) 55, 9 Fed. Cas. No. 4,819.

See 2 Cent. Dig. tit. "Aliens," § 47 *et seq.*; and see also *supra*, note 56.

Statutes empowering aliens to take by descent are construed, discussed, or referred to in the following cases:

Alabama.— Etheridge *v.* Malempre, 18 Ala. 565; Bartlett *v.* Morris, 9 Port. (Ala.) 266.

Arkansas.— Jones *v.* Minogue, 29 Ark. 637.

California.— Blythe *v.* Hinckley, 127 Cal. 431, 59 Pac. 787; People *v.* Roach, 76 Cal. 294, 18 Pac. 407; State *v.* Smith, 70 Cal. 153, 12 Pac. 121; Matter of Leopold, 67 Cal. 385, 7 Pac. 766; Matter of Guilford, 67 Cal. 380, 7 Pac. 763; Matter of Billings, 65 Cal. 593, 4 Pac. 639; State *v.* Rogers, 13 Cal. 159; Siemssen *v.* Bofer, 6 Cal. 250, construing a provision in the constitution.

Illinois.— Adams *v.* Akerlund, 168 Ill. 632, 48 N. E. 454.

Indiana.— State *v.* Witz, 87 Ind. 190; Murray *v.* Kelly, 27 Ind. 42.

Iowa.— Wilcke *v.* Wilcke, 102 Iowa 173, 71 N. W. 201; Furenes *v.* Mickelson, 86 Iowa 508, 53 N. W. 416; King *v.* Ware, 53 Iowa 97, 4 N. W. 858.

Kentucky.—Eustache *v.* Rodaquest, 11 Bush (Ky.) 42; Louisville *v.* Gray, 1 Litt. (Ky.) 146.

Louisiana.— Sala's Succession, 50 La. Ann. 1009, 24 So. 674.

Massachusetts.—Lumb *v.* Jenkins, 100 Mass. 527; Palmer *v.* Downer, 2 Mass. 179 note, construing 11 & 12 Wm. III, c. 6.

Missouri.— Utassy *v.* Giedinghagen, 132 Mo. 53, 33 S. W. 444; Burke *v.* Adams, 80 Mo. 504, 50 Am. Rep. 510.

New Hampshire.— Montgomery *v.* Dorion, 7 N. H. 475.

New Jersey.—Colgan *v.* McKeon, 24 N. J. L. 566; Yeo *v.* Mercereau, 18 N. J. L. 387.

New York.— Wainwright *v.* Low, 132 N. Y. 313, 30 N. E. 747; Stamm *v.* Bostwick, 122 N. Y. 48, 25 N. E. 233, 9 L. R. A. 597 [*affirming* 40 Hun (N. Y.) 35]; Goodrich *v.* Russell, 42 N. Y. 177; Wright *v.* Saddler, 20 N. Y. 320; McCarthy *v.* Marsh, 5 N. Y. 263; Callahan *v.* O'Brien, 72 Hun (N. Y.) 216, 25 N. Y. Suppl. 410, 55 N. Y. St. 201; Daly *v.* Beer, 57 Hun (N. Y.) 590, 10 N. Y. Suppl. 893, 32 N. Y. St. 1064; McCarty *v.* Terry, 7 Lans. (N. Y.) 236; Heeney *v.* Brooklyn Benev. Soc., 33 Barb. (N. Y.) 360; Parish *v.* Ward, 28 Barb. (N. Y.) 328; Redpath *v.* Rich, 3 Sandf. (N. Y.) 79; Nolan *v.* Command, 11 N. Y. Civ. Proc. 295; Larreau *v.* Davignon, 5 Abb. Pr. N. S. (N. Y.) 367; People *v.* Irvin, 21 Wend. (N. Y.) 128; Jackson *v.* FitzSimmons, 10 Wend. (N. Y.) 9, 24 Am. Dec. 198; Jackson *v.* Adams, 7 Wend. (N. Y.) 367; Jackson *v.* Lyon, 9 Cow. (N. Y.) 664; Banks *v.* Walker, 3 Barb. Ch. (N. Y.) 438; Kilfoy *v.* Powers, 3 Dem. Surr. (N. Y.) 198.

Rhode Island.— De Wolf *v.* Middleton, 18 R. I. 814, 26 Atl. 44, 31 Atl. 271, 31 L. R. A. 146.

South Carolina.—Keenan *v.* Keenan, 7 Rich. (S. C.) 345; Ford *v.* Husman, 7 Rich. (S. C.) 165; Burnett *v.* Noble, 8 Rich. Eq. (S. C.) 58; Richards *v.* McDaniel, 2 Mill (S. C.) 18.

by purchase[60] or devise,[61] and to transmit the title, so acquired and taken,

Tennessee.— Garretson *v.* Brien, 3 Heisk. (Tenn.) 534.

Texas.— Hanrick *v.* Gurley, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330 [*following* Hanrick *v.* Patrick, 119 U. S. 156, 7 S. Ct. 147, 30 L. ed. 396; Hanrick *v.* Hanrick, 63 Tex. 618; Hanrick *v.* Hanrick, 61 Tex. 596]; Gray *v.* Kauffman, 82 Tex. 65, 17 S. W. 513; Andrews *v.* Spear, 48 Tex. 567; Portis *v.* Hill, 30 Tex. 529, 98 Am. Dec. 481; Barclay *v.* Cameron, 25 Tex. 232; Wardrup *v.* Jones, 23 Tex. 489; Hornsby *v.* Bacon, 20 Tex. 556, construing constitution of the Republic of Texas.

Virginia.— Hannon *v.* Hounihan, 85 Va. 429, 12 S. E. 157; Jacksons *v.* Sanders, 2 Leigh (Va.) 109.

United States.— Hanrick *v.* Patrick, 119 U. S. 156, 7 S. Ct. 147, 30 L. ed. 396; Sullivan *v.* Burnett, 105 U. S. 334, 26 L. ed. 1124; McKinney *v.* Saviego, 18 How. (U. S.) 235, 15 L. ed. 365; Levy *v.* McCartee, 6 Pet. (U. S.) 102, 8 L. ed. 334; Spratt *v.* Spratt, 4 Pet. (U. S.) 393, 7 L. ed. 897; McCreery *v.* Somerville, 9 Wheat. (U. S.) 354, 6 L. ed. 109, construing 11 & 12 Wm. III, c. 6; Billings *v.* Aspen Min., etc., Co., 51 Fed. 338, 10 U. S. App. 1, 2 C. C. A. 252; Branagh *v.* Smith, 46 Fed. 517; McConville *v.* Howell, 5 McCrary (U. S.) 319, 17 Fed. 104.

England.— Doe *v.* Jones, 4 T. R. 300.

Canada.— Rumrell *v.* Henderson, 22 U. C. C. P. 180; Leatherman *v.* Trow, 15 U. C. C. P. 578; Doe *v.* Maloney, 9 U. C. Q. B. 251.

See 2 Cent. Dig. tit. "Aliens," § 33 *et seq.*; and also *supra*, note 58.

Construction of acts.— To enable one to take advantage of a statute enabling aliens to take lands from a deceased person the statute must have been complied with at the time of the decease of the intestate, which is the time with reference to which the rights of the parties are determined. If a person cannot inherit lands by reason of alienage of himself or another, a subsequent removal of the disqualification will not vest the title in him. Smith *v.* Smith, 33 Barb. (N. Y.) 371 note.

Authorizing aliens to hold real estate does not remove disability of aliens to inherit; nor does a statute, enlarging the rights of heirship of aliens, remove their disability to transmit title by descent. Bartlett *v.* Morris, 9 Port. (Ala.) 266. Nor does a statute removing disability, due to descent of title through alien ancestors, enable one to take by descent when title must be traced through alien ancestor of another. Banks *v.* Walker, 3 Barb. Ch. (N. Y.) 438. But the term "ancestor" in an enabling act was held to include collaterals as well as lineals. McCarthy *v.* Marsh, 5 N. Y. 263. For right to take collaterally through alien ancestor, as affected by statute, see *supra*, IV, C, 1, b, (II).

In an enabling act where an alien is required to "appear and claim" land in order to take it, the word "appear" was held to include appearance by an attorney, although the wording was that the alien should appear. Matter of Guilford, 67 Cal. 380, 7 Pac. 763. So an assignee may "appear." Matter of Leopold, 67 Cal. 385, 7 Pac. 766.

The law existing at the time of descent cast governs the right of aliens to inherit realty. Hauensteins *v.* Lynham, 28 Gratt. (Va.) 62; Pilla *v.* German School Assoc., 23 Fed. 700. But *compare* Jackson *v.* Lyon, 9 Cow. (N. Y.) 664; Jackson *v.* Skeels, 19 Johns. (N. Y.) 198, construing a special act.

60. For alien's right to purchase as affected by treaty see Adams *v.* Akerlund, 168 Ill. 632, 48 N. E. 454.

See 2 Cent. Dig. tit. "Aliens," § 47 *et seq.*; and also *supra*, note 56.

Statutes empowering aliens to purchase real estate are construed, discussed, or referred to in the following cases:

Arkansas.— Jones *v.* Minogue, 29 Ark. 637.

California.— Blythe *v.* Hinckley, 127 Cal. 431, 59 Pac. 787.

Illinois.— Adams *v.* Akerlund, 168 Ill. 632, 48 N. E. 454.

Iowa.—See Greenheld *v.* Stanforth, 21 Iowa 595; Purczell *v.* Smidt, 21 Iowa 540.

Kansas.— An alien woman who in good faith has become a resident of the United States may, under Kan. Gen. Stat. (1897), c. 51, take a defeasible title in land and hold the same for a period of six years: and if, during that time, she complies with the provisions of the statute she may acquire an indefeasible title in it as against an attack by the state or any other party. Wuester *v.* Folin, 60 Kan. 334, 56 Pac. 490.

Kentucky.— Com. *v.* Newcomb, (Ky. 1900) 58 S. W. 445.

Nevada.— State *v.* Preble, 18 Nev. 251.

New Jersey.—Yeo *v.* Mercereau, 18 N. J. L. 387.

New York.— People *v.* Snyder, 41 N. Y. 397, 51 Barb. (N. Y.) 589; Cumberland *v.* Graves, 9 Barb. (N. Y.) 595; Renner *v.* Muller, 57 How. Pr. (N. Y.) 229; Ellice *v.* Winn, 12 Wend. (N. Y.) 342; Jackson *v.* Adams, 7 Wend. (N. Y.) 367.

Oregon.— Lavery *v.* Arnold, 36 Oreg. 84, 58 Pac. 524, 57 Pac. 906.

South Carolina.—McClenaghan *v.* McClenaghan, 1 Strobh. Eq. (S. C.) 295, 47 Am. Dec. 532.

United States.—Cross *v.* Del Valle, 1 Wall. (U. S.) 1, 17 L. ed. 515; Spratt *v.* Spratt, 1 Pet. (U. S.) 343, 7 L. ed. 171; Matthew *v.* Rae, 3 Cranch C. C. (U. S.) 699, 16 Fed. Cas. No. 9,284.

Canada.— Doe *v.* Maloney, 9 U. C. Q. B. 251.

See 2 Cent. Dig. tit. "Aliens," § 33 *et seq.*; and also *supra*, note 58.

In one case the word "conveyance" in such an act was held to include "release," and to cover sales, purchases, and conveyances in trust. Cumberland *v.* Graves, 9 Barb. (N. Y.) 595.

61. For alien's right to take by devise as affected by treaty see Adams *v.* Akerlund, 168 Ill. 632, 48 N. E. 454; Yeaker *v.* Yeaker, 4 Metc. (Ky.) 33, 81 Am. Dec. 530; Stamm *v.* Bostwick, 40 Hun (N. Y.) 35; Stephen *v.*

either by descent[62] or devise,[63] or to dispose thereof by conveyance or otherwise.[64]

D. Actions against — 1. Civil.[65] Within the rule that a nation or state has jurisdiction over all persons[66] and property found within its territorial bounds,[67]

Swann, 9 Leigh (Va.) 404; Jackson *v.* Clarke, 3 Wheat. (U. S.) 1, 4 L. ed. 319.

See 2 Cent. Dig. tit. "Aliens," § 47 *et seq.*; and also *supra*, note 56.

Statutes empowering aliens to take by devise are construed, discussed, or referred to in the following cases: Matter of Guilford, 67 Cal. 380, 7 Pac. 763; Matter of Billings, 65 Cal. 593, 4 Pac. 639; Adams *v.* Akerlund, 168 Ill. 632, 48 N. E. 454; Eustache *v.* Rodaquest, 11 Bush (Ky.) 42; Stamm *v.* Bostwick, 122 N. Y. 48, 25 N. E. 233, 9 L. R. A. 597; Hall *v.* Hall, 81 N. Y. 130; Wright *v.* Saddler, 20 N. Y. 320; Dusenberry *v.* Dawson, 9 Hun (N. Y.) 511; Wadsworth *v.* Murray, 16 Barb. (N. Y.) 601; Fay *v.* Taylor, 31 Misc. (N. Y.) 32, 63 N. Y. Suppl. 572.

See 2 Cent. Dig. tit. "Aliens," § 33 *et seq.*; and also *supra*, note 58.

A devise to alien trustees of lands held by an alien, under N. Y. Laws (1798), c. 72, "to enable aliens to purchase and hold real estate within this state," was held to be valid. Howard *v.* Moot, 64 N. Y. 262.

62. For alien's right to transmit by descent as affected by treaty see Brown *v.* Sprague, 5 Den. (N. Y.) 545; Jackson *v.* Lunn, 3 Johns. Cas. (N. Y.) 109; Fiott *v.* Com. 12 Gratt. (Va.) 564.

See 2 Cent. Dig. tit. "Aliens," § 47 *et seq.*; and also *supra*, note 56.

Statutes empowering aliens to transmit by descent are construed, discussed, or referred to in the following cases: Cumberland *v.* Graves, 7 N. Y. 305; Parish *v.* Ward, 28 Barb. (N. Y.) 328; Larreau *v.* Davignon, 5 Abb. Pr. N. S. (N. Y.) 367, Sheld. (N. Y.) 128; Branagh *v.* Smith, 46 Fed. 517.

See 2 Cent. Dig. tit. "Aliens," § 33 *et seq.*; and also *supra*, note 58.

63. For alien's right to transmit by devise as affected by treaty see Crane *v.* Reeder, 21 Mich. 24, 4 Am. Rep. 430; Watson *v.* Donnelly, 28 Barb. (N. Y.) 653; Foxwell *v.* Craddock, 1 Patt. & H. (Va.) 250.

See 2 Cent. Dig. tit. "Aliens," § 47 *et seq.*; and also *supra*, note 56.

Statutes empowering aliens to transmit by devise are construed, discussed, or referred to in the following cases: Dusenberry *v.* Dawson, 9 Hun (N. Y.) 511; Richards *v.* McDaniel, 2 Mill (S. C.) 18; Jackson *v.* Clarke, 3 Wheat. (U. S.) 1, 4 L. ed. 319.

See 2 Cent. Dig. tit. "Aliens," § 33 *et seq.*; and also *supra*, note 58.

64. For alien's right to convey, sell, or dispose of realty as affected by treaty see:

California.— Matter of Leopold, 67 Cal. 385, 7 Pac. 766; Siemssen *v.* Bofer, 6 Cal. 250.

Illinois.— Scharpf *v.* Schmidt, 172 Ill. 255, 50 N. E. 182; Adams *v.* Akerlund, 168 Ill. 632, 48 N. E. 454, wherein it was held that the words "*fonds et biens*,"— translated "goods and effects,"— covered real estate as well as personal property.

Kentucky.— Yeaker *v.* Yeaker, 4 Metc. (Ky.) 33, 81 Am. Dec. 530.

Michigan.— Crane *v.* Reeder, 21 Mich. 24, 4 Am. Rep. 430.

New York.— Kull *v.* Kull, 37 Hun (N. Y.) 476; People *v.* Snyder, 51 Barb. (N. Y.) 589; Watson *v.* Donnelly, 28 Barb. (N. Y.) 653; Wieland *v.* Renner, 65 How. Pr. (N. Y.) 245; Matter of Beck, 2 Connoly Surr. (N. Y.) 355, 11 N. Y. Suppl. 199, 31 N. Y. St. 965.

South Carolina.— Love *v.* Hadden, 3 Brev. (S. C.) 1; Hart *v.* Hart, 2 Desauss. Eq. (S. C.) 57.

Tennessee.—Baker *v.* Shy, 9 Heisk. (Tenn.) 85.

Virginia.—Stephen *v.* Swann, 9 Leigh (Va.) 404.

United States.— Hauenstein *v.* Lynham, 100 U. S. 483, 25 L. ed. 628; Carneal *v.* Banks, 10 Wheat. (U. S.) 181, 6 L. ed. 297; Chirac *v.* Chirac, 2 Wheat. (U. S.) 259, 4 L. ed. 234.

See 2 Cent. Dig. tit. "Aliens," § 47 *et seq.*; and also *supra*, note 56.

Statutes empowering aliens to convey real estate are construed, discussed, or referred to in the following cases:

Illinois.— Scharpf *v.* Schmidt, 172 Ill. 255, 50 N. E. 182; De Graff *v.* Went, 164 Ill. 485, 45 N. E. 1075.

Iowa.— Purczell *v.* Smidt, 21 Iowa 540.

New York.— Dusenberry *v.* Dawson, 9 Hun (N. Y.) 511; Cumberland *v.* Graves, 9 Barb. (N. Y.) 595; Aldrich *v.* Manton, 13 Wend. (N. Y.) 458.

South Carolina.— Richards *v.* McDaniel, 2 Mill (S. C.) 18.

Washington.— Oregon Mortg. Co. *v.* Carstens, 16 Wash. 165, 47 Pac. 421, 35 L. R. A. 841.

United States.— Sullivan *v.* Burnett, 105 U. S. 334, 26 L. ed. 1124, construing a Missouri statute; De Franca *v.* Howard, 21 Fed. 774, construing a Missouri statute; Matthew *v.* Rae, 3 Cranch C. C. (U. S.) 699, 16 Fed. Cas. No. 9,284, construing a Maryland act relating to the District of Columbia.

See 2 Cent. Dig. tit. "Aliens," § 33 *et seq.*; and also *supra*, note 58.

65. See 2 Cent. Dig. tit. "Aliens," § 61 *et seq.*

66. All persons who are found within the limits of government, whether their residence be permanent or temporary, are to be deemed so far citizens or subjects thereof as that the right of jurisdiction, civil and criminal, will attach to them. Molyneux *v.* Seymour, 30 Ga. 440, 76 Am. Dec. 662 [*citing* Story Confl. L., §§ 539, 543, 550]; Peabody *v.* Hamilton, 106 Mass. 217; State *v.* Bordentown, 32 N. J. L. 192; Johnson *v.* Dalton, 1 Cow. (N. Y.) 543, 13 Am. Dec. 564; The Schooner Exchange *v.* McFaddon, 7 Cranch (U. S.) 116, 3 L. ed. 287.

67. Although the non-resident come not within the territorial limits of a state, still,

an alien may be sued in the proper court — federal, state, or territorial[68] — in an action *in personam* whenever the court properly obtains jurisdiction of his person,[69] or in a proceeding *in rem* when the alien's property is within the jurisdiction of the court.[70] Thus an alien may be sued for an assault and battery,[71] upon his contracts, wherever made,[72] as well as to recover property

if he owns property there, this will give the local courts jurisdiction.

Georgia.— Molyneux *v.* Seymour, 30 Ga. 440, 76 Am. Dec. 662 [*citing* Story Confl. L. §§ 539, 543, 550].

Maine.— Smith *v.* Eaton, 36 Me. 298, 58 Am. Dec. 746; Lovejoy *v.* Albee, 33 Me. 414, 54 Am. Dec. 630 [*citing* Story Confl. L. §§ 21, 539, 543, 546, 549, 550, 556; Bissell *v.* Briggs, 9 Mass. 462, 6 Am. Dec. 88; Borden *v.* Fitch, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225; Picquet *v.* Swan, 5 Mason (U. S.) 35, 19 Fed. Cas. No. 11,134; Becquet *v.* McCarthy, 2 B. & Ad. 951, 22 E. C. L. 398; Douglas *v.* Forrest, 4 Bing. 686, 13 E. C. L. 693].

New York.— Olcott *v.* Maclean, 10 Hun (N. Y.) 277.

United States.— Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565.

England.— Anonymous, 1 Atk. 19; Warrender *v.* Warrender, 9 Bligh N. S. 89.

Canada.— Buffalo, etc., R. Co. *v.* Hemmingway, 22 U. C. Q. B. 562.

Personal property has no locality other than that of the person having the same in possession, ownership, custody, or control. Molyneux *v.* Seymour, 30 Ga. 440, 76 Am. Dec. 662 [*citing* Story Confl. L. §§ 539, 543, 550].

68. For courts having jurisdiction of actions against aliens see ADMIRALTY; AMBASSADORS AND CONSULS; COURTS.

69. Jurisdiction may be acquired by appearance of alien (Olcott *v.* Maclean, 73 N. Y. 223), or by personal service of process upon him (Russ *v.* Mitchell, 11 Fla. 80). But extraterritorial service of process upon alien defendants, who have not voluntarily appeared, is ineffectual to bring them within the jurisdiction of the court, or make them parties to the suit. McHenry *v.* New York, etc., R. Co., 25 Fed. 65. See also, generally, ACTIONS, III; PROCESS.

70. *Florida.*— Russ *v.* Mitchell, 11 Fla. 80.

Illinois.— Seymour *v.* Bailey, 66 Ill. 288.

Maryland.— Field *v.* Adreon, 7 Md. 209.

Maine.— See Smith *v.* Eaton, 36 Me. 298, 58 Am. Dec. 746 [*citing* Lovejoy *v.* Albee, 33 Me. 414, 54 Am. Dec. 630].

Massachusetts.— Waugh *v.* Riley, 8 Metc. (Mass.) 290; Barrell *v.* Benjamin, 15 Mass. 354.

Minnesota.— McNair *v.* Toler, 21 Minn. 175.

Missouri.— Greenia *v.* Greenia, 14 Mo. 526.

Nebraska.— People *v.* McClay, 2 Nebr. 7.

Nevada.— See Courtney *v.* Turner, 12 Nev. 345.

New York.— Olcott *v.* Maclean, 73 N. Y. 223; Overing *v.* Russell, 32 Barb. (N. Y.) 263; Clarke *v.* Morey, 10 Johns. (N. Y.) 69; Scott *v.* Thorpe, 1 Edw. (N. Y.) 512.

North Carolina.— Rooker *v.* Crinkley, 113 N. C. 73, 18 S. E. 56.

Texas.— Franco-Texan Land Co. *v.* Chaptive, (Tex. 1886) 3 S. W. 31. *Compare* Lee *v.* Salinas, 15 Tex. 495.

United States.— St. Luke's Hospital *v.* Barclay, 3 Blatchf. (U. S.) 259, 21 Fed. Cas. No. 12,241.

England.— Bouvier L. Dict. [*citing* Calvin's Case, 7 Coke 17].

Canada.— Buffalo, etc., R. Co. *v.* Hemmingway, 22 U. C. Q. B. 562.

See 2 Cent. Dig. tit. "Aliens," § 65 *et seq.*

Alien enemy may be sued. Seymour *v.* Bailey, 66 Ill. 288. See, generally, WAR.

Arrest proceedings.— An alien passing through the jurisdiction may be arrested on a capias ad respondendum upon a cause of action arising in a foreign country. In the absence of proof it will be assumed that the foreign law is the same as that here. Macaulay *v.* O'Brien, 5 Brit. Col. 510. A defendant cannot rely on a change of residence to a foreign country so as to avoid the law of arrest to which he was subject in this province at the time he incurred the debt upon which the action is brought, when that change of residence has been effected by a fraudulent flight to avoid arrest. Kersterman *v.* McLellan, 10 Ont. Pr. 122. See also, generally, ARREST.

Attachment proceedings are within the rule that aliens may be sued. Olcott *v.* Maclean, 73 N. Y. 223; Field *v.* Adreon, 7 Md. 209, wherein it was held that an unnaturalized alien, residing and doing business in the state, is, for commercial purposes, a citizen, in contemplation of the attachment laws. See also, generally, ATTACHMENT; GARNISHMENT.

Within the rule allowing suits against aliens, it seems an alien may be sued by another alien. Roberts *v.* Knights, 7 Allen (Mass.) 449; Barrell *v.* Benjamin, 15 Mass. 354; Rea *v.* Hayden, 3 Mass. 24; Dewitt *v.* Buchanan, 54 Barb. (N. Y.) 31; Johnson *v.* Dalton, 1 Cow. (N. Y.) 543, 13 Am. Dec. 564; The Jerusalem, 2 Gall. (U. S.) 191, 13 Fed. Cas. No. 7,293, wherein it was held that the court may take jurisdiction of actions between non-resident foreigners, particularly in suits *in rem*, as in such suits the proper forum is the *locus rei sitæ*.

But see Montalet *v.* Murray, 4 Cranch (U. S.) 46, 2 L. ed. 545, wherein it was held that, both parties being aliens, no suit can be instituted in the United States; and to the same effect see Dumoussay *v.* Delevit, 3 Harr. & M. (Md.) 151, where an action of replevin was abated on a plea that both parties were aliens, and the court therefore had not jurisdiction.

71. Dewitt *v.* Buchanan, 54 Barb. (N. Y.) 31, it appearing in this case that the assault had been committed in a foreign country. See, generally, ASSAULT AND BATTERY.

72. Barrell *v.* Benjamin, 15 Mass. 354. See also, generally, CONTRACTS.

assigned by him, as a bankrupt, in fraud of the bankruptcy act.[73] So it has been held that the alienage of a mortgagor is no defense to a writ of entry brought by the mortgagee to foreclose the equity of redemption.[74] The liability of an alien to be sued carries with it the right to use all the means and appliances of defense permitted to citizens who are sued.[75] He may employ an attorney to conduct his defense;[76] he is also entitled to the benefit of bankruptcy laws,[77] exemption laws,[78] and may plead the statute of limitations.[79]

2. CRIMINAL. Aliens domiciled in a country owe a local and temporary allegiance[80] to the government of that country.[81] They are bound to obey the general laws of the country, and may be prosecuted in criminal proceedings for violations of them.[82] Thus, it has been held that they might be prosecuted for homicide,[83] treason,[84] or for disinterring and removing from the place of burial the remains of any deceased person without a permit.[85]

Specific performance of a contract to purchase land may be decreed. Scott *v.* Thorpe, 1 Edw. (N. Y.) 512 (wherein it was held that alienage of defendant is no defense in such suits); Milliken *v.* Barrow, 55 Fed. 148. And it is not competent for a party who goes in under a contract to purchase to avail himself of the defense of alienage. Williams *v.* Myers, 2 Nova Scotia Dec. 157. See also Harney *v.* Donohoe, 97 Mo. 141, 10 S. W. 191; Hepburn *v.* Dunlop, 1 Wheat. (U. S.) 179, 4 L. ed. 65, 3 Wheat. (U. S.) 231, 4 L. ed. 377.

But *compare* Cutten *v.* McFarlane, 1 Nova Scotia Dec. 468, where it was held that plaintiff, as an alien, being disqualified from taking a bill of sale or transfer of a British vessel, under 17 & 18 Vict. c. 104, and the agreement sued on being an attempt to evade the statute, the agreement could not be enforced. See also, generally, SPECIFIC PERFORMANCE.

73. Olcott *v.* Maclean, 73 N. Y. 223, holding that alienage of defendant is no defense in such an action, where it appears that the suit was brought and the property attached in the state, and jurisdiction of defendant's person acquired by his personal appearance. See also, generally, BANKRUPTCY.

74. Waugh *v.* Riley, 8 Metc. (Mass.) 290. See also, generally, MORTGAGES.

75. Seymour *v.* Bailey, 66 Ill. 288.

As against a mere naked trespasser an alien will be protected in the possession of his public lands the same as a citizen. Courtney *v.* Turner, 12 Nev. 345.

Jury medietate linguæ.— Alien defendants are not entitled in the province of Nova Scotia, in any case, civil or criminal, to a jury *de medietate linguæ*. Reg. *v.* Burdell, 6 Nova Scotia 126. See *infra*, note 85.

76. Russ *v.* Mitchell, 11 Fla. 80; McNair *v.* Toler, 21 Minn. 175. See also, generally, ATTORNEY AND CLIENT.

The court may appoint counsel to appear for, and defend a suit against, an alien. Russ *v.* Mitchell, 11 Fla. 80.

77. *In re* Boynton, 10 Fed. 277. See also, generally, BANKRUPTCY.

78. People *v.* McClay, 2 Nebr. 7, wherein it was held that a resident alien, whose family is not in this state, is as much entitled to the benefit of the law giving exemption from sale of his personal property, taken upon execution against him, as is a citizen, if he came here with a settled purpose of abandoning his foreign residence, and, on his arrival here, fixed upon this state as his home, and intends to remove his family here. See also, generally, EXEMPTIONS; HOMESTEADS.

79. Overing *v.* Russell, 32 Barb. (N. Y.) 263. See also, *supra*, IV; and, generally, LIMITATIONS OF ACTIONS.

80. See ALLEGIANCE.

81. Homestead Case, 1 Pa. Dist. 785; Carlisle *v.* U. S., 16 Wall. (U. S.) 147, 21 L. ed. 426.

82. *California.*—People *v.* Chin Mook Sow, 51 Cal. 597.

New York.— People *v.* McLeod, 1 Hill (N. Y.) 377, 37 Am. Dec. 328, 25 Wend. (N. Y.) 483 [*citing* Campbell *v.* Hall, Cowp. 204].

North Carolina.— State *v.* Antonio, 11 N. C. 200.

United States.— Carlisle *v.* U. S., 16 Wall. (U. S.) 147, 21 L. ed. 426; Kempe *v.* Kennedy, 5 Cranch (U. S.) 173, 3 L. ed. 70; *In re* Wong Yung Quy, 6 Sawy. (U. S.) 442, 2 Fed. 624.

England.— Rex *v.* Esop, 7 C. & P. 456, 32 E. C. L. 705.

Canada.— Reg. *v.* School, 26 U. C. Q. B. 212; Reg. *v.* Lynch, 26 U. C. Q. B. 208; Reg. *v.* McMahon, 26 U. C. Q. B. 195.

See 2 Cent. Dig. tit. "Aliens," § 67.

For general matters relating to criminal law and criminal procedure see CRIMINAL LAW.

83. People *v.* McLeod, 1 Hill (N. Y.) 377, 37 Am. Dec. 328, 25 Wend. (N. Y.) 483. See also, generally, HOMICIDE.

84. Homestead Case, 1 Pa. Dist. 785; Carlisle *v.* U. S., 16 Wall. (U. S.) 147, 21 L. ed. 426; Kempe *v.* Kennedy, 5 Cranch (U. S.) 173, 3 L. ed. 70. But on this point see U. S. *v.* Villato, 2 Dall. (U. S.) 370, 1 L. ed. 419, 28 Fed. Cas. No. 16,622. See also, generally, TREASON.

85. *In re* Wong Yung Quy, 6 Sawy. (U. S.) 442, 2 Fed. 624, under the California statute of April 1, 1878, making such an act a criminal offense.

It is no defense on behalf of a foreigner, charged in England with a crime committed there, that he did not know he was doing wrong, the act not being an offense in his own country. But, though it is not a defense in law, yet it is a matter to be considered in

E. Actions by — 1. In General. It may be laid down, as a general rule, that all foreigners,[86] *sui juris*, and not otherwise specially disabled by the law of the place where the suit is brought,[87] may there maintain suits in the proper courts[88] to vindicate their rights and redress their wrongs.[89] All personal actions are

mitigation of punishment. Rex *v.* Esop, 7 C. & P. 456, 32 E. C. L. 705. And to the same effect see Cambioso *v.* Maffet, 2 Wash. (U. S.) 98, 4 Fed. Cas. No. 2,330.

Jury de medietate linguæ.— Aliens accused of crime are not entitled to be tried by a jury one half of whom are aliens. People *v.* Chin Mook Sow, 51 Cal. 597; State *v.* Antonio, 11 N. C. 200; Reg. *v.* Burdell, 6 Nova Scotia 126.

86. **Alien enemies,** however, are not within the rule. Anderson L. Dict.; Taylor *v.* Carpenter, 3 Story (U. S.) 458, 23 Fed. Cas. No. 13,784, 2 Woodb. & M. (U. S.) 1, 23 Fed. Cas. No. 13,785; Pisani *v.* Lawson, 6 Bing. N. Cas. 90, 37 E. C. L. 524. See, generally, War.

87. **By comity and the laws of the states,** resident aliens have the right to the same remedies in courts as citizens, and no court will deny those rights without positive legislation taking them away. Taylor *v.* Carpenter, 2 Woodb. & M. (U. S.) 1, 23 Fed. Cas. No. 13,785. *Compare*, however, Mitchell *v.* Wells, 37 Miss. 235, wherein it was held that, as an alien can sue here only so long as permitted by our laws or policy, the declaration of a prohibiting policy, pending a suit, is a bar to its further prosecution. See also Valk *v.* U. S., 29 Ct. Cl. 62, as to the application of a treaty upon alien's right to sue under a special statute giving to citizens only a right to sue.

88. **For courts having jurisdiction** of suits by aliens see Admiralty; Ambassadors and Consuls; Courts; and Taylor *v.* Carpenter, 2 Woodb. & M. (U. S.) 1, 23 Fed. Cas. No. 13,785, wherein it is said that aliens may sue in the federal courts as extensively as in the state courts; also Breedlove *v.* Nicolet, 7 Pet. (U. S.) 413, 8 L. ed. 731, to the effect that an alien does not lose his right to sue in the courts of the United States by residing in one of the states of the Union.

89. Story Confl. L. § 565; Bouvier L. Dict. [*citing* Calvin's Case, 7 Coke 17]; Taylor *v.* Carpenter, 2 Woodb. & M. (U. S.) 1, 23 Fed. Cas. No. 13,785 [*citing* Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 370; South Carolina Bank *v.* Case, 8 B. & C. 427, 15 E. C. L. 213; Jesson *v.* Wright, 2 Bligh 2; King of Spain *v.* Hullet, 1 Cl. & F. 333, 6 Eng. Reprint 941; Hullet *v.* King of Spain, 1 Dow. & C. 169; Berne *v.* Bank of England, 9 Ves. Jr. 347]; Wood *v.* Campbell, 3 U. C. Q. B. 269.

See 2 Cent. Dig. tit. "Aliens," § 61 *et seq.*

Plea of alienage is discouraged in the courts of both England and the United States, and is a defense not favored in the law. Taylor *v.* Carpenter, 2 Woodb. & M. (U. S.) 1, 23 Fed. Cas. No. 13,785. See also, generally, War.

Alien's right of suit is not affected by the fact that a similar remedy is not afforded to aliens in the country to which he belongs (Taylor *v.* Carpenter, 2 Woodb. & M. (U. S.) 1, 23 Fed. Cas. No. 13,785), nor by his physical location, nor by his personal character (King of Prussia *v.* Kuepper, 22 Mo. 550, 66 Am. Dec. 639).

Appearance by attorney may be made on behalf of alien claimant. Matter of Guilford, 67 Cal. 380, 7 Pac. 763; Matter of Leopold, 67 Cal. 385, 7 Pac. 766; Rabasse's Succession, 47 La. Ann. 1452, 17 So. 867, 49 Am. St. Rep. 433. See also Rabasse's Succession, 47 La. Ann. 1452, 17 So. 867, 49 Am. St. Rep. 433, relating to other representation of alien claimants.

For security for costs to be given by alien suitors see Costs.

Foreign sovereign or government may sue (King of Prussia *v.* Kuepper, 22 Mo. 550, 66 Am. Dec. 639; Republic *v.* De Arrangois, 11 How. Pr. (N. Y.) 1; Waguelin *v.* Republic, L. R. 20 Eq. 140; U. S. *v.* Wagner, L. R. 2 Ch. 582; Colombian Government *v.* Rothschild, 1 Sim. 94, 2 Eng. Ch. 94; Hullet *v.* King of Spain, 1 Dow. & C. 169), and stands on the same footing with an ordinary citizen to the rules and practice of the court in which the suit is instituted (King of Spain *v.* Hullet, 1 Cl. & F. 333, 6 Eng. Reprint 941). But *compare* King of Spain *v.* Oliver, Pet. C. C. (U. S.) 276, 14 Fed. Cas. No. 7,813; King of Spain *v.* Oliver, 2 Wash. (U. S.) 429, 14 Fed. Cas. No. 7,814; Berne *v.* Bank of England, 9 Ves. Jr. 347, to the effect that a judicial court cannot take notice of a foreign government not acknowledged by the government of the country in which the court sits.

One alien may sue another. See *supra*, note 70; and Roberts *v.* Knights, 7 Allen (Mass.) 449; Lorway *v.* Lousada, 1 Lowell (U. S.) 77, 15 Fed. Cas. No. 8,517. But see Dumoussay *v.* Delevit, 3 Harr. & M. (Md.) 151 (wherein it was held that replevin could not be maintained when both parties were aliens); and Brinley *v.* Avery, Kirby (Conn.) 25 (wherein it was held that a plea in abatement, that both parties are aliens, and that the contract declared on was made in a foreign country and was to have been performed there, is good [*compare*, however, Roberts *v.* Knights, 7 Allen (Mass.) 449, holding that one alien may sue another in the courts of Massachusetts upon a contract made abroad, if the parties are transiently in the commonwealth]).

Remedy by way of injunction is open to aliens in proper cases. De Laveaga *v.* Williams, 5 Sawy. (U. S.) 573, 7 Fed. Cas. No. 3,759. See also, generally, Injunctions.

Suit against governor.— See Rose *v.* Governor, 24 Tex. 496, wherein it was held that an alien could not, under the laws of Texas, sue the governor of that state. See also, generally, States.

within this rule,[90] such as actions for assault,[91] libel,[92] or slander,[93] as well as suits for the recovery of money or other personal property,[94] and proceedings for the protection of trade-mark rights.[95] So, also, it has been held that an alien might maintain an action for statutory damages or penalty for death by wrongful act.[96]

90. *Alabama.*— Luke *v.* Calhoun County, 52 Ala. 115; Sidgreaves *v.* Myatt, 22 Ala. 617.

Georgia.— Augusta R. Co. *v.* Glover, 92 Ga. 132, 18 S. E. 406.

Illinois.— Zacharie *v.* Godfrey, 50 Ill. 186, 99 Am. Dec. 506.

Louisiana.—Richmond *v.* Milne, 17 La. 312, 36 Am. Dec. 613, under the laws of Scotland.

Maryland.— Dumoussay *v.* Delevit, 3 Harr. & M. (Md.) 151.

Massachusetts.— Mulhall *v.* Fallon, 176 Mass. 266, 57 N. E. 386; Johnston *v.* Trade Ins. Co., 132 Mass. 432; Peabody *v.* Hamilton, 106 Mass. 217; Scanlan *v.* Wright, 13 Pick. (Mass.) 523, 25 Am. Dec. 344; Levine *v.* Taylor, 12 Mass. 8.

Missouri.— Greenia *v.* Greenia, 14 Mo. 526.

New Hampshire.— Emerson *v.* Shaw, 57 N. H. 223.

New York.— Dewitt *v.* Buchanan, 54 Barb. (N. Y.) 31; McArthur *v.* Bloom, 2 Duer (N. Y.) 151; Lemoine *v.* Gauton, 2 E. D. Smith (N. Y.) 343; Lister *v.* Wright, 2 Hill (N. Y.) 320; Clarke *v.* Morey, 10 Johns. (N. Y.) 69; Taylor *v.* Carpenter, 11 Paige (N. Y.) 292, 42 Am. Dec. 114; Coats *v.* Holbrook, 2 Sandf. Ch. (N. Y.) 586.

North Carolina.— Cruden *v.* Neale, 2 N. C. 338; Ray *v.* McCulloch, 1 N. C. 543; Hamiltons *v.* Eaton, 1 N. C. 83.

Texas.— Franco-Texan Land Co. *v.* Chaptive, (Tex. 1886) 3 S. W. 31.

United States.— U. S. *v.* O'Keefe, 11 Wall. (U. S.) 178, 20 L. ed. 131: Breedlove *v.* Nicolet, 7 Pet. (U. S.) 413, 8 L. ed. 731; Vetaloro *v.* Perkins, 101 Fed. 393; Wise *v.* Resler, 2 Cranch C. C. (U. S.) 182, 30 Fed. Cas. No. 17,911: Otteridge *v.* Thompson, 2 Cranch C. C. (U. S.) 108, 18 Fed. Cas. No. 10,618; Taylor *v.* Carpenter, 2 Woodb. & M. (U. S.) 1, 23 Fed. Cas. No. 13,785.

England.— 1 Bl. Comm. 372; Comyns Dig. 428; Jacob L. Dict.; Ramkissenseat *v.* Barker, 1 Atk. 51; Openheimer *v.* Levy, 2 Str. 1082; Pisani *v.* Lawson, 6 Bing. N. Cas. 90, 37 E. C. L. 524; Calvin's Case, 7 Coke 17.

Canada.— Wood *v.* Campbell, 3 U. C. Q. B. 269.

Personal actions, being transitory, are not limited to any particular country. Taylor *v.* Carpenter, 2 Woodb. & M. (U. S.) 1, 23 Fed. Cas. No. 13,785 [*citing* Story Confl. L. 450; 3 Bl. Comm. 249]. Hence an alien, like any other person, may bring suit *in personam* against any person over whom jurisdiction can be obtained. Sidgreaves *v.* Myatt, 22 Ala. 617.

91. Luke *v.* Calhoun County, 52 Ala. 115; Dewitt *v.* Buchanan, 54 Barb. (N. Y.) 31, holding that one alien may sue another alien in a state court for an assault and battery committed in a foreign country. See, generally, ASSAULT AND BATTERY.

92. Pisani *v.* Lawson, 6 Bing. N. Cas. 90, 37 E. C. L. 524.

93. Sidgreaves *v.* Myatt, 22 Ala. 617; Otteridge *v.* Thompson, 2 Cranch C. C. (U. S.) 108, 18 Fed. Cas. No. 10,618; Taylor *v.* Carpenter, 2 Woodb. & M. (U. S.) 1, 23 Fed. Cas. No. 13,785; Bacon Abr.; Comyns Dig. 428. See also, generally, LIBEL AND SLANDER.

But see Lister *v.* Wright, 2 Hill (N. Y.) 320, wherein it was doubted whether an alien could sue an alien for slander spoken in a foreign country.

94. *Louisiana.*— Richmond *v.* Milne, 17 La. 312, 36 Am. Dec. 613, under the laws of Scotland.

Maryland.— Dumoussay *v.* Delevit, 3 Harr. & M. (Md.) 151.

Missouri.— Greenia *v.* Greenia, 14 Mo. 526.

New York.— Dewitt *v.* Buchanan, 54 Barb. (N. Y.) 31.

North Carolina.— Hamiltons *v.* Eaton, 1 N. C. 83.

Texas.— Franco-Texan Land Co. *v.* Chaptive, (Tex. 1886) 3 S. W. 31.

England.— 1 Bl. Comm. 372; Comyns Dig. 428; Jacob L. Dict.

Canada.— Milne *v.* Moore, 24 Ont. 456.

See also, generally, REPLEVIN; TROVER.

Distributive share of the personal property, to which alien may be entitled as next of kin, may be recovered by him. Bradwell *v.* Weeks, 1 Johns. Ch. (N. Y.) 206 (holding that the right of recovering such property may be suspended during a war, the person in actual possession being constituted a trustee for his benefit till the return of peace); Page *v.* Pendleton, Wythe (Va.) 127. See also Milne *v.* Moore, 24 Ont. 456 [*following* Re Klœbe, 28 Ch. D. 175], to the effect that, in the administration of the Ontario estate of a deceased domiciled abroad, foreign creditors are entitled to dividends *pari passu* with Ontario creditors. See also, generally, DESCENT AND DISTRIBUTION.

95. Lemoine *v.* Gauton, 2 E. D. Smith (N. Y.) 343; Taylor *v.* Carpenter, 11 Paige (N. Y.) 292, 42 Am. Dec. 114; Coats *v.* Holbrook, 2 Sandf. Ch. (N. Y.) 586; Taylor *v.* Carpenter, 2 Woodb. & M. (U. S.) 1, 23 Fed. Cas. No. 13,785. See, generally, TRADE-MARKS AND TRADE-NAMES.

96. Luke *v.* Calhoun County, 52 Ala. 115; Augusta R. Co. *v.* Glover, 92 Ga. 132, 18 S. E. 406; Mulhall *v.* Fallon, 176 Mass. 266, 57 N. E. 386; Vetaloro *v.* Perkins, 101 Fed. 393. See also, generally, DEATH.

But see Brannigan *v.* Union Gold-Min. Co., 93 Fed. 164, wherein it was held that nonresident aliens are not entitled to the benefit of the Colorado statute giving a right of action for death by wrongful act to the next of kin of the deceased; and to the same effect see Deni *v.* Pennsylvania R. Co., 181 Pa. St. 525, 37 Atl. 558, under a Pennsylvania statute.

2. Relating to Real Property.[97] The rule that an alien friend, except when prohibited by law from so doing,[98] may claim the same protection of his rights as a citizen[99] applies to whatever rights he may have with respect to real property, whether such rights are guaranteed to him by treaty, by statute,[1] or are common-law rights.[2] Thus he may maintain an action — as ejectment or trespass to try title — to recover possession of land.[3] He may maintain trespass *quare clausum fregit*,[4] or may seek to have lands partitioned.[5] An alien mortgagee is entitled in equity to enforce the sale of the mortgaged premises for the payment of debt secured by the mortgage.[6]

3. Defenses — a. In General. A defendant may interpose the same matters of defense against alien plaintiffs as against citizen plaintiffs.[7] Hence it has been

97. **Formerly, at common law,** an alien could not have any action except a personal action. Comyns Dig. 427; Barrett *v.* Kelly, 31 Tex. 476. At common law, if plaintiff is an alien, named at the commencement of suit, it is a cause for abatement. Levine *v.* Taylor, 12 Mass. 8; Hutchinson *v.* Brock, 11 Mass. 119; Ainslie *v.* Martin, 9 Mass. 454; Martin *v.* Woods, 9 Mass. 377; Sewall *v.* Lee, 9 Mass. 363. But such disability occurring after action brought merely suspends the right to prosecute. Levine *v.* Taylor, 12 Mass. 8; Hutchinson *v.* Brock, 11 Mass. 119.

98. **In Illinois,** a non-resident alien cannot maintain a bill to set aside a will of real estate, as the statute [Ill. Laws (1895) p. 327] allows only a "person interested" to maintain such bill, and a non-resident alien, under our disqualifying statute, has no interest in the lands devised. Jele *v.* Lemberger, 163 Ill. 338, 45 N. E. 279.

99. In the courts of the United States alien friends are entitled to claim the same protection of their rights as citizens. Taylor *v.* Carpenter, 3 Story (U. S.) 458, 23 Fed. Cas. No. 13,784; Taylor *v.* Carpenter, 2 Woodb. & M. (U. S.) 1, 23 Fed. Cas. No. 13,185.

1. See *supra*, IV, C, 2.

2. See *supra*, IV, C, 1; and Society, etc. *v.* Wheeler, 2 Gall. (U. S.) 105, 22 Fed. Cas. No. 13,156 [*cited* in American Mut. L. Ins. Co. *v.* Owen, 15 Gray (Mass.) 491; March *v.* Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732].

3. *Missouri.*— Utassy *v.* Giedinghagen, 132 Mo. 53, 33 S. W. 444.

New Jersey.— Den *v.* Brown, 7 N. J. L. 305.

New York.— Peck *v.* Young, 26 Wend. (N. Y.) 613; Young *v.* Peck, 21 Wend. (N. Y.) 389.

Texas.— Ortiz *v.* De Benavides, 61 Tex. 60; White *v.* Sabariego, 23 Tex. 243.

Virginia.— Farley *v.* Shippen, Wythe (Va.) 135.

United States.—Hauenstein *v.* Lynham, 100 U. S. 483, 25 L. ed. 628; Shanks *v.* Dupont, 3 Pet. (U. S.) 242, 7 L. ed. 666; Bonaparte *v.* Camden, etc., R. Co., Baldw. (U. S.) 205, 3 Fed. Cas. No. 1,617; Fisher *v.* Harnden, 1 Paine (U. S.) 55, 9 Fed. Cas. No. 4,819.

Canada.— See also Doe *v.* Dickson, 2 U. C. Jur. 326.

See also, generally, Ejectment.

Before office found, even at common law, it seems, an alien might sue to recover possession of realty.

Alabama.— Jinkins *v.* Noel, 3 Stew. (Ala.) 60.

California.—But see, *contra*, Siemssen *v.* Bofer, 6 Cal. 250; and *compare* Norris *v.* Hoyt, 18 Cal. 217.

Maryland.— But see Guyer *v.* Smith, 22 Md. 239, 85 Am. Dec. 650, where this rule was doubted.

Massachusetts.— Scanlan *v.* Wright, 13 Pick. (Mass.) 523, 25 Am. Dec. 344.

New York.— Bradstreet *v.* Oneida County, 13 Wend. (N. Y.) 546; Jackson *v.* Britton, 4 Wend. (N. Y.) 507; Jackson *v.* Lunn, 3 Johns. Cas. (N. Y.) 109.

North Carolina.— Rouche *v.* Williamson, 25 N. C. 141. But see, *contra*, Barges *v.* Hogg, 2 N. C. 485.

Texas.— But see, *contra*, Barrett *v.* Kelly, 31 Tex. 476; Hardy *v.* De Leon, 5 Tex. 211.

United States.— Jones *v.* McMasters, 20 How. (U. S.) 8, 15 L. ed. 805.

Canada.— Williams *v.* Myers, 2 Nova Scotia Dec. 157. As to the common-law right of an alien to take and hold land by act of the parties see *supra*, IV, C, 1, a.

Under the Mexican laws an alien could not maintain an action to recover land in Texas. Holliman *v.* Peebles, 1 Tex. 673.

4. Ramires *v.* Kent, 2 Cal. 558; Barges *v.* Hogg, 2 N. C. 485. *Compare* Courtney *v.* Turner, 12 Nev. 345; Ortiz *v.* De Benavides, 61 Tex. 60.

5. Scharpf *v.* Schmidt, 172 Ill. 255, 50 N. E. 182; Schultze *v.* Schultze, 144 Ill. 290, 33 N. E. 201, 36 Am. St. Rep. 432, 19 L. R. A. 90; Scanlan *v.* Wright, 13 Pick. (Mass.) 523, 25 Am. Dec. 344; Nolan *v.* Command, 11 N. Y. Civ. Proc. 295; Cryer *v.* Andrews, 11 Tex. 170. See also, generally, Partition.

6. Richmond *v.* Milne, 17 La. 312, 36 Am. Dec. 613; Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 370; Hughes *v.* Edwards, 9 Wheat. (U. S.) 489, 497, 6 L. ed. 142, 144 (wherein it was said that, in such a foreclosure proceeding, "the alienage of the mortgagee, if he be a friend, can, upon no principle of law or equity, be urged against him"); Craig *v.* Radford, 3 Wheat. (U. S.) 594, 4 L. ed. 467. See also, generally, Mortgages.

7. Milliken *v.* Barrow, 55 Fed. 148. See cases cited *infra*, notes 8, 9. But *compare*, on this point, Com. *v.* Beaumarchais, 3 Call (Va.) 122; Page *v.* Pendleton, Wythe (Va.) 127.

held that he may set up a discharge in insolvency,[8] or payment, as a valid defense in an action brought against him by an alien.[9]

b. Alienage of Plaintiff. Whenever a plaintiff is incapacitated from suing, by reason of his alienage, defendant should raise the objection by a plea in abatement.[10]

V. NATURALIZATION.

A. Definition. Naturalization is the act or proceeding by which an alien becomes a citizen.[11]

8. **Insolvent laws** of a state are effective as a discharge against resident aliens in the same way and to the same extent as against resident citizens. Milliken *v.* Barrow, 55 Fed. 148; Letchford *v.* Convillon, 20 Fed. 608; Von Glahn *v.* Varrenne, 1 Dill. (U. S.) 515, 28 Fed. Cas. No. 16,994. See also, generally, BANKRUPTCY; INSOLVENCY.

But see Hobblethwaite *v.* Batturs, 1 Miles (Pa.) 82, wherein it was held that a discharge under the Maryland insolvent law does not bar a recovery on a cause of action existing before the discharge, where, at the time of the contract, plaintiff was an alien and foreign subject.

9. Court *v.* Vanbibber, 3 Harr. & M. (Md.) 140. See also, generally, PAYMENT.

But see Hamiltons *v.* Eaton, 1 N. C. 83, wherein it was held that debts, due to British subjects, paid into the public treasury compulsorily by an act of assembly, may, notwithstanding, be recovered of the debtor by the creditor under the provisions of the treaty of peace with Great Britain in 1783; and *compare*, to the same effect, Page *v.* Pendleton, Wythe (Va.) 127.

10. *Maryland.*— Shivers *v.* Wilson, 5 Harr. & J. (Md.) 130, 9 Am. Dec. 497.

Massachusetts.— Martin *v.* Woods, 9 Mass. 377.

Minnesota.—McNair *v.* Toler, 21 Minn. 175.

New Hampshire.— Educational Soc., etc. *v.* Varney, 54 N. H. 376.

New York.—Burnside *v.* Matthews, 54 N. Y. 78.

Texas.— Lee *v.* Salinas, 15 Tex. 495.

United States.— Rateau *v.* Bernard, 3 Blatchf. (U. S.) 244, 20 Fed. Cas. No. 11,579; The Bee, 1 Ware (U. S.) 336, 3 Fed. Cas. No. 1,219.

England.— Comyns Dig. 428; Burk *v.* Brown, 2 Atk. 397.

See, generally, ABATEMENT AND REVIVAL; WAR; and also *supra*, note 89.

But see Dewitt *v.* Buchanan, 54 Barb. (N. Y.) 31, wherein it was held that an objection to the maintenance of an action in which both plaintiffs and defendants were aliens, but in which defendant was served in the jurisdiction, should be interposed by a motion and not by answer, so that any facts warranting the court, in its discretion, to entertain the action might be made to appear by affidavit; and also White *v.* Sabariego, 23 Tex. 243, holding that, where an action is brought by an alien to recover land, the facts, if any exist, which bring him within the exception to the rule that an alien cannot sue for land, must be set forth in his petition to enable him to maintain his action.

A plea of alienage interposed to a real action, it has been held, goes in general to defeat the right of action altogether. White *v.* Sabariego, 23 Tex. 243.

Replication setting up naturalization.— To the general plea of alien friend, made by the tenant, naturalization may be replied by the demandants; so, also, that, although born within the allegiance of the King of England, and without the allegiance of the commonwealth, they were inhabitants of this state at the ratification of the treaty of peace, or that they are citizens of some other of the United States; or British subjects may confess and avoid the plea of alienage by bringing themselves within the treaty of 1794. Ainslie *v.* Martin, 9 Mass. 454.

11. Anderson L. Dict.

Other definitions.— Naturalization is the removal of the disabilities of alienage. State *v.* Manuel, 20 N. C. 122.

"Naturalization is the act of adopting a foreigner, and clothing him with the privileges of a native citizen." Per Fuller, C. J., in Boyd *v.* Nebraska, 143 U. S. 135, 12 S. Ct. 375, 36 L. ed. 103, 110.

A nation, or the sovereign who represents it, may grant to a stranger the quality of a citizen by admitting him into the body of the political society. This is called naturalization. Vattel L. Nat., bk. I, c. 19, §§ 212–214.

Collective naturalization is where the government, by treaty or cession, acquires the whole or a part of the territory of another nation, and takes to itself the inhabitants thereof. State *v.* Boyd, 31 Nebr. 682, 48 N. W. 739, 51 N. W. 602.

Distinguished from denizenation.— In England a denizen is an alien-born who has obtained, *ex donatione regis*, letters patent to make him a subject. White *v.* White, 2 Metc. (Ky.) 185; dissenting opinion of Brewer, J., in Fong Yue Ting *v.* U. S., 149 U. S. 698, 13 S. Ct. 1016, 37 L. ed. 905; Levy *v.* McCartee, 6 Pet. (U. S.) 102, 8 L. ed. 334; 1 Bl. Comm. 374; Coke Litt. 8*a*; Comyns Dig. tit. Aliens (D); Craw *v.* Ramsay, Vaughan 278. The crown may denizenize but cannot naturalize, the latter requiring the consent of parliament. Calvin's Case, 7 Coke 25*b*; 2 Rolle 93; Comyns Dig. 430. In the primary but obsolete sense of the word a denizen is a natural-born subject of a country. Coke Litt. 129*a*. A denizen is in a kind of middle state, between an alien and natural-born subject, and partakes of both of them. 1 Bl.

B. Power to Naturalize. Congress having exercised the power "to establish an uniform rule of naturalization," conferred by the federal constitution,[12] no alien can become a citizen except in the mode pointed out by congress. Such mode, under the power so conferred, is exclusive.[13]

C. Control of Congress over State Courts. Though congress may authorize state courts to naturalize aliens, and state courts, under such authority, may do so,[14] a state is under no constitutional obligation to furnish tribunals to aid in the administration of the naturalization laws of congress,[15] and hence may prescribe limitations upon the exercise, by its courts, of jurisdiction in such matters,[16] or even altogether prohibit its courts from entertaining jurisdiction.[17]

D. Persons Capable. The power to naturalize is applicable only to those of foreign birth,[18] and is limited to "aliens, being free white persons, and to aliens of African nativity, and to persons of African descent."[19]

Comm. 375. In South Carolina the status seems to have been created by statute. Vaux *v.* Nesbit, 1 McCord Eq. (S. C.) 352. Denizenation has no retrospective operation. Priest *v.* Cummings, 20 Wend. (N. Y.) 338; Vaux *v.* Nesbit, 1 McCord Eq. (S. C.) 352.

12. U. S. Const. art. 1, § 8, cl. 4.

In England.— Formerly an act of parliament was required in each particular case to naturalize an alien. White *v.* White, 2 Metc. (Ky.) 185; U. S. *v.* Rhodes, 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151. But by 7 & 8 Vict. c. 66, which was a general act, it was enacted that aliens of friendly states might become naturalized British subjects upon complying with the requisites of the act. By 33 & 34 Vict. c. 14, further facilities of naturalization are afforded.

13. *Alabama.*— Etheridge *v.* Malempre, 18 Ala. 565.

California.— *Ex p.* Knowles, 5 Cal. 300.

Illinois.— See Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

Massachusetts.— Stephens, Petitioner, 4 Gray (Mass.) 559; Gladhill, Petitioner, 8 Metc. (Mass.) 168.

Michigan.— Andres *v.* Arnold, 77 Mich. 85, 43 N. W. 857, 6 L. R. A. 238.

New Hampshire.— Beavins' Petition, 33 N. H. 89.

New York.— Matter of Ramsden, 13 How. Pr. (N. Y.) 429; Lynch *v.* Clarke, 1 Sandf. Ch. (N. Y.) 583; People *v.* Sweetman, 3 Park. Crim. (N. Y.) 358.

North Carolina.— Rouche *v.* Williamson, 25 N. C. 141; State *v.* Manuel, 20 N. C. 122.

South Carolina.— Davis *v.* Hall, 1 Nott & M. (S. C.) 292.

Virginia.— Com. *v.* Towles, 5 Leigh (Va.) 743; Barzizas *v.* Hopkins, 2 Rand. (Va.) 276.

Wisconsin.— *In re* Wehlitz, 16 Wis. 443, 84 Am. Dec. 700.

United States.—Houston *v.* Moore, 5 Wheat. (U. S.) 1, 5 L. ed. 19; Chirac *v.* Chirac, 2 Wheat. (U. S.) 259, 4 L. ed. 234; *In re* Gee Hop, 71 Fed. 274; U. S. *v.* Villato, 2 Dall. (U. S.) 370, 1 L. ed. 419, 28 Fed. Cas. No. 16,622; Minneapolis *v.* Reum, 56 Fed. 576, 12 U. S. App. 446, 6 C. C. A. 31; Matthew *v.* Rae, 3 Cranch C. C. (U. S.) 699, 16 Fed. Cas. No. 9,284; Lanz *v.* Randall, 4 Dill. (U. S.) 425, 14 Fed. Cas. No. 8,080.

See also Collet *v.* Collet, 2 Dall. (U. S.) 294, 1 L. ed. 387, wherein it was held that, though the states have concurrent authority with the United States to naturalize aliens, such authority cannot be exercised so as to contravene the acts of congress.

See 2 Cent. Dig. tit. "Aliens," § 117.

As to courts possessing power to naturalize see *infra*, V, F.

14. State *v.* Penney, 10 Ark. 621; Rump *v.* Com., 30 Pa. St. 475; Croesus Min., etc., Co. *v.* Colorado Land, etc., Co., 19 Fed. 78.

As to state courts possessing power to naturalize see *infra*, V, F.

15. Morgan *v.* Dudley, 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735; Stephens, Petitioner, 4 Gray (Mass.) 559; State *v.* Whittemore, 50 N. H. 245; Lab's Petition, 3 Pa. Dist. 728. See also Scott *v.* Strobach, 49 Ala. 477, 488, wherein it is said: "The courts of the state exercise the power thus conferred, rather as matter of comity than as matter of duty."

16. Rushworth *v.* Judges, 58 N. J. L. 97, 32 Atl. 743, 30 L. R. A. 761. See also Lab's Petition, 3 Pa. Dist. 728.

17. Gilroy, Petitioner, 88 Me. 199, 33 Atl. 979, 51 Am. St. Rep. 392 (wherein it was held that Me. Laws (1893), c. 310, which prohibit any court, other than the supreme judicial and superior courts, from entertaining any jurisdiction over the naturalization of aliens, is not in violation of any provision of the constitution of the United States); Stephens, Petitioner, 4 Gray (Mass.) 559; Beavins' Petition, 33 N. H. 89.

See 2 Cent. Dig. tit. "Aliens," § 117.

18. U. S. *v.* Rhodes, 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151.

19. U. S. Rev. Stat. (1878), § 2169. See also the following cases: Schutz's Petition, 64 N. H. 241, 8 Atl. 827; *In re* Kanaka Nian, 6 Utah 259, 21 Pac. 993, 4 L. R. A. 726; North Noonday Min. Co. *v.* Orient Min. Co., 6 Sawy. (U. S.) 299, 1 Fed. 522.

See 2 Cent. Dig. tit. "Aliens," §§ 119–122.

An alien enemy cannot be permitted to make the declaration required by law preparatory to the naturalization of aliens. U. S. Rev. Stat. (1878), § 2171; *Ex p.* Newman, 2 Gall. (U. S.) 11, 18 Fed. Cas. No. 10,174. See also *Ex p.* Overington, 5 Binn. (Pa.) 371. *Compare Ex p.* Little, 2 Browne (Pa.) 218.

Half white.— A person of half white and

E. Qualifications. To entitle an alien to be admitted to citizenship by naturalization, he must possess all the qualifications made requisite by statute.[20]

F. Jurisdiction. The statute authorizing any court of record of a state having common-law jurisdiction and a seal and clerk to naturalize aliens[21] does not require such court to have common-law jurisdiction over all classes of actions. It is sufficient that it has common-law jurisdiction over all subjects upon which it has authority to adjudicate, and that it exercises its powers according to the course of the common law.[22] The court, however, must have a clerk, distinct

half Indian blood is not a white person within the meaning of the naturalization laws, and therefore he is not entitled to be admitted to citizenship thereunder. *In re* Camille, 6 Sawy. (U. S.) 541, 6 Fed. 256.

Minors.— An alien, though a minor, may be admitted to citizenship. Priest *v.* Cummings, 20 Wend. (N. Y.) 338; *In re* Merry, 9 Wkly. Notes Cas. (Pa.) 169. But in such case the proceedings therefor must be had through a guardian or next friend. Le Forestiere's Petition, 2 Mass. 419; *In re* Lawler, 5 Montg. Co. Rep. (Pa.) 77.

As to effect of naturalization of parent on child see *infra*, V, I, 3.

Mongolians are not white persons within the meaning of the naturalization laws. Accordingly, natives of Burmah (Matter of Po, 7 Misc. (N. Y.) 471, 28 N. Y. Suppl. 383), natives of China (*In re* Hong Yen Chang, 84 Cal. 163, 24 Pac. 156; U. S. *v.* Wong Kim Ark, 169 U. S. 649, 18 S. Ct. 456, 42 L. ed. 890; Fong Yue Ting *v.* U. S., 149 U. S. 698, 13 S. Ct. 1016, 37 L. ed. 905; *In re* Gee Hop, 71 Fed. 274; *In re* Ah Yup, 5 Sawy. (U. S.) 155, 1 Fed. Cas. No. 104), and natives of Japan (*In re* Saito, 62 Fed. 126), being Mongolians, are not entitled to become citizens of the United States.

Native citizens of Mexico, whatever may be their status, are eligible to be naturalized. *In re* Rodriguez, 81 Fed. 337.

Women, either single (Brown *v.* Shilling, 9 Md. 74) or married (*Ex p.* Pic, 1 Cranch C. C. (U. S.) 372, 19 Fed. Cas. No. 11,118), may be naturalized, and, in the case of a married woman, without the consent of her husband (Priest *v.* Cummings, 16 Wend. (N. Y.) 617).

As to effect of naturalization of husband on alien wife see *infra*, V, I, 4.

20. Matter of Stewart, 7 Rob. (N. Y.) 635; Northumberland County Naturalizations, 18 Pa. Co. Ct. 270; *In re* Kanaka Nian, 6 Utah 259, 21 Pac. 993, 4 L. R. A. 726.

See 2 Cent. Dig. tit. "Aliens," §§ 123–130.

As to evidence of qualifications see *infra*, V, G, 4.

Good moral character.— An applicant for naturalization must be a person of good moral character. Matter of Stewart, 7 Rob. (N. Y.) 635; *In re* Bodek, 63 Fed. 813. One who has been convicted of perjury, though afterward pardoned, is not of good moral character. *In re* Spenser, 5 Sawy. (U. S.) 195, 22 Fed. Cas. No. 13,234.

Residence for the requisite time must have passed. State *v.* Macdonald, 24 Minn. 48; Schutz's Petition, 64 N. H. 241, 8 Atl. 827; Matter of Clark, 18 Barb. (N. Y.) 444; Matter of Stewart, 7 Rob. (N. Y.) 635; Matter of Rice, 7 Daly (N. Y.) 22; Matter of Bye, 2 Daly (N. Y.) 525; Matter of Scott, 1 Daly (N. Y.) 534; Matter of Hawley, 1 Daly (N. Y.) 531; *Ex p.* Paul, 7 Hill (N. Y.) 56; *Ex p.* Walton, 1 Cranch C. C. (U. S.) 186, 29 Fed. Cas. No. 17,127; *Ex p.* Saunderson, 1 Cranch C. C. (U. S.) 219, 21 Fed. Cas. No. 12,378; *Ex p.* Pasqualt, 1 Cranch C. C. (U. S.) 243, 18 Fed. Cas. No. 10,788; Anonymous, 1 Fed. Cas. No. 465, 4 N. Y. Leg. Obs. 98; *In re* An Alien, 1 Fed. Cas. No. 201*a*. But U. S. Rev. Stat. (1878), § 2174, conferring upon seamen who have served on board merchant vessels of the United States the right to citizenship, does not extend to the naval service. *In re* Gormly, 14 Phila. (Pa.) 211, 37 Leg. Int. (Pa.) 346, 9 Wkly. Notes Cas. (Pa.) 96.

21. U. S. Rev. Stat. (1878), § 2165.

22. *California.*— Matter of Conner, 39 Cal. 98, 2 Am. Rep. 427 [*disapproving Ex p.* Knowles, 5 Cal. 300].

Illinois.— Dale *v.* Irwin, 78 Ill. 170; People *v.* McGowan, 77 Ill. 644, 20 Am. Rep. 254. *Compare* Mills *v.* McCabe, 44 Ill. 194.

Kentucky.— Morgan *v.* Dudley, 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735.

Maine.— Dean, Petitioner, 83 Me. 489, 22 Atl. 385, 13 L. R. A. 229.

Massachusetts.— Gladhill, Petitioner, 8 Metc. (Mass.) 168.

New York.— People *v.* Sweetman, 3 Park. Crim. (N. Y.) 358.

Pennsylvania.— Moran *v.* Rennard, 3 Brewst. (Pa.) 601; Com. *v.* Lee, 1 Brewst. (Pa.) 273.

United States.— U. S. *v.* Lehman, 39 Fed. 49; U. S. *v.* Power, 14 Blatchf. (U. S.) 223, 27 Fed. Cas. No. 16,080; *Ex p.* Smith, 22 Fed. Cas. No. 12,969, 3 Wkly. L. Gaz. 237.

But see State *v.* Baker, 51 La. Ann. 1243, 26 So. 102, wherein it was held that a criminal district court is without jurisdiction to entertain an application for naturalization, though it is a court of record, possessed of common-law jurisdiction.

See 2 Cent. Dig. tit. "Aliens," §§ 131–137.

Court of appellate jurisdiction.— A court possessing appellate jurisdiction only has been held to have no power to naturalize an alien. *Ex p.* Knowles, 5 Cal. 300. See also *Ex p.* McKenzie, 51 S. C. 244, 28 S. E. 468.

County courts.— In California, Illinois, New York, and Texas, county courts may naturalize. Matter of Conner, 39 Cal. 98, 2 Am. Rep. 427; Beardstown *v.* Virginia, 81 Ill. 541; Dale *v.* Irwin, 78 Ill. 170 [*overruling* Knox County *v.* Davis, 63 Ill. 405]; People *v.* McGowan, 77 Ill. 644, 20 Am. Rep. 254; People

from the judge of such court, to enable it to confer citizenship on an alien by naturalization.[23]

G. Proceedings — 1. Nature of Proceedings. The power to naturalize an alien is a judicial power.[24] Consequently, proceedings for naturalization are judicial proceedings, to be exercised by the court.[25]

2. Declaration of Intention — a. Necessity. Except in the case of a minor residing in the United States for three years before his majority,[26] or of a person honorably discharged from the military service of the United States,[27] a previous declaration of intention to become a citizen is an absolute prerequisite to the naturalization of an alien.[28]

b. Requisites and Sufficiency. An applicant must declare his intention in such form as to show the time when the intention to become a citizen was actually made.[29]

v. Pease, 30 Barb. (N. Y.) 588; People *v.* Sweetman, 3 Park. Crim. (N. Y.) 358; *Ex p.* Burkhardt, 16 Tex. 470.

Federal and territorial courts.— Circuit and district courts of the United States, and district and supreme courts of territories, have jurisdiction to naturalize aliens. U. S. Rev. Stat. (1878), § 2165.

A probate court having no common-law jurisdiction cannot entertain an application for naturalization. *Ex p.* Tweedy, 22 Fed. 84. Otherwise if it has common-law jurisdiction. Matter of Harstrom, 7 Abb. N. Cas. (N. Y.) 391; *Ex p.* Smith, 22 Fed. Cas. No. 12,969, 3 Wkly. L. Gaz. 237.

23. State *v.* Webster, 7 Nebr. 469; State *v.* Whittemore, 50 N. H. 245; *Ex p.* Cregg, 2 Curt. (U. S.) 98, 6 Fed. Cas. No. 3,380. See also Dean, Petitioner, 83 Me. 489, 22 Atl. 385, 13 L. R. A. 229, wherein it was held that a court in which the judge thereof is charged with the duty of keeping its records, which must be authenticated by him, though having a recorder charged with the duty of keeping such records when requested so to do by the judge, is not a court having a clerk, within the federal statutes regulating naturalization.

24. *Alabama.*— Scott *v.* Strobach, 49 Ala. 477.

California.— Bode *v.* Trimmer, 82 Cal. 513, 23 Pac. 187; *Ex p.* Knowles, 5 Cal. 300.

Kentucky.— Morgan *v.* Dudley, 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735.

Nebraska.— State *v.* Boyd, 31 Nebr. 682, 48 N. W. 739, 51 N. W. 602.

New York.— Matter of Clark, 18 Barb. (N. Y.) 444.

Pennsylvania.— Rump *v.* Com., 30 Pa. St. 475.

United States.— Spratt *v.* Spratt, 4 Pet. (U. S.) 393, 7 L. ed. 897; *In re* Bodek, 63 Fed. 813; Green *v.* Salas, 31 Fed. 106; U. S. *v.* Makins, 26 Fed. Cas. No. 15,710, 3 Am. L. Rev. 777, Hoffm. Op. 500; *In re* Coleman, 15 Blatchf. (U. S.) 406, 6 Fed. Cas. No. 2,980.

25. Matter of Clark, 18 Barb. (N. Y.) 444. See also Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704, wherein it was held that naturalization papers issued to an alien by the clerk of a court, without any order of court, are void.

26. U. S. Rev. Stat. (1878), § 2167; State *v.* Macdonald, 24 Minn. 48; Schutz's Petition, 64 N. H. 241, 8 Atl. 827.

27. U. S. Rev. Stat. (1878), § 2166; Scott *v.* Strobach, 49 Ala. 477; Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936. But the exception of the statute does not apply to aliens who have served in the navy. *In re* Chamavas, 21 N. Y. Suppl. 104, 48 N. Y. St. 551 [*disapproving* Matter of Stewart, 7 Rob. (N. Y.) 635]; *In re* Bailey, 2 Sawy. (U. S.) 200, 2 Fed. Cas. No. 728. By a subsequent statute [28 U. S. Stat. at L. c. 165] the rule now applies to persons honorably discharged from navy or marine corps.

28. *Ex p.* Brownlee, 9 Ark. 191; McCarty *v.* Hodges, 2 Edm. Sel. Cas. (N. Y.) 433. See also Banks *v.* Walker, 3 Barb. Ch. (N. Y.) 438, wherein it is held that, where it is clearly inferable from a record of naturalization that the alien had not, at least three years previous to the date thereof, declared on oath his intention to become a citizen of the United States and to renounce all allegiance to any foreign prince or sovereignty, and particularly to the king of the country of which he was a subject, but that the court has mistaken the registry of the arrival of the alien in the United States for such a declaration of intention, the naturalization is invalid.

See 2 Cent. Dig. tit. "Aliens," §§ 139, 140.

As to operation and effect of declaration of intention see *infra*, V, I, 2.

Presumptions.— The declaration by an alien of his intention to become a citizen, made before a person not authorized to receive the same, constitutes no ground for presuming that a subsequent valid declaration has been made before an officer who was authorized. State *v.* Olin, 23 Wis. 309.

29. *In re* Randall, 14 Phila. (Pa.) 224, 37 Leg. Int. (Pa.) 377, 9 Wkly. Notes Cas. (Pa.) 159.

Name of foreign sovereign.— The declaration of an alien of his intention to become a citizen of the United States stated that it was, *bona fide*, his intention to become a citizen of the United States, and to renounce and abjure all allegiance and fidelity to every foreign prince, state, potentate, and sovereignty whatever, and particularly to the Queen of Great Britain and Ireland. It was

3. Petition. A petition for naturalization must allege the existence of all facts and the fulfilment of all conditions upon the existence and fulfilment of which the statutes which confer the right have made it dependent.[30]

4. Evidence of Qualifications. The application must be supported by legal proof of the facts on which it rests.[31]

5. Judgment — a. Entry. Judgments upon petitions for naturalization should be formally entered.[32]

b. Conclusiveness. A record of the judgment of a competent court admitting an alien to become a citizen, and reciting the facts which entitle the alien to such judgment, cannot be impeached by proof contradicting these recitals. In all collateral proceedings such record is conclusive.[33]

held that the declaration was not objectionable because the name of the queen was not stated. *Ex p.* Smith, 8 Blackf. (Ind.) 395.

Oath.— The declaration of intention must be under oath. U. S. *v.* Walsh, 22 Fed. 644.

Place of making declaration.— A declaration of intention to become a citizen must be made at the regular office of the clerk, or in open court. People *v.* Sweetman, 3 Park. Crim. (N. Y.) 358; Santo Scola's Case, 8 Pa. Co. Ct. 344; *In re* Langtry, 12 Sawy. (U. S.) 467, 31 Fed. 879; Butterworth's Case, 1 Woodb. & M. (U. S.) 323, 4 Fed. Cas. No. 2,251. *Contra,* Andres *v.* Arnold, 77 Mich. 85, 43 N. W. 857, 6 L. R. A. 238; *In re* Boso, 6 Kulp (Pa.) 83.

30. Cummings' Petition, 41 N. H. 270; *In re* Bodek, 63 Fed. 813.

See 2 Cent. Dig. tit. "Aliens," § 142.

As to petition by minor see *supra,* note 19.

Petitions for naturalization must be filed at or before the time of their presentation. *In re* Bodek, 63 Fed. 813.

New petition.— One who has been improperly naturalized may surrender his certificate and present a new petition. Com. *v.* Paper, 1 Brewst. (Pa.) 263.

31. Cummings' Petition, 41 N. H. 270; Matter of Clark, 18 Barb. (N. Y.) 444; Matter of ———, 7 Hill (N. Y.) 137; Spratt *v.* Spratt, 1 Pet. (U. S.) 343, 7 L. ed. 171; *In re* Lipshitz, 97 Fed. 584; *In re* Bodek, 63 Fed. 813; U. S. *v.* Grottkau, 30 Fed. 672; *In re* Coleman, 15 Blatchf. (U. S.) 406, 6 Fed. Cas. No. 2,980; *In re* Tucker, 1 Cranch C. C. (U. S.) 89, 24 Fed. Cas. No. 14,214; Anonymous, Pet. C. C. (U. S.) 457, 1 Fed. Cas. No. 468.

See 2 Cent. Dig. tit. "Aliens," § 141.

Capacity of alien witness.— An alien cannot vouch for a person petitioning to be naturalized. Com. *v.* Paper, 1 Brewst. (Pa.) 263.

Evidence of intention.— Substantial evidence of the existence of an intention to become a citizen for the required time, in addition to the oath of the applicant, is necessary. Cummings' Petition, 41 N. H. 270; *In re* Fronascone, 99 Fed. 48.

Oath required.— The only oath required to be taken by an alien on his becoming a citizen is that prescribed by the act of congress. An alien cannot be required to take an oath of allegiance to any particular state. *Ex p.* Granstein, 1 Hill (S. C.) 141. Final papers will be refused where it appears that petitioner could not write, and that the oath of allegiance purporting to have been signed by him bore a well-written signature. Matter of Conway, 9 Misc. (N. Y.) 652, 30 N. Y. Suppl. 835, 62 N. Y. St. 343.

32. Prentice *v.* Miller, 82 Cal. 570, 23 Pac. 189; Bode *v.* Trimmer, 82 Cal. 513, 23 Pac. 187; *In re* Bodek, 63 Fed. 813; Green *v.* Salas, 31 Fed. 106. See also *In re* Coleman, 15 Blatchf. (U. S.) 406, 6 Fed. Cas. No. 2,980.

See 2 Cent. Dig. tit. "Aliens," § 145.

Nature of judgment.— A judgment admitting an alien to citizenship has none of the properties or qualities of a judicial proceeding *in personam.* It is, rather, *in rem.* Scott *v.* Strobach, 49 Ala. 477.

Sufficiency of entry.— The preliminary proofs, having thereon the initials of the presiding judge, on being filed in the clerk's office with the oath of allegiance, constitute a record of the judgment admitting to citizenship. Matter of Christern, 43 N. Y. Super. Ct. 523. The record need not show affirmatively the existence of all the legal prerequisites. Harley *v.* State, 40 Ala. 689; McDaniel *v.* Richards, 1 McCord (S. C.) 187; *In re* Coleman, 15 Blatchf. (U. S.) 406, 6 Fed. Cas. No. 2,980; *In re* McCoppin, 5 Sawy. (U. S.) 630, 15 Fed. Cas. No. 8,713. See also Com. *v.* Towles, 5 Leigh (Va.) 743.

33. *Alabama.*— Scott *v.* Strobach, 49 Ala. 477. See also Harley *v.* State, 40 Ala. 689.

Arkansas.— State *v.* Penney, 10 Ark. 621.

Illinois.—Ackerman *v.* Haenck, 147 Ill. 514, 35 N. E. 381; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; People *v.* McGowan, 77 Ill. 644, 20 Am. Rep. 254.

Indian Territory.— Raymond *v.* Raymond, 1 Indian Terr. 334, 37 S. W. 202.

Minnesota.— State *v.* Macdonald, 24 Minn. 48. See also State *v.* Barrett, 40 Minn. 65, 41 N. W. 459.

New York.— McCarthy *v.* Marsh, 5 N. Y. 263 [*reversing* 2 Edm. Sel. Cas. (N. Y.) 433]; People *v.* Pease, 30 Barb. (N. Y.) 588; Banks *v.* Walker, 3 Barb. Ch. (N. Y.) 438; Matter of McCarran, 8 Misc. (N. Y.) 482, 29 N. Y. Suppl. 582, 60 N. Y. St. 168, 23 L. R. A. 835; Ritchie *v.* Putnam, 13 Wend. (N. Y.) 524.

Pennsylvania.— *In re* Contested Elections, 2 Brewst. (Pa.) 1; Com. *v.* Leary, 1 Brewst. (Pa.) 270; Com. *v.* Sheriff, 1 Brewst. (Pa.) 183.

South Carolina.— See McDaniel *v.* Richards, 1 McCord (S. C.) 187. *Compare* Vaux *v.* Nesbit, 1 McCord Eq. (S. C.) 352.

c. **Modification or Vacation.** The court before whom proceedings to naturalize an alien take place may, on the ground of fraud,[34] mistake, or irregularity,[35] amend or vacate its order or decree in that behalf made, provided such court is one having an inherent power to correct or annul its judgments or decrees.[36]

6. **Certificate.** Informalities in a certificate of naturalization do not invalidate it.[37]

H. Evidence of Naturalization.[38] Though, as a general rule, naturalization cannot be proved by parol,[39] yet, where no record can be produced showing the

Virginia.— See Com. *v.* Towles, 5 Leigh (Va.) 743.

Wisconsin.— State *v.* Hoeflinger, 35 Wis. 393.

United States.— Spratt *v.* Spratt, 1 Pet. (U. S.) 343, 7 L. ed. 171; Stark *v.* Chesapeake Ins. Co., 7 Cranch (U. S.) 420, 3 L. ed. 391; Campbell *v.* Gordon, 6 Cranch (U. S.) 176, 3 L. ed. 190; U. S. *v.* Gleason, 78 Fed. 396; The Acorn, 2 Abb. (U. S.) 434, 1 Fed. Cas. No. 29.

See 2 Cent. Dig. tit. "Aliens," § 145.

But see State *v.* Stumpf, 23 Wis. 630, wherein it was held that where oaths, in the form required for aliens declaring their intention to become citizens, were signed in blank by the clerk of a circuit court and so delivered by him to a justice of the peace, to be by the latter filled out with the date and the names of the persons subscribing them, and the oath was in fact administered by the justice, and not, as it purported to have been, by the clerk, these facts may be shown by parol.

Certificate void on its face.— A certificate of naturalization void in its face — for example, a certificate of the naturalization of a Chinaman — is not within the rule stated in the text. *In re* Gee Hop, 71 Fed. 274.

34. Vaux *v.* Nesbit, 1 McCord Eq. (S. C.) 352; U. S. *v.* Kornmehl, 89 Fed. 10; U. S. *v.* Norsch, 42 Fed. 417, holding, however, that a state of facts must be disclosed from which the court can see that the judgment was fraudulently procured.

See 2 Cent. Dig. tit. "Aliens," § 146.

Who entitled to set aside.— A private person cannot sue to set aside an order admitting an alien to citizenship. Raymond *v.* Raymond, 1 Indian Terr. 334, 37 S. W. 202; McCarran *v.* Cooper, 162 N. Y. 654, 57 N. E. 1116 [*affirming* 16 N. Y. App. Div. 311, 44 N. Y. Suppl. 695]; Com. *v.* Paper, 1 Brewst. (Pa.) 263; *In re* Shaw, 2 Pa. Dist. 250; Pintsch Compressing Co. *v.* Bergin, 84 Fed. 140.

35. Matter of Christern, 43 N. Y. Super. Ct. 523, 56 How. Pr. (N. Y.) 5; Richards *v.* McDaniel, 2 Nott & M. (S. C.) 351. But see Matter of Desty, 8 Abb. N. Cas. (N. Y.) 250, wherein it was held that, where the record fails to show the proceedings necessary to the issue of a certificate of naturalization, the court cannot make up the record *nunc pro tunc*, and issue the certificate accordingly.

A clerical error in a record admitting an alien to citizenship may be corrected. State *v.* Macdonald, 24 Minn. 48; Priest *v.* Cummings, 16 Wend. (N. Y.) 617.

36. U. S. *v.* Norsch, 42 Fed. 417.

Laches.— Neglect for more than twenty-five years to make an application for the setting aside of an order of naturalization is fatal to the application. Matter of McCarran, 8 Misc. (N. Y.) 482, 31 Abb. N. Cas. (N. Y.) 416, 29 N. Y. Suppl. 582, 60 N. Y. St. 168, 23 L. R. A. 835.

Suit by United States on certificate of state court.— The United States can sue in a federal court for the cancellation of a certificate or decree of naturalization which has been obtained by fraud in a state court. U. S. *v.* Norsch, 42 Fed. 417.

37. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704, wherein it was held that a misnomer in a certificate of naturalization does not vitiate it. See also Com. *v.* Towles 5 Leigh (Va.) 743, wherein it was held that a certificate, stating that the party "took the oath in such case required by the act of congress," imports that he took the oath required in the very words prescribed by the statute, and that the act of naturalization is good.

See 2 Cent. Dig. tit. "Aliens," §§ 148–150.

Amendment.— A naturalized alien who subsequently obtains an order of court changing his name is not entitled to have his naturalization certificate amended to conform to the change. Matter of Nigri, 32 Misc. (N. Y.) 392, 66 N. Y. Suppl. 182.

Attestation.— A certificate of naturalization must be attested by a prothonotary or clerk. *In re* Questions on Election, etc., 2 Brewst. (Pa.) 138.

Sufficiency of certificate.— A certificate of naturalization was to this effect: I, J. F. G., Clerk, etc., certify that, at a superior court held at Savannah, J. M. R., an alien, etc., petitioned the court to be admitted a citizen, and having in all things complied with the law in such case made and provided, the said J. M. R. was accordingly admitted a citizen of the United States of America, having first taken and subscribed, in open court, the oath of naturalization. It was held that the certificate was not sufficient to show J. M. R. naturalized. Miller *v.* Reinhart, 18 Ga. 239.

In Canada the certificate required by the act of 31 Vict. c. 66, § 5, must be both filed and openly read in court on the first day of the term. *Ex p.* Dow, 18 N. Brunsw. 302.

38. As to evidence of alienage see *supra*, III.

39. *California.*— Belcher *v.* Farren, 89 Cal. 73, 26 Pac. 791; Prentice *v.* Miller, 82 Cal. 570, 23 Pac. 189; Bode *v.* Trimmer, 82 Cal. 513, 23 Pac. 187; Miller *v.* Prentice, 82 Cal. 104, 23 Pac. 8.

New Mexico.— Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936.

naturalization of an alien possessing the requisite qualifications to become a citizen, naturalization may be inferred from the fact that for a long time he voted, held office, and exercised all the rights and privileges of a citizen.[40]

I. Operation and Effect — 1. In General. An alien on becoming a naturalized citizen possesses the rights of a native-born citizen.[41]

Vermont.— State *v.* O'Hearn, 58 Vt. 718, 6 Atl. 606.

West Virginia.— Dryden *v.* Swinburne, 20 W. Va. 89.

United States.— Green *v.* Salas, 31 Fed. 106; Slade *v.* Minor, 2 Cranch C. C. (U. S.) 139, 22 Fed. Cas. No. 12,937.

See 2 Cent. Dig. tit. "Aliens," §§ 152, 153.

Identification of person.— Where a certificate of naturalization recites the person as Patrick W. Doran, and his real name is Patrick Peter William Doran, he may prove by his own oath that it was issued to him, and that he is the person naturalized thereby. Beardstown *v.* Virginia, 81 Ill. 541.

40. *Illinois.*— Ryan *v.* Egan, 156 Ill. 224, 40 N. E. 827. See also Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

New York.— People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242; People *v.* McNally, 59 How. Pr. (N. Y.) 500.

North Dakota.— Kadlec *v.* Pavik, 9 N. D. 278, 83 N. W. 5.

South Carolina.—Sasportas *v.* De la Motta, 10 Rich. Eq. (S. C.) 38.

Virginia.—Nalle *v.* Fenwick, 4 Rand. (Va.) 585.

United States.— Boyd *v.* Nebraska, 143 U. S. 135, 12 S. Ct. 375, 36 L. ed. 103 [*reversing* 31 Nebr. 682, 48 N. W. 739, 51 N. W. 602].

But see Dennis *v.* Brewster, 7 Gray (Mass.) 351, wherein it was held that proof that a foreigner, now deceased, resided in the United States, owned parts of vessels, and acted as master of coasting vessels in the United States, and that the records of shipping of the port where he resided had been destroyed, is not sufficient to be submitted to the jury as evidence of his having been naturalized during that period, without proof of a search among his papers for a certificate of naturalization, or some evidence that such a certificate once existed.

Copy of record.— An exemplified copy of the record is the best evidence of naturalization and is, of course, competent to show it.

Alabama.— See Harley *v.* State, 40 Ala. 689.

California.— Belcher *v.* Farren, 89 Cal. 73, 26 Pac. 791; Prentice *v.* Miller, 82 Cal. 570, 23 Pac. 189; Bode *v.* Trimmer, 82 Cal. 513, 23 Pac. 187.

Kentucky.— Newcomb *v.* Newcomb, (Ky. 1900) 57 S. W. 2.

Minnesota.— State *v.* Barrett, 40 Minn. 65, 41 N. W. 459.

New Mexico.— Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936.

New York.— People *v.* McNally, 59 How. Pr. (N. Y.) 500.

United States.— The Acorn, 2 Abb. (U. S.) 434, 1 Fed. Cas. No. 29; U. S. *v.* Makins, 26 Fed. Cas. No. 15,710, 3 Am. L. Rev. 777, Hoffm. Op. 500.

In a plea of naturalization, in answer to an information of the attorney-general praying forfeiture of the land of an alleged alien, it is not necessary to aver compliance with the prerequisites to the admission to citizenship. The record of naturalization is sufficient. Harley *v.* State, 40 Ala. 689.

Presumption from declaration of intention. — The fact that three years have expired since an alien declared his intention to become a citizen does not raise a presumption that he has actually become a citizen. State *v.* Olin, 23 Wis. 309.

Secondary evidence.— Where the record of naturalization proceedings have been destroyed secondary evidence is admissible to prove that the party became a citizen. Hogan *v.* Kurtz, 94 U. S. 773, 24 L. ed. 317. But the certificate of the clerk of a court, to the effect that there is no evidence on the records of the court that certain persons had been naturalized therein as testified to by them, is not competent evidence to disapprove the fact of naturalization, as it is secondary. Beardstown *v.* Virginia, 81 Ill. 541.

41. Scott *v.* Strobach, 49 Ala. 477; Heney *v.* Brooklyn Benev. Soc., 39 N. Y. 333; Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204; U. S. *v.* Rhodes, 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151; Bulwinkle *v.* U. S., 4 Ct. Cl. 395; Bacon Abr. tit. Aliens, *b*.

Acquiring and holding land.— The naturalization of an alien places him upon the footing, in respect of acquiring and holding real estate, of a natural-born citizen. People *v.* Conklin, 2 Hill (N. Y.) 67; Priest *v.* Cummings, 16 Wend. (N. Y.) 617; Manuel *v.* Wulff, 152 U. S. 505, 14 S. Ct. 651, 38 L. ed. 532. See also Harley *v.* State, 40 Ala. 689, wherein it was held that the defeasible estate of an alien, in lands purchased by him, is perfected by his becoming a naturalized citizen before office found. But see Sutliff *v.* Forgey, 1 Cow. (N. Y.) 89, wherein it was held that naturalization merely removes the disability of the alien to hold lands, leaving the state a right to enter if he dies without heirs, or leaving alien heirs only.

Citizen of state of residence.— An alien naturalized under the laws of the United States is a citizen of the state in which he resides. *In re* Wehlitz, 16 Wis. 443, 84 Am. Dec. 700; Gribble *v.* Pioneer Press Co., 5 McCrary (U. S.) 73, 15 Fed. 689.

Civil rights.— Naturalization by judicial proceeding or otherwise confers only civil rights. Dorsey *v.* Brigham, 177 Ill. 250, 52 N. E. 303, 69 Am. St. Rep. 228, 42 L. R. A. 809.

Necessity of order of court.— The oath of naturalization, when taken, confers the rights

2. Of Declaration of Intention. A declaration of intention to become a citizen does not make the alien a citizen. An alien remains such until naturalization is complete.[42] Consequently, an alien cannot take by descent, in the absence of enabling statutes, where the ancestor dies after the alien has filed a declaration of intention, but before actual naturalization.[43]

3. On Minor Children. The minor child of an alien, though born out of the United States, if dwelling within the United States at the time of the naturalization of his parent, becomes a citizen by virtue of such naturalization.[44] It has

of a citizen, and it is not necessary that there should be an order of court admitting him to become a citizen. Campbell *v.* Gordon, 6 Cranch (U. S.) 176, 3 L. ed. 190.

42. Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936; *In re* Moses, 83 Fed. 995 (wherein it was held that an immigrant does not cease to be an alien, merely by declaring his intention of becoming a citizen, so as to relieve his wife and minor children from the operation of the law governing the admission of aliens); Minneapolis *v.* Reum, 56 Fed. 576, 12 U. S. App. 446, 6 C. C. A. 31 (wherein it was held that a foreign-born resident of the United States, who has merely declared his intention to become a citizen, but has never complied with any other provision of the naturalization laws, is none the less an alien, because of the fact that the constitution and laws of the state wherein he resides have conferred the elective franchise and other privileges of citizenship on foreign subjects who have declared their intention to be naturalized, and that he has actually voted for member of congress and state and county officers); Maloy *v.* Duden, 25 Fed. 673. See also Valk *v.* U. S., 28 Ct. Cl. 241, wherein it was held that a claimant under the Indian depredation act is not a citizen, within the meaning of that statute, merely because he has taken the primary declaration.

As to necessity and requisites of declaration of intention see *supra*, V, G. 2.

43. White *v.* White, 2 Metc. (Ky.) 185; Foss *v.* Crisp, 20 Pick. (Mass.) 121; Harman *v.* Ferrall, 64 N. C. 474. See also McDaniel *v.* Richards, 1 McCord (S. C.) 187, wherein it appeared that an alien female had given notice of her intention to become a citizen, and had taken the oath, but died before she was duly naturalized. It was held that her husband could not inherit through her.

See 2 Cent. Dig. tit. "Aliens," § 160

In Indiana, aliens who have declared their intention, according to law, to become citizens may hold land in fee simple. State *v.* Beackmo, 8 Blackf. (Ind.) 246; Eldon *v.* Doe, 6 Blackf. (Ind.) 341.

In Louisiana, a person who has declared his intention to become a citizen of the state, and has qualified as an elector under La. Const. art. 185, is a citizen of the state, and eligible to the office of coroner (State *v.* Fowler, 41 La. Ann. 380, 6 So. 602), or inspector of weights and measures (State *v.* Abbott, 41 La. Ann. 1096, 6 So. 805).

In Texas, after a foreigner by birth has duly declared his intention of being naturalized as a citizen, he is invested with all the rights of citizenship except the elective franchise; and therefore he can acquire real estate by purchase, and, on his death, can transmit by descent to his children. Schrimpf *v.* Settegast, 38 Tex. 96, 35 Tex. 323.

44. *Arkansas.*— State *v.* Penney, 10 Ark. 621.

Florida.— O'Connor *v.* State, 9 Fla. 215.

Illinois.— Dorsey *v.* Brigham, 177 Ill. 250, 52 N. E. 303, 69 Am. St. Rep. 228, 42 L. R. A. 809; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349.

Maine.— See Calais *v.* Marshfield, 30 Me. 511.

Maryland.— Brown *v.* Shilling, 9 Md. 74.

Minnesota.— State *v.* Mims, 26 Minn. 183, 2 N. W. 494, 683.

Missouri.— Gumm *v.* Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312; State *v.* Andriano, 92 Mo. 70, 4 S. W. 263.

New Mexico.— Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936.

New York.— Matter of Morrison, 22 How. Pr. (N. Y.) 99; Young *v.* Peck, 21 Wend. (N. Y.) 389; Sutliff *v.* Forgey, 1 Cow. (N. Y.) 89; West *v.* West, 8 Paige (N. Y.) 433.

South Carolina.— North *v.* Valk, Dudley Eq. (S. C.) 212.

Texas.— Franks *v.* Hancock, 1 Tex. Unrep. Cas. 554. See also Warnell *v.* Finch, 15 Tex. 163.

West Virginia.— Dryden *v.* Swinburne, 20 W. Va. 89.

United States.— Campbell *v.* Gordon, 6 Cranch (U. S.) 176, 3 L. ed. 190; North Noonday Min. Co. *v.* Orient Min. Co., 6 Sawy. (U. S.) 299, 1 Fed. 522; Vint *v.* King, 28 Fed. Cas. No. 16,950, 2 Am. L. Reg. 712.

See 2 Cent. Dig. tit. "Aliens," § 156, and Citizens.

As to capacity of minor to be naturalized see *supra*, V, D.

An illegitimate minor child living as a member of his reputed father's family becomes a citizen on the naturalization of his reputed father. Dale *v.* Irwin, 78 Ill. 170. But see Guyer *v.* Smith, 22 Md. 239, 85 Am. Dec. 650.

Naturalization after majority of child.— A father's naturalization after his child has attained majority does not make such child a citizen. Dorsey *v.* Brigham, 177 Ill. 250, 52 N. E. 303, 69 Am. St. Rep. 228, 42 L. R. A. 809; State *v.* Boyd, 31 Nebr. 682, 48 N. W. 739, 51 N. W. 602; Dryden *v.* Swinburne, 20 W. Va. 89.

Naturalization by treaty.— The minor child of one who became a citizen under a

also been held that if an alien father takes the oath declaring his intention to become a citizen, his minor child thereby acquires an inchoate status as a citizen, and, if he attains majority before the father completes his naturalization, that status is capable of being converted into complete citizenship by other means than the direct application provided for by the naturalization laws.[45] But the naturalization of a father does not affect the citizenship of his minor son, who did not come to the United States until after his father had been naturalized.[46]

4. On Wife. An alien woman whose husband becomes a naturalized citizen of the United States is thereby made a citizen,[47] even though she has not attained her majority,[48] or does not come to the United States until after his death.[49]

5. Retroactive Effect. Numerous authorities support the doctrine that naturalization, of itself, has no retroactive effect.[50]

J. Offenses against Naturalization Laws. An applicant for naturalization cannot be indicted for falsely swearing as to his residence for the requisite time in the state. The statute provides that proof of such residence shall be by other testimony. Consequently, such oath is not one that the court can take, and is extrajudicial.[51]

treaty, if residing in the United States at the time, would thereby become a citizen. Crane *v.* Reeder, 25 Mich. 303.

Naturalization of stepfather.— The minor child of an alien widow becomes a citizen upon the naturalization of his mother's second husband. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; People *v.* Newell, 38 Hun (N. Y.) 78; U. S. *v.* Kellar, 11 Biss. (U. S.) 314, 13 Fed. 82.

45. Boyd *v.* Nebraska, 143 U. S. 135, 12 S. Ct. 375, 36 L. ed. 103 [*reversing* 31 Nebr. 682, 48 N. W. 739, 51 N. W. 602]. See also Schrimpf *v.* Settegast, 38 Tex. 96.

46. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

47. *Georgia.*— Headman *v.* Rose, 63 Ga. 458.

Illinois.— Dorsey *v.* Brigham, 177 Ill. 250, 52 N. E. 303, 69 Am. St. Rep. 228, 42 L. R. A. 809.

New York.— Burton *v.* Burton, 1 Keyes (N. Y.) 359; People *v.* Newell, 38 Hun (N. Y.) 78; Renner *v.* Müller, 44 N. Y. Super. Ct. 535.

North Carolina.— Kane *v.* McCarthy, 63 N. C. 299.

United States.— Kelly *v.* Owen, 7 Wall. (U. S.) 496, 19 L. ed. 283; U. S. *v.* Kellar, 11 Biss. (U. S.) 314, 13 Fed. 82; Leonard *v.* Grant, 6 Sawy. (U. S.) 603, 5 Fed. 11.

See 2 Cent. Dig. tit. "Aliens," § 157, and Citizens.

But see White *v.* White, 2 Metc. (Ky.) 185, wherein it was said that "naturalization is a personal privilege, and the alien wife does not become a naturalized citizen by the naturalization of the husband."

As to capacity of married woman to be naturalized see *supra*, V, D.

48. Renner *v.* Müller, 44 N. Y. Super. Ct. 535.

49. Headman *v.* Rose, 63 Ga. 458; Burton *v.* Burton, 1 Keyes (N. Y.) 359; 19 Op. Atty.-Gen. (U. S.) 402. See also Kircher *v.* Murray, 54 Fed. 617, wherein it was held that, under the declaration adopted by the convention of Texas, Nov. 7, 1835, promising citizenship and donations of land to all volunteers in her war for independence, a citizen of Illinois who afterward entered her army as a volunteer, and died in her service, became a citizen of Texas, and his wife's citizenship followed his, though she never came to Texas.

50. *Kentucky.*— White *v.* White, 2 Metc. (Ky.) 185.

Nebraska.— State *v.* Boyd, 31 Nebr. 682, 48 N. W. 739, 51 N. W. 602.

New York.— Heney *v.* Brooklyn Benev. Soc., 39 N. Y. 333 [*affirming* 33 Barb. (N. Y.) 360]; Smith *v.* Smith, 33 Barb. (N. Y.) 371 note; Priest *v.* Cummings, 20 Wend. (N. Y.) 338 [*affirming* 16 Wend. (N. Y.) 617]. *Compare* Jackson *v.* Beach, 1 Johns. Cas. (N. Y.) 399.

South Carolina.— Vaux *v.* Nesbit, 1 McCord Eq. (S. C.) 352.

West Virginia.— Dryden *v.* Swinburne, 20 W. Va. 89, wherein it was held that no court has power, in naturalizing an alien, to declare in its order that such alien shall be held to be a citizen from a time preceding the making of the order.

England.—See Collingwood *v.* Pace, 1 Vent. 419.

See 2 Cent. Dig. tit. "Aliens," § 155.

On alien wife.— Marriage of an alien wife to a citizen has no retrospective effect (Dorsey *v.* Brigham, 177 Ill. 250, 52 N. E. 303, 69 Am. St. Rep. 228, 42 L. R. A. 809), and will not entitle her to dower in lands of which her husband was seized during coverture, and which he had aliened previous to her naturalization (Priest *v.* Cummings, 20 Wend. (N. Y.) 338 [*affirming* 16 Wend. (N. Y.) 617]; Labatut *v.* Schmidt, Speers Eq. (S. C.) 421).

51. State *v.* Helle, 2 Hill (S. C.) 290; U. S. *v.* Grottkau, 30 Fed. 672.

See 2 Cent. Dig. tit. "Aliens," § 161.

Forgery of certificate.— The words, "if any person shall make, forge," etc., a certificate of naturalization, as used in the act of congress of March 3, 1813, entitled "An act for the regulation of seamen," etc., are intended to be general in their operation, and

VI. IMMIGRATION.

A. Definition. Immigration is the entering into a country with the intention of residing in it.[52]

B. Power to Exclude or Expel Aliens — 1. In General. According to the accepted maxims of international law, every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.[53] And the right of a nation to

are not confined to seamen. U. S. *v.* Randolph, 1 Pittsb. (Pa.) 24, 1 Pittsb. Leg. J. 21, 27 Fed. Cas. No. 16,120.

Sale of certificate.— The certificate or evidence of citizenship, the sale of which is made criminal by the act of congress of March 3, 1813, is a certified copy of the act by which one was naturalized, and does not include a certificate signed by the clerk, and under the court's seal, to the effect that one, on the day named therein, was admitted to be a citizen. U. S. *v.* Makins, 26 Fed. Cas. No. 15,710, 3 Am. L. Rev. 777, Hoffm. Op. 500.

Under U. S. Rev. Stat. (1878), § 5424, it is a criminal offense to sell a certificate of naturalization to other than the person to whom it was issued; and it is immaterial that such certificate was fraudulently procured, by misrepresentation to the court, or that it was forged, if *prima facie* and apparently valid. U. S. *v.* Ragazzini, 50 Fed. 923. As to nature of offense see Berkowitz *v.* U. S., 93 Fed. 452, 35 C. C. A. 379.

Jurisdiction of state courts.— Perjury committed in a state court relative to an application for naturalization under the laws of the United States is indictable in the courts of the state. State *v.* Whittemore, 50 N. H. 245; Rump *v.* Com., 30 Pa. St. 475. *Contra*, People *v.* Sweetman, 3 Park. Crim. (N. Y.) 358.

Indictment.—An indictment for false swearing in a naturalization proceeding which alleges that the person who administered the oath was a deputy clerk of the court, and acting as such when the oath was administered, is sufficient, without alleging the steps by which the officer became deputy clerk. Nor, in such case, is it necessary to allege that the deputy clerk was authorized to administer such oath. U. S. *v.* Lehman, 39 Fed. 49.

An indictment for a violation of U. S. Rev. Stat. (1878), § 5425, making any one guilty of a felony who obtains any certificate of citizenship known to such person to have been procured by fraud, which describes the fraud charged by averring only that defendant obtained a certificate at a time when he was not legally entitled thereto, without describing the facts constituting the fraud, is bad, though it avers that such facts are unknown to the grand jury. U. S. *v.* Lehman, 39 Fed. 768.

An indictment for perjury alleged to have been committed by respondent in his declaration of intention to become a citizen of the United States need not set forth the declaration. And an allegation in such indictment which states that the application of respondent to become a citizen was before "the district court of the said United States then and there holden for the said district of Massachusetts," and that said respondent "did then and there, in the said matter and proceeding, knowingly swear falsely and make oath before said court," is a sufficient designation of the court, and a distinct averment that the oath was made before it. U. S. *v.* Walsh, 22 Fed. 644.

An indictment for perjury alleging the making of a false affidavit relative to an application for naturalization thereafter to be made, and that affiant at the time of making the affidavit was sworn as a witness in support of said application, is sufficient. It is unnecessary to aver that such application was afterward made, or that the affidavit was used. State *v.* Whittemore, 50 N. H. 245.

Evidence.— Where the indictment alleges the perjury to have been committed by respondent in his application for naturalization, the record of the court before which the application was made by him, signed, and sworn to, is the best and only evidence that can be produced. U. S. *v.* Walsh, 22 Fed. 644.

52. U. S. *v.* Burke, 99 Fed. 895.

Distinguished from deportation.— Deportation is the removal of an alien out of the country because his presence is deemed inconsistent with the public welfare, but without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent or of those of the country to which he is taken. Fong Yue Ting *v.* U. S., 149 U. S. 698, 13 S. Ct. 1016, 37 L. ed. 905.

Distinguished from emigration.— Emigration is the act of removing from one place or country to another. One who is called an emigrant at the place of his former residence is styled an immigrant on arrival at his new domicile. Rapalje & L. L. Dict.

Distinguished from expatriation.— Expatriation is the voluntary act of abandoning one's country and becoming the citizen or subject of another. Black L. Dict. See also McIlvaine *v.* Coxe, 2 Cranch (U. S.) 280, 2 L. ed. 279.

53. U. S. *v.* Wong Kim Ark, 169 U. S. 649, 18 S. Ct. 456, 42 L. ed. 890; Wong Wing *v.* U. S., 163 U. S. 228, 16 S. Ct. 977, 41 L. ed. 140; Lem Moon Sing *v.* U. S., 158 U. S. 538, 15 S. Ct. 967, 39 L. ed. 1082; Lees *v.* U. S., 150 U. S. 476, 14 S. Ct. 163, 37 L. ed. 1150; Fong Yue Ting *v.* U. S., 149 U. S. 698 13

expel or deport foreigners who have not been naturalized, or taken any steps toward becoming citizens of the country, is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.[54]

2. In the United States. In the United States control over aliens belongs exclusively to the political department of the government, and may be exercised either through treaties made by the president and senate, or through statutes enacted by congress.[55]

C. Immigration Officers — 1. Appointment. Inspectors of immigration, under the act of congress of March 3, 1891, are to be appointed by the secretary of the treasury, and not by the superintendent of immigration.[56]

2. Powers and Duties. Under a statute requiring the board of immigration commissioners to examine into the condition of immigrants, such board cannot delegate to a committee the power to determine whether immigrants shall be permitted to land.[57]

S. Ct. 1016, 37 L. ed. 905; Ekiu *v.* U. S., 142 U. S. 651, 12 S. Ct. 336, 35 L. ed. 1146; Chae Chan Ping *v.* U. S., 130 U. S. 581, 9 S. Ct. 623, 32 L. ed. 1068; Edye *v.* Robertson, 112 U. S. 580, 5 S. Ct. 247, 28 L. ed. 798; *In re* Way Tai, 96 Fed. 484; *In re* Florio, 43 Fed. 114; U. S. *v.* Craig, 28 Fed. 795; *In re* Day, 27 Fed. 678; Bar Int. L. (Gillespie's ed. 1883) 708, note 711; 2 Ortolan Diplomatie de la Mer (4th ed.) c. 14, p. 297; 1 Phillimore Int. L. (3d ed.) c. 10, § 220; 1 Vattel L. Nat. c. 19, §§ 230, 231; Wharton Dig. Int. L. § 206.

See 2 Cent. Dig. tit. "Aliens," §§ 70–72.

54. Wong Wing *v.* U. S., 163 U. S. 228, 16 S. Ct. 977, 41 L. ed. 140; Fong Yue Ting *v.* U. S., 149 U. S. 698, 13 S. Ct. 1016, 37 L. ed. 905; *In re* Sing Lee, 54 Fed. 334.

As to expulsion of alien enemies see War.

In England the only question that has ever been made in regard to the power to expel aliens has been whether it could be exercised by the king without the consent of parliament. It was formerly exercised by the king, but in later times by parliament, which passed several acts on the subject between 1792 and 1848. 1 Bl. Comm. 260; 1 Chalmer Col. Op. 26; Chitty Prerog. Crown 49; 2 Coke Inst. 57; 34 Hansard Parl. Deb. (first series) 441, 445, 471, 1065–1071; *In re* Adam, 1 Moore P. C. 460; Musgrove *v.* Chun Teeong Toy, [1891] A. C. 272.

55. Chan Gun *v.* U. S., 9 App. Cas. (D. C.) 290; Wong Wing *v.* U. S., 163 U. S. 228, 16 S. Ct. 977, 41 L. ed. 140; Fong Yue Ting *v.* U. S., 149 U. S. 698, 13 S. Ct. 1016, 37 L. ed. 905; Ekiu *v.* U. S., 142 U. S. 651, 12 S. Ct. 336, 35 L. ed. 1146; *In re* Florio, 43 Fed. 114; U. S. *v.* Craig, 28 Fed. 795.

See 2 Cent. Dig. tit. "Aliens," § 71.

Control of states.— A state statute laying a tax upon aliens arriving in the ports of the state is unconstitutional. People *v.* Compagnie Générale Transatlantique, 107 U. S. 59, 2 S. Ct. 87, 27 L. ed. 383; Edye *v.* Robertson, 112 U. S. 580, 5 S. Ct. 247, 28 L. ed. 798; Smith *v.* Turner, 7 How. (U. S.) 283, 12 L. ed. 702; People *v.* Pacific Mail Steamship Co., 8 Sawy. (U. S.) 640, 16 Fed. 344. So a state statute which requires the master of a vessel to give a bond to indemnify the municipalities of the state against any expense for the relief or support of passengers carried on such vessel, or in lieu thereof pay a certain sum for each passenger brought to the ports of the state, is a regulation of commerce, and therefore unconstitutional. Henderson *v.* Wickham, 92 U. S. 259, 23 L. ed. 543. See also Chy Lung *v.* Freeman, 92 U. S. 275, 23 L. ed. 550; *In re* Ah Fong, 3 Sawy. (U. S.) 144, 1 Fed. Cas. No. 102. And any state law preventing aliens either coming to or residing in the state is unconstitutional and void. State *v.* The Steamship Constitution, 42 Cal. 578, 10 Am. Rep. 303; Lin Sing *v.* Washburn, 20 Cal. 534. See also New York *v.* Emigration Com'rs, 59 Hun (N. Y.) 624, 13 N. Y. Suppl. 751, 36 N. Y. St. 721.

See, generally, Commerce.

Power to punish.— Congress, having the power to exclude aliens, has a right to make that exclusion effective by punishing those who assist in introducing or attempting to introduce aliens in violation of its prohibition. Lees *v.* U. S., 150 U. S. 476, 14 S. Ct. 163, 37 L. ed. 1150; Fong Yue Ting *v.* U. S., 149 U. S. 698, 13 S. Ct. 1016, 37 L. ed. 905.

56. Ekiu *v.* U. S., 142 U. S. 651, 12 S. Ct. 336, 35 L. ed. 1146, construing 26 U. S. Stat. at L. c. 551, U. S. Rev. Stat. Suppl. (1891), p. 934, c. 551.

See 2 Cent. Dig. tit. "Aliens," § 101.

As to compensation of immigration commissioners under particular statutes see People *v.* Van Ness, 76 Cal. 121, 18 Pac. 139; People *v.* Bunker, 70 Cal. 212, 11 Pac. 703; Forrester *v.* Dunn, 65 Cal. 562, 4 Pac. 574.

57. *In re* Murnane, 39 Fed. 99.

See 2 Cent. Dig. tit. "Aliens," § 102.

Liability for loss of immigrant's baggage. — Commissioners of immigration are not responsible for loss of an immigrant's baggage. Semler *v.* Emigration Com'rs, 1 Hilt. (N. Y.) 244. See also Murphy *v.* Emigration Com'rs, 28 N. Y. 134.

Officer vested with power.— Under the regulation of the secretary of the treasury which declares that the superintendent of immigration at the port of New York shall examine into the condition of passengers arriving at that port, and report to the collector whether any person is within the prohibition of the act of congress of Feb. 26, 1885; and under the act of congress of Feb. 23, 1887, amending the act of 1885, which provides that if,

3. Review of Officer's Acts. Although congress may, if it sees fit, authorize the courts to investigate and ascertain the facts upon which an alien's right to land is made by the statute to depend, yet it may intrust the final determination of these facts to an executive officer, and, if it does so, his order is due process of law, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reëxamine the evidence on which he acted, or to controvert its sufficiency.[58]

D. Immigrants Excluded. It has been held that the alien labor law, which makes it unlawful to assist the importation or migration of any alien or foreigner under any contract or agreement "to perform labor or service of any kind," is only intended to prohibit the importation of foreigners under contract to perform unskilled manual labor.[59] It has also been held that it is not a violation of the

on such examination by the superintendent, any person shall be found within the prohibition of the act, and the same is reported to the collector, such person shall not be permitted to land, it has been held that such power of determination is vested in the superintendent of immigration, and not in the collector. *In re* Bucciarello, 45 Fed. 463.

Return after permission to land.— Under authority from the secretary of the treasury, granted by either general regulations or special instructions in individual cases, pursuant to the act of congress of Oct. 19, 1888, the superintendent or inspector of immigration may, at any time within one year after his landing, take into custody, and return to the country from which he came, an alien immigrant arriving in violation of law, even though he may have been previously passed in and allowed to land. *In re* Lifieri, 52 Fed. 293.

Taking oaths.— The provision of the immigration act that inspectors of immigration and their assistants "shall have power to administer oaths, and to take and consider testimony touching the rights of" aliens to enter the United States, "all of which shall be entered of record," does not require inspectors to take such testimony. They may decide the question of the right to land upon their own inspection and examination. Ekiu *v.* U. S., 142 U. S. 651, 12 S. Ct. 336, 35 L. ed. 1146, 1150.

The treasury department may make rules and regulations to carry out the statute and facilitate the exclusion and return of persons whose immigration congress has forbidden, but no mere rule can operate to exclude a person not excluded by the statute. *In re* Kornmehl, 87 Fed. 314.

58. Chan Gun *v.* U. S., 9 App. Cas. (D. C.) 290; U. S. *v.* Gue Lim, 176 U. S. 459, 20 S. Ct. 415, 44 L. ed. 544; Lem Moon Sing *v.* U. S., 158 U. S. 538, 15 S. Ct. 967, 39 L. ed. 1082; Fong Yue Ting *v.* U. S., 149 U. S. 698, 13 S. Ct. 1016, 37 L. ed. 905; Ekiu *v.* U. S., 142 U. S. 651, 12 S. Ct. 336, 35 L. ed. 1146; *In re* Li Foon, 80 Fed. 881; U. S. *v.* Rogers, 65 Fed. 787.

See 2 Cent. Dig. tit. "Aliens," § 103; and Habeas Corpus.

Conclusiveness of decision of immigration officers.— Under the act of congress of March 3, 1891, as amended by the act of congress of Aug. 18, 1894, providing that "in every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the secretary of the treasury," such decision is not reviewable by the courts where it is shown that the person excluded is an alien, and that the decision was made in the manner required by the statute. Ekiu *v.* U. S., 142 U. S. 651, 12 S. Ct. 336, 35 L. ed. 1146; *In re* Way Tai, 96 Fed. 484; *In re* Ota, 96 Fed. 487; *In re* Moses, 83 Fed. 995; U. S. *v.* Chung Shee, 71 Fed. 277; U. S. *v.* Arteago, 68 Fed. 883, 30 U. S. App. 297, 16 C. C. A. 58; U. S. *v.* Rogers, 65 Fed. 787; *In re* Chin Yuen Sing, 65 Fed. 571; *In re* Howard, 63 Fed. 263; *In re* Didfirri, 48 Fed. 168; *In re* Hirsch Berjanski, 47 Fed. 445; *In re* Florio, 43 Fed. 114; *In re* Vito Rullo, 43 Fed. 62; *In re* Dietze, 40 Fed. 324; *In re* Palagano, 38 Fed. 580; *In re* Cummings, 32 Fed. 75; *In re* Day, 27 Fed. 678; 28 U. S. Stat. at L. c. 301, U. S. Rev. Stat. Suppl. (1899), p. 252, c. 301, par. 6. But the jurisdiction of the courts in habeas corpus is not excluded when, although an appeal to the secretary has been taken, through some rule of procedure in the office, the papers will not be sent to him. *In re* Monaco, 86 Fed. 117. See also *In re* Gottfried, 89 Fed. 9. And an alien immigrant prevented from landing by an officer claiming authority to do so under an act of congress, and thereby restrained of his liberty, is entitled to a writ of habeas corpus to ascertain whether the restraint is lawful. Ekiu *v.* U. S., 142 U. S. 651, 12 S. Ct. 336, 35 L. ed. 1146. So, too, the question whether persons ordered to be returned are alien immigrants is jurisdictional, and may be determined by the courts. U. S. *v.* Burke, 99 Fed. 895; *In re* Maiola, 67 Fed. 114; *In re* Panzara, 51 Fed. 275.

59. U. S. *v.* Laws, 163 U. S. 258, 16 S. Ct. 998, 41 L. ed. 151, wherein it was held that a contract made with an alien, to come to the United States as a chemist on a sugar plantation, is not a contract to perform labor or service within the meaning of the act; Church of Holy Trinity *v.* U. S., 143 U. S. 457, 12 S. Ct. 511, 36 L. ed. 226 [*reversing* 36 Fed. 303], wherein it was held that the act does not apply to one who comes to the United States under contract to enter the service of a church as its rector: U. S. *v.* Gay, 95 Fed. 226, 37 C. C. A. 46 [*affirming* 80

alien labor law for a corporation to knowingly employ, at its office in the United States near the Canadian border, a person who resides in Canada, and who comes daily to his work in the United States.[60]

E. Detention and Return of Immigrants. A warrant of deportation, issued by the secretary of the treasury under the alien labor law, should set out

Fed. 254], wherein it was held that an agreement to employ a foreigner as a draper, window-dresser and drygoods clerk in a store in the United States, and as a part of his compensation to refund to him the cost of his passage to the United States, is not within the spirit of the statute.

See 2 Cent. Dig. tit. "Aliens," §§ 105–111.

Alien seamen.— The immigration laws have no application to alien seamen who constitute the *bona fide* crew of a vessel trading in the ports of the United States, and who enter such ports with their ship, in the discharge of the duties of their employment, and without any intention of becoming residents of the United States. U. S. *v.* Burke, 99 Fed. 895.

Convicts.— An immigrant who has been convicted, in the country from which he came, of an assault with a deadly weapon, and has served the term of imprisonment imposed, is a convict within the meaning of the act regulating immigration. *In re* Aliano, 43 Fed. 517.

Liability to become a public charge.— In order to debar and return an alien immigrant, on the ground of his being a person likely to become a public charge, there must be a determination by the inspection officer that the immigrant is likely to become a public charge; and such determination must be made upon competent evidence, tending to show such to be the fact. *In re* Feinknopf, 47 Fed. 447; *In re* O'Sullivan, 24 Blatchf. (U. S.) 416, 31 Fed. 447. See also U. S. *v.* Lipkis, 56 Fed. 427; *In re* Bracmadfar, 37 Fed. 774.

Milliner.— A woman who is engaged as a milliner is not a "professional artist" within the exception of the act. U. S. *v.* Thompson, 41 Fed. 28.

Native-born children of alien parents.— Children born in the United States of alien parents are citizens, and not aliens, and hence are not subject to exclusion, under the immigration laws, on their return with their alien parents from a temporary visit abroad. *In re* Giovanna, 93 Fed. 659.

New industry.— The manufacture of fine lace curtains, which has been carried on in the United States for only about three years, and is still confined to two or three establishments, and which was brought into existence by the McKinley tariff law and will probably disappear if the protection thereby given is withdrawn, is a new industry within the exception of the contract labor law. U. S. *v.* Bromiley, 58 Fed. 554. Defendants contracted with a resident of France to come to the United States and work for them in the manufacture of "French silk stockings," which were shown to be articles materially different from ordinary silk stockings. It was shown that there had been manufactured in the United States stockings whereof the feet were the same as those of the "French silk stockings," but the legs were different, and made by different machines. It was held that the manufacture of the complete "French silk stockings" was a new industry, within the exception. U. S. *v.* McCallum, 44 Fed. 745.

Personal or domestic servant.— An "under-coachman," whose duties are, partly, to assist in keeping stables, horses, and carriages in good order, but principally to drive the horses when his employer or any of his family go out in carriages, and to accompany on horseback the younger members of the family when they go out on horseback, and who boards with his employer's coachman, and sleeps in a room over the coach-house, is a "personal or domestic servant" within the exception of the act. *In re* Howard, 63 Fed. 263. But an immigrant arriving in the United States, under a contract to labor on a dairy-farm, the product of which, or a part thereof, forms an article of merchandise that competes with others in a similar business, and whose passage here has been paid by the agent of the employer, is not within the exception. *In re* Cummings, 32 Fed. 75.

Prostitutes.— The act of congress of March 3, 1875, relating to the importation of women into the United States for the purposes of prostitution, is applicable to women imported for that purpose from all countries whatsoever. U. S. *v.* Johnson, 19 Blatchf. (U. S.) 257, 7 Fed. 453.

Resident aliens.— The act of congress of March 3, 1891, excluding certain classes of alien immigrants from admission to the United States, and requiring their deportation, does not apply to aliens domiciled in the United States, and who are returning thereto after a temporary absence. *In re* Ota, 96 Fed. 487; *In re* Maiola, 67 Fed. 114; *In re* Martorelli, 63 Fed. 437; *In re* Panzara, 51 Fed. 275. See also *In re* Yamasaka, 95 Fed. 652, wherein it was held that neither the act of congress of March 3, 1891, nor any prior act of congress, confers authority on ministerial officers of the United States to arrest and deport an immigrant, who has become domiciled in this country, on the ground that he has become a public charge from causes existing prior to his landing.

Wife of alien who has filed a declaration of intention.— An immigrant, by merely declaring his intention of becoming a citizen, does not cease to be an alien so as to relieve his wife and minor children from the operation of the law governing the admission of aliens. *In re* Moses, 83 Fed. 995.

60. U. S. *v.* Michigan Cent. R. Co., 48 Fed. 365.

the names of the immigrants, or otherwise identify such immigants as the persons to be deported.[61]

F. Actions for Penalties under Immigration Laws — 1. Right of Action. To give a right of action under the alien labor law the immigrant must, previous to his becoming a resident of the United States, have entered into a contract to perform labor or services in the United States;[62] he must have actually migrated or entered into the United States in pursuance of such contract;[63] and defendant must have prepaid his transportation, or otherwise assisted, encouraged, or solicited his migration, knowing that the immigrant had entered into the contract.[64] It would seem, also, that labor must have been performed under the contract.[65]

2. Nature of Action. An action to recover the penalty for a violation of the alien labor law, though civil in its form,[66] is criminal in its nature.[67]

3. Jurisdiction. A federal district court has jurisdiction over actions to recover penalties and forfeitures for a violation of the alien labor law.[68]

4. Pleading. In an action of debt to recover the penalty for the importation of a foreign laborer the declaration must aver every particular necessary to bring the case within the purview of the statute.[69]

61. U. S. *v.* Amor, 68 Fed. 885, 30 U. S. App. 302, 16 C. C. A. 60.

See 2 Cent. Dig. tit. "Aliens," § 112.

As to deportation of Chinese see *infra*, VII, B.

Landing.— An alien immigrant, detained by the collector of the port on report of the state commissioner of immigration that she came within the excluded class, was placed in a mission house, as a more suitable place than the steamship, pending the decision of the question of her right to land, and was kept there, by agreement between her attorney and the attorney for the United States, until final judgment upon a writ of habeas corpus. It was held that placing her in such mission left her in the same position, as far as regarded her right to land, as if she had never been removed from the steamship. Ekiu *v.* U. S., 142 U. S. 651, 12 S. Ct. 336, 35 L. ed. 1146. See also People *v.* Hurlburt, 67 How. Pr. (N. Y.) 356; *In re* Florio, 43 Fed. 114; *In re* Palagano, 38 Fed. 580.

Power to deport.— Under the immigration laws an alien who succeeds in surreptitiously landing in the United States may, within a year from the date of such landing, be arrested and deported by the secretary of the treasury without a judicial proceeding before a court. U. S. *v.* Yamasaka, 100 Fed. 404, 40 C. C. A. 454.

62. U. S. *v.* Gay, 80 Fed. 254; U. S. *v.* Edgar, 48 Fed. 91, 4 U. S. App. 41, 1 C. C. A. 49 [*affirming* 45 Fed. 44]; Moller *v.* U. S., 57 Fed. 490, 13 U. S. App. 472, 6 C. C. A. 459 (wherein it was held that neither the prepaying of transportation nor the assisting or encouraging in anywise the importation of an alien, is a violation of the alien labor act, without a contract or agreement made previous to the importation or migration binding the alien to perform labor or services in the United States); U. S. *v.* Craig, 28 Fed. 795.

See 2 Cent. Dig. tit. "Aliens," § 113.

63. U. S. *v.* Gay, 80 Fed. 254; U. S. *v.* Borneman, 41 Fed. 751; U. S. *v.* Craig, 28 Fed. 795.

64. U. S. *v.* Gay, 80 Fed. 254; U. S. *v.* River Spinning Co., 70 Fed. 978; U. S. *v.* Edgar, 45 Fed. 44; U. S. *v.* Borneman, 41 Fed. 751; U. S. *v.* Craig, 28 Fed. 795.

65. U. S. *v.* River Spinning Co., 70 Fed. 978.

Liability of vessel or master.— Under the act of congress of March 3, 1891, the agent of a vessel, who is ordered to detain on board and return immigrants unlawfully brought to the United States, is bound to so detain them at all hazards, and will only be relieved therefrom by *vis major* or inevitable accident. Warren *v.* U. S., 58 Fed. 559, 5 U. S. App. 656, 7 C. C. A. 368. But where a stowaway, found upon a British vessel soon after leaving Liverpool, is in good faith regularly enrolled as a member of the crew for the voyage to New Orleans and return, his status is thereby fixed as a British sailor, and he cannot be regarded as a destitute alien immigrant so as to charge the master, upon arrival at New Orleans, with the duties and penalties imposed by the act of congress of March 3, 1891, in respect to the immigration and importation of aliens; and the fact that such sailor deserts while in port does not affect the master's responsibility. U. S. *v.* Sandrey, 48 Fed. 550.

66. Moller *v.* U. S., 57 Fed. 490, 13 U. S. App. 472, 6 C. C. A. 459. See also U. S. *v.* Banister, 70 Fed. 44, wherein it was held that the action was one for tort, and that it might be begun by capias, in accordance with the state law.

67. Lees *v.* U. S., 150 U. S. 476, 14 S. Ct. 163, 37 L. ed. 1150.

68. Lees *v.* U. S., 150 U. S. 476, 14 S. Ct. 163, 37 L. ed. 1150.

Venue.— A civil action, under the statute imposing a penalty for importing an alien laborer, will lie in the district into which such laborer enters, or in any other district in which defendant may be found. U. S. *v.* Craig, 28 Fed. 795.

69. U. S. *v.* Gay, 80 Fed. 254; U. S. *v.* River Spinning Co., 70 Fed. 978, wherein it was held that, in an action to recover the

5. Evidence. In a suit by the United States under the alien labor law a deposition is admissible in evidence against defendant.[70]

G. Criminal Prosecutions under Immigration Laws — 1. Against Master of Vessel. In an indictment against the master of a vessel under § 8 of the act of congress of March 3, 1891, for knowingly or negligently landing or permitting to land any alien immigrants, the burden of proving such wilful or negligent permission is upon the United States.[71]

2. Importation of Prostitutes. In an indictment for a violation of a statute forbidding the importation into the United States of women for the purposes of prostitution, it is not necessary to set out the acts constituting the importation,[72] nor that the importation was in pursuance of a previous agreement, nor the place in the United States where the prostitution was to be carried on, nor the specific kind of prostitution.[73] And an indictment is not objectionable in alleging that defendants did "import and bring," etc., whereas the statute merely uses "import," for, when used in this connection, the words are synonymous.[74]

VII. Chinese Exclusion Acts.[75]

A. Purpose of Acts. The object of the Chinese exclusion acts is to prevent further immigration of Chinese laborers — not to expel those already in the United States.[76]

B. Persons Excluded — 1. Laborers. The term "laborer" as used in the Chinese exclusion acts only includes those whose occupation involves physical toil and who work for wages.[77]

penalty, the declaration should contain a particular allegation of a contract between defendant and the alien whose migration is alleged to have been assisted, setting forth categorically in what such contract consisted, a distinct statement that labor was performed under such contract, and a distinct statement of the acts by which defendant assisted the alien to migrate; U. S. *v.* Borneman, 41 Fed. 751, wherein it was held that a declaration in debt for the penalty which fails to allege that the foreign laborer did actually migrate to this country, and that defendant, when he assisted him to migrate, knew that he was under contract, is fatally defective. See also U. S. *v.* Great Falls, etc., R. Co., 53 Fed. 77.

Negativing exceptions of statute.— It seems that the declaration in such an action should negative the exceptions of the statute. U. S. *v.* River Spinning Co., 70 Fed. 978.

70. Moller *v.* U. S., 57 Fed. 490, 13 U. S. App. 472, 6 C. C. A. 459.

Defendant as witness.— In an action to recover the penalty for a violation of the alien labor law defendant cannot be compelled to be a witness against himself. Lees *v.* U. S., 150 U. S. 476, 14 S. Ct. 163, 37 L. ed. 1150.

71. U. S. *v.* Spruth, 71 Fed. 678 [*distinguishing* Warren *v.* U. S., 58 Fed. 559, 5 U. S. App. 656, 7 C. C. A. 368].

See 2 Cent. Dig. tit. "Aliens," § 115.

72. U. S. *v.* Johnson, 19 Blatchf. (U. S.) 257, 7 Fed. 453.

See 2 Cent. Dig. tit. "Aliens," § 116.

Evidence that defendants kept a house of prostitution is admissible to prove defendants' occupation, and the intent of the importation and the contents of the baggage of the women being material on the question of their character, evidence that one defendant had possession of the checks for all such baggage was competent to show his connection with the importation. U. S. *v.* Pagliano, 53 Fed. 1001. See also U. S. *v.* Johnson, 19 Blatchf. (U. S.) 257, 7 Fed. 453.

Waiver of objections.— On a prosecution for bringing women into the country for purposes of prostitution a verdict of guilty will not be disturbed on motion for a new trial on the ground that the court was without jurisdiction, the evidence rendering it doubtful whether the importation was not into another district, where no such objection was taken at the trial or presented by the record. U. S. *v.* Pagliano, 53 Fed. 1001.

73. U. S. *v.* Pagliano, 53 Fed. 1001.

74. U. S. *v.* Pagliano, 53 Fed. 1001.

75. As to power to exclude or expel see *supra*, VI, B.

As to conspiracy to expel see Conspiracy.

76. Case of Chinese Merchant, 7 Sawy. (U. S.) 546, 13 Fed. 605; Case of Chinese Cabin Waiter, 7 Sawy. (U. S.) 536, 13 Fed. 286.

See 2 Cent. Dig. tit. "Aliens," § 74.

As to constitutionality of exclusion acts or provisions therein see Constitutional Law.

In Canada, it has been held that the provision in the coal mines regulation act of 1890, that "No Chinaman shall be employed in, or allowed to be for the purpose of employment in, any mine to which this act applies, below ground," is within the constitutional power of the provincial legislature as being a regulation of coal mines, and is not *ultra vires*, as an interference with the subject of aliens. *In re* Coal Mines Regulation Amendment Act of 1890, 5 Brit. Col. 306.

77. *In re* Tung Yeong, 9 Sawy. (U. S.) 620, 19 Fed. 184; *In re* Ho King, 8 Sawy. (U. S.) 438, 14 Fed. 724.

See 2 Cent. Dig. tit. "Aliens," § 76.

2. Merchants. A Chinese person who claims to be a merchant must show a fixed place of business and such frequent sales of merchandise as entitle him to be considered a merchant within the ordinary meaning of the term, or an actual and substantial interest in some firm of such merchants.[78] His name, however, need not appear in the firm-name.[79] It is sufficient if it appears in the articles of copartnership and the partnership accounts.[80]

3. Persons Born in United States. A person born in the United States of Chinese parents, who are permanently domiciled in the United States, is a citizen of the United States, and cannot be excluded therefrom, or denied the right of entry.[81]

Who are laborers.— A laundryman (*In re* Leung, 86 Fed. 303, 58 U. S. App. 7, 30 C. C. A. 69; U. S. *v.* Yong Yew, 83 Fed. 832), or a gambler or highbinder (U. S. *v.* Ah Fawn, 57 Fed. 591), or a restaurant or lodging-house keeper (U. S. *v.* Chung Ki Foon, 83 Fed. 143; *In re* Ah Yow, 59 Fed. 561), is a laborer within the meaning of the exclusion acts. And the status of a Chinese laborer, under acts relating to deportation, is not changed by his arrest upon a criminal charge and his subsequent enforced idleness in jail. U. S. *v.* Chung Ki Foon, 83 Fed. 143. But a seaman who ships aboard a vessel bound for a port in the United States, and who lands with the intention and desire to reship as soon as possible (*In re* Jam, 101 Fed. 989; *In re* Ah Kee, 22 Fed. 519; *In re* Moncan, 8 Sawy. (U. S.) 350, 14 Fed. 44. *Compare* Matter of Fook, 65 How. Pr. (N. Y.) 404), or an actor or theatrical performer (*In re* Ho King, 8 Sawy. (U. S.) 438, 14 Fed. 724), or a physician (U. S. *v.* Chin Fee, 94 Fed. 828), is not a laborer.

Student children of laborer.— Where children of a Chinese laborer are lawfully permitted to enter the United States as students, and thereafter remain continually in the public and private English schools of the United States, they thereby acquire the status of students, and the occupation of their father is not imputable to them. U. S. *v.* Chu Chee, 87 Fed. 312.

Subjects of China.— The inhibitions of the act cannot be construed to exclude laborers who are Chinese by race and language, but who are not, and never were, subjects of the Emperor of China, or resident within his dominions. U. S. *v.* Douglas, 17 Fed. 634. *Compare In re* Ah Lung, 9 Sawy. (U. S.) 306, 18 Fed. 28.

78. U. S. *v.* Lung Hong, 105 Fed. 188; U. S. *v.* Wong Hong, 71 Fed. 283.

See 2 Cent. Dig. tit. "Aliens," § 82.

Who are merchants.— A Chinese person who is a member of a firm of Chinese merchants engaged in buying and selling merchandise at a fixed place of business, and who is sent out by such firm to take charge of another mercantile establishment in which such firm owns a one half interest (*In re* Chu Poy, 81 Fed. 826), or a member of a trading firm, living at the store with several other members of the firm, though he does the housework for them (U. S. *v.* Sun, 76 Fed. 450), is a merchant. So one having been a merchant at the time of the passage of the Geary act, and during the time for registration, was not made liable to deportation by subsequently becoming a laborer. U. S. *v.* Sing Lee, 71 Fed. 680. And, where a Chinese person is shown to have been a member of a firm of merchants in the United States, the fact that he has lately visited China and returned from there, nothing being shown as to his manner of reëntry, does not warrant his arrest and deportation. U. S. *v.* Wong Lung, 103 Fed. 794. But one who owns an interest in a mercantile firm, but is not actively engaged in the conduct of its business, nd who works as cook in a restaurant, of which he is a part proprietor (Mar Bing Guey *v.* U. S., 97 Fed. 576), or one who, during half his time, is engaged in cutting and sewing garments, for sale by a firm of which he is a member (Lai Moy *v.* U. S., 66 Fed. 955, 29 U. S. App. 517, 14 C. C. A. 283), or one who, during his residence in the United States, was engaged in business as a member of a firm, but occasionally, during a year previous to his departure for a temporary visit, worked for short periods as a house-servant in order to accommodate an old employer when he was without a servant (Lew Jim *v.* U. S., 66 Fed. 953, 29 U. S. App. 513, 14 C. C. A. 281), or one serving a term of imprisonment at hard labor, though prior to his imprisonment he owned an interest, in the name of another, in a mercantile firm, and retains it during his imprisonment (U. S. *v.* Wong Ah Hung, 62 Fed. 1005), is not a merchant.

Change of occupation.— Where a Chinese person is admitted into the United States upon presentation of a certificate identifying him as a merchant, proof that ever since he was permitted to land he has continuously engaged in manual labor will overcome the effect of such certificate as *prima facie* evidence of his right to remain in the United States. U. S. *v.* Ng Park Tan, 86 Fed. 605.

79. U. S. *v.* Wong Ah Gah, 94 Fed. 831; U. S. *v.* Wong Hong, 71 Fed. 283; Lee Kan *v.* U. S., 62 Fed. 914, 15 U. S. App. 516, 10 C. C. A. 669.

80. U. S. *v.* Pin Kwan, 100 Fed. 609, 40 C. C. A. 618; Wong Fong *v.* U. S., 77 Fed. 168, 44 U. S. App. 674, 23 C. C. A. 110; Lee Kan *v.* U. S., 62 Fed. 914, 15 U. S. App. 516, 10 C. C. A. 669. *Compare In re* Quan Gin, 61 Fed. 395.

81. U. S. *v.* Wong Kim Ark, 169 U. S. 649, 18 S. Ct. 456, 42 L. ed. 890; Quock Ting *v.* U. S., 140 U. S. 417, 11 S. Ct. 733, 851, 35 L. ed. 501; Lee Sing Far *v.* U. S., 94 Fed. 834, 35 C. C. A. 327; U. S. *v.* Lee Pon, 94

4. Persons Returning to United States. Persons departing from the United States *animo revertendi* and within the class entitled to reëntry may do so on presenting a proper certificate of identity.[82]

5. Wife and Minor Child of Resident. The wife and minor children of a Chinese person who is domiciled in the United States may enter the United States, by reason of the right of the husband and father, without a certificate.[83]

C. Certificate of Identity — 1. Nature of Certificate. Certificates of identity merely establish *prima facie* the right of their holders to enter the United States,[84] and are licenses revocable at the pleasure of congress.[85]

2. Necessity. Chinese persons, other than laborers, desiring to enter the United States, and not domiciled therein, must procure a certificate from the

Fed. 827; Gee Fook Sing *v.* U. S., 49 Fed. 146, 7 U. S. App. 27, 1 C. C. A. 211; Lem Hing Dun *v.* U. S., 49 Fed. 148, 7 U. S. App. 31, 1 C. C. A. 210; *In re* Wy Shing, 13 Sawy. (U. S.) 530, 36 Fed. 553; *In re* Yung Sing Hee, 13 Sawy. (U. S.) 482, 36 Fed. 437; *Ex p.* Chin King, 13 Sawy. (U. S.) 333, 35 Fed. 354; *In re* Look Tin Sing, 21 Fed. 905.

See, generally, Citizens, and 2 Cent. Dig. tit. "Aliens," § 83.

82. *In re* Tong Ah Chee, 23 Fed. 441; Case of Former Residence by a Chinese Laborer, 21 Fed. 791; Case of Limited Tag, 21 Fed. 789; Case of Unused Tag, 21 Fed. 701; *In re* Shong Toon, 21 Fed. 386; *In re* Pong Ah Chee, 18 Fed. 527; Case of Chinese Cabin Waiter, 7 Sawy. (U. S.) 536, 13 Fed. 286.

See also *infra*, VII, C, 2; and 2 Cent. Dig. tit. "Aliens," § 85.

What constitutes a departure.— Chinese subjects purchasing through tickets, and embarking in an American vessel bound from one American port to another, who do not leave the vessel when she, having leave to do so, touches at a foreign port, have not departed from the United States within the meaning of the Chinese exclusion act. *In re* Tong Wah Sick, 13 Sawy. (U. S.) 497, 36 Fed. 440. And a Chinese laborer, a resident of the United States, does not lose his residence by going into Mexico and remaining there only one night. U. S. *v.* Lee Yung, 63 Fed. 520. So a Chinese laborer who has acquired a residence does not lose the same by shipping as one of the crew on an American vessel, at an American port, for a voyage to a foreign port and return, though he may land at such foreign port. *In re* Jack Sen, 13 Sawy. (U. S.) 510, 36 Fed. 441; Case of Chinese Laborers on Shipboard, 7 Sawy. (U. S.) 542, 13 Fed. 291; Case of Chinese Cabin Waiter, 7 Sawy. (U. S.) 536, 13 Fed. 286.

Departure before passage of exclusion acts. — Chinese persons who were in the United States at the date of the treaty of 1880 with China, and who departed before the exclusion act of 1882 took effect, are entitled, under such act, to land without producing custom-house certificates. U. S. *v.* Jung Ah Lung, 124 U. S. 621, 8 S. Ct. 663, 31 L. ed. 591; Chew Heong *v.* U. S., 112 U. S. 536, 5 S. Ct. 255, 28 L. ed. 770; *In re* Ah Ping, 23 Fed. 329; *In re* Shong Toon, 21 Fed. 386; *In re* Tung Yeong, 9 Sawy. (U. S.) 620, 19 Fed. 184. See also *In re* Moncan, 8 Sawy. (U. S.) 350, 14 Fed. 44, wherein it was held that a person on board a vessel of the United States, or any one of them, is, in contemplation of law, within the territory and jurisdiction of the United States; and therefore a Chinese laborer who shipped on an American vessel at London prior to the passage of the exclusion act of 1882, and continued on her until her arrival in the United States, although after the expiration of the ninety days next following the passage of said act, is entitled to reside therein. But under the act of congress of Nov. 3, 1893, Chinese persons who left the United States before its passage cannot return. Lai Moy *v.* U. S., 66 Fed. 955, 29 U. S. App. 517, 14 C. C. A. 283; Lew Jim *v.* U. S., 66 Fed. 953, 29 U. S. App. 513, 14 C. C. A. 281. And the right of a Chinese person to readmission to the United States, on the ground that he has already been engaged as a merchant therein, is governed by such act, though he departed from the country before that act was passed. U. S. *v.* Loo Way, 68 Fed. 475; *In re* Yee Lung, 61 Fed. 641.

83. U. S. *v.* Gue Lim, 176 U. S. 459, 20 S. Ct. 415, 44 L. ed. 544 [*affirming* 83 Fed. 136]; *In re* Lee Yee Sing, 85 Fed. 635; *In re* Lum Lin Ying, 59 Fed. 682; *In re* Chung Toy Ho, 42 Fed. 398, 9 L. R. A. 204. *Contra*, *In re* Li Foon, 80 Fed. 881; *In re* Wo Tai Li, 48 Fed. 668; Case of Chinese Wife, 21 Fed. 785; *In re* Ah Quan, 21 Fed. 182.

See 2 Cent. Dig. tit. "Aliens," § 80.

84. *In re* Tung Yeong, 9 Sawy. (U. S.) 620, 19 Fed. 184. But see *In re* Chinese Relators, 58 Fed. 554, wherein it was held that where the passport, certificate, and papers of a Chinese immigrant are regular, and such as the statutes declare to be *prima facie* evidence of the facts therein stated, their effect is not to be overcome by the sworn statement of a special inspector that he was told by an interpreter that the immigrant had made statements inconsistent with the papers. See also Jew Sing *v.* U. S., 97 Fed. 582, wherein it was held that a certificate of residence issued to a Chinese person is *prima facie* evidence of the right of the holder to remain in the United States, of which right he can only be deprived by the courts upon proof that he has committed some act which would work its forfeiture.

85. Fong Yue Ting *v.* U. S., 149 U. S. 698, 13 S. Ct. 1016, 37 L. ed. 905; Chae Chan Ping *v.* U. S., 130 U. S. 581, 9 S. Ct. 623, 32 L. ed. 1068, holding that the license exists at the will of the government.

Chinese authorities, viséd by the consular representative of the United States,[86] as such certificate in such cases is sole evidence of the right to enter the United States.[87]

3. Requisites and Sufficiency. In order to make a certificate of identity *prima facie* evidence of the holder's right to come into the United States, it must conform to the requirements of the statute.[88]

D. Registration of Residents. A Chinese laborer, convicted of felony, is not entitled to register under the exclusion act of Nov. 3, 1893.[89]

86. Wan Shing *v.* U. S., 140 U. S. 424, 11 S. Ct. 729, 35 L. ed. 503; Chew Heong *v.* U. S., 112 U. S. 536, 5 S. Ct. 255, 28 L. ed. 770.

As to necessity of certificate in case of wife or minor child of Chinese person domiciled in the United States, or of child born in the United States of Chinese parentage, see *supra*, VII, B, 3; VII, B, 5.

Under the act of congress of May 6, 1882, it has been held that the certificate is not the only competent evidence that a Chinese person is not a laborer, and therefore entitled to come to and reside within the United States, but the fact may be shown by any other pertinent and convincing testimony. *In re* Ho King, 8 Sawy. (U. S.) 438, 14 Fed. 724. See also *In re* Ah Quan, 21 Fed. 182.

Domiciled persons.— The only evidence of the right of a Chinese laborer, who left the United States after the passage of the act of congress of May 6, 1882, to reënter is the certificate provided in the act. Case of Limited Tag, 21 Fed. 789; Case of Unused Tag, 21 Fed. 701; *In re* Shong Toon, 21 Fed. 386; *In re* Pong Ah Chee, 18 Fed. 527. See also *supra*, VII, B, 4. But the requirements of the exclusion act that the viséd certificate of identity therein provided for shall be the sole evidence permissible to establish a right to enter the United States does not apply to a merchant, long domiciled in the United States, who is returning from a temporary visit to China, and he may establish his right by the documentary evidence of identity furnished to him by the customs officers on his departure from the United States. Lau Ow Bew *v.* U. S., 144 U. S. 47, 12 S. Ct. 517, 36 L. ed. 340 [*reversing* 47 Fed. 578]. See also *In re* Yee Lung, 61 Fed. 641; U. S. *v.* Chin Quong Look, 52 Fed. 203; U. S. *v.* Gee Lee, 50 Fed. 271, 7 U. S. App. 183, 1 C. C. A. 516.

87. U. S. *v.* Pin Kwan, 100 Fed. 609, 40 C. C. A. 618; Mar Bing Guey *v.* U. S., 97 Fed. 576 (wherein it was held that a Chinese person, erroneously permitted to enter without such certificate, is unlawfully within the United States and may be arrested and deported without regard to his occupation since his entry); *In re* Wo Tai Li, 48 Fed. 668.

See 2 Cent. Dig. tit. "Aliens," § 89.

Loss of certificate.— A Chinese person, having obtained a certificate on his departure, and having had it stolen from him during his absence, is entitled to land, on his return to the port whence he sailed (no one in the meantime having presented the certificate), on proving these facts and identifying himself as the person to whom the certificate was issued. U. S. *v.* Jung Ah Lung, 124 U. S. 621, 8 S. Ct. 663, 31 L. ed. 591.

88. U. S. *v.* Yee Mun Sang, 93 Fed. 365; U. S. *v.* Chu Chee, 93 Fed. 797, 35 C. C. A. 613 (wherein it was held that a certificate of a consul of the United States in China, not indorsed on one from the Chinese government, is not evidence tending to establish the right of a Chinese person to enter into the United States); U. S. *v.* Yong Yew, 83 Fed. 832. But see U. S. *v.* Pin Kwan, 94 Fed. 824, wherein it was held that a Chinese person, not a laborer, who has come to the United States with a certificate properly signed and viséd, and after examination has been permitted to enter the United States and has engaged in business as a merchant for seventeen months, cannot in the absence of fraud be deported on the ground that the certificate is incomplete and defective in matters of nomenclature and description.

Authority of consul.— A certificate of identification given by a Chinese consul in Japan, and viséd by the vice consul-general of the United States at Yokohama, is not sufficient, in the absence of evidence other than the certificate itself, that the consul issuing it has authority from the Chinese government to do so. U. S. *v.* Mock Chew, 54 Fed. 490, 7 U. S. App. 534, 4 C. C. A. 482.

89. U. S. *v.* Chew Cheong, 61 Fed. 200; 2 Cent. Dig. tit. "Aliens," § 91.

Necessity of registration.— A Chinese person who fails to show one of the prescribed excuses for not having procured a certificate is liable to deportation, although he does show the required residence. *In re* Ny Look, 56 Fed. 81.

Excuse for failure to register.— Imprisonment pursuant to sentence for crime is not a valid excuse for failure to register within the time limited by exclusion acts of May 5, 1892, and Nov. 3, 1893, providing for the deportation of Chinese laborers who fail to register within a prescribed time unless prevented by accident, sickness, or other unavoidable cause. U. S. *v.* Ah Poing, 69 Fed. 972.

Payment of costs.— The act of congress of May 5, 1892, § 6, permitting a Chinese laborer, arrested without a certificate of residence, to show that he was entitled to such a certificate, but was prevented, by reason of accident, sickness, or other unavoidable cause, from procuring it, declares that on such showing a certificate shall be granted to him "upon his paying the cost." It was held that the act does not refer to the costs of the laborer's arrest and trial. U. S. *v.* Tye, 70 Fed. 318.

E. Proceedings to Deport — 1. Nature of Proceedings. A proceeding for deportation under the Chinese exclusion acts is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment by appropriate and lawful means of the fact whether the conditions exist upon which congress has enacted that an alien of this class may remain within the country.[90]

2. Jurisdiction. The provisions of the Chinese exclusion acts authorizing Chinese persons, thought to be unlawfully within the United States, to be arrested and taken before a commissioner, confer jurisdiction upon such commissioner to determine the cases, and no order of the district judge, referring such cases to the commissioner for hearing, is either required or authorized.[91]

3. Pleadings. It is not necessary for a complaint in a deportation proceeding to allege anything further than that defendant is a Chinese person and is found within the United States without the certificate of residence required by statute.[92]

4. Burden of Proof. The burden rests upon a Chinese person, arrested for deportation as being unlawfully within the United States, to prove that he belongs to one of the privileged classes named in the statute.[93]

90. Chan Gun *v.* U. S., 9 App. Cas. (D. C.) 290; Fong Yue Ting *v.* U. S., 149 U. S. 698, 13 S. Ct. 1016, 37 L. ed. 905; The Haytian Republic, 57 Fed. 508; U. S. *v.* Wong Dep Ken, 57 Fed. 206; *In re* Sing Lee, 54 Fed. 334; *In re* Ng Loy Hoe, 53 Fed. 914; U. S. *v.* Hing Quong Chow, 53 Fed. 233; U. S. *v.* Wong Sing, 51 Fed. 79; *In re* Chow Goo Pooi, 25 Fed. 77. See also U. S. *v.* Lee Ching Goon, (Ariz. 1900) 60 Pac. 692, wherein it was held that a proceeding for deportation is special and statutory. It is analogous to a criminal action in the respect that the machinery is criminal.

Jury trial.— An order of deportation may be made without a jury trial. *In re* Tsu Tse Mee, 81 Fed. 562; *In re* Sing Lee, 54 Fed. 334; *In re* Chow Goo Pooi, 25 Fed. 77.

91. U. S. *v.* Lee Lip, 100 Fed. 842.

A justice of the supreme court of the District of Columbia is a "United States judge" within the meaning of the Chinese exclusion acts, and hence has jurisdiction to grant orders for deportation as provided by those acts. Chan Gun *v.* U. S., 9 App. Cas. (D. C.) 290.

Cancellation of certificate.— In a proceeding for the deportation of a Chinese person arrested as being unlawfully in the United States, the commissioner has no jurisdiction to cancel a certificate of residence, issued to defendant and regular on its face, on the ground that it was procured by fraud. *In re* See Ho How, 101 Fed. 115.

Conditions precedent.— An arrest upon a formal complaint under oath is not a necessary precedent to the jurisdiction of a United States judge to grant an order for deportation of a Chinese laborer. Chan Gun *v.* U. S., 9 App. Cas. (D. C.) 290.

Detention of vessel.— If the court should be of opinion that a Chinese person had no right to land, it is its duty to remand him to the custody from which he was taken, if the ship be in port and about to return to the country from which he came; but the court has no right, nor color of right, to detain the ship. *In re* Chow Goo Pooi, 25 Fed. 77.

Imprisonment at hard labor.— A United States commissioner, while he has authority, in a summary proceeding under the Chinese exclusion acts, to order the deportation of a Chinaman found to be unlawfully within the United States, has no jurisdiction to order him to be imprisoned at hard labor for thirty days prior to the time fixed for his deportation. *In re* Ah Yuk, 53 Fed. 781.

Want of funds to deport.— A warrant for the arrest of a Chinese person will not be refused by a district judge who has no judicial knowledge that the executive department is without the funds necessary to deport such person. *In re* Lintner, 57 Fed. 587. See also U. S. *v.* Chum Shang Yuen, 57 Fed. 588; *In re* Ny Look, 56 Fed. 81; *In re* Chow Goo Pooi, 25 Fed. 77.

92. U. S. *v.* Williams, 83 Fed. 997.

No formal complaint or pleadings are required in a proceeding to deport a Chinese person. Fong Yue Ting *v.* U. S., 149 U. S. 698, 13 S. Ct. 1016, 37 L. ed. 905.

Return of process.— In general, process is not returnable to a district other than that of its issuance; but the Chinese exclusion act of 1888 alters this rule so far as relates to inquiry into the right of a Chinese person to be in the United States. U. S. *v.* Long Hop, 55 Fed. 58.

See, generally, Process.

93. U. S. *v.* Lung Hong, 105 Fed. 188.

The power of congress to prescribe a rule of evidence in proceedings for the deportation of Chinese aliens is included within its general authority to exclude aliens, or to prescribe the conditions upon which they may remain in the United States. Fong Yue Ting *v.* U. S., 149 U. S. 698, 13 S. Ct. 1016, 37 L. ed. 905; U. S. *v.* Williams, 83 Fed. 997; U. S. *v.* Wong Dep Ken, 57 Fed. 206; *In re* Sing Lee, 54 Fed. 334.

Refusal to testify.—A Chinese person, who has been shown by uncontradicted evidence to be entitled to remain in the United States, cannot be deported because of his refusal to be sworn to testify at the request of the United States. *Ex p.* Sing, 82 Fed. 22.

5. Order of Deportation — a. Requisites and Sufficiency. The order of deportation need not explicitly refer to the specific act of congress under which the person to be deported is adjudged to be unlawfully in the United States.[94]

b. Conclusiveness. A judgment of deportation of a Chinese person, by a court having jurisdiction of the controversy and the parties, cannot be impeached on habeas corpus by proof of a different state of facts from that on which the judgment was based.[95]

c. To What Country. The words "country from whence he came," as used in the act of congress of Oct. 1, 1888, providing for deportation "to the country from whence he came" of a Chinese person not entitled to remain in the United States, and other acts on the subject, do not refer exclusively to the empire of China.[96] Accordingly, where a Chinese person has been convicted of being unlawfully in the United States, and the evidence shows that he entered the United States from Canada after having been in that country for a time, he must be returned to Canada.[97]

6. Appeal. The right of appeal to a district court, given by § 13 of the act of congress of Sept. 13, 1888, to a Chinese person adjudged by a United States commissioner to be unlawfully in the United States, is not taken away by § 3 of the act of congress of May 5, 1892.[98]

94. *In re* Tsu Tse Mee, 81 Fed. 562, wherein it was held that it is sufficient if the order of deportation shows that the person to be deported has been adjudged to be unlawfully within the United States.

Surplusage.— A commissioner having made an order of deportation, a further order, that the person to be deported "be forthwith taken before the nearest United States judge, that a review of these proceedings may be had and proper order of deportation made," being unnecessary, may be treated as surplusage. *In re* Wong Fock, 81 Fed. 558.

Forms of orders of deportation may be found in Fong Yue Ting *v.* U. S., 149 U. S. 698, 13 S. Ct. 1016, 37 L. ed. 905; U. S. *v.* Wong Dep Ken, 57 Fed. 206.

95. *In re* Gut Lun, 83 Fed. 141; *In re* Tsu Tse Mee, 81 Fed. 702. See also U. S. *v.* Chung Shee, 76 Fed. 951, 44 U. S. App. 751, 22 C. C. A. 639 [*affirming* 71 Fed. 277], wherein it was held that a judgment of a federal court discharging on habeas corpus a Chinese immigrant detained on board a vessel pursuant to a collector's decision, and permitting him to land, is conclusive of the right of entry and that right cannot be re-examined by any subsequent proceedings for deportation.

See, generally, Habeas Corpus.

96. *In re* Leo Hem Bow, 47 Fed. 302; 2 Cent. Dig. tit. "Aliens," § 92.

Departure of vessel.— Where a Chinese person has, on proceeding by habeas corpus, or by a justice, judge, or commissioner, been found to be unlawfully within the United States, and the vessel from which he was taken has sailed, the court may direct the marshal to whose custody such person has been remanded to cause him to be removed to the country whence he came. *In re* Chin Ah Sooey, 21 Fed. 393.

Vacation of order.— The court, on application of the United States attorney, may vacate a sentence, and issue a new writ of deportation to China, where the commissioner's order is impossible of execution and effective only to detain and imprison defendant in the United States unlawfully. U. S. *v.* Ah Toy, 47 Fed. 305.

97. U. S. *v.* Don On, 49 Fed. 569; U. S. *v.* Chong Sam, 47 Fed. 878; *In re* Mah Wong Gee, 47 Fed. 433.

98. U. S. *v.* Wong Dep Ken, 57 Fed. 203. But see U. S. *v.* Lee Ching Goon, (Ariz. 1900) 60 Pac. 692, wherein it was held that the United States has no right of appeal from the order of a United States commissioner discharging a Chinese person as a member of the privileged class, since the statute provides an appeal only for defendant from a conviction.

Bail pending appeal.— The court will not admit to bail, pending appeal from the denial of a writ of habeas corpus, a Chinese immigrant seeking discharge from detention by the collector. Chan Gun *v.* U. S., 9 App. Cas. (D. C.) 290; *In re* Chin Yuen Sing, 65 Fed. 788. See also Case of Chinese Wife, 21 Fed. 808. *Compare* Case of Unused Tag, 21 Fed. 701.

A notice of appeal to the district court from an order of deportation must be served within the time provided by statute. U. S. *v.* See Ho How, 100 Fed. 730.

Review on appeal.— The finding of a commissioner that a Chinese person is not lawfully in the United States will not be disturbed on appeal unless clearly against the weight of evidence. U. S. *v.* Chung Fung Sun, 63 Fed. 261. So, while a court in its discretion may permit a Chinese laborer, arrested on the Texas side of the Rio Grande, and ordered deported by a commissioner, to return to Mexico, where he formerly resided, when satisfied of the proof of his claim that he entered the United States unintentionally, it will not interfere with the order of deportation where it appears more probable, from the evidence, that his entry was intentional. Yee Yee Chung *v.* U. S., 95 Fed. 432.

Waiver of objections.— Where a Chinese

F. Proceedings to Exclude. Authority to investigate and determine the facts upon which a Chinese person's right to enter the United States is made to depend is vested in the collector of customs. And the decision of a collector, when adverse to the right of a Chinese person to enter, is conclusive upon the courts.[99] In such case the only remedy is an appeal to the secretary of the treasury.[1] It has been held, however, that this rule will not prevent a court from entertaining an application for a writ of habeas corpus in behalf of one who was refused a fair hearing by the collector, and deported before the expiration of the time allowed him by law for appeal.[2] It has also been held that a collector's decision is not conclusive upon the courts when favorable to the right to land.[3]

G. Offenses against Exclusion Acts. A vessel stolen from its owner and used, while out of his control, without his knowledge or consent, in bringing Chinese laborers into the United States in violation of law, does not become liable to seizure and forfeiture. To work a forfeiture of a vessel the master must knowingly violate the statute.[4]

person was ordered deported by a commissioner, and appealed to the district court, where the case was tried *de novo* and he was discharged, the United States cannot for the first time, on a writ of error in the circuit court of appeals, raise the objection that the record filed on appeal was insufficient to give the district court jurisdiction. U. S. *v.* Lee Seick, 100 Fed. 398, 40 C. C. A. 448.

99. Act of congress of Aug. 18, 1894; Lem Moon Sing *v.* U. S., 158 U. S. 538, 15 S. Ct. 967, 39 L. ed. 1082; Ekiu *v.* U. S., 142 U. S. 651, 12 S. Ct. 336, 35 L. ed. 1146; *In re* Lee Ping, 104 Fed. 678 (wherein it was held that the fact that the collector disregarded the plain provisions of the statute and refused the right to land to one having a certificate of his student character conforming to the requirements of the statute, and which was not controverted by the United States, did not give a court jurisdiction to review his decision); *In re* Lee Lung, 102 Fed. 132; U. S. *v.* Gin Fung, 100 Fed. 389, 40 C. C. A. 439 [*reversing* 89 Fed. 153]; *In re* Way Tai, 96 Fed. 484; *In re* Leong Youk Tong, 90 Fed. 648; *In re* Lee Yee Sing, 85 Fed. 635; *In re* Chin Yuen Sing, 65 Fed. 571; 2 Cent. Dig. tit. "Aliens," § 95. But see *In re* Tom Yum, 64 Fed. 485, wherein it was held that a collector did not have final jurisdiction to determine whether a person of Chinese descent is a citizen of the United States, but such question may be determined by the courts. See also U. S. *v.* Wong Chung, 92 Fed. 141, wherein it was held that, in a proceeding before a commissioner for the deportation of a Chinese person, the action of a deputy collector some months previously, in refusing defendant the right to enter into the United States, is not an adjudication which constitutes a bar to the consideration of defendant's rights by the commissioner on the merits, where the deputy entered no decision, made no findings, and heard no evidence to rebut the *prima facie* showing made by defendant of his right of entry.

See, generally, HABEAS CORPUS.

Prior to the act of congress of Aug. 18, 1894, it had been held that there was no statute or treaty making the decision of customs officials final, or ousting the courts of jurisdiction. U. S. *v.* Jung Ah Lung, 124 U. S. 621, 8 S. Ct. 663, 31 L. ed. 591 [*affirming* 25 Fed. 141]; *In re* Chow Goo Pooi, 25 Fed. 77.

1. *In re* Lee Lung, 102 Fed. 132.

2. *In re* Gin Fung, 89 Fed. 153. See also U. S. *v.* Chin Fee, 94 Fed. 828, wherein it was held that the decision of a customs officer, that a Chinese person is not entitled to enter the United States, made after such person has already entered and without any application for entry, is not such an adjudication as is made conclusive by the statute.

3. *In re* Li Sing, 86 Fed. 896, 58 U. S. App. 1, 30 C. C. A. 451; *In re* Li Foon, 80 Fed. 881. See also U. S. *v.* Lau Sun Ho, 85 Fed. 422, wherein it was held that the action of the collector of a port in permitting a Chinese laborer to land, upon representations that he was born in the United States, is not in any sense judicial, and, in a proceeding for the laborer's deportation, does not constitute even *prima facie* evidence of his right to remain in the United States. And see U. S. *v.* Lee Hoy, 48 Fed. 825, wherein it was held that the presence of a Chinese merchant, otherwise entitled to be in the United States, is not rendered unlawful by the fact that, upon his return from a visit to Canada, the collector permitted him to land, upon the certificates of private persons and his own personal knowledge, without the visèd certificate required by the amended exclusion act. *Compare* U. S. *v.* Loo Way, 68 Fed. 475.

4. U. S. *v.* The Geo. E. Wilton, 43 Fed. 606.

See 2 Cent. Dig. tit. "Aliens," §§ 96–99.

As to proceedings to deport see *supra*, VII, E. To exclude see *supra*, VII, F.

A vessel touches at a port of the United States, within the meaning of the act to exclude Chinese laborers from the United States, when she calls there for orders, or a cargo for a foreign port; and Chinese laborers who are on board of her as passengers or crew are not unlawfully in the country, contrary to said act, during her stay for such purpose. *In re* Moncan, 8 Sawy. (U. S.) 350, 14 Fed. 44.

Change in management.— A steamship company cannot escape its duty to take back, to the country from which they are brought,

ALIENUS. In old English law, another's, or the property of another.[1]

ALIGNMENT. The act of adjusting a line; the state of being so adjusted; and, in terms of engineering, "the ground-plan of a road or other work as distinguished from its profile."[2]

ALIKE. Equally.[3]

ALIMENT. In Scotch law, a fund for maintenance; ALIMONY,[4] *q. v.*

ALIMONY. See DIVORCE; HUSBAND AND WIFE; MARRIAGE.

A L'IMPOSSIBLE NUL EST TENU. A maxim meaning "No man is bound to perform the impossible."[5]

ALIO INTUITU. With another view or object.[6]

ALIQUIS. One; a person.[7]

ALIQUIS NON DEBET ESSE JUDEX IN PROPRIA CAUSA, QUIA NON POTEST ESSE JUDEX ET PARS. A maxim meaning "One ought not to be a judge in his own cause, because he cannot be a judge and party both."[8]

ALITER. Otherwise.[9]

ALIUD EST CELARE, ALIUD TACERE. To conceal is one thing; to be silent is another.[10]

ALIUD EST DISTINCTIO, ALIUD SEPARATIO. Distinction is one thing; separation is another.[11]

ALIUD EST POSSIDERE, ALIUD ESSE IN POSSESSIONE. It is one thing to possess; it is another to be in possession.[12]

ALIUD EST VENDERE, ALIUD VENDENTI CONSENTIRE. To sell is one thing; to consent to sell is another.[13]

ALIUD EXAMEN. A different or foreign mode of trial.[14]

ALIUNDE. From another source or quarter.[15]

ALIZARIN. A red coloring matter, of the character of Turkish reds, extracted from madder-root or made from anthracene, and extensively used as a dye-stuff.[16]

Chinese laborers unlawfully landed in the United States by it, by the departure of the vessel on which they are brought, or any change in its officers or management, pending proceedings to determine the right of the Chinese persons to reënter the United States. Case of Unused Tag, 21 Fed. 701.

Indictment for aiding unlawful entry.— An indictment under the act of congress of May 6, 1882, making it unlawful for any person "to aid or abet the landing in the United States from any vessel of any Chinese person not lawfully entitled to enter the United States," must state facts sufficient to show that the Chinese person was one prohibited from landing, and that he was brought on the same vessel from which he landed on a voyage which terminated at the time of the landing. It is demurrable if it merely shows that he was a Chinese laborer, and alleges that he was not lawfully entitled to enter the United States, and that he landed from a certain vessel. U. S. *v.* Trumbull, 46 Fed. 755.

1. Burrill L. Dict.

2. Chester *v.* Leonard, 68 Conn. 495, 507, 37 Atl. 397 [*citing* Webster International Dict.].

3. The word "alike" is the same as the word "equally" when used in the expression, "to be possessed and enjoyed by them alike," in a will. Loveacres *v.* Blight, Cowp. 352, 357.

4. Wharton L. Lex.

5. Adams Gloss.

6. Burrill L. Dict.

Used as in the expression, "The act . . , did not, as it seems to me, contemplate a case like the present, but was passed *alio intuitu*," per Ellenborough, C. J., in Payne *v.* Spencer, 6 M. & S. 231, 234.

7. Burrill L. Dict.

8. Broom Leg. Max.

9. Burrill L. Dict.

Used in the reports to introduce a converse proposition or exception to a rule stated, as in the expression, "It has been held *aliter* ever since," in Copley *v.* Hepworth, 12 Mod. 1.

10. Burrill L. Dict. [*citing* Carter *v.* Boehm, 3 Burr. 1905, 1910].

Applied in Roseman *v.* Canovan, 43 Cal. 110, 118.

11. Black L. Dict.

12. Wharton L. Lex.

13. Burrill L. Dict.

14. Black L. Dict.

15. Burrill L. Dict.

Used in the expression, "And it appeared *aliunde* that the name of the vicar was," etc., in 1 Greenleaf Ev. § 291.

16. *In re* Schaeffer, 2 App. Cas. (D. C.) 1, 4.

"**The name has its origin** in the trade-name — Alizari — applied to madder in the countries bordering on the Mediterranean Sea." *In re* Schaeffer, 2 App. Cas. (D. C.) 1, 4.

ALL. Each; every;[17] and sometimes equivalent to "any."[18]

ALLAY. See ALLOY.

ALLEGANS CONTRARIA NON EST AUDIENDUS. A maxim meaning "He is not to be heard who alleges things contradictory to each other."[19]

ALLEGANS SUAM TURPITUDINEM NON EST AUDIENDUS. A maxim meaning "He is not to be heard who alleges his own infamy."[20]

ALLEGARI NON DEBUIT QUOD PROBATUM NON RELEVAT. A maxim meaning "That ought not to be alleged which, if proved, is not relevant."[21]

ALLEGATA ET PROBATA. Allegations and proof.[22]

ALLEGATION. The assertion, declaration, or statement of a party to an action, made in a pleading, setting out what he expects to prove.[23]

ALLEGATION OF FACULTIES. An allegation of the means at the disposal of the husband, where, in a suit for divorce, alimony is demanded.[24]

ALLEGED. Charged; stated.[25]

ALLEGIANCE. The obligation of fidelity and obedience which the individual owes to the government or to the sovereign under which he lives in return for the protection he receives.[26] (See, generally, ALIENS; CITIZENS; TREASON.)

17. Powle *v.* Delano, 144 Mass. 95, 100, 10 N. E. 769; Sherburne *v.* Sischo, 143 Mass. 439, 442, 9 N. E. 797; State *v.* Babcock, 22 Nebr. 33, 37, 33 N. W. 709; State *v.* Cummings, 17 Nebr. 311, 316, 22 N. W. 545 [*citing* Craig Universal Dict.; Webster Dict.]; Bloom *v.* Xenia, 32 Ohio St. 461, 467; Burnett *v.* Great North Scotland R. Co., 54 L. J. Q. B. 531, 539.

18. Agawam Bank *v.* Strever, 18 N. Y. 502, 510. See also Moore *v.* Virginia F. & M. Ins. Co., 28 Gratt. (Va.) 508, 516, 26 Am. Rep. 373.

Rule of construction.— In acts of assembly as well as in common parlance the word "all" is a general rather than a universal term, and is to be understood in one sense or the other, according to the demand, or sound reason. Stone *v.* Elliott, 11 Ohio St. 252, 258; Kieffer *v.* Ehler, 18 Pa. St. 388, 391.

The word "all," as applied to persons and things, occurs frequently in all writings — lay, as well as legal — sacred and profane; and the generality of the phrase is frequently to be restrained in an act, not only by the context, but by the general form and scheme of the statute, as demonstrative of the intention of the legislature. Phillips *v.* State, 15 Ga. 518.

19. Broom Leg. Max.

20. Wharton L. Lex.

21. Burrill L. Dict.

22. Burrill L. Dict.

A phrase frequently used to express the rule that the evidence and allegations in the pleadings must correspond, as in the sentence, "The *allegata* and *probata* must agree; the latter must support the former," in Boone *v.* Chiles, 10 Pet. (U. S.) 177, 209, 9 L. ed. 388, 399.

23. Black L. Dict.

24. Lovett *v.* Lovett, 11 Ala. 763, 771; Wright *v.* Wright, 3 Tex. 168, 179.

25. Scholfield, J., in Watt *v.* People, 126 Ill. 9, 33, 18 N. E. 340, 1 L. R. A. 403.

26. Jackson *v.* Goodell, 20 Johns. (N. Y.) 188, 191; State *v.* Hunt, 2 Hill (S. C.) 1, 219; Carlisle *v.* U. S., 16 Wall. (U. S.) 147, 21 L. ed. 426; Inglis *v.* Sailors' Snug Harbor, 3 Pet. (U. S.) 99, 155, 7 L. ed. 617, 637; Calvin's Case, 7 Coke 1, 4*b*; 1 Bl. Comm. 366.

May be absolute or qualified.— "It may be an absolute and permanent obligation, or it may be a qualified and temporary one. The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign. The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence. This obligation of temporary allegiance of an alien resident in a friendly country is everywhere recognized by publicists and statesmen." Carlisle *v.* U. S., 16 Wall. (U. S.) 147, 21 L. ed. 426.

Not dependent on ownership of land.—"As to allegiance, it is indeed due from every citizen to the state, but it is a political obligation, and is as binding on him who enjoys the protection of the Commonwealth, without owning a foot of soil, as on him who counts his acres by hundreds of thousands. So also it is due to the Federal Government, through which none of our titles have been derived. The truth is, that this obligation, which is reciprocal to the right of protection, results out of the political relations between the government and the citizen, and bears no relation whatever to his land-titles any more than to his personal property." Wallace *v.* Harmstad, 44 Pa. St. 492, 501.

Binds to observance of what laws.— "Allegiance binds the citizen to the observance of all laws which are promulgated by his own sovereign, not inconsistent with the laws of nature. The laws of nature as they are denominated also rightfully require obedience, not by reason of allegiance, but because they emanate from a higher authority than any human government. They are written upon the hearts of all men; exist before governments are organized; anterior of course to allegiance, 'and are binding all over the globe, in all countries and at all times' . . . allegiance itself is modified and controlled by them." Adams *v.* People, 1 N. Y. 173, 175.

ALLEGIARE. To defend or justify by due course of law.[27]

ALLENARLY. Only;[28] a technical term used in Scotch conveyancing.[29]

ALLEVIARE. To levy or pay an accustomed fine or composition.[30]

ALLEY. A narrow passage or way in a city,[31] not meant primarily as a substitute for a street, but only as a local accommodation to a limited neighborhood.[32] (Alleys: As Boundaries, see BOUNDARIES. Dedication of, see DEDICATION. Duties, Liabilities, and Powers of Municipalities Concerning, see MUNICIPAL CORPORATIONS.)

ALL FAULTS. Words used in contracts of sale, which, in the absence of fraud on the part of the vendor, cover all such faults and defects as are not inconsistent with the identity of the goods as described.[33]

ALL-FOURS. A metaphorical expression used to describe cases which are alike in all the circumstances which affect their determination, and which are said to be, or run, upon all-fours.[34]

ALLIANCE. The union or connection of two persons or families by marriage.[35] In international law, a union between two or more nations, contracted by compact, treaty, or league.[36]

ALLISION. The running of one vessel into another.[37]

ALLOCARE. To ALLOW,[38] *q. v.*

ALLOCATIO. An ALLOCATION,[39] *q. v.*

ALLOCATION. An allowance made upon accounts in the exchequer.[40]

ALLOCATIONE FACIENDA. Literally, "making allowance." A writ for allowing to an accountant such sums of money as he hath lawfully expended in his office, directed to the lord treasurer and barons of the exchequer.[41]

ALLOCATUR. Literally, "it is allowed." A term used to express the allowance of a thing or proceeding by a court, judge, or judicial officer, and now applied in England to the certificate given by the master, on taxing a bill of costs, showing the amount taxed or allowed.[42] (See, generally, APPEAL AND ERROR; COSTS; DAMAGES.)

ALLOCUTION. The formal address of the judge to a prisoner, asking him why sentence should not be pronounced.[43] (See, generally, CRIMINAL LAW.)

27. Jacob L. Dict.

28. Balmerino's Case, 3 How. St. Tr. 591, 699.

29. Century Dict.; Macintosh *v.* Gordon, 4 Bell Sc. App. 105, 119, 124.

30. Burrill L. Dict.

31. Winston *v.* Johnson, 42 Minn. 398, 401, 45 N. W. 958; Bailey *v.* Culver, 12 Mo. App. 175, 183; Matter of Woolsey, 95 N. Y. 135, 140.

The term "public alley" has not, like "highway," any fixed and legal meaning. People *v.* Jackson, 7 Mich. 432, 447, 74 Am. Dec. 729.

32. Horton *v.* Williams, 99 Mich. 423, 427, 58 N. W. 369; Beecher *v.* People, 38 Mich. 289, 291, 31 Am. Rep. 316.

Distinguished from "highway."—In Debolt *v.* Carter, 31 Ind. 355, 367, the court, speaking of alleys, said: "Ordinarily, they are laid out and dedicated to the public use, and especially for the use and convenience of the property-holders of the town or city, by the proprietor thereof, or are laid out and established for the same purpose by the corporate authorities. 'Highway' is a word of much broader signification; it includes every species of ways over which the public at large have a right of passage, whether they be roads, navigable rivers, or streets and alleys;" and in Bagley *v.* People, 43 Mich. 355, 5 N. W. 415, 38 Am. Rep. 192: "An alley can in no proper or legal sense be considered as a public highway, or be governed by rules relating thereto. While the city may have, and undoubtedly has, certain limited rights therein for municipal purposes, yet the public have no general right of way over or through the same. It is designed more especially for the use and accommodation of the owners of property abutting thereon, and to give the public the same unqualified rights therein that they have in and to the use of the public streets would defeat the very end and object intended;" but an alley was held to be a road in Sharett's Road, 8 Pa. St. 89, 92.

33. Whitney *v.* Boardman, 118 Mass. 242; Shepherd *v.* Kain, 5 B. & Ald. 240, 7 E. C. L. 137; Schneider *v.* Heath, 3 Campb. 506, 508; Pickering *v.* Dowson, 4 Taunt. 779.

34. Abbott L. Dict.

35. Bouvier L. Dict.

36. Burrill L. Dict.

37. Burrill L. Dict.

Distinguished from "collision," which is a running of two vessels into each other. Burrill L. Dict.

38. Adams Gloss.

39. Burrill L. Dict.

40. Wharton L. Lex.

41. Jacob L. Dict.

42. Burrill L. Dict.

43. State *v.* Ball, 27 Mo. 324, 326.

ALLODARII. Tenants in fee simple.[44]

ALLODIAL. Free; held in free and absolute ownership.[45] (See, generally, PROPERTY.)

ALLODIUM. Land possessed by one in his own right, without owing any rent or service to any superior.[46]

ALLOGRAPH. A document not written by any of the parties thereto.[47]

ALLONGE. A paper attached to a negotiable instrument for receiving indorsements too numerous to be written on the bill itself.[48] (See, generally, BILLS AND NOTES.)

ALLOT. To set apart a thing to a person as his share.[49]

ALLOTMENT. The act of allotting; that which is allotted.[50] (Allotment: Of Corporate Stock, see CORPORATIONS. Of Dower, see DOWER. Of Exempt Property or Homestead, see EXEMPTIONS; HOMESTEADS.)

ALLOTMENT NOTE. A writing by a seaman, whereby he makes an assignment of part of his wages in favor of his wife, father or mother, grandfather or grandmother, brother or sister.[51]

ALLOTMENT SYSTEM. The practice of dividing land into small portions for cultivation by agricultural laborers and other cottagers at their leisure, and after they have performed their ordinary day's work.[52]

ALLOTTEE. A person to whom land under an inclosure act or shares in a public undertaking are allotted.[53]

ALLOW. To permit;[54] to grant license to; to yield;[55] to suffer; to tolerate;[56] to fix;[57] to substitute by way of compensation something for another;[58] and frequently used in wills in the sense of "intend;"[59] "direct;"[60] "give;"[61] and "will."[62]

ALLOWANCE. Something conceded as a compensation, abatement, or deduction;[63] a gift or gratuity to a child or other dependent;[64] the sanction or appro-

44. Coke Litt. 1*b*.

45. Wallace *v.* Harmstad, 44 Pa. St. 492, 499; Barker *v.* Dayton, 28 Wis. 367, 384.

46. McCartee *v.* Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 513, 18 Am. Dec. 516 [*citing* 2 Bl. Comm. 104].

47. Wharton L. Lex.

48. *Alabama.*— Crutchfield *v.* Easton, 13 Ala. 337, 338.

Indiana.— French *v.* Turner, 15 Ind. 59, 62 [*citing* Story Bills, § 204].

Nebraska.— Doll *v.* Hollenbeck, 19 Nebr. 639, 643, 28 N. W. 286 [*citing* Webster Dict.; Daniel Neg. Instr. 690].

Wisconsin.— Crosby *v.* Roub, 16 Wis. 616, 626, 84 Am. Dec. 720.

United States.— Osgood *v.* Artt, 17 Fed. 575, 577.

49. Glenn *v.* Glenn, 41 Ala. 571, 586; Fort *v.* Allen, 110 N. C. 183, 190, 14 S. E. 685 [*citing* Anderson L. Dict.].

50. Century Dict.

51. Abbott L. Dict. [*citing* Mozley & W. L. Dict.].

52. Black L. Dict.

53. Wharton L. Lex.

54. Kearns *v.* Kearns, 107 Pa. St. 575, 578; Doty *v.* Lawson, 14 Fed. 892, 901; Huxham *v.* Wheeler, 3 H. & C. 75, 84.

55. Doty *v.* Lawson, 14 Fed. 892, 901.

56. Gregory *v.* U. S., 17 Blatchf. (U. S.) 325, 330, 10 Fed. Cas. No. 5,803.

57. Equivalent to "fix" in a statute relating to the rate of interest allowed. Hinds *v.* Marmolejo, 60 Cal. 229, 231.

58. Glenn *v.* Glenn, 41 Ala. 571, 586.

59. Hunter *v.* Stembridge, 12 Ga. 192, 194; Harmon *v.* James, 7 Ind. 263, 264.

60. Cabeen *v.* Gordon, 1 Hill Eq. (S. C.) 51, 55.

61. Cabeen *v.* Gordon, 1 Hill Eq. (S. C.) 51, 55.

62. Ramsey *v.* Hanlon, 33 Fed. 425, 426.

63. Carroll County *v.* Richardson, 54 Ind. 153, 159 [*citing* Worcester Dict.].

Expenses and charges of trustee.— In the English cases the expenses and the charges to which the trustee may be entitled outside of the ordinary fee-bill are designated as allowances. Downing *v.* Marshall, 37 N. Y. 380, 390.

Other than money.— In Burgess *v.* Clark, 14 Q. B. D. 735, 738, Brett, M. R., defined the word "allowance" as "a payment beyond the agreed salary of the officer, for additional services rendered by him," but in the same case Cotton, L. J., confined the meaning of the word to "the use of a room, or coals, or candles, or article of the like kind," or an allowance for the payment of them, while in Reg. *v.* Ramsgate, 23 Q. B. D. 66, Field, J., expressed a preference for the latter view, and defined the word as an allowance of something other than money. This decision was followed in Edwards *v.* Salmon, 23 Q. B. D. 531.

64. Taylor *v.* Staples, 8 R. I. 170, 179, 5 Am. Rep. 556.

Imports a voluntary act.— "Whether we consider the ordinary and popular signification of the word, or the more accurate and technical meaning attached to it by lexicographers, it is entirely inappropriate to express the idea of a fixed compensation adopted for the payment of services rendered by one person to another. The word 'allowance'

bation of the court to certain acts;[65] settlement;[66] to put upon allowance; to restrain or limit to a certain quantity of provision or drink.[67] (Allowance: Additional — To Costs, see Costs; To Pay in Army or Navy, see Army and Navy. Of Appeal or Writ of Error, see Appeal and Error. Of Claim against Decedent's Estate, see Executors and Administrators. To Surviving Spouse or Child, see Executors and Administrators.)

ALLOWER. To let; to hire.[68]

ALLOY or **ALLAY.** An inferior metal added to gold or silver in coining and in manufacture.[69]

ALLUVIO or **ALLUVIO MARIS.** Alluvion,[70] *q. v.*

ALLUVION. See Navigable Waters; Waters.

ALMANAC. See Evidence; Time.

ALMS. That which is given to the poor or needy.[71]

ALMSHOUSE. A house appropriated for the poor.[72] (See, generally, Asylums; Charities; Hospitals; Paupers.)

ALNAGE. Ell-measure; the measuring with an ell.[73]

ALNAGE DUTIES. Duties payable on woolen cloths at so much per ell.[74]

ALNAGER. A sworn public officer whose duty it was to measure woolen cloths and collect the duties thereon.[75]

ALNETUM. In old English law, a place where alders grew.[76]

ALONE. Solely.[77]

ALONG. By;[78] by the length of;[79] on;[80] over;[81] adjoining.[82]

imports the voluntary act of one party in doing something which is in his discretion to perform or withhold, at pleasure. To allow implies the right to determine, and is the act of a superior toward a dependent, granting a privilege which he has authority to confer or deny. It does not express the relations existing between co-contractors, vendor and vendee, or employer and employee, where there is a right secured by contract on one side, and no power of voluntary action on the other. Allowances are made by husband to wife, parents to children, the head of a family to its members, superannuated dependents and servants, from the benevolent to the poor, and, in cases where the act is discretionary with the donor, as a reward for benefits conferred, or services voluntarily rendered by one to another." Mangam *v.* Brooklyn, 98 N. Y. 585, 596, 50 Am. Rep. 705.

Not necessarily payable in instalments.— While "allowance" is often used in the sense of a stated sum paid from time to time, it is susceptible of a much more enlarged signification, and is often used to denote a sum or thing granted or permitted by the law. Jeter *v.* Jeter, 36 Ala. 391, 408.

65. Gildart *v.* Starke, 1 How. (Miss.) 450, 457.

66. "Allowance," when used in a judge's certificate to a case-made, is equivalent to the word "settlement." Atchison, etc., R. Co. *v.* Cone, 37 Kan. 567, 569, 15 Pac. 499.

67. Feagin *v.* Comptroller, 42 Ala. 516, 522 [*citing* Webster Dict.].

68. Kelham Dict.

69. Abbott L. Dict.

70. Burrill L. Dict.

71. Century Dict.

Distinguished from "charity."— "In many instances where the words 'alms' and 'charity' are both used, we are to consider it as mere tautology." Bedford's Case, 2 Dougl. El. Cas. 69, 106. But in Taunton's Case, 1 Dougl. El. Cas. 367, 370, the court said: "'Alms' means parochial collection, or parish relief. 'Charity' signifies sums arising from the revenue of certain specific funds which have been established or bequeathed for the purpose of assisting the poor."

72. Colored Orphans' Ben. Assoc. *v.* New York City, 104 N. Y. 581, 586, 12 N. E. 279; People *v.* Tax, etc., Com'rs, 36 Hun (N. Y.) 311, 312 [*citing* Webster Dict.]; Matter of Curtis, 25 N. Y. St. 1028, 7 N. Y. Suppl. 207, construing statute exempting almshouses from certain tax.

73. Burrill L. Dict.

74. Brown L. Dict.

They were abolished by 11 & 12 Wm. III, c. 20, § 2.

75. Jacob L. Dict.

76. Burrill L. Dict.

77. Salem Capital Flour Mills Co. *v.* Stayton Water Ditch, etc., Co., 13 Sawy. (U. S.) 99, 110, 33 Fed. 146.

78. Church *v.* Meeker, 34 Conn. 421, 425.

79. Cook County *v.* Great Western R. Co., 119 Ill. 218, 225, 10 N. E. 564 [*citing* Webster Dict.]; Pratt *v.* Atlantic, etc., R. Co., 42 Me. 579, 585; Postal Tel. Cable Co. *v.* Norfolk, etc., R. Co., 88 Va. 920, 926, 14 S. E. 803.

80. Church *v.* Meeker, 34 Conn. 421, 425; Nappanee *v.* Ruckman, 7 Ind. App. 361, 34 N. E. 609; Heath *v.* Des Moines, etc., R. Co., 61 Iowa 11, 14, 15 N. W. 573.

Context must show meaning.— The word "along" does not mean "upon" unless the context shows that it is used in the sense of "upon and along." Stevens *v.* Erie R. Co., 21 N. J. Eq. 259, 34 N. J. L. 532.

81. Church *v.* Meeker, 34 Conn. 421, 425; Heath *v.* Des Moines, etc., R. Co., 61 Iowa 11, 14, 15 N. W. 573.

82. Walton *v.* St. Louis, etc., R. Co., 67 Mo. 56, 58.

"'Along' a line does not signify that

ALONG WITH. In addition to.[83]

ALORS. There; at that time; in that place.[84]

ALSO. Likewise;[85] in the same or like manner;[86] in addition;[87] besides;[88] too;[89] also used as a copulative conjunction denoting nearly the same as the word "and."[90]

ALT. High;[91] and, in Scotch practice, an abbreviation of *alter*,— the opposite party, the defender.[92]

ALTA PRODITIO. High treason.[93]

ALTARAGE. The offerings made upon the altar, and also the profits that arise to the priest by reason of the altar.[94]

ALTA VIA. The highway.[95]

ALTER. To change[96] or make different[97] without destroying identity.[98]

ALTERATION. A change or substitution of one thing for another.[99] (Alteration: Of Boundaries, see BOUNDARIES. Of Brands or Marks, see ANIMALS; INSPECTION. Of Instruments, see ALTERATIONS OF INSTRUMENTS. Of Political Divisions, see COUNTIES; MUNICIPAL CORPORATIONS; SCHOOLS AND SCHOOL DISTRICTS; TOWNS. Of Records, see RECORDS. Of Streets or Highways, see STREETS AND HIGHWAYS.)

an object must be on the line, but rather the reverse; 'along,' in this sense, is used as the equivalent of 'up to,' 'extending to,' 'reaching to'" (Benton *v.* Horsley, 71 Ga. 619, 626); nor do the words necessarily import that the object must at all points touch or be parallel to the line (Com. *v.* Franklin, 133 Mass. 569, 570, construing Mass. Gen. Stat. c. 45, § 6, authorizing a person adjoining a highway to construct a sidewalk along the lines of his land).

83. Pilkington *v.* Myers, 8 L. T. Rep. N. S. 720.

84. Kelham Dict.

85. Panton *v.* Tefft, 22 Ill. 367; Allison *v.* Bates, 6 B. Mon. (Ky.) 78, 80; Rawlings *v.* Hunt, 90 N. C. 270, 273; Howell *v.* Com., 97 Pa. St. 332, 335 [*citing* Worcester Dict.].

86. *Dakota.*— Van Dusen *v.* Fridley, 6 Dak. 322, 43 N. W. 703 [*citing* Webster Dict.].

Illinois.— Panton *v.* Tefft, 22 Ill. 367.

Kentucky.— Allison *v.* Bates, 6 B. Mon. (Ky.) 78, 80.

New Jersey.— Morgan *v.* Morgan, 41 N. J. Eq. 235, 237, 3 Atl. 63.

North Carolina.— Rawlings *v.* Hunt, 90 N. C. 270, 273; Hyman *v.* Williams, 34 N. C. 92, 94; Sherrill *v.* Echard, 29 N. C. 161, 164.

Pennsylvania.— Howell *v.* Com., 97 Pa. St. 332, 335 [*citing* Worcester Dict.].

87. *Dakota.*— Van Dusen *v.* Fridley, 6 Dak. 322, 43 N. W. 703 [*citing* Webster Dict.].

Illinois.— Panton *v.* Tefft, 22 Ill. 367.

Maine.— Loring *v.* Hayes, 86 Me. 351, 29 Atl. 1093.

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88. Rawlings *v.* Hunt, 90 N. C. 270, 273.

89. Howell *v.* Com., 97 Pa. St. 332, 335 [*citing* Worcester Dict.].

90. Farish *v.* Cook, 6 Mo. App. 328, 332; Evans *v.* Knorr, 4 Rawle (Pa.) 66, 69; Garland *v.* Harrison, 8 Leigh (Va.) 368, 384.

91. Kelham Dict.

92. Burrill L. Dict.

93. Wharton L. Lex.

94. Jacob L. Dict.

95. Bouvier L. Dict.

Used in Primer *v.* Philips, 1 Salk. 222.

96. *California.*— People *v.* Sassovich, 29 Cal. 480, 484.

New Jersey.— Jaqui *v.* Johnson, 26 N. J. Eq. 321, 327.

Ohio.— Haynes *v.* State, 15 Ohio St. 455, 457.

Oregon.— Heiple *v.* Clackamas County, 20 Oreg. 147, 149, 25 Pac. 291.

Pennsylvania.— Wallace *v.* Blair, 1 Grant (Pa.) 75, 79.

97. Black River Imp. Co. *v.* Holway, 87 Wis. 584, 590, 59 N. W. 126.

98. Heiple *v.* Clackamas County, 20 Oreg. 147, 149, 25 Pac. 291; Davenport *v.* Magoon, 13 Oreg. 3, 7, 4 Pac. 299, 57 Am. Rep. 1; Black River Imp. Co. *v.* Holway, 87 Wis. 584, 590, 59 N. W. 126.

99. Johnson *v.* Wyman, 9 Gray (Mass.) 186, 189.

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Bond, see BONDS.

Instrument Amounting to Forgery, see FORGERY.

Records, see RECORDS.

Will by Testator, see WILLS.

Altered Instrument as Documentary Evidence, see EVIDENCE.

Cancellation of Altered Instrument, see CANCELLATION OF INSTRUMENTS.

Reformation of Altered Instrument, see REFORMATION OF INSTRUMENTS.

Rights of Surety Affected by Alteration of Instrument, see PRINCIPAL AND SURETY.

I. DEFINITION.

An alteration is an act done upon an instrument by which its meaning or language is changed. If what is written upon, or erased from, an instrument has no tendency to produce this result, or to mislead any person, it is not an alteration.[1] Technically, it is a change in an instrument by a party thereto, or one

1. 1 Greenleaf Ev. § 566. See also Cochran *v.* Nebeker, 48 Ind. 459; Holland *v.* Hatch, 11 Ind. 497, 71 Am. Dec. 363; Bridges *v.* Winters, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598; Oliver *v.* Hawley, 5 Nebr. 439; Kountz *v.* Kennedy, 63 Pa. St. 187, 3 Am. Rep. 541.

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entitled thereunder, or one in privity with such person, after the instrument has been signed or fully executed, without the consent of the other party to it, by an erasure, interlineation, addition, or substitution of material matter affecting the identity of the instrument or contract, or the rights and obligations of the parties.[2] The writing of words calculated to change the legal effect of the instrument is, to all intents, as fully an alteration as an erasure and substitution.[3]

II. Time of Change.

A. After Complete Execution. If the instrument is in the same state in which the party complaining caused it to be made or delivered — that is, if the change was made before the instrument was executed, or the contract in its ultimate form is that upon which the minds of the parties met — there is no alteration, in contemplation of law, which will avoid the instrument.[4] An alteration

N. W. 1053 [*citing* Black L. Dict.] an alteration is defined to be an act done upon a written instrument which, without destroying its identity, changes its language and meaning. This seems to be inaccurate, because, in a legal sense, what is an alteration must be considered with respect to the effect of the particular change, and to change the meaning of an instrument is, in legal contemplation, to destroy its identity, which is, at least in part, fixed by its meaning.

Ex vi termini an alteration imports a change in some particular. Williams *v.* Jensen, 75 Mo. 681.

Words not actually erased or canceled.— Where words in a deed have a crooked line drawn in pencil over them, as if for cancellation or erasure, but the words are not actually erased or canceled, they still form a part of the deed; and if the purchaser accepts the deed in this condition he is bound by such acceptance, although he insisted that the words should not be in the deed, and was told by the grantor that they had been canceled. His proper remedy is by a suit to reform the instrument. Rosenkrans *v.* Snover, 19 N. J. Eq. 420, 97 Am. Dec. 668.

2. This may be said to be the legal, rather than the ordinary, definition of the term, as applied in the modern decisions. See the following cases:

Georgia.— Jackson *v.* Johnson, 67 Ga. 167; Thrasher *v.* Anderson, 45 Ga. 538.

Illinois.— Ryan *v.* Springfield First Nat. Bank, 148 Ill. 349, 35 N. E. 1120; White *v.* Alward. 35 Ill. App. 195.

Iowa.— Shepard *v.* Whetstone, 51 Iowa 457, 1 N. W. 753, 33 Am. Rep. 143.

Kentucky.—Cason *v.* Wallace, 4 Bush (Ky.) 388; Commonwealth Bank *v.* McChord, 4 Dana (Ky.) 191, 29 Am. Dec. 398.

Massachusetts.— Church *v.* Fowle, 142 Mass. 12, 6 N. E. 764; Com. *v.* Emigrant Industrial Sav. Bank, 98 Mass. 12, 93 Am. Dec. 126; Granite R. Co. *v.* Bacon, 15 Pick. (Mass.) 239; Smith *v.* Dunham, 8 Pick. (Mass.) 246.

Mississippi.— Bridges *v.* Winters, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598.

New Hampshire.—Morrill *v.* Otis, 12 N. H. 466.

New York.— Troy City Bank *v.* Lauman, 19 N. Y. 477,

North Carolina.— Cheek *v.* Nall, 112 N. C. 370, 17 S. E. 80.

Ohio.— Holland *v.* Hatch, 15 Ohio St. 464.

Pennsylvania.— Wessell *v.* Glenn, 108 Pa. St. 104; Kountz *v.* Kennedy, 63 Pa. St. 187, 3 Am. Rep. 541.

Tennessee.— Waldron *v.* Young, 9 Heisk. (Tenn.) 777; Farnsworth *v.* Sharp, 4 Sneed (Tenn.) 54.

Texas.— Chamberlain *v.* Wright, (Tex. Civ. App. 1896) 35 S. W. 707; Morris *v.* Cude, 57 Tex. 337.

United States.— Bingham *v.* Reddy, 5 Ben. (U. S.) 266, 3 Fed. Cas. No. 1,414.

England.— Downes *v.* Richardson, 5 B. & Ald. 674, 7 E. C. L. 367.

In Morrill *v.* Otis, 12 N. H. 466, the court defines an alteration of an instrument to be something by which its meaning or language is changed, either in a material or an immaterial particular. This language has been quoted in one state where the strict rule is maintained that any change, no matter how immaterial, by one claiming under the instrument, will vitiate it. Moore *v.* Macon Sav. Bank, 22 Mo. App. 684. The first case, however, uses the term "alteration" in its comprehensive, rather than its technical, legal sense, as indicated by the sentence immediately following that above referred to: "If what is written upon or erased from the paper containing the instrument have no tendency to produce this result, or to mislead any person, it cannot be said to be an alteration." In addition to this the matters set up in that case were held to be immaterial — if to be considered as alterations at all — changes of which character are of no effect, as held in other cases in that state.

3. Holland *v.* Hatch, 11 Ind. 497, 71 Am. Dec. 363.

4. *Alabama.*— Webb *v.* Mullins, 78 Ala. 111; Davis *v.* Carlisle, 6 Ala. 707; Ravisies *v.* Alston, 5 Ala. 297.

Colorado.— Chapman *v.* Sargent, 6 Colo. App. 438, 40 Pac. 849.

Delaware.— Warder *v.* Stewart, 2 Marv. (Del.) 275, 36 Atl. 88; Hollis *v.* Vandergrift, 5 Houst. (Del.) 521.

Idaho.— People *v.* Bugbee, 1 Ida. 88.

Illinois.—Sargent *v.* Evanston, 154 Ill. 268,

which avoids an instrument upon the technical and strict grounds of alteration is generally made after the instrument has had a legal existence and inception.[5]

B. Before Issue of Bill or Note. In this connection a bill or note is not considered as issued before it comes into the hands of some one entitled to make a claim upon it.[6]

40 N. E. 440; Cairo, etc., R. Co. *v.* Parrott, 92 Ill. 194; McNab *v.* Young, 81 Ill. 11.

Iowa.—Shepard *v.* Whetstone, 51 Iowa 457, 1 N. W. 753, 33 Am. Rep. 143.

Maine.— Hilton *v.* Houghton, 35 Me. 143.

Massachusetts.— Ward *v.* Allen, 2 Metc. (Mass.) 53, 35 Am. Dec. 387, holding that it is no defense to an action, by a *bona fide* holder of a bill of exchange against the acceptor, that the bill was fraudulently altered before acceptance.

Michigan.— People *v.* Brown, 2 Dougl. (Mich.) 9.

Missouri.— Coney *v.* Laird, 153 Mo. 408, 55 S. W. 96; Fowles *v.* Bebee, 59 Mo. App. 401.

New Hampshire.—Hills *v.* Barnes, 11 N. H. 395.

New Jersey.— Thorpe *v.* Keeler, 18 N. J. L. 251; White *v.* Williams, 3 N. J. Eq. 376.

Oregon.— Nickum *v.* Gaston, 28 Oreg. 322, 42 Pac. 130.

Pennsylvania.— Britton *v.* Stanley, 4 Whart. (Pa.) 114; Grambs *v.* Lynch, 4 Pennyp. (Pa.) 243, 20 Wkly. Notes Cas. (Pa.) 376.

Texas.—Bell *v.* Boyd, 76 Tex. 133, 13 S. W. 232; Jacoby *v.* Brigman, (Tex. 1887) 7 S. W. 366.

Vermont.—Batchelder *v.* Blake, 70 Vt. 197, 40 Atl. 34.

Wisconsin.— Williams *v.* Starr, 5 Wis. 534.

United States.— De Malarin *v.* U. S., 1 Wall. (U. S.) 282, 17 L. ed. 594.

England.— Fitch *v.* Jones, 5 E. & B. 238, 85 E. C. L. 238; Downes *v.* Richardson, 5 B. & Ald. 674, 7 E. C. L. 367; Coke *v.* Brummell, 8 Taunt. 439, 4 E. C. L. 220; Paton *v.* Winter, 1 Taunt. 420; Stevens *v.* Lloyd, M. & M. 292, 22 E. C. L. 524.

Canada.— Fitch *v.* Kelly, 44 U. C. Q. B. 578; Fraser *v.* Fraser, 14 U. C. C. P. 70.

See also *infra*, V, B, 2; and 2 Cent. Dig. tit. "Alteration of Instruments," § 54 *et seq.*

5. Bingham *v.* Reddy, 5 Ben. (U. S.) 266, 3 Fed. Cas. No. 1,414. So in Bell *v.* State Bank, 7 Blackf. (Ind.) 456, wherein an alteration in the time of the payment of a note, made by the maker before negotiating the note and after it was indorsed, was held not to present a case of the alteration of a perfected note, but to raise a question of the due execution of a simple authority. See also Boalt *v.* Brown, 13 Ohio St. 364.

6. Eddy *v.* Bond, 19 Me. 461, 36 Am. Dec. 767; Church *v.* Fowle, 142 Mass. 12, 6 N. E. 764 (holding that if a promissory note is attested by one not a party to it, and without the procurement and knowledge of either of the parties to it and the note is accepted by the payee without any knowledge that it has been attested, it is not an alteration of an existing contract); Portage County Branch Bank *v.* Lane, 8 Ohio St. 405 (wherein a surety signed a note for the accommodation of the principal, who changed the amount before negotiating it; it was held that the surety was discharged, not because of an alteration, but because the note executed by him was not an available obligation until discounted by the payee named therein, and because the note actually discounted was a different note from the one executed by the surety); Douglass *v.* Scott, 8 Leigh (Va.) 43 (which was a negotiable note signed and indorsed in blank by several persons, and delivered to another to raise money for his own accommodation, and it was held that the note was not available to the person for whose benefit it was made until it had been discounted).

Acceptance.— Until acceptance or negotiation, a bill drawn for a debt due from the drawee to the drawer, and while in the hands of the drawee and before acceptance, does not become an available security. Ratcliff *v.* Planters' Bank, 2 Sneed (Tenn.) 424. But if, upon presentment of a bill for acceptance, the payee alters it, and it is accepted as altered, it is vitiated as against the drawer and indorser because, before acceptance, the bill was a perfect instrument on which the drawers might have been sued. Walton *v.* Hastings, 4 Campb. 223; Outhwaite *v.* Luntley, 4 Campb. 179; Paton *v.* Winter, 1 Taunt. 420. See also *infra*, VII, F, 11.

Under the stamp laws the mere correction of an error, by consent, before delivery will not require a restamping. Hill *v.* McLeod, 17 Nova Scotia 280. See also Merchants' Bank *v.* Stirling, 13 Nova Scotia 439; Sherrington *v.* Jermyn, 3 C. & P. 374, 14 E. C. L. 617; Downes *v.* Richardson, 5 B. & Ald. 674, 7 E. C. L. 367, where three persons joined as drawer, acceptor, and first indorser in an accommodation bill, and it was afterward issued to another person, but, previous to the issuance, its date was altered; it was held that a fresh stamp was not necessary, because the bill, in point of law, had not been issued before it was altered. In Cotton *v.* Simpson, 8 A. & E. 136, 35 E. C. L. 518, where defendant had signed a joint and several promissory note as surety with the principal debtor, and afterward the payee, without the surety's knowledge, induced another person to sign the instrument with the view of strengthening the security, the court held that defendant was liable, because the new surety could not be liable on the note by reason of the stamp laws, and therefore the alteration operated nothing. But this case has not been accepted as announcing the correct rule. Gardner *v.* Walsh, 34 Eng. L. & Eq. 162. But where the alteration is a distinct transaction, although made with the consent

C. Under Circumstances Importing Authority. And so, also, in this connection, it is held that an instrument will not be vitiated by a change after it is signed by one party and turned over to another for delivery under circumstances which import authority to perfect it for the purpose of rendering it available to the person to whom it is to be finally delivered.[7]

D. After Signing by One Party — 1. IN GENERAL. But, on the other hand, after one party subscribes a paper which binds him on the one part, the terms of the paper cannot be changed by the other party before signing or accepting it. This, however, seems not within the contemplation of the usual conception of the term "alteration" as dealing with the effect of a material change of a completed instrument or contract, but rather falls within other general rules pertinent to the elements of a binding contract.[8]

2. CHANGES NOT AFFECTING PARTIES WHO HAVE SIGNED. Where an instrument is to be considered as an entire transaction, operating, as to different parties, from the time of the execution by each, but not perfect until the execution by all, a change in the instrument, in a part thereof affecting only the particular party at the time executing it, will not avoid the deed as to the parties who had previously executed it, the instrument being complete as to the latter and the change in no way affecting their interest.[9]

of the acceptor before the bill is negotiated, it is held that a new stamp is necessary. Bowman *v.* Nichol, 5 T. R. 537.

7. Hilton *v.* Houghton, 35 Me. 143; Whitmore *v.* Nickerson, 125 Mass. 496, 28 Am. Rep. 257, holding that the indorsement of a note payable to the order of the indorser, with a blank for the signature of the maker, and delivery to the clerk of the indorser, who is authorized to deliver it to a member of a firm for the firm's signature, is binding upon the indorser, though the clerk acts in excess of his authority and has the note signed by the maker in his individual capacity. See also Beary *v.* Haines, 4 Whart. (Pa.) 17; Dusenberry *v.* O'Shiel, 2 Hill (N. Y.) 410.

See *infra*, V, C; and VII, F, 21, j.

8. *Michigan.*— Jenkinson *v.* Monroe, 61 Mich. 454, 28 N. W. 663 (holding that where a written agreement is interlined by one of the parties before signing it, but after execution by the other party, the question upon the disputed point of whether the clause was a part of the written contract as executed by the parties is not one of the vitiating effect of an alteration, but is simply as to what was or was not included in the contract); Osborne *v.* Van Houten, 45 Mich. 444, 8 N. W. 77 (discharge of guarantor by change before approval of contract).

Nebraska.— McGavock *v.* Morton, 57 Nebr. 385, 77 N. W. 785, wherein it is said that all discussion as to materiality, or as to whether the change was an alteration or a spoliation, was beside the issue, because the theory is, not that the contract was altered after it was made, but that the change was made after execution by one side and before execution by the other, or, in other words, that, because of the change at that time, regardless of who made it, there was never a consensus.

Ohio.— Hayes *v.* Dumont, 2 Ohio Cir. Ct. 229, wherein a contract, executed by one party and delivered to his agent for the purpose of procuring the signature of the other party, was held not to be rendered wholly void by reason of a material change made by such agent before the execution by the other party, but to be enforceable against the party first executing it in its original condition.

Utah.— American Pub. Co. *v.* Fisher, 10 Utah 147, 37 Pac. 259, holding that if the writing in question had been a contract debt the alteration would have had the effect to destroy it, and, consequently, if it was not a contract debt an unauthorized addition could not make it one.

Wisconsin.— Sherwood *v.* Merritt, 83 Wis. 233, 53 N. W. 512, wherein plaintiff and defendant entered into an oral agreement for the sale and purchase of land, which agreement was reduced to writing by plaintiff and handed by him to defendant's agent with a check for the earnest-money provided for in the contract, which check was to be delivered by defendant's agent to defendant upon the execution of the contract by the latter. The contract was changed by the agent, before delivery of the check to defendant, without the knowledge or consent of plaintiff, and defendant signed the contract in the changed form and afterward insisted upon its fulfilment in that form. It was held that plaintiff was entitled to recover back his check and had a right to repudiate the contract which defendant was attempting to enforce as not being the contract which plaintiff had entered into.

United States.— The Hero, 6 Fed. 526: Pew *v.* Laughlin, 3 Fed. 39, holding that a change made under the circumstances stated in the text could not be considered as a mere spoliation, because not made after the instrument was fully executed.

9. Van Horn *v.* Bell, 11 Iowa 465, 79 Am. Dec. 506 [*quoting* 1 Greenleaf Ev. § 568]; Davis *v.* Shafer, 50 Fed. 764: Hall *v.* Chandless, 4 Bing. 123, 13 E. C. L. 430: Doe *v.* Bingham, 4 B. & Ald. 672, 6 E. C. L. 648.

III. INTENT.

A. In General.[10] In one respect the intent with which an instrument is altered in the legal sense may be material; in another, it is wholly immaterial. The first phase refers to a change made by a party to the instrument with the purpose of altering it, leaving out of view the *bona fides* of his purpose; the second, to a change which has come about through accident, without any purpose on the part of anyone interested in the instrument to alter it.[11]

B. Accident or Mistake. Whenever it is clear that an instrument once perfect has become mutilated or effaced by accident or the effect of time, such mutilation or effacement operates nothing against its validity.[12] So a physical change made by a party interested will not vitiate the instrument where such a change is the result of a mistake of fact or mere inadvertence, made without any purpose to change the terms of the instrument.[13]

C. Fraudulent Purpose. The term "alteration," being usually applied to the act of a party to the instrument, imports some fraud or improper design to change its effect; the fraudulent purpose is a conclusion of law from the fact that the change is wilfully made.[14] Upon the question of how far the effect of a

10. See 2 Cent. Dig. tit. "Alteration of Instruments," § 57 *et seq.*

11. **Intent becomes material** only when the act done by the party to the instrument is wilful — that is to say, when it is done by him for the purpose of making a change therein. Cline *v.* Goodale, 23 Oreg. 406, 31 Pac. 956. The term "alteration" implies intention. Carrique *v.* Beaty, 24 Ont. App. 302.

12. *Indiana.*— Frazer *v.* Boss, 66 Ind. 1; Cochran *v.* Nebeker, 48 Ind. 459.

Iowa.— Murray *v.* Graham, 29 Iowa 520.

Pennsylvania.— Rhoads *v.* Frederick, 8 Watts (Pa.) 448, accidental erasure of signature and seal by child.

South Carolina.—Burton *v.* Pressly, Cheves Eq. (S. C.) 1.

Canada.— Doe *v.* McGill, 8 U. C. Q. B. 224.

See 2 Cent. Dig. tit. "Alteration of Instruments," § 75.

13. *Alabama.*— Lowremore *v.* Berry, 19 Ala. 130, 54 Am. Dec. 188, wherein the word "paid" was written across the face of a note by mistake, and it was held that this would not discharge the maker, and that therefore trover would lie for the conversion of the note.

Georgia.— Gwin *v.* Anderson, 91 Ga. 827, 18 S. E. 43; Lowry *v.* McLain, 75 Ga. 372.

Louisiana.— Garnier *v.* Peychaud, 9 La. 182, erasure of debtor's signature to note, through error or inadvertence.

Maine.— Milbery *v.* Storer, 75 Me. 69, 46 Am. Rep. 361; Brett *v.* Marston, 45 Me. 401, which was an erasure by mistake of the name of one who at the inception of the note had signed it on the back under the words "Holden on the within," and it was held that this did not discharge such person from liability.

Missouri.—Boulware *v.* State Bank, 12 Mo. 542, which involved the cancellation of the note through mistake.

Nebraska.— Russell *v.* Longmoor, 29 Nebr. 209, 45 N. W. 624, holding that where the owner of a chattel mortgage, in the form of a bill of sale with a defeasance clause, innocently, and without any intention to alter the contract, tore the instrument into two parts, separating the granting from the defeasance clause, the validity of the instrument as a whole was not affected and the rules as to alteration of instruments did not apply.

Pennsylvania.— Fisher *v.* King, 153 Pa. St. 3, 25 Atl. 1029, 31 Wkly. Notes Cas. (Pa.) 515 (which involved the signature by indorser as a witness in the place of the signature of a witness, by mistake); Marshall *v.* Gougler, 10 Serg. & R. (Pa.) 164, wherein witnesses to an assignment inadvertently signed as witnesses to the original execution of the instrument instead of as witnesses to the assignment.

Texas.— Henrietta Nat. Bank *v.* State Nat. Bank, 80 Tex. 648, 16 S. W. 321, 26 Am. St. Rep. 773.

United States.— Cancellation of deed by tearing off seal, induced by fraud or mistake. U. S. *v.* Spalding, 2 Mason (U. S.) 478, 27 Fed. Cas. No. 16,365; U. S. *v.* Williams, 1 Ware (U. S.) 173, 28 Fed. Cas. No. 16,724.

England.— Raper *v.* Birbeck, 15 East 17; Wilkinson *v.* Johnson, 3 B. & C. 428, 10 E. C. L. 198 (striking out indorsement by mistake); Novelli *v.* Rossi, 2 B. & Ad. 757, 22 E. C. L. 317.

Mistake of law and fact distinguished.— The mistake which may not render an alteration fatal refers to an alteration which is *in fieri*, and where there is a mistake of fact or inadvertence. If a signature is crossed out under a mistake of law as to the effect of such an alteration the instrument will nevertheless be avoided, as where the person who scratched out the signature did so under the impression that the legal effect of the document was different from what it really was. Hindustan, etc., Bank *v.* Smith, 36 L. J. C. P. 241.

14. *Indiana.*— Cochran *v.* Nebeker, 48 Ind. 459.

Massachusetts.— Wheelock *v.* Freeman, 13 Pick. (Mass.) 165, 23 Am. Dec. 674.

Missouri.— Law *v.* Crawford, 67 Mo. App. 150.

change is to be controlled by the fraudulent intention of the party making the change the cases do not seem to be in harmony. On the one hand the rule that fraud is implied from the mere fact of a material change means that when one party, without the consent of another, changes the terms of the instrument in a material respect it is immaterial that he had no actual fraudulent design,[15] the intent being of no moment save as it affects the right to resort to the original indebtedness.[16] On the other hand, the presence or absence of a fraudulent intent is distinctly recognized in many cases as a controlling element upon the effect of an act set up as an alteration,[17] though in some of the cases not to such an extent that they may be said to be entirely opposed to those which lay down the rule that the intent is of no moment.[18]

Nebraska.— Oliver *v.* Hawley, 5 Nebr. 439.
Oregon.— Cline *v.* Goodale, 23 Oreg. 406, 31 Pac. 956.
South Carolina.— Heath *v.* Blake, 28 S. C. 406, 5 S. E. 842.
Tennessee.—McDaniel *v.* Whitsett, 96 Tenn. 10, 33 S. W. 567; Taylor *v.* Taylor, 12 Lea (Tenn.) 714; McVey *v.* Ely, 5 Lea (Tenn.) 438; Blair *v.* State Bank, 11 Humphr. (Tenn.) 83.

15. *Alabama.*— Glover *v.* Robbins, 49 Ala. 219, 20 Am. Rep. 272.
Illinois.— Soaps *v.* Eichberg, 42 Ill. App. 375.
Indiana.— Dietz *v.* Harder, 72 Ind. 208.
Iowa.— Eckert *v.* Pickel, 59 Iowa 545, 13 N. W. 708.
Kansas.— Davis *v.* Eppler, 38 Kan. 629, 16 Pac. 793; Sheley *v.* Sampson, 5 Kan. App. 465, 46 Pac. 994.
Kentucky.—Phoenix Ins. Co. *v.* McKernan, 100 Ky. 97, 18 Ky. L. Rep. 617, 37 S. W. 490.
Maryland.— Owen *v.* Hall, 70 Md. 97, 16 Atl. 376.
Massachusetts.— Fay *v.* Smith, 1 Allen (Mass.) 477, 79 Am. Dec. 752; Draper *v.* Wood, 112 Mass. 315, 17 Am. Rep. 92.
Michigan.—Aldrich *v.* Smith, 37 Mich. 468, 26 Am. Rep. 536.
Minnesota.— Renville County *v.* Gray, 61 Minn. 242, 63 N. W. 635.
Missouri.— Moore *v.* Hutchinson, 69 Mo. 429; German Bank *v.* Dunn, 62 Mo. 79; Capital Bank *v.* Armstrong, 62 Mo. 59; Evans *v.* Foreman, 60 Mo. 449; Law *v.* Crawford, 67 Mo. App. 150.
Nebraska.— Brown *v.* Straw, 6 Nebr. 536, 29 Am. Rep. 369.
New York.— Booth *v.* Powers, 56 N. Y. 22.
Ohio.— Harsh *v.* Klepper, 28 Ohio St. 200.
Pennsylvania.— Hartley *v.* Corboy, 150 Pa. St. 23, 24 Atl. 295; Craighead *v.* McLoney, 99 Pa. St. 211; Marshall *v.* Gougler, 10 Serg. & R. (Pa.) 164; Moore *v.* Bickham, 4 Binn. (Pa.) 1.
South Carolina.— Heath *v.* Blake, 28 S. C. 406, 5 S. E. 842; Burton *v.* Pressly, Cheves Eq. (S. C.) 1.
Tennessee.—McDaniel *v.* Whitsett, 96 Tenn. 10, 33 S. W. 567; Taylor *v.* Taylor, 12 Lea (Tenn.) 714; Crockett *v.* Thomason, 5 Sneed (Tenn.) 341.

16. Booth *v.* Powers, 56 N. Y. 22. See VII, D, 4, e.
This rule leads to the converse conclusion that an immaterial change will not constitute such an alteration of the instrument as to vitiate it, even though the act was done with fraudulent intent. See VII, E, 4.

17. *California.*— Oakland First Nat. Bank *v.* Wolff, 79 Cal. 69, 21 Pac. 551, 748; Rogers *v.* Shaw, 59 Cal. 260.
Illinois.— Vogle *v.* Ripper, 34 Ill. 100, 85 Am. Dec. 298.
Maine.— Croswell *v.* Labree, 81 Me. 44, 16 Atl. 331, 10 Am. St. Rep. 238; Milbery *v.* Storer, 75 Me. 69, 46 Am. Rep. 361; Thornton *v.* Appleton, 29 Me. 298; Hale *v.* Russ, 1 Me. 334.
Massachusetts.— Lee *v.* Butler, 167 Mass. 426, 46 N. E. 52, 57 Am. St. Rep. 466; Adams *v.* Frye, 3 Metc. (Mass.) 103; Ford *v.* Ford, 17 Pick. (Mass.) 418; Smith *v.* Dunham, 8 Pick. (Mass.) 246.
Mississippi.— Foote *v.* Hambrick, 70 Miss. 157, 11 So. 567, 35 Am. St. Rep. 631.
New Hampshire.— Bowers *v.* Jewell, 2 N. H. 543.
Oregon.— Wallace *v.* Tice, 32 Oreg. 283, 51 Pac. 733.
Virginia.— Keen *v.* Monroe, 75 Va. 424.
By statute it is sometimes necessary that an alteration which will discharge one from liability must not only be material and by one claiming a benefit under the instrument, but must be made with an intent to defraud, as in Georgia. Hotel Lanier Co. *v.* Johnson, 103 Ga. 604, 30 S. E. 558; Gwin *v.* Anderson, 91 Ga. 827, 18 S. E. 43.

18. Thus, notwithstanding the cases from Massachusetts cited in the last preceding note, it was held in Fay *v.* Smith, 1 Allen (Mass.) 477, 478, 79 Am. Dec. 752, that no case had gone so far in that state as to hold that, where a material alteration in a contract had been made by the payee or obligee "with the express intention of changing the operation of the contract itself," it could afterward be enforced even in the absence of any fraudulent intent. In Lee *v.* Butler, 167 Mass. 426, 46 N. E. 52, 57 Am. St. Rep. 466, one of several papers constituting a memorandum in a contract guaranteeing payment of a loan erroneously stated the amount of the loan, as shown by other papers. With a view to correct the error, the grantee altered the figures, but the correction was also erroneous, and it was held that, though the change was not altogether immaterial, yet the figures originally inserted in it were not necessary to give the instrument effect: that the contract actually existing between the

D. Correction of Mistake to Conform to Original Intention — 1. Rule Permitting.[19] Where there is a mistake in an instrument whereby the real intention of the parties is left imperfectly expressed, many of the courts consider that a change made by one of the parties to the instrument without the consent of the other party, so as to make it conform to the original intention of the parties and to correct the mistake, is not such an alteration as will avoid the instrument.[20] In this sense the intent with which a change is made may be said to enter into the consideration of its effect, for it is to the exclusion of such a change that an altera-

parties was not changed by the change in the figures; that the memorandum, with the other competent evidence in the case, proved the same contract after the change as before it; that the rule applied in Adams *v.* Frye, 3 Metc. (Mass.) 103, should be applied in this case, but that the court did not find circumstances to show a *prima facie* fraudulent intent. This case does not seem to be inconsistent with Fay *v.* Smith, 1 Allen (Mass.) 477, 79 Am. Dec. 752. So, in Foote *v.* Hambrick, 70 Miss. 157, 11 So. 567, 35 Am. St. Rep. 631, and Wallace *v.* Tice, 32 Oreg. 283, 51 Pac. 733, cited in the last preceding note, the change was for the purpose of correcting a mistake to conform to the original intention of the parties, and while this may be said to come under the distinction in Fay *v.* Smith, 1 Allen (Mass.) 477, 79 Am. Dec. 752, the court in the first case recognizes that it is opposed to the general principle that a material alteration vitiates the instrument without reference to the motive of the person making the alteration. See further *infra*, III, D.

19. See 2 Cent. Dig. tit. "Alteration of Instruments," § 76.

20. *California.*— Sill *v.* Reese, 47 Cal. 294, holding that such a change need not be noted, at the bottom of the instrument, before the latter is signed in order to make it available as evidence. See also Turner *v.* Billagram, 2 Cal. 520.

Connecticut.—Murray *v.* Klinzing, 64 Conn. 78, 29 Atl. 244, which case, however, involved the filling of a blank, for which see further *supra*, V, C, 9.

Georgia.— In Hadden *v.* Larned, 87 Ga. 634, 13 S. E. 806, it appeared that a commissioner of deeds for Georgia in another state, in attesting a deed executed in the latter state, erased the printed words describing him, which by mistake were opposite the name of another attesting witness, and interlined such words in their proper place, but without explanation of the erasure, and attached his seal as commissioner. It was held that as the erasure was plainly to correct an error, it did not vitiate the attestation. See also Hanson *v.* Crawley, 41 Ga. 303.

Illinois.— Ryan *v.* Springfield First Nat. Bank, 148 Ill. 349, 35 N. E. 1120; Pardee *v.* Lindley, 31 Ill. 174, 83 Am. Dec. 219; Reed *v.* Kemp, 16 Ill. 445.

Kentucky.— Mattingly *v.* Riley, 20 Ky. L. Rep. 1621, 49 S. W. 799; Duker *v.* Franz, 7 Bush (Ky.) 273, 3 Am. Rep. 314.

Maryland.— Outtoun *v.* Dulin, 72 Md. 536, 20 Atl. 134.

Massachusetts.— Produce Exch. Trust Co. *v.* Bieberbach, 176 Mass. 577, 58 N. E. 162; Lee *v.* Butler, 167 Mass. 426, 46 N. E. 52, 57 Am. St. Rep. 466; Ames *v.* Colburn, 11 Gray (Mass.) 390, 71 Am. Dec. 723.

Mississippi.— Foote *v.* Hambrick, 70 Miss. 157, 11 So. 567, 35 Am. St. Rep. 631 [*approving* McRaven *v.* Crisler, 53 Miss. 542], holding that the alteration of a trust deed in a material matter, by one of the grantors, after its execution and delivery, without the knowledge or consent of another grantor, whereby an advantage was conferred upon the beneficiary, would not render the deed absolutely void where the alteration was made in good faith in an honest effort to correct a mistake and to conform the instrument to the real intention of the parties at the time it was executed, though the ruling was said to be in conflict with the cases in England and the United States which hold that any alteration of a deed or other instrument made by the voluntary act of the grantor, etc., destroys the instrument altogether. To the same effect see Conner *v.* Routh, 7 How. (Miss.) 176, 40 Am. Dec. 59.

New Hampshire.— Cole *v.* Hills, 44 N. H. 227, holding that in such cases assent may be implied. But see Bowers *v.* Jewell, 2 N. H. 543.

New York.— Clute *v.* Small, 17 Wend. (N. Y.) 238, wherein it is said that though the cases allowing an alteration of express words to correct a mistake were very scant, while those allowing an omission to be supplied were numerous, no distinction appeared to be established and they all seemed to stand upon the same principle — that of carrying out the original intent.

Ohio.— Jessup *v.* Dennison, 2 Disney (Ohio) 150.

Oregon.— Wallace *v.* Tice, 32 Oreg. 283, 51 Pac. 733.

Pennsylvania.— Latshaw *v.* Hiltebeitel, 2 Pennyp. (Pa.) 257.

Utah.— McClure *v.* Little, 15 Utah 379, 49 Pac. 298, 62 Am. St. Rep. 938.

Vermont.— Derby *v.* Thrall, 44 Vt. 413, 8 Am. Rep. 389.

England.— Brutt *v.* Picard, R. & M. 37, 21 E. C. L. 698; Jacob *v.* Hart, 6 M. & S. 142; Byrom *v.* Thompson, 11 A. & E. 31, 39 E. C. L. 42; Kershaw *v.* Cox, 2 Esp. 246; London, etc., Bank *v.* Roberts, 22 Wkly. Rep. 402; Webber *v.* Maddocks, 3 Campb. 1.

Canada.— Fitch *v.* Kelly, 44 U. C. Q. B. 578; Sayles *v.* Brown, 28 Grant Ch. (U. C.) 10; Merchants' Bank *v.* Stirling, 13 Nova Scotia 439.

tion must be made wilfully or intentionally.[21] Some of these cases apparently proceed upon the theory that the fact that the change is made only for the purpose of correcting a mistake is that which renders the change immaterial, and for this reason will not vitiate the instrument,[22] while in others the inherent immateriality of the correction would seem to have its due weight in connection with the purpose for which the change is made.[23]

2. Rule Prohibiting Reformation by Parties. On the other hand, it is laid down broadly that one party to an instrument has no right to reform its language without the consent of the other party, however inaccurately the real contract between the parties may be expressed.[24]

21. Hayes *v.* Dumont, 2 Ohio Cir. Ct. 229. And if made for the purpose of correcting a mistake the change is to that extent considered innocently done. Sill *v.* Reese, 47 Cal. 294; Ames *v.* Colburn, 11 Gray (Mass.) 390, 71 Am. Dec. 723. Stated in another way, it is competent, in determining whether a change has materially affected the rights of the parties, to take into consideration their intention when the agreement was executed. Ryan *v.* Springfield First Nat. Bank, 148 Ill. 349, 35 N. E. 1120. So in Chamberlain *v.* Wright, (Tex. Civ. App. 1896) 35 S. W. 707, where a note was executed for a certain amount and thereafter a line was drawn through the marginal figures indicating the amount, and the amount expressed in the body of the note was left in its original condition, corresponding with the marginal figures through which the line had been drawn, it was held that the supposed change was simply indicative of a mistake to be corrected to the advantage of the maker, and showing an honest purpose on the part of the holder not to avail himself of an error in his favor; that it was not supposed that the maker was "panting, like a hart for the water-brook," to pay more money than he justly owed, but that if he had such a desire he could have gratified it by complying with his obligation as it remained expressed in the note.

22. See Duker *v.* Franz, 7 Bush (Ky.) 273, 3 Am. Rep. 314; McRaven *v.* Crisler, 53 Miss. 542; Latshaw *v.* Hiltebeitel, 2 Pennyp. (Pa.) 257; London. etc., Bank *v.* Roberts, 22 Wkly. Rep. 402.

23. *Connecticut.*— Murray *v.* Klinzing, 64 Conn. 78, 29 Atl. 244.

Maryland.— Outtoun *v.* Dulin, 72 Md. 536, 20 Atl. 134.

Mississippi.— Conner *v.* Routh, 7 How. (Miss.) 176, 40 Am. Dec. 59.

New Hampshire.— Cole *v.* Hills, 44 N. H. 227.

New York.— Clute *v.* Small, 17 Wend. (N. Y.) 238; Boyd *v.* Brotherson, 10 Wend. (N. Y.) 93.

Vermont.— Derby *v.* Thrall, 44 Vt. 413, 8 Am. Rep. 389.

England.— An award by an umpire which mistakenly recites the christian name of one of the original arbitrators is not thereby vitiated. The mistake is in an immaterial part. Hence it follows that the alteration, subsequent to the publication of the award, by striking out the writing and inserting the right christian name, does not vitiate the award, but it leaves it as it was before the alteration. Trew *v.* Burton, 1 Cr. & M. 533.

24. *Illinois.*— Kelly *v.* Trumble, 74 [illegible] 428.

Iowa.— Murray *v.* Graham, 29 Iowa 520.

Michigan.—Aldrich *v.* Smith, 37 Mich. 468, 26 Am. Rep. 536.

Missouri.— Capital Bank *v.* Armstrong, 62 Mo. 59 (to the effect that if mistakes arise in the preparation of written instruments, aside from consent of all parties to the needed correction the courts of the country alone can furnish adequate redress); Evans *v.* Foreman, 60 Mo. 449.

New Jersey.— Hunt *v.* Gray, 35 N. J. L. 227, 10 Am. Rep. 232.

Pennsylvania.— Clark *v.* Eckstein, 22 Pa. St. 507, 62 Am. Dec. 307; Miller *v.* Gilleland, 19 Pa. St. 119, 1 Am. L. Reg. 672.

Tennessee.— Taylor *v.* Taylor, 12 Lea (Tenn.) 714.

Texas.—Otto *v.* Halff, 89 Tex. 384, 34 S. W. 910, 59 Am. St. Rep. 56.

Utah.— The same rigid rule cannot be applied to a report made by a business firm to a commercial agency for the purpose of obtaining credit. Belleville Pump, etc., Works *v.* Samuelson, 16 Utah 234, 52 Pac. 282.

Cases distinguished.— Many of the cases on this particular feature of the subject seem to be irreconcilable. From the general statements in the cases adhering to the various views above indicated it would sometimes appear that the cases permitting the correction of a mistake and those refusing to allow one party, without the consent of the other, to reform the language of the contract, are directly opposed to each other. Thus in Taylor *v.* Taylor, 12 Lea (Tenn.) 714, it was said that to hold as it was held in Duker *v.* Franz, 7 Bush (Ky.) 273, 3 Am. Rep. 314 (both of which cases are cited *supra*, in this section) would open the door to controversies intended by the law to be closed by the written contract of the parties. On one point, however, there is a clear and well-drawn line of distinction. Thus, in some of the cases which permit the correction of a mistake by one party to an instrument without the consent of the other, the mistake which may be corrected must be one which makes the instrument conform to the original intention of the parties in the sense of making it as the parties intended it to be at the time of its execution, and not merely to make it conform to the real contract of the parties made

IV. By Whom Made.

A. In General. The term "alteration" is said to be usually applied at this day to the act of the party entitled under the instrument.[25] The rule thus broadly stated is true, however, only in distinguishing the effect of a spoliation or an act done by a stranger from the effect of such a change made by a party to the instrument,[26] for while it is true that the change must be made by a party interested, or with his knowledge or consent,[27] and it is equally well settled that an alteration by the holder, obligee, or party claiming under the instrument will vitiate it,[28] it is not always true that the change must be made by the holder of the instrument or the party claiming under it, but, on the contrary, the general rule is that a material change made by any party to the instrument will vitiate it as against another party not consenting.[29]

before the instrument was reduced to writing, for whether the real facts conform to the instrument as changed is immaterial if the party without whose consent the change is made intended to execute the instrument as it appeared before the change. See:

Georgia.— Low *v.* Argrove, 30 Ga. 129.

Illinois.— So while in Ryan *v.* Springfield First Nat. Bank, 148 Ill. 349, 35 N. E. 1120, it is held to be competent, in determining whether a change has materially affected the rights of the parties, to take into consideration their intention when the agreement was executed, in Kelly *v.* Trumble, 74 Ill. 428, the court held in accordance with the last text statements, at the same time recognizing the principle that if the law would have supplied the words added the change would have been immaterial.

Kentucky.— Duker *v.* Franz, 7 Bush (Ky.) 273, 3 Am. Rep. 314.

Maine.— Hervey *v.* Harvey, 15 Me. 357.

New Hampshire.— Bowers *v.* Jewell, 2 N. H. 543 [*distinguishing* the remark in Chitty on Bills, p. 85, that an alteration to correct a mistake will not vitiate a bill of exchange, in that, from the English cases on this point, it appeared that the alteration was by consent and the effect was considered with reference to the stamp act; and *citing* Knill *v.* Williams, 10 East 431; Kershaw *v.* Cox, 2 Esp. 246; Cardwell *v.* Martin, 9 East 190, 1 Campb. 79, 180].

25. 1 Greenleaf Ev. § 566. See also Grimes *v.* Piersol, 25 Ind. 246; Bingham *v.* Shadle, 45 Nebr. 82, 63 N. W. 143; Oliver *v.* Hawley, 5 Nebr. 439; State *v.* Manhattan Silver Min. Co., 4 Nev. 318; Blair *v.* State Bank, 11 Humphr. (Tenn.) 83.

26. See *infra*, IV, C.

Comprehensive statement.—Perhaps a better statement of the rule in this connection, in view of the authorities as a whole, is the comprehensive one to the effect that a change otherwise amounting to a technical alteration is vitiating if made by one other than a stranger. Alabama State Land Co. *v.* Thompson, 104 Ala. 570, 16 So. 440, 53 Am. St. Rep. 80; Lesser *v.* Scholze, 93 Ala. 338, 9 So. 273.

27. *Alabama.*— Jordan *v.* Long, 109 Ala. 414, 19 So. 843.

Idaho.— Mulkey *v.* Long, (Ida. 1897) 47 Pac. 949.

New Hampshire.—Hills *v.* Barnes, 11 N. H. 395.

New York.— Martin *v.* Tradesmen's Ins. Co., 101 N. Y. 498, 5 N. E. 338, holding that an alteration made by defendant or a third party without plaintiff's consent, or while the contract is out of plaintiff's hands, has no effect as long as the original contents of the instrument are ascertainable.

Ohio.— Hayes *v.* Dumont, 2 Ohio Cir. Ct. 229.

28. *Alabama.*— Payne *v.* Long, 121 Ala. 385, 25 So. 780.

Arkansas.— Overton *v.* Matthews, 35 Ark. 146, 37 Am. Rep. 9; Chism *v.* Toomer, 27 Ark. 108.

Indiana.— Nicholson *v.* Combs, 90 Ind. 515, 46 Am. Rep. 229.

Kentucky.—Phoenix Ins. Co. *v.* McKernan, 100 Ky. 97, 18 Ky. L. Rep. 617, 37 S. W. 490; Singleton *v.* McQuerry, 85 Ky. 41, 8 Ky. L. Rep. 710, 2 S. W. 652.

Massachusetts.— Cape Ann. Nat. Bank *v.* Burns, 129 Mass. 596.

Missouri.— Moore *v.* Hutchinson, 69 Mo. 429.

Nebraska.— Hurlbut *v.* Hall, 39 Nebr. 889, 58 N. W. 538.

New Jersey.— Quinzel *v.* Schmidt, (N. J. 1897) 38 Atl. 665.

New York.— Colson *v.* Arnot, 57 N. Y. 253, 15 Am. Rep. 496; Bruce *v.* Westcott, 3 Barb. (N. Y.) 374.

Ohio.— Newman *v.* King, 54 Ohio St. 273, 43 N. E. 683, 56 Am. St. Rep. 705, 35 L. R. A. 471.

Pennsylvania.— Southwark Bank *v.* Gross, 35 Pa. St. 80; U. S. Bank *v.* Russel, 3 Yeates (Pa.) 391.

South Carolina.— Mills *v.* Starr, 2 Bailey (S. C.) 359, which was a change in a specialty by party claiming under it.

West Virginia.— Yeager *v.* Musgrave, 28 W. Va. 90.

See also, generally, VII, D *et seq.*

Very slight alterations in a written instrument, made after it is signed by the obligor, if made without his knowledge or consent and by a party interested in the contract, or at the instance of such party, will destroy the instrument altogether. American Pub. Co. *v.* Tishos, 10 Utah 147, 37 Pac. 259.

29. *Alabama.*— Jordan *v.* Long, 109 Ala. 414, 19 So. 843; Montgomery *v.* Crossthwait,

B. By One of Several Obligors or Promisors. As further illustrating the last text statement, the weight of authority supports the view that an alteration made by one obligee or principal, without the consent of his co-obligor or surety, discharges the latter,[30] and the rule that, when one of two innocent persons must suffer for the fraud of a third, the loss must fall on the one who enabled the commission of the fraud, has no application.[31]

C. Changes by Stranger to Instrument — 1. General Rule. Erasures, interlineations, and changes, however material, made in and upon an instrument by a stranger to it, are in legal contemplation wholly immaterial and ineffective to give to the instrument any other or different meaning or operation than that which attached to it before such interlineation. Such a mutilation is a mere spoliation, as distinguished from an alteration.[32] The instrument will be enforced

90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140.

Indiana.— If plaintiff made the alteration himself it is immaterial whether or not he was the holder at the time he made it. Brooks *v.* Allen, 62 Ind. 401.

Ohio.— Carlile *v.* Lamb, 16 Ohio Cir. Ct. 578, holding that a material alteration by one maker without the assent of others will release the latter, and that an instruction that the alteration must be made by or at the instance of, or with the complicity of, the owner or holder of the note meant that some of the parties in interest, or all of the parties in interest, must know something about it.

Tennessee.— Organ *v.* Allison, 9 Baxt. (Tenn.) 459.

30. See *infra*, V, A, 2, d; and 2 Cent. Dig. tit. "Alteration of Instruments," § 57 *et seq.*

31. Goodman *v.* Eastman, 4 N. H. 455. For negligent execution of commercial paper see Bills and Notes.

32. *Alabama.*— Anderson *v.* Bellenger, 87 Ala. 334, 6 So. 82, 13 Am. St. Rep. 46, 4 L. R. A. 680; Davis *v.* Carlisle, 6 Ala. 707.

Arkansas.— Andrews *v.* Calloway, 50 Ark. 358, 7 S. W. 449.

California.— Walsh *v.* Hunt, 120 Cal. 46, 52 Pac. 115, 39 L. R. A. 697; Robinson *v.* Nevada Bank, 81 Cal. 106, 22 Pac. 478; Langenberger *v.* Krœger, 48 Cal. 147, 17 Am. Rep. 418.

Connecticut.—Nichols *v.* Johnson, 10 Conn. 192.

Florida.— Orlando *v.* Gooding, 34 Fla. 244, 15 So. 770.

Idaho.— Mulkey *v.* Long, (Ida. 1897) 47 Pac. 949.

Illinois.— Condict *v.* Flower, 106 Ill. 105; Bledsoe *v.* Graves, 5 Ill. 382; Paterson *v.* Higgins, 58 Ill. App. 268.

Indiana.— John *v.* Hatfield, 84 Ind. 75; Ballard *v.* Franklin L. Ins. Co., 81 Ind. 239; Brooks *v.* Allen, 62 Ind. 401; State *v.* Berg, 50 Ind. 496; Cochran *v.* Nebeker, 48 Ind. 459; Piersol *v.* Grimes, 30 Ind. 129, 95 Am. Dec. 673; Nelson *v.* Johnson, 18 Ind. 329; Collins *v.* Makepeace, 13 Ind. 448; Kingan *v.* Silvers, 13 Ind. App. 80, 37 N. E. 413.

Iowa.— Andrews *v.* Burdick, 62 Iowa 714, 16 N. W. 275; Murray *v.* Graham, 29 Iowa 520.

Kentucky.— Terry *v.* Hazlewood, 1 Duv. (Ky.) 104; Lee *v.* Alexander, 9 B. Mon. (Ky.) 25, 48 Am. Dec. 412 [*overruling* Letcher *v.* Bates, 6 J. J. Marsh. (Ky.) 524, 22 Am. Dec. 92].

Maryland.— Wickes *v.* Caulk, 5 Harr. & J. (Md.) 36.

Massachusetts.— Drum *v.* Drum, 133 Mass. 566.

Michigan.— White Sewing Mach. Co. *v.* Dakin, 86 Mich. 581, 49 N. W. 583, 13 L. R. A. 313.

Minnesota.— Ames *v.* Brown, 22 Minn. 257.

Mississippi.— Clopton *v.* Elkin, 49 Miss. 95; Bridges *v.* Winters, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598; Croft *v.* White, 36 Miss. 455.

Missouri.— Moore *v.* Ivers, 83 Mo. 29; Medlin *v.* Platte County, 8 Mo. 235, 40 Am. Dec. 135; McMurtrey *v.* Sparks, 71 Mo. App. 126.

Nebraska.— Perkins Windmill, etc., Co. *v.* Tillmar, 55 Nebr. 652, 75 N. W. 1098; Bingham *v.* Shadle, 45 Nebr. 82, 63 N. W. 143; Consaul *v.* Sheldon, 35 Nebr. 247, 52 N. W. 1104.

Nevada.— State *v.* Manhattan Silver Min. Co., 4 Nev. 318.

New York.—Gleason *v.* Hamilton, 138 N. Y. 353, 34 N. E. 283, 52 N. Y. St. 882, 21 L. R. A. 210; Solon *v.* Williamsburgh Sav. Bank, 114 N. Y. 122, 21 N. E. 168, 23 N. Y. St. 138; Casoni *v.* Jerome, 58 N. Y. 315; Waldorf *v.* Simpson, 15 N. Y. App. Div. 297, 44 N. Y. Suppl. 921; Trow *v.* Glen Cove Starch Co., 1 Daly (N. Y.) 280; Rees *v.* Overbaugh, 6 Cow. (N. Y.) 746; Waring *v.* Smyth, 2 Barb. Ch. (N. Y.) 119, 47 Am. Dec. 299.

North Carolina.— Mathis *v.* Mathis, 20 N. C. 46.

Ohio.— Thompson *v.* Massie, 41 Ohio St. 307; Fullerton *v.* Sturgis, 4 Ohio St. 529; Tarbill *v.* Richmond City Mill Works, 2 Ohio Cir. Ct. 564; Hayes *v.* Dumont, 2 Ohio Cir. Ct. 229.

Oregon.— Whitlock *v.* Manciet, 10 Oreg. 166.

Pennsylvania.— Robertson *v.* Hay, 91 Pa. St. 242; Neff *v.* Horner, 63 Pa. St. 327, 3 Am. Rep. 555; Worrall *v.* Gheen, 39 Pa. St. 388.

Tennessee.—Crockett *v.* Thomason, 5 Sneed (Tenn.) 341; Boyd *v.* McConnel, 10 Humphr. (Tenn.) 68.

Texas.— Tutt *v.* Thornton, 57 Tex. 35.

Vermont.— Bellows *v.* Weeks, 41 Vt. 590 (holding that alterations in a tax-list, after being deposited in the town clerk's office, by persons other than the listers do not make

as it was originally written if its original terms may be ascertained therefrom,[33] and the change will not deprive the party of his right to have the instrument restored and enforced.[34]

2. When Identity of Instrument Destroyed. If the identity of the instrument is destroyed so that it cannot be pleaded with profert, want of profert may be excused by an allegation of accidental destruction;[35] the law regarding the act, so far as the rights of the parties to the instrument are concerned, merely as the destruction of primary evidence, compelling a resort to that which is secondary.[36]

3. Party to Instrument as Stranger. A material change in an instrument by a person having a beneficial interest therein is an alteration;[37] but even a party to an instrument may be regarded as a stranger under some circumstances. Thus if, after an instrument is fully executed and delivered, it comes into a party's hands, a change made therein by him, without the consent of the other parties thereto, will be regarded as a spoliation.[38]

V. Authority and Consent.

A. Authority—1. In General. An alteration need not be made by the hand of the payee, but it is enough if done by his procurement.[39] If a change is made in an instrument by a duly authorized agent the principal will be bound by the act as if done by himself. This is true to the extent of charging the princi-

the list void); Bigelow *v.* Stilphen, 35 Vt. 521.

Washington.—Murray *v.* Peterson, 6 Wash. 418, 33 Pac. 969.

West Virginia.—Yeager *v.* Musgrave, 28 W. Va. 90.

Wisconsin.—Fuller *v.* Green, 64 Wis. 159, 24 N. W. 907, 54 Am. Rep. 600.

England.—Henfree *v.* Bromley, 6 East 309; Waugh *v.* Bussell, 5 Taunt. 707, 1 E. C. L. 362.

See *infra*, VII, A, D; and 2 Cent. Dig. tit. "Alteration of Instruments," § 61 *et seq.*

Change by trespasser against the will of the holder of the instrument leaves the instrument valid as originally written. Union Nat. Bank *v.* Roberts, 45 Wis. 373.

Change by thief of an indorsement is a mere spoliation, and will not affect the instrument or the rights of the owner thereon. Dinsmore *v.* Duncan, 57 N. Y. 573, 15 Am. Rep. 534; Colson *v.* Arnot, 57 N. Y. 253, 15 Am. Rep. 496; Ledwich *v.* McKim, 53 N. Y. 307. Conversely, a thief is a stranger as regards securities payable to bearer. Brown *v.* U. S., 20 Ct. Cl. 416. See Bills and Notes; Bonds.

33. Camp *v.* Shaw, 52 Ill. App. 241; Bridges *v.* Winters, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598; Medlin *v.* Platte County, 8 Mo. 235, 40 Am. Dec. 135; Christian County Bank *v.* Goode, 44 Mo. App. 129.

A receipt mutilated by a stranger without the procurement of the party is not deprived of its legal operation as an instrument of evidence so long as it remains legible. Goodfellow *v.* Inslee, 12 N. J. Eq. 355.

34. Russell *v.* Reed, 36 Minn. 376, 31 N. W. 452; Ames *v.* Brown, 22 Minn. 257.

35. See *infra*, VIII, A.

36. Lee *v.* Alexander, 9 B. Mon. (Ky.) 25, 48 Am. Dec. 412; Medlin *v.* Platte County, 8 Mo. 235, 40 Am. Dec. 135; Crockett *v.* Thomason, 5 Sneed (Tenn.) 341; Boyd *v.* McConnel, 10 Humphr. (Tenn.) 68.

37. McMurtrey *v.* Sparks, 71 Mo. App. 126, upon the effect of a change by an administrator in a note payable to him as administrator. Where, for the purpose of purchasing stock, the payee of a note delivered it to the maker, who transferred it in payment for the stock, after which the note was altered by the transferee and afterward was redelivered to the original payee, it was held, upon a rescission of the transaction for the purchase of the stock, that the person to whom it had been delivered in payment of the stock being the holder and legal owner of the note at the time of the alteration, he could not be considered a stranger. Keene *v.* Weeks, 19 R. I. 309, 33 Atl. 446.

38. Bucklen *v.* Huff, 53 Ind. 474; Green *v.* Beckner, 3 Ind. App. 39, 29 N. E. 172. Where a contract is completely executed and delivered to one of the parties for safekeeping, the other party cannot thereafter rescind the contract by obtaining possession of it and erasing his name therefrom. Natchez *v.* Minor, 9 Sm. & M. (Miss.) 544, 48 Am. Dec. 727.

A guardian cannot, without payment, legally destroy a contract to the prejudice of his wards. Where a maker of a note, with sureties, payable to one as guardian, afterward becomes guardian himself and then cuts the names of the sureties from the note formerly executed by him, this will not extinguish the note. Williams *v.* Moseley, 2 Fla. 304.

39. Soaps *v.* Eichberg, 42 Ill. App. 375; Chicago Title, etc., Co. *v.* O'Marr, 18 Mont. 568, 46 Pac. 809, 47 Pac. 4. See 2 Cent. Dig. tit. "Alteration of Instruments," § 77 *et seq.*

pal with the liability on the instrument which he seeks to avoid,[40] as well as of charging the principal who attempts to enforce such instrument with the consequences of the alteration.[41]

2. Sufficiency of Agency — Mere Custody of Instrument — a. In General. When the acts of the agent are thus imputable to the principal, the former cannot be regarded as a stranger.[42] But there must be such agency in fact, or the relations of the parties must import authority from the party principal. A change by one who is merely the custodian of an instrument is at most a spoliation— the act of a stranger — and will not destroy the validity of the instrument,[43] as in the case of a change in a bond by the officer, or his deputy, who is the mere custodian of it, or a change after approval, either by the approving officer or by a party to the instrument with knowledge of such officer;[44] and this is true though the custodian was formerly the agent for other purposes of one of the parties to the instrument.[45] Mere possession does not necessarily import authority to make or consent to a material change unless the relation of the parties may be taken into consideration.[46]

b. Partners. If a note is signed by the makers in their individual names, and not as a firm, one of the makers has no right to bind the other to a material change without the latter's consent.[47] But such an alteration of a note, given for money borrowed for the firm's use in its regular business, is held to bind the other parties.[48]

40. Pelton *v.* San Jacinto Lumber Co., 113 Cal. 21, 45 Pac. 12; Robertson *v.* Hay, 91 Pa. St. 242 (wherein defendant executed a bond and mortgage, leaving it in the hands of one, as his agent, to raise money on it. While in the agent's hands the mortgage was altered by adding a clause waiving the benefit of a specific act of assembly, and the bond and mortgage were then negotiated by the agent. It was held that the alteration having been made by the agent of the mortgagor, intrusted by him with the papers and authorized to sell the mortgage, the act became that of the mortgagor); Whitfield *v.* Collingwood, 1 C. & K. 325, 47 E. C. L. 325.

Revocation of authority.— Where a contract in writing is made in two parts for the sale of land, the contract being between the vendor, by his agent, and the vendee, without being witnessed and acknowledged, and, after the power of attorney authorizing the agent to make the contract is revoked, the agent, for the purpose of entitling the contract to be recorded, without the privity of the vendee, and without fraudulent intent, causes the copy of such contract retained by him to be attested by witnesses, and then acknowledged the execution thereof as the agent of the vendor, such attestation and acknowledgment is not such an alteration as makes the contract void. Even if the recording of the revocation of the power of attorney was constructive notice to complainant of the fact of revocation, the want of actual notice repelled the idea of fraud. Young *v.* Wright, 4 Wis. 144, 65 Am. Dec. 303.

41. *Alabama.*— White Sewing Mach. Co. *v.* Saxon, 121 Ala. 399, 25 So. 784.

Illinois.— Paterson *v.* Higgins, 58 Ill. App. 268.

Indiana.— Eckert *v.* Louis, 84 Ind. 99, wherein the confidential agent of the payee, after delivery to such agent and with the payee's knowledge, changed a note, without the consent of one who had signed as surety.

Iowa.—Hollingsworth *v.* Holbrook, 80 Iowa 151, 45 N. W. 561, 20 Am. St. Rep. 411 [*criticizing* Bigelow *v.* Stilphen, 35 Vt. 521, *infra*, note 53], holding that an agent's authority to renew and take security for notes owned by his principal, being unrestricted, is sufficient to charge the principal with an alteration in a chattel mortgage made by the agent after delivery, and will avoid the mortgage.

North Carolina.— Allen *v.* Jordan, 3 N. C. 298, holding that where the agent, at the request of his principal, subscribed, as a witness, a note which he had taken for his principal, this constituted a material alteration.

South Dakota.— Wyckoff *v.* Johnson, 2 S. D. 91, 48 N. W. 837.

England.— Powell *v.* Divett, 15 East 29; Hindustan, etc., Bank *v.* Smith, 36 L. J. C. P. 241.

42. Eckert *v.* Louis, 84 Ind. 99; Allen *v.* Jordan, 3 N. C. 298.

Authority to bind separate estate.— Where a married woman executed a note and gave to the payee authority to add to the note anything which counsel, if consulted, might suggest to make the note "right, legal, and proper," it was held that this was sufficient to authorize an addition which would make the note legal and binding upon her separate estate. Faddiken *v.* Cantrell, 69 N. Y. 597, 25 Am. Rep. 253.

43. Rees *v.* Overbaugh, 6 Cow. (N. Y.) 746; Yeager *v.* Musgrave, 28 W. Va. 90.

44. See *infra*, VII, F, 21, h, i.

45. Nickerson *v.* Swett, 135 Mass. 514, holding that the fact that the agent is an officer gives him no authority to alter the instrument.

46. The Hero, 6 Fed. 526.

47. Horn *v.* Newton City Bank, 32 Kan. 518, 4 Pac. 1022; Perring *v.* Hone, 4 Bing. 28, 13 E. C. L. 384.

48. Taylor *v.* Taylor, 12 Lea (Tenn.) 714. And, where the maker and guarantors of a note were partners and the note was for the

c. No Inference from Marital Relation. The mere marital relation, coupled with the possession of the instrument by the husband, does not justify the implication of authority in the husband to make an alteration.[49]

d. One of Several Parties to Instrument. The principle under which any change in a material part of a bill or note will render it invalid as against any party not consenting thereto, even in the hands of an innocent holder, prevails in favor of an obligor in the event of a change in the instrument by a co-obligor — as, by a maker against one who has executed for accommodation, or by a principal against sureties in a bond — without the former's authority or consent.[50] There is no implied agency in such a case, as the principle of implied agency can arise only when the instrument is in an unfinished state.[51] In some cases such surrender of possession of an instrument by one obligor to another is considered as sufficiently importing agency to protect an innocent third party.[52]

use of the firm, the maker was held to have implied authority to bind the guarantors by his consent to a change. Pahlman *v.* Taylor, 75 Ill. 629. So an erasure, by one of the makers of a firm-note, to make the note conform to the original agreement, being within the scope of the partnership business, was held to bind the firm. Mace *v.* Heath, 30 Nebr. 620, 46 N. W. 918. And where an alteration was made in a certificate of deposit by a party continuing the business after the dissolution of a firm of bankers, but before notice to the holder, it was held that the retiring partner was not discharged from liability. Howell *v.* Adams, 68 N. Y. 314.

49. Foote *v.* Hambrick, 70 Miss. 157, 11 So. 567, 35 Am. St. Rep. 631; Smith *v.* Fellows, 41 N. Y. Super. Ct. 36, holding that the execution by the wife of a mortgage, and a delivery to the husband for the purpose of negotiating a loan with the mortgagee therein named, confers no authority upon the husband to change the name of the maker and negotiate the mortgage with another person.

50. *California.*— Pelton *v.* San Jacinto Lumber Co., 113 Cal. 21, 45 Pac. 12.

Connecticut.— Ætna Nat. Bank *v.* Winchester, 43 Conn. 391.

Delaware.— Newark Bank *v.* Crawford, 2 Houst. (Del.) 282.

Indiana.—Hert *v.* Oehler, 80 Ind. 83; Schnewind *v.* Hacket, 54 Ind. 248; Bell *v.* State Bank, 7 Blackf. (Ind.) 456.

Iowa.— Bell *v.* Mahin, 69 Iowa 408, 29 N. W. 331.

Kentucky.— Blakey *v.* Johnson, 13 Bush (Ky.) 197, 26 Am. Rep. 254; Locknane *v.* Emmerson, 11 Bush (Ky.) 69; Lisle *v.* Rogers, 18 B. Mon. (Ky.) 528.

Maryland.—Burrows *v.* Klunk, 70 Md. 451, 17 Atl. 378, 14 Am. St. Rep. 371, 3 L. R. A. 576.

Massachusetts.— Greenfield Sav. Bank *v.* Stowell, 123 Mass. 196, 25 Am. Rep. 67; Citizens' Nat. Bank *v.* Richmond, 121 Mass. 110; Draper *v.* Wood, 112 Mass. 315, 17 Am. Rep. 92; Stoddard *v.* Penniman, 108 Mass. 366, 11 Am. Rep. 363; Agawam Bank *v.* Sears, 4 Gray (Mass.) 95; Fay *v.* Smith, 1 Allen (Mass.) 477, 79 Am. Dec. 752.

Michigan.—Aldrich *v.* Smith, 37 Mich. 468, 26 Am. Rep. 536; Bradley *v.* Mann, 37 Mich. 1.

Minnesota.— Renville County *v.* Gray, 61 Minn. 242, 63 N. W. 635; Flanigan *v.* Phelps, 42 Minn. 186, 43 N. W. 1113.

Missouri.— Capital Bank *v.* Armstrong, 62 Mo. 59; Britton *v.* Dierker, 46 Mo. 591, 2 Am. Rep. 553; Trigg *v.* Taylor, 27 Mo. 245, 72 Am. Dec. 263; Fred Heim Brewing Co. *v.* Hazen, 55 Mo. App. 277.

Montana.—McMillan *v.* Hefferlin, 18 Mont. 385, 45 Pac. 548.

New Hampshire.— Goodman *v.* Eastman, 4 N. H. 455.

New York.— Woodworth *v.* Bank of America, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239.

Ohio.— Jones *v.* Bangs, 40 Ohio St. 139, 48 Am. Rep. 664; Boalt *v.* Brown, 13 Ohio St. 364; Portage County Branch Bank *v.* Lane, 8 Ohio St. 405.

Pennsylvania.—Kennedy *v.* Lancaster County Bank, 18 Pa. St. 347.

Tennessee.— Crockett *v.* Thomason, 5 Sneed (Tenn.) 341.

Texas.— Farmers, etc., Nat. Bank *v.* Novich, 89 Tex. 381, 34 S. W. 914. See also Butler *v.* State, 31 Tex. Crim. 63, 19 S. W. 676.

Washington.—Fairhaven *v.* Cowgill, 8 Wash. 686, 36 Pac. 1093.

West Virginia.—Ohio Valley Bank *v.* Lockwood, 13 W. Va. 392, 31 Am. Rep. 768.

United States.— Wood *v.* Steele, 6 Wall. (U. S.) 80, 18 L. ed. 725.

Canada.— Halcrow *v.* Kelly, 28 U. C. C. P. 551.

51. Agawam Bank *v.* Sears, 4 Gray (Mass.) 95; Flanigan *v.* Phelps, 42 Minn. 186, 43 N. W. 1113. The same may be said to be approved with regard to one whose commission is but to deliver an instrument, though he be one of the joint makers of the contract. Schwalm *v.* McIntyre, 17 Wis. 232.

52. *Florida.*— Orlando *v.* Gooding, 34 Fla. 244, 15 So. 770.

North Carolina.— Wilmington, etc., R. Co. *v.* Kitchin, 91 N. C. 39, in which case it was considered that where one of several co-obligors in a bond placed it unconditionally in the hands of another for delivery, and the latter erased the names of one of the signers and then delivered it, of which change the obligee had no knowledge, the co-obligor acted as the agent of his associates and the bond was not vitiated.

3. Agent Regarded as Stranger. Where the change is made by one who is or was the agent of one of the parties, but without any authority from the principal, either express or implied from the circumstances, and the matter being outside the scope of his particular employment, the act is generally considered to be a mere spoliation, having no effect upon the instrument.[53]

B. Consent — 1. In General. A change made by the authority or with the consent of the party, or in his presence and with his privity, must be accorded the same effect as if made with his own hand — that is, he cannot set it up to avoid liability — and if he seeks to enforce the instrument the alteration may be set up against it.[54] So the cases cited in this article to the vitiating effect of an altera-

Pennsylvania.— Ogle *v.* Graham, 2 Penr. & W. (Pa.) 132.

Virginia.—Douglass *v.* Scott, 8 Leigh (Va.) 43, upon the point that the instrument was not available to the person for whose benefit it was made until it was discounted. See *supra*, II, B; and *infra*, VII, F, 21, j.

Oregon.— See Wills *v.* Wilson, 3 Oreg. 308, wherein the distinction is made between the taking of a note by plaintiff knowing it to have been changed without consent of one of the makers, or taking it with knowledge of such facts as to put him upon inquiry; and the taking of a note, without fault and being deceived into believing that it was changed by both of the makers, when in fact one of them did not authorize the change.

53. *California.*— Walsh *v.* Hunt, 120 Cal. 46, 52 Pac. 115, 39 L. R. A. 697 (a case where a party employed to obtain a loan and deliver a note and mortgage therefor altered the instruments and obtained a larger sum, and it was held the lender could recover the authorized amount); Langenberger *v.* Krœger, 48 Cal. 147, 17 Am. Rep. 418.

Illinois.— Paterson *v.* Higgins, 58 Ill. App. 268; Day *v.* Ft. Scott Invest., etc., Co., 53 Ill. App. 165.

Indiana.— Kingan *v.* Silvers, 13 Ind. App. 80, 37 N. E. 413.

Iowa.—Mathias *v.* Leathers, 99 Iowa 18, 68 N. W. 449.

Massachusetts.— Nickerson *v.* Swett, 135 Mass. 514.

Michigan.— White Sewing Mach. Co. *v.* Dakin, 86 Mich. 581, 49 N. W. 583, 13 L. R. A. 313.

Minnesota.— Ames *v.* Brown, 22 Minn. 257.

Missouri.— Lubbering *v.* Kohlbrecher, 22 Mo. 596; Hays *v.* Odom, 79 Mo. App. 425; Christian County Bank *v.* Goode, 44 Mo. App. 129.

Nevada.— State *v.* Manhattan Silver Min. Co., 4 Nev. 318.

New Jersey.— Hunt *v.* Gray, 35 N. J. L. 227, 10 Am. Rep. 232, applying the principle to a change made by one intrusted with a note to discount, and holding that the agency to discount imported no agency to change, and that the act would be regarded as the act of a stranger.

New York.—Gleason *v.* Hamilton, 138 N. Y. 353, 34 N. E. 283, 52 N. Y. St. 882, 21 L. R. A. 210; Van Brunt *v.* Eoff, 35 Barb. (N. Y.) 501.

Ohio.— Fullerton *v.* Sturges, 4 Ohio St. 529; Hayes *v.* Dumont, 2 Ohio Cir. Ct. 229.

Pennsylvania.— Robertson *v.* Hay, 91 Pa. St. 242.

South Carolina.— An alteration by a trustee who holds for the benefit of others does not avoid the deed. Flinn *v.* Brown, 6 Rich. (S. C.) 209.

South Dakota.— Acme Harvester Co. *v.* Butterfield, 12 S. D. 91, 80 N. W. 170.

Vermont.—Bigelow *v.* Stilphen, 35 Vt. 521, holding that an agent to sell goods and receive and transmit proceeds is not authorized to alter a note so received.

Illustrations of rule.— A memorandum, indorsed on a bill for the purpose of identification by the commissioner who took depositions in the case, is not such a mutilation as will justify its exclusion. Manning *v.* Maroney, 87 Ala. 563, 6 So. 343, 13 Am. St. Rep. 67. Where one, who is not the payee's agent for that purpose, writes across the face of a draft words which restrict the medium of payment, this will not vitiate the instrument. Langenberger *v.* Krœger, 48 Cal. 147, 17 Am. Rep. 418.

Unauthorized change, by an attorney, of a contract sent to him for the purpose of bringing an action will not defeat the principal's rights under the original contract, but the instrument will be reformed. Day *v.* Ft. Scott Invest., etc., Co., 53 Ill. App. 165. See also Gleason *v.* Hamilton, 138 N. Y. 353, 34 N. E. 283, 52 N. Y. St. 882, 21 L. R. A. 210.

A change made by a collecting agent will be regarded as a mere spoliation, and cannot bind the holder. Hays *v.* Odom, 79 Mo. App. 425.

Enforcement by either party.— Where the change thus made is by the agent of the obligor or promisor, the obligee or payee may enforce the original contract. Walsh *v.* Hunt, 120 Cal. 46, 52 Pac. 115, 39 L. R. A. 697. Or if the change is unauthorizedly made by the agent of the obligee the latter may recover on the original instrument. Kingam *v.* Silvers, 13 Ind. App. 80, 37 N. E. 413.

54. *Kentucky.*—Locknane *v.* Emmerson, 11 Bush (Ky.) 69.

Missouri.— Evans *v.* Foreman, 60 Mo. 449.

Nebraska.— Holland *v.* Griffith, 13 Nebr. 472, 14 N. W. 387.

Ohio.—Sturges *v.* Williams, 9 Ohio St. 443, 75 Am. Dec. 473.

Pennsylvania.— Miller *v.* Gilleland, 19 Pa. St. 119.

England.— Jacobs *v.* Hart, 2 Stark 45, 3 E. C. L. 310, holding that where a bill is

tion refer generally to changes made after complete execution or without consent. The general rule is that a change made with the consent of the parties to the instrument does not avoid it.[55] The assent may be before or after the change is made,[56] and if the change is pursuant to an agreement between the parties it is immaterial that it was made by one of them after the agreement and in the absence of the other.[57] Consent sometimes may be implied from the nature of the alteration as expressed, or from custom.[58]

2. CHANGES IN DEEDS — a. In General. Aside from the principle that authority to make a deed must be by deed, the parties to an instrument under seal may by consent make a change in it after execution.[59] Complete execution is con-

signed by the drawer and taken by the payee to the acceptor for acceptance, and the latter discovers a mistake in the date, which the payee thereupon corrects, the acceptor is liable.

Canada.— Fitch *v.* Kelly, 44 U. C. Q. B. 578.

See 2 Cent. Dig. tit. "Alteration of Instruments," §§ 81 *et seq.*, 89 *et seq.*

55. *Alabama.*— Ravisies *v.* Alston, 5 Ala. 297.

California.— Sill *v.* Reese, 47 Cal. 294.

Colorado.— Hochmark *v.* Richler, 16 Colo. 263, 26 Pac. 818.

Connecticut.—Burrows *v.* Stoddard, 3 Conn. 160.

Delaware.— Warder *v.* Stewart, 2 Marv. (Del.) 275, 36 Atl. 88; Hollis *v.* Vandergrift, 5 Houst. (Del.) 521.

Idaho.— Mulkey *v.* Long, (Ida. 1897) 47 Pac. 949.

Illinois.— King *v.* Bush, 36 Ill. 142; Knoebel *v.* Kircher, 33 Ill. 308.

Indiana.— Nelson *v.* White, 61 Ind. 139; Voiles *v.* Green, 43 Ind. 374; Richmond Mfg. Co. *v.* Davis, 7 Blackf. (Ind.) 412.

Iowa.— Grimsted *v.* Briggs, 4 Iowa 559.

Kentucky.— Brown *v.* Warnock, 5 Dana (Ky.) 492.

Massachusetts.—Prouty *v.* Wilson, 123 Mass. 297; Boston *v.* Benson, 12 Cush. (Mass.) 61; Willard *v.* Clarke, 7 Metc. (Mass.) 435; Hunt *v.* Adams, 6 Mass. 519; Smith *v.* Crooker, 5 Mass. 538.

Michigan.— Stewart *v.* Port Huron First Nat. Bank, 40 Mich. 348, holding that the indorser's consent to an alteration need not be in writing.

Mississippi.— Wilson *v.* Henderson, 9 Sm. & M. (Miss.) 375, 48 Am. Dec. 716.

New Hampshire.— Humphreys *v.* Guillow, 13 N. H. 385, 38 Am. Dec. 499.

New York.— Vidvard *v.* Cushman, 35 Hun (N. Y.) 18; Woolley *v.* Constant, 4 Johns. (N. Y.) 54, 4 Am. Dec. 246. Where a note is altered, by consent of the maker and holder, by erasing the name of the surety the note is not invalidated so that it cannot be the subject of larceny by the maker. People *v.* Call, 1 Den. (N. Y.) 120, 43 Am. Dec. 655.

Ohio.— Wardlow *v.* List, 41 Ohio St. 414; Tiernan *v.* Fenimore, 17 Ohio 545 (holding that if a surety on an appeal bond is present when the clerk refuses to approve it and requires another surety, and the former raises no objection, he will be deemed to have consented to the change); Hayes *v.* Dumont, 2 Ohio Cir. Ct. 229.

Pennsylvania.— Stahl *v.* Berger, 10 Serg. & R. (Pa.) 170, 13 Am. Dec. 666.

Virginia.— Schmelz *v.* Rix, 95 Va. 509, 28 S. E. 890.

United States.— Speake *v.* U. S., 9 Cranch (U. S.) 28, 3 L. ed. 645.

England.— Kershaw *v.* Cox, 2 Esp. 246; Jacobs *v.* Hart, 2 Stark 45, 3 E. C. L. 310; Walton *v.* Hastings, 4 Campb. 223; Outhwaite *v.* Luntley, 4 Campb. 179; Whitfield *v.* Collingwood, 1 C. & K. 325, 47 E. C. L. 325.

56. See *infra*, VI.

57. Phillips *v.* Crips, 108 Iowa 605, 79 N. W. 373; Wardlow *v.* List, 41 Ohio St. 414; Kane *v.* Herman, (Wis. 1901) 85 N. W. 140, holding that where several stockholders were liable as guarantors on notes of the corporation, and arranged among themselves that certain of them should assume particular debts and be released from liability as to the others, the understanding between them being that the ultimate liability of the whole was to be borne equally by them, this was sufficient authority for erasing the name of one of the parties as guarantor on a particular note.

58. Toomer *v.* Rutland, 57 Ala. 379, 29 Am. Rep. 722; Eddy *v.* Bond, 19 Me. 461, 36 Am. Dec. 767; Hunt *v.* Adams, 6 Mass. 519; Bowers *v.* Jewell, 2 N. H. 543.

59. *Alabama.*— Ravisies *v.* Alston, 5 Ala. 297.

Indiana.— Richmond Mfg. Co. *v.* Davis, 7 Blackf. (Ind.) 412.

Hawaii.— Kahai *v.* Kamai, 8 Hawaii 694.

Kentucky.— Berry *v.* Berry, 7 J. J. Marsh. (Ky.) 487.

Massachusetts.— Smith *v.* Crooker, 5 Mass. 538.

Missouri.— Coney *v.* Laird, 153 Mo. 408, 55 S. W. 96.

New Jersey.— Thorpe *v.* Keeler, 18 N. J. L. 251; Camden Bank *v.* Hall, 14 N. J. L. 583.

New York.— Tompkins *v.* Corwin, 9 Cow. (N. Y.) 255 (holding that the legal effect of altering, by consent of parties, the time limited to do an act in the condition of a bond is to give it effect only from the time of the alteration); Penny *v.* Corwithe, 18 Johns. (N. Y.) 499.

North Carolina.— Doe *v.* McArthur, 9 N. C. 33, 11 Am. Dec. 738.

Pennsylvania.— Henning *v.* Werkheiser, 8 Pa. St. 518, holding that assent to the addi-

summated by final delivery, hence the mere signing and sealing of an instrument does not preclude changes before delivery.[60]

b. After Acknowledgment and Delivery. If there has been a delivery, still the parties may consent to a change and redelivery, the new delivery constituting a reëxecution,[61] even without reacknowledgment,[62] though it is also held that when the instrument is acknowledged before an officer appointed by law to take and certify the instrument the parties have no right to make the most trifling change in it[63] without a redelivery and a reacknowledgment, the latter especially as against third persons.[64] Where the instrument has been actually delivered it is

tion of one subscribing witness may cure the objection to that extent, but if there are two witnesses added assent to the addition of one only will not be sufficient.

Virginia.— Cleaton *v.* Chambliss, 6 Rand. (Va.) 86.

United States.— Speake *v.* U. S., 9 Cranch (U. S.) 28, 3 L. ed. 645.

England.— Hudson *v.* Revett, 5 Bing. 368, 15 E. C. L. 625; Zouch *v.* Claye, 2 Lev. 35; Doe *v.* Houghton, 1 M. & R. 208, 17 E. C. L. 659 (being an insertion of what was before implied); Paget *v.* Paget, 2 Ch. Cas. 410.

After execution of later mortgage.—Where a mortgage was altered, at the request of the mortgagor, three years after it was executed and recorded, and two years after the execution and recording of a later mortgage, by inserting the rate and payment of interest, so as to make the prior instrument conform to a note, the alteration being without any fraud, it was held not to vitiate the mortgage, which could be foreclosed for the amount due the mortgagee as disclosed by the record. Gunter *v.* Addy, 58 S. C. 178, 36 S. E. 553.

Consent by one of joint mortgagors.— If the mortgage is joint and the change made with the consent of one of the mortgagors, affects his interest alone, the others cannot complain. Woodbury *v.* Allegheny, etc., R. Co., 72 Fed. 371.

60. Reformed Dutch Church *v.* Ten Eyck, 25 N. J. L. 40; Duncan *v.* Hodges, 4 McCord (S. C.) 239, 17 Am. Dec. 734. See also Fraser *v.* Fraser, 14 U. C. C. P. 70. So an alteration, made before delivery and with the consent of the parties, of the date of a notary's certificate of acknowledgment will not affect the validity of the instrument. Miller *v.* Williams, (Colo. 1899) 59 Pac. 740.

See also *supra*, II, C; and *infra*, VII, F, 17, b, (III).

61. Hoffecker *v.* New Castle County Mut. Ins. Co., 4 Houst. (Del.) 306; De Malarin *v.* U. S., 1 Wall. (U. S.) 282, 17 L. ed. 594, which was a grant. In Fitzpatrick *v.* Fitzpatrick, 6 R. I. 64, 75 Am. Dec. 681, it was held that where a deed is so defectively executed, under a power contained in a mortgage, as to be void, and the grantee thereafter executed a quitclaim deed to the mortgagee, who sold under the power, the first deed may be corrected by interlineations by consent of the parties and, both deeds being reacknowledged and recorded afresh, it will be presumed to have been delivered as of a new date, so as to take effect from redelivery.

To revest part of estate.— It is held, however, that an alteration by consent cannot operate to revest a part of the estate. Booker *v.* Stivender, 13 Rich. (S. C.) 85.

62. Bassett *v.* Bassett, 55 Me. 127, where a deed of an undivided half of certain premises, once completed and delivered, was subsequently surrendered for the purpose of striking out the words "one undivided half of," and again delivered as a conveyance of the whole. To the same effect see Prettyman *v.* Goodrich, 23 Ill. 330; Woodbury *v.* Allegheny, etc., R. Co., 72 Fed. 371. So where, as between the parties to the deed, no deed is necessary, the insertion of additional land into a deed, by consent and after acknowledgment, does not affect its validity. Walkley *v.* Clarke, 107 Iowa 451, 78 N. W. 70.

63. See Moore *v.* Bickham, 4 Binn. (Pa.) 1, wherein it was held that a purchaser of land was not bound to accept a deed in which there was a blank left for the consideration money, notwithstanding the grantors authorized their agents to fill the blank. See *infra*, V, C, 9.

64. Coit *v.* Starkweather, 8 Conn. 289 (under a positive requirement that all deeds of land should be attested by two witnesses and acknowledged before a magistrate, holding that a material change is fatally defective without a new attestation and acknowledgment; but that, if the change is immaterial, then it will be good without such new acknowledgment and attestation); Collins *v.* Collins, 51 Miss. 311, 24 Am. Rep. 632 (which was a bill by a woman to obtain a decree against her husband for support, in aid of which object she charged a fraudulent disposition of his property by her husband, and sought to set aside or avoid a deed of trust of real estate, and a sale thereof. The husband had executed a deed of trust to secure eighteen hundred dollars, and, after the execution, acknowledgment, and recording of the instrument, he borrowed a further sum from the person secured in the deed, and thereafter attempted to secure the latter sum by interlineation in the trust deed, and it was held that such attempt created no new contract or deed, and that it did not invalidate or change the original deed, or affect the interests of third parties in the property). So in Alabama it is held that an alteration by the grantor, or by his authority, after acknowledgment but before delivery, will be inoperative without a new acknowledgment when the effect of the alteration made is to enlarge the estate or premises conveyed. But

held, on the one hand, that a redelivery will be necessary; and mere parol authority, at this stage, to make an alteration, in the absence of the obligor or grantor, is not sufficient.[65] On the other hand, actual redelivery is not necessary, but the circumstances may be sufficient to import the legal equivalent of such delivery,[66] as where the change is made in the presence of the parties,[67] or where the grantor himself carries the instrument to the proper office to be recorded.[68] Subsequent assent or ratification may be sufficient,[69] and, where the party who makes the change is the agent of the obligor, it is considered that parol authority is sufficient, because the authority thus conferred is not to execute a deed, but to make it certain by alteration or addition.[70]

3. By One of Several. If a change is made with the consent of only one of several parties liable on an instrument it will be good as to him, though as to the others the instrument will be void.[71]

4. By Maker and Obligee against Co-Obligor. A change made by the maker or obligor, with the knowledge or at the instance of the payee or obligee, will discharge a co-maker, obligee, or surety not consenting to such change.[72]

when its effect is to limit or restrict the estate, and it is made in pursuance of an intention expressed at the time of the signature and acknowledgment, it will take effect from the subsequent delivery of the deed, and another acknowledgment will not be necessary. Burgess *v.* Blake, (Ala. 1900) 28 So. 963; Webb *v.* Mullins, 78 Ala. 111; Sharpe *v.* Orme, 61 Ala. 263. In Moelle *v.* Sherwood, 148 U. S. 21, 13 S. Ct. 426, 37 L. ed. 350, it is held that the old execution and acknowledgment are not continued in existence as to new property inserted; that if the deed can be deemed valid as between the parties from the time of the alteration it could not affect and be in force as to subsequent purchasers without notice whose deeds were already recorded, but that as to them, by the statute of Nebraska, it is void. See also *infra*, V, C, 9, a, (IV), (D).

A chattel mortgage requires neither attestation or acknowledgment, and therefore the insertion, by consent, of other property will not affect its validity. Winslow *v.* Jones, 8 Ala. 496, 7 So. 262. See also Chicago Title, etc., Co. *v.* O'Marr, 18 Mont. 568, 46 Pac. 809, 47 Pac. 4. A chattel mortgage is not a deed. Jones Chatt. Mort. (4th ed.), § 102.

65. Martin *v.* Hanning, 26 U. C. Q. B. 80; Thorne *v.* Williams, 13 Ont. 577.

66. Hoffecker *v.* New Castle County Mut., etc., Ins. Co., 4 Houst. (Del.) 306.

67. See *infra*, V, C, 9.

68. Prettyman *v.* Goodrich, 23 Ill. 330. To the same effect see Woodbury *v.* Allegheny, etc., R. Co., 72 Fed. 371.

69. Camden Bank *v.* Hall, 14 N. J. L. 583; Wester *v.* Bailey, 118 N. C. 193, 24 S. E. 89. See also *infra*, V, C, 9, a, (IV), (A), (2), (c). *Contra*, Sans *v.* People, 8 Ill. 327; Cleaton *v.* Chambliss, 6 Rand. (Va.) 86.

Conveyance of land.—If a grantor ratifies an insertion in the deed, he and those claiming under him are bound thereby. Chezum *v.* McBride, 21 Wash. 558, 58 Pac. 1067. See also Mohlis *v.* Trauffler, 91 Iowa 751, 60 N. W. 521; Cutler *v.* Rose, 35 Iowa 456.

70. Knapp *v.* Maltby, 13 Wend. (N. Y.) 587, upon the authority of Texira *v.* Evans [*cited* in Master *v.* Miller, 1 Anstr. 228], involving the filling of blanks. See *infra*, V, C, 9, a, (III), (B).

71. *Illinois.*—Canon *v.* Grigsby, 116 Ill. 151, 5 N. E. 362, 56 Am. Rep. 769; Prettyman *v.* Goodrich, 23 Ill. 330, holding that a deed by husband and wife, altered, after execution, by the husband's consent, is still good against him, though void as against the wife.

Massachusetts.—Where a change is made, with the assent of the party, with a view to the immediate discount of the paper, but upon agreement to obtain the consent of another party to the change, the note so negotiated will be valid as against the assenting party, though the consent of the other was not obtained. Stoddard *v.* Penniman, 113 Mass. 386.

North Carolina.—Spivey *v.* Grant, 96 N. C. 214, 2 S. E. 45.

Oregon.—Wills *v.* Wilson, 3 Oreg. 308.

Pennsylvania.—Myers *v.* Nell, 84 Pa. St. 369. But in Smith *v.* Weld, 2 Pa. St. 54, the instrument was sued on as a joint bond, and, as the assent of one of the obligors was not proved, it was held that no recovery could be had in this action against the other obligor, for the discharge of one of the joint and several obligors is the discharge of all.

Vermont.—Broughton *v.* Fuller, 9 Vt. 373.

England.—Coke *v.* Brummell, 8 Taunt. 439, 4 E. C. L. 220.

72. *Alabama.*—White Sewing Mach. Co. *v.* Saxon, 121 Ala. 399, 25 So. 784; Montgomery *v.* Crossthwait, 90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140; Glover *v.* Robbins, 49 Ala. 219, 20 Am. Rep. 272.

Delaware.—Newark Bank *v.* Crawford, 2 Houst. (Del.) 282.

Georgia.—Hanson *v.* Crawley, 41 Ga. 303.

Iowa.—Marsh *v.* Griffin, 42 Iowa 403.

Missouri.—King *v.* Hunt, 13 Mo. 97.

Nebraska.—Brown *v.* Straw, 6 Nebr. 536; 29 Am. Rep. 369.

New Hampshire.—Haines *v.* Dennett, 11 N. H. 180.

New Mexico.—Ruby *v.* Talbott, 5 N. M. 251, 21 Pac. 72, 3 L. R. A. 724.

5. As to Party Making Alteration. The rule that an alteration avoids the instrument does not apply, of course, so as to release the party who makes the alteration.[73]

C. Filling Blanks — 1. In General. It may be laid down generally that if one signs an instrument containing blanks, he must be understood to intrust it to the person to whom it is so delivered to be filled up properly, according to the agreement between the parties, and when so filled the instrument is as good as if originally executed in complete form;[74] and if one sign or indorse a note or bill containing blanks to be filled, the delivery of such an instrument is an authority to fill up the blanks in conformity with the original agreement.[75] As has been pointed out, however, this is a question of authority, and not of alteration of a completed instrument.[76]

2. Implied Authority — a. In General. If a party to an instrument intrusts it to another for use, with blanks not filled, such instrument so delivered carries on its face an implied authority to fill up the blanks necessary to perfect the same; and as between such party and innocent third persons the person to whom the instrument is so intrusted must be deemed the agent of the party who committed the instrument to his custody.[77] Even if the note is not a negotiable one, still the

North Carolina.— Darwin *v.* Rippey, 63 N. C. 318.

Ohio.— Thompson *v.* Massie, 41 Ohio St. 307; Harsh *v.* Klepper, 28 Ohio St. 200; Sturges *v.* Williams, 9 Ohio St. 443, 75 Am. Dec. 473.

Pennsylvania.— Hartley *v.* Corboy, 150 Pa. St. 23, 24 Atl. 295; Neff *v.* Horner, 63 Pa. St. 327, 3 Am. Rep. 555.

73. *Indiana.*— Where defendant erased a subscription made by him to a proposed corporation, action on the subscription may still be maintained, as the terms of the subscription may be shown by parol evidence. Johnson *v.* Wabash, etc., Plank-road Co., 16 Ind. 389.

Maine.— Hughes *v.* Littlefield, 18 Me. 400.

Pennsylvania.— Struthers *v.* Kendall, 41 Pa. St. 214, 80 Am. Dec. 610; Patterson *v.* Patterson, 2 Penr. & W. (Pa.) 200.

Texas.— Butler *v.* State, 31 Tex. Crim. 63, 19 S. W. 676.

West Virginia.—Ohio Valley Bank *v.* Lockwood, 13 W. Va. 392, 31 Am. Rep. 768.

United States.— U. S. *v.* Linn, 1 How. (U. S.) 104, 11 L. ed. 64; Cutts *v.* U. S., 1 Gall. (U. S.) 69, 6 Fed. Cas. No. 3,522. And so if done by the obligee — as tearing off the seal or canceling the instrument, through the fraud of the obligor — the instrument will not be vitiated. U. S. *v.* Spalding, 2 Mason (U. S.) 478, 27 Fed. Cas. No. 16,365.

74. *Illinois.*—White *v.* Alward, 35 Ill. App. 195.

Kentucky.— Yocum *v.* Barnes, 8 B. Mon. (Ky.) 496.

Missouri.— Roe *v.* Town Mut. F. Ins. Co., 78 Mo. App. 452; New England L. & T. Co. *v.* Brown, 59 Mo. App. 461, holding that the rule that the alteration of a contract in a material or immaterial particular by a party thereto discharges another party not consenting cannot be applied to every form and kind of written instrument, and that where the contract is executory, and is not for the payment of money or to affect the title to real estate, it has no application.

Pennsylvania.— Bugger *v.* Cresswell, (Pa. 1888) 12 Atl. 829.

United States.—Violett *v.* Patton, 5 Cranch (U. S.) 142, 3 L. ed. 61.

England.— *In re* Tahiti Cotton Co., L. R. 17 Eq. 273.

75. *Mississippi.*— Wilson *v.* Henderson, 9 Sm. & M. (Miss.) 375, 48 Am. Dec. 716.

Oregon.— Cox *v.* Alexander, 30 Oreg. 438, 46 Pac. 794.

Pennsylvania.— Stahl *v.* Berger, 10 Serg. & R. (Pa.) 170, 13 Am. Dec. 666.

Virginia.—Jordan *v.* Neilson, 2 Wash. (Va.) 164.

United States.—Davidson *v.* Lanier, 4 Wall. (U. S.) 447, 18 L. ed. 377.

76. White *v.* Alward, 35 Ill. App. 195; Waldron *v.* Young, 9 Heisk. (Tenn.) 777.

77. *Alabama.*—Robertson *v.* Smith, 18 Ala. 220; Roberts *v.* Adams, 8 Port. (Ala.) 297, 33 Am. Dec. 291.

Illinois.— Canon *v.* Grigsby, 116 Ill. 151, 5 N. E. 362, 56 Am. Rep. 769.

Indiana.— De Pauw *v.* Salem Bank, 126 Ind. 553, 25 N. E. 705, 26 N. E. 151; Cronkhite *v.* Nebeker, 81 Ind. 319, 42 Am. Rep. 127; Gothrupt *v.* Williamson, 61 Ind. 599; Gillaspie *v.* Kelley, 41 Ind. 158, 13 Am. Rep. 318; Spitler *v.* James, 32 Ind. 202, 2 Am. Rep. 334; Johns *v.* Harrison, 20 Ind. 317.

Kansas.—Lowden *v.* Schoharie County Nat. Bank, 38 Kan. 533, 16 Pac. 748.

Kentucky.— Smith *v.* Lockridge, 8 Bush (Ky.) 423; Commonwealth Bank *v.* McChord, 4 Dana (Ky.) 191, 29 Am. Dec. 398.

Maine.— Abbott *v.* Rose, 62 Me. 194, 16 Am. Rep. 427.

Massachusetts.— Greenfield Sav. Bank *v.* Stowell, 123 Mass. 196, 25 Am. Rep. 67.

Michigan.— Weidman *v.* Symes, 120 Mich. 657, 79 N. W. 894, 77 Am. St. Rep. 603.

Mississippi.— Davis *v.* Lee, 26 Miss. 505, 59 Am. Dec. 267; Torry *v.* Fisk, 10 Sm. & M. (Miss.) 590; Wilson *v.* Henderson, 9 Sm. & M. (Miss.) 375, 48 Am. Rep. 716; Hemphill *v.* Alabama Bank, 6 Sm. & M. (Miss.) 44.

Missouri.— Green *v.* Kennedy, 6 Mo. App. 577.

New York.— Weyerhauser *v.* Dun, 100 N.Y. 150, 2 N. E. 274; Redlich *v.* Doll, 54 N. Y. 234, 13 Am. Rep. 573; Chemung Canal Bank

rule above stated is held to be the same as to the liability of the person signing the blank, if it is a contract for the payment of money, for the leaving of a blank raises the implied authority to treat the person with whom the paper was intrusted as an agent authorized to fill the blank.[78] So the doctrine applies whether the paper is discounted or is delivered in payment of an existing debt.[79]

b. Filling by Bona Fide Holder. In like manner any *bona fide* holder into whose hands the instrument passes has authority to fill blanks to perfect the instrument.[80]

c. Circumstances Must Import Authority. The cases which recognize the foregoing doctrine are such only in which the possession of the uncompleted paper has been intrusted to others under circumstances which permit the inference of authority to perfect it, and where, in view of such apparent authority, it would be a fraud upon innocent parties to permit the assertion to the contrary.[81]

v. Bradner, 44 N. Y. 680; Van Duzer *v.* Howe, 21 N. Y. 531; Page *v.* Morrell, 3 Keyes (N. Y.) 117; Hardy *v.* Norton, 66 Barb. (N. Y.) 527; Mitchell *v.* Culver, 7 Cow. (N. Y.) 336; Harris *v.* Berger, 15 N. Y. St. 389.

Ohio.— Jones *v.* Bangs, 40 Ohio St. 139, 48 Am. Rep. 664; Fullerton *v.* Sturges, 4 Ohio St. 529.

Tennessee.— Waldron *v.* Young, 9 Heisk. (Tenn.) 777; Grissom *v.* Fite, 1 Head (Tenn.) 331.

Vermont.— Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11.

United States.— Angle *v.* Northwestern L. Ins. Co., 92 U. S. 330, 23 L. ed. 556; Pittsburgh Bank *v.* Neal, 22 How. (U. S.) 96, 16 L. ed. 323; Goodman *v.* Simonds, 20 How. (U. S.) 343, 15 L. ed. 934; Violett *v.* Patton, 5 Cranch (U. S.) 142, 3 L. ed. 61.

England.— Russel *v.* Langstaffe, 2 Dougl. 514, which is the early and leading English case on this subject, cited in many of the cases. See also Collis *v.* Emett, 1 H. Bl. 313; Montague *v.* Perkins, 22 Eng. L. & Eq. 516; Cruchley *v.* Clarance, 2 M. & S. 90; Snaith *v.* Mingay, 1 M. & S. 87; Schultz *v.* Astler, 2 Bing. N. Cas. 544, 29 E. C. L. 655.

Canada.— Le Banque Nationale *v.* Sparks, 27 U. C. C. P. 320.

Reason of rule.— The rule is founded not only upon that principle of general jurisprudence which casts the loss, when one of two equally innocent persons must suffer, upon him who has put it in the power of another to do the injury, but also upon that rule of the law of agency which makes the principal liable for the acts of his agent, notwithstanding the private instructions of the principal have been disregarded, when he has held the agent out as possessing a more enlarged authority. Fisher *v.* Dennis, 6 Cal. 577, 65 Am. Dec. 534; Spitler *v.* James, 32 Ind. 202, 2 Am. Rep. 334; Fullerton *v.* Sturges, 4 Ohio St. 529.

Filling after insolvency of drawer.— An accommodation indorser will not be discharged notwithstanding the blanks are filled after the insolvency of the drawer and acceptor of the bill, and the creditor has notice of such condition. Fetters *v.* Muncie Nat. Bank, 34 Ind. 251, 7 Am. Rep. 225.

Filling after death of indorser.— It has been held, however, that with the death of the indorser the authority to fill blanks left by him ceases, and the fact that he is an accommodation indorser is sufficient notice to one who takes the instrument thereafter. Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11.

Filling when indorser unconscious.— But the fact that after delivery to the maker, and before the instrument is discounted, the indorser becomes unconscious by sudden illness will not affect his liability on the indorsement, even though the bank has notice of these facts. Bechtel's Estate, 133 Pa. St. 367, 19 Atl. 412.

78. Johnston Harvester Co. *v.* McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39.

79. Smith *v.* Lockridge, 8 Bush (Ky.) 423.

Renewal notes.— Fetters *v.* Muncie Nat. Bank, 34 Ind. 251, 7 Am. Rep. 225; Bechtel's Estate, 133 Pa. St. 367, 19 Atl. 412. See also Douglass *v.* Scott, 8 Leigh (Va.) 43.

80. *New York.*— Redlich *v.* Doll, 54 N. Y. 234; 13 Am. Rep. 573; Page *v.* Morrell, 3 Keyes (N. Y.) 117.

Oregon.— Cox *v.* Alexander, 30 Oreg. 438, 46 Pac. 794.

Pennsylvania.— Bechtel's Estate, 133 Pa. St. 369, 19 Atl. 412.

South Carolina.— Aiken *v.* Cheeseborough, 1 Hill (S. C.) 172.

England.— Cruchley *v.* Clarance, 2 M. & S. 90.

81. Solon *v.* Williamsburgh Sav. Bank, 114 N. Y. 122, 21 N. E. 168, 23 N. Y. St. 138; Taddiken *v.* Cantrell, 69 N. Y. 597, 25 Am. Rep. 253; Ledwich *v.* McKim, 53 N. Y. 307 (holding that where bonds conditioned for the payment, in the alternative, of two kinds and amounts of national currency, to be determined by the place to be fixed for payment, contained a clause authorizing the president to fix by indorsement such place of payment, and had been indorsed in blank, but while in the possession of the corporation were stolen, a *bona fide* purchaser from the thief has no authority to fill up the blank); Baxendale *v.* Bennett, 3 Q. B. D. 525 (analogous to last case).

Application of text.— The mere signing a blank piece of paper, without any intention that it shall be used for any purpose, does not confer an implied authority upon one

d. Authority Confined to Perfecting the Instrument. The implied authority to fill blanks is confined to such insertions as are necessary to make the instrument perfect according to its nature, frame, and intended use. There is no inference of authority to make any addition to the terms of the instrument, or to make a new instrument by erasing what is written or printed, or by filling blanks with stipulations repugnant to the plainly expressed intention of the paper as shown by its written or printed terms, and such an addition or alteration will avoid the instrument even in the hands of an innocent holder,[82] unless the person authorized to fill the blanks may be considered as a stranger with reference to any other changes which he may make.[83] But, on the other hand, where an accommodation note is delivered with a blank to be filled by authority, he to whom it is so delivered may make a change in the matter inserted in the blank before the instrument is negotiated.[84]

who obtains possession thereof to write a note over the name and negotiate it as such, and the instrument under these circumstances will be void. Nance *v.* Lary, 5 Ala. 370. This is instanced by the writing of an obligation over a signature in an album. Harris *v.* Berger, 15 N. Y. St. 389. So where one writes his name on a piece of paper, to be used for the purpose of identifying his signature, and the person to whom it is delivered fills up the paper with a promissory note and negotiates it, the instrument is a forgery and no recovery can be had on it. Grand Haven First Nat. Bank *v.* Zims, 93 Iowa 140, 61 N. W. 483; Caulkins *v.* Whisler, 29 Iowa 495, 4 Am. Rep. 236. And where one, with whom an indorsed instrument containing blanks was not left and intrusted for use, obtains possession thereof without the knowledge of the party with whom the paper was left, there is no authority in the person so obtaining possession of the instrument to fill the blanks so as to bind the indorser. Lenheim *v.* Wilmarding, 55 Pa. St. 73.

82. *Alabama.*—Toomer *v.* Rutland, 57 Ala. 379, 29 Am. Rep. 722. Signing a piece of paper with intent that it shall be filled up with a simple promise does not import authority to seal and deliver as a bond. Manning *v.* Norwood, 1 Ala. 429.

Connecticut.— Mahaiwe Bank *v.* Douglass, 31 Conn. 170, holding that a custom among banks of regarding erasures of printed matter in negotiable paper as no evidence of an unauthorized alteration when the same erasures of written matter would be so, has not existed so long or become so general as to be a part of the law merchant.

Indiana.— De Pauw *v.* Salem Bank, 126 Ind. 553, 25 N. E. 705, 26 N. E. 151; Cronkhite *v.* Nebeker, 81 Ind. 319, 42 Am. Rep. 127; McCoy *v.* Lockwood, 71 Ind. 319; Franklin L. Ins. Co. *v.* Courtney, 60 Ind. 134; Coburn *v.* Webb, 56 Ind. 96, 26 Am. Rep. 15. Where one signs a blank form of a bill of exchange as drawer, for the accommodation of another to whom it is delivered, and it is filled up as a promissory note without the knowledge of the drawer, he is discharged upon the instrument in the hands of the person chargeable with the alteration. Luellen *v.* Hare, 32 Ind. 211. In Holland *v.* Hatch, 11 Ind. 497, 71 Am. Dec. 363, it was held that the insertion of a clause waiving appraisement laws, made by plaintiff, rendered the instrument void, because such clause was in no manner necessary to make a complete instrument, and that it did not matter that there were other blanks to be filled which were necessary to make the instrument complete. This ruling resulted in a reversal of the judgment of the lower court, after which plaintiff took a nonsuit and subsequently brought suit in Ohio, where it seems a majority of the court did not disagree with the above decision, but held that the added words might be rejected as forming no part of the instrument. Holland *v.* Hatch, 15 Ohio St. 464. Later, in Spitler *v.* James, 32 Ind. 202, 2 Am. Rep. 334, it was held that the signing of a note blank in several respects necessary to make a complete instrument, and also containing sufficient space to insert the place of payment, raised a sufficient inference of authority to insert a place of payment in favor of a *bona fide* holder to whom the note passed after such insertion.

Kentucky.— Blakey *v.* Johnson, 13 Bush (Ky.) 197, 26 Am. Rep. 254.

Massachusetts.— Greenfield Sav. Bank *v.* Stowell, 123 Mass. 196, 25 Am. Rep. 67.

Missouri.— Ivory *v.* Michael, 33 Mo. 398.

New York.—Weyerhauser *v.* Dun, 100 N. Y. 150, 2 N. E. 274; McGrath *v.* Clark, 56 N. Y. 34, 15 Am. Rep. 372; Meise *v.* Doscher, 83 Hun (N. Y.) 580, 31 N. Y. Suppl. 1072, 65 N. Y. St. 50; Farmers' Nat. Bank *v.* Thomas, 79 Hun (N. Y.) 595, 29 N. Y. Suppl. 837, 61 N. Y. St. 518; National Ulster County Bank *v.* Madden, 41 Hun (N. Y.) 113; Bruce *v.* Westcott, 3 Barb. (N. Y.) 374.

United States.— Angle *v.* Northwestern L. Ins. Co., 92 U. S. 330, 23 L. ed. 556.

England.— Crotty *v.* Hodges, 4 M. & G. 561, 43 E. C. L. 292.

Canada.— Hall *v.* Merrick, 40 U. C. Q. B. 566; Halcrow *v.* Kelly, 28 U. C. C. P. 551.

83. Fullerton *v.* Sturges, 4 Ohio St. 529, wherein it appears that, though one may be authorized to fill blanks in a note, the unauthorized affixing of seals will be considered as an act of a stranger. See *supra*. IV, C.

84. Michigan Ins. Bank *v.* Eldred, 9 Wall. (U. S.) 544, 19 L. ed. 763, which was a change of a date inserted in a blank, before negotiating the instrument. To the same point is Hepler *v.* Mt. Carmel Sav. Bank, 97 Pa.

e. As between Original Parties or Those Having Notice. One who signs a blank piece of paper cannot be bound without showing an authority to fill it, unless some principle of estoppel can be applied,[85] and as between the signer and the party to whom the instrument is intrusted, or as between the former and a subsequent purchaser with notice of limitations upon the authority of the person to whom the instrument is intrusted, the signer cannot be bound by the filling of unauthorized blanks or the excessive exercise of authority in filling blanks intentionally left to be filled.[86] But it does not matter that the party taking such instrument has knowledge of the mere fact that it was executed in blank, so long as there is nothing to put him on notice that the authority thereby conferred is restricted or has been violated.[87]

3. Filling Amount. Where one signs an instrument blank as to amount,[88] or signs or indorses a note, bill, or acceptance with such blank, he will be liable to a *bona fide* holder for any amount which has been inserted in the blank, as the delivery in blank authorizes the person to whom the instrument is delivered to fill the blank with any amount.[89] It will not alter the effect, as far as an innocent

St. 420, 39 Am. Rep. 813, where one month was inadvertently written for another and was immediately corrected by drawing a pen through it and writing the correct month above that first written. So as to changing the time of payments once inserted into the blank. Douglass *v.* Scott, 8 Leigh (Va.) 43, upon the principle, however, that the person with whom the instrument was left has authority to make changes therein up to the time it becomes an available security, and that at the time of its change the instrument had not been issued so as to make it such security.

85. Richards *v.* Day, 137 N. Y. 183, 33 N. E. 146, 50 N. Y. St. 389, 33 Am. St. Rep. 704, 23 L. R. A. 601 [*citing* Dutchess, etc., County R. Co. *v.* Mabbett, 58 N. Y. 397; Chauncey *v.* Arnold, 24 N. Y. 330; Drury *v.* Foster, 2 Wall. (U. S.) 24, 17 L. ed. 780]. But no such principle arises in an action between original parties, or one of the original parties and the representative of the other. Richards *v.* Day, 137 N. Y. 183, 33 N. E. 146, 50 N. Y. St. 389, 33 Am. St. Rep. 704, 23 L. R. A. 601.

86. *Arkansas.*— Little Rock Trust Co. *v.* Martin, 57 Ark. 277, 21 S. W. 468; Overton *v.* Matthews, 35 Ark. 146, 37 Am. Rep. 9.

Indiana.— Luellen *v.* Hare, 32 Ind. 211.

Kentucky.— Limestone Bank *v.* Penick, 2 T. B. Mon. (Ky.) 98, 15 Am. Dec. 136.

Mississippi.— Goss *v.* Whitehead, 33 Miss. 213; Goad *v.* Hart, 8 Sm. & M. (Miss.) 787; Hemphill *v.* Alabama Bank, 6 Sm. & M. (Miss.) 44; Johnson *v.* Blasdale, 1 Sm. & M. (Miss.) 17, 40 Am. Dec. 85, in which cases it appears that an excess of authority in filling a blank as to the amount of a note will render the instrument void as against one who takes the note with knowledge of the limited authority, only as to the excess. Upon the same question Patton *v.* Shanklin, 14 B. Mon. (Ky.) 13, involving the insertion of an excessive rate of interest, is in point, and Clower *v.* Wynn, 59 Ga. 246, seems to the same effect as the cases cited from Mississippi.

Missouri.— Wagner *v.* Diedrich, 50 Mo. 484; Mackey *v.* Basil, 50 Mo. App. 190; Goodman *v.* Simonds, 19 Mo. 106.

87. *Alabama.*—Huntington *v.* Mobile Branch Bank, 3 Ala. 186.

Indiana.— Eichelberger *v.* Old Nat. Bank, 103 Ind. 401, 3 N. E. 127.

Kansas.— Joseph *v.* Eldorado First Nat. Bank, 17 Kan. 256.

Massachusetts.— Putnam *v.* Sullivan, 4 Mass. 45, 3 Am. Dec. 206.

New York.— Redlich *v.* Doll, 54 N. Y. 234, 13 Am. Rep. 573; Chemung Canal Bank *v.* Bradner, 44 N. Y. 680; Mitchell *v.* Culver, 7 Cow. (N. Y.) 336.

United States.— Michigan Ins. Bank *v.* Eldred, 9 Wall. (U. S.) 544, 19 L. ed. 763.

England.— Russel *v.* Langstaffe, 2 Dougl. 514.

88. Jewell *v.* Rock River Paper Co., 101 Ill. 57, holding that if a subscription-book for corporation stock is signed for the purpose of inducing others to subscribe, leaving the amount of such subscription blank raises an implied authority in those taking subscriptions to fill up the blank.

89. *Alabama.*—Huntington *v.* Mobile Branch Bank, 3 Ala. 186.

Kentucky.— Smith *v.* Lockridge, 8 Bush (Ky.) 423; Hall *v.* Commonwealth Bank, 5 Dana (Ky.) 258, 30 Am. Dec. 685; Commonwealth Bank *v.* Curry, 2 Dana (Ky.) 142; Limestone Bank *v.* Penick, 5 T. B. Mon. (Ky.) 25.

Illinois.— Trainor *v.* Adams, 54 Ill. App. 523; Young *v.* Ward, 21 Ill. 223.

Mississippi.— Johnson *v.* Blasdale, 1 Sm. & M. (Miss.) 17, 40 Am. Dec. 85.

New York.— Van Duzer *v.* Howe, 21 N. Y. 531.

Tennessee.—Grissom *v.* Fite, 1 Head (Tenn.) 331.

Wisconsin.—Johnston Harvester Co. *v.* McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39.

England.—Montague *v.* Perkins, 22 Eng. L. & Eq. 516 (any amount covered by the stamp); Schultz *v.* Astley, 2 Bing. N. Cas. 544, 29 E. C. L. 655.

Canada.— Le Banque Nationale *v.* Sparks, 27 U. C. C. P. 320.

holder is concerned, that there was a marginal notation for the amount for which the body of the instrument was to be filled, which notation was also changed,[90] but it is otherwise as to a person having knowledge of such notation.[91]

4. Filling Date. Where a note or bill contains a blank for the date, and it is signed and indorsed to another in this condition, the necessary presumption is that the latter, or the person to whom he passes it, is authorized to fill in the date,[92] and this implied authority extends to the insertion of any date, and is not confined to the insertion of the date of the signing,[93] though it is also considered otherwise where the person to whom the instrument is passed has knowledge of the true date of its execution.[94]

5. Filling Place of Payment. Where a note is intended to be made payable at a bank there is implied authority to insert such place in a blank left in a note,[95] and where no place of payment is inserted, but a blank is left in the note following the word "at," the frame of the note thus indicating the intention to make it payable at a particular place, there is an implied authority to fill such blank.[96] On the other hand, the mere omission of a place of payment, such a clause not being necessary to the completeness of the instrument, is not of itself, and without anything in the frame of the instrument to indicate that the place of payment was intended, sufficient to raise an inference of authority to insert a place of payment.[97] A payee has no authority to fill a blank indicating a place of

90. This is because such notation is no part of the note, as well as because the purchaser had no notice of the change. Merritt *v.* Boyden, (Ill. 1901) 60 N. E. 907; Schryver *v.* Hawkes, 22 Ohio St. 308; Johnston Harvester Co. *v.* McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39; Garrard *v.* Lewis, 10 Q. B. D. 30. See also Poorman *v.* Mills, 39 Cal. 345, 2 Am. Rep. 451.

91. Woolfolk *v.* Bank of America, 10 Bush (Ky.) 504; Hall *v.* Commonwealth Bank, 5 Dana (Ky.) 258, 30 Am. Dec. 685; Henderson *v.* Bondurant, 39 Mo. 369, 93 Am. Dec. 281.

92. *Illinois.*— Gill *v.* Hopkins, 19 Ill. App. 74.

Indiana.— Emmons *v.* Meeker, 55 Ind. 321.

Massachusetts.— Androscoggin Bank *v.* Kimball, 10 Cush. (Mass.) 373.

New York.— Page *v.* Morrell, 3 Keyes (N. Y.) 117; Mechanics', etc., Bank *v.* Schuyler, 7 Cow. (N. Y.) 337 note; Mitchell *v.* Culver, 7 Cow. (N. Y.) 336.

Pennsylvania.— Bechtel's Estate, 133 Pa. St. 367, 19 Atl. 412 (holding that indorsing an accommodation note, left blank as to date, confers authority to insert a date to correspond with the note for which the note executed in blank is given in renewal); Hepler *v.* Mount Carmel Sav. Bank, 97 Pa. St. 420, 39 Am. Rep. 813.

United States.— Michigan Ins. Bank *v.* Eldred, 9 Wall. (U. S.) 544, 19 L. ed. 763.

Contra, Inglish *v.* Breneman, 5 Ark. 377, 41 Am. Dec. 96, 9 Ark. 122, 47 Am. Dec. 735.

93. Androscoggin Bank *v.* Kimball, 10 Cush. (Mass.) 373; Page *v.* Morrell, 3 Keyes (N. Y.) 117; Mechanics', etc., Bank *v.* Schuyler, 7 Cow. (N. Y.) 337 note; Mitchell *v.* Culver, 7 Cow. (N. Y.) 336.

94. Overton *v.* Matthews, 35 Ark. 146, 37 Am. Rep. 9 (holding that the implied authority to fill the date is authority to insert the true date; that as between the payee and the maker the insertion of an untrue date will avoid the instrument, though as between the maker and an innocent purchaser for value before maturity the insertion of an untrue date by the payee would not avoid the instrument); Emmons *v.* Meeker, 55 Ind. 321; Emmons *v.* Carpenter, 55 Ind. 329. In the last case, Biddle, J., dissented upon this particular phase of the question upon the ground that if the parties had intended to insert the true date there would appear to be no reason for leaving the blank.

95. Marshall *v.* Drescher, 68 Ind. 359, wherein the payee inquired of the maker as to where the note should be left for payment, and the latter mentioned a particular bank, and it was held that the payee had an implied authority to insert the name of such bank.

96. *Illinois.*— Canon *v.* Grigsby, 116 Ill. 151, 5 N. E. 362, 56 Am. Rep. 769.

Indiana.— Gillaspie *v.* Kelley, 41 Ind. 158, 13 Am. Rep. 318.

Kentucky.— Cason *v.* Grant County Deposit Bank, 97 Ky. 487, 16 Ky. L. Rep. 344, 31 S. W. 40, 53 Am. St. Rep. 418.

New York.— Redlich *v.* Doll, 54 N. Y. 234, 13 Am. Rep. 573; Waggoner *v.* Millington, 8 Hun (N. Y.) 142; Kitchen *v.* Place, 41 Barb. (N. Y.) 465.

Oregon.— Cox *v.* Alexander, 30 Oreg. 438, 46 Pac. 794.

Pennsylvania.— Wessell *v.* Glenn, 108 Pa. St. 104.

Contra, Morehead *v.* Parkersburg Nat. Bank, 5 W. Va. 74, 13 Am. Rep. 636, which, however, was not a case of accommodation paper.

97. McCoy *v.* Lockwood, 71 Ind. 319 [but in Spitler *v.* James, 32 Ind. 202, 2 Am. Rep. 334, it seems that the insertion of a place of payment was considered as impliedly authorized to complete the instrument for the purposes for which it was intended, notwith-

payment where his authority is limited to the filling in of other particularly designated blanks only.[98]

6. Filling Amount of Interest. The holder of a note, though it contains other blanks,[99] has no implied authority to insert into it matter causing it to bear interest, or changing its effect as to the rate of interest,[1] but, if the frame of the note as written manifests an intention or agreement that it shall run at some rate of interest, it is held that the implied authority is sufficient if the note passes into the hands of an innocent party with the blank filled,[2] though, if it remains in the hands of the original party, evidence of the agreement or consent of the maker to allow the payee to fix the rate would be necessary.[3] But, notwithstanding a blank is left in the place for the insertion of a rate of interest, this imports no authority to insert a greater rate than the legal rate of interest.[4]

7. Filling Time of Payment. The execution and delivery of an instrument in blank as to time of payment is implied authority to fill it in with any time, and if the blank is filled the maker cannot complain after the note has reached the hands of an innocent holder for value.[5] But if the blank indicates that the instrument is to be a time note there is no authority to write any words making it payable on demand.[6]

8. Filling in Names of Parties — a. In General. Where a note is signed by one maker when it contains, among other blanks, one for words making it a joint and several obligation, its delivery to the person for whose accommodation it is

standing the frame of the instrument itself did not indicate that a place of payment was intended to be inserted]; Charlton *v.* Reed, 61 Iowa 166, 16 N. W. 64, 47 Am. Rep. 808; Kitchen *v.* Place, 41 Barb. (N. Y.) 465; Crotty *v.* Hodges, 4 M. & G. 561, 43 E. C. L. 292.

98. Toomer *v.* Rutland, 57 Ala. 379, 29 Am. Rep. 722.

99. Coburn *v.* Webb, 56 Ind. 96, 26 Am. Rep. 15. *Compare* Weidman *v.* Symes, 120 Mich. 657, 79 N. W. 894, 77 Am. St. Rep. 603.

1. See *infra*, VII, F, 8. See also McGrath *v.* Clark, 56 N. Y. 34, 15 Am. Rep. 372 (holding that the addition of the words "with interest" was not within the rule of implied authority to fill a blank, even though the note is given to take up another which contains such clause); Meise *v.* Doscher, 83 Hun (N. Y.) 580, 31 N. Y. Suppl. 1072, 65 N. Y. St. 50; Farmers' Nat. Bank *v.* Thomas, 79 Hun (N. Y.) 595, 29 N. Y. Suppl. 837, 61 N. Y. St. 518.

2. See Fisher *v.* Dennis, 6 Cal. 577, 65 Am. Dec. 534; Rainbolt *v.* Eddy, 34 Iowa 440, 11 Am. Rep. 152. See also Weidman *v.* Symes, 120 Mich. 657, 79 N. W. 894, 77 Am. St. Rep. 603.

3. Fisher *v.* Dennis, 6 Cal. 577, 65 Am. Dec. 534, holding, however, that such an insertion is not an alteration which will vitiate the instrument entirely, as an alteration to vitiate must change something expressed so as to defeat the intention of one of the contracting parties, but that it will vitiate the instrument only to the excess over the legal rate, the form of the instrument indicating that some interest was intended. See also Patton *v.* Shanklin, 14 B. Mon. (Ky.) 13.

4. *Colorado.*— Hoopes *v.* Collingwood, 10 Colo. 107, 13 Pac. 909, 3 Am. St. Rep. 565.

Indiana.— Palmer *v.* Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469.

Iowa.— Conger *v.* Crabtree, 88 Iowa 536, 55 N. W. 335, 45 Am. St. Rep. 249 (holding that the mere delivery of a negotiable note with interest blanks unfilled will not of itself raise a legal presumption of authority to fill such blanks, and that the burden is upon plaintiff, even though he be an innocent purchaser, to show such negligence in the execution of the instrument as to estop defendant from pleading the alteration. The pleadings in this case did not aver that defendant was negligent in making and delivering the note with the blanks unfilled, nor that plaintiff had no notice of the alleged alteration when he purchased the note); Grand Haven First Nat. Bank *v.* Hall, 83 Iowa 645, 50 N. W. 944.

Michigan.— Holmes *v.* Trumper, 22 Mich. 427, 7 Am. Rep. 661, where interest clause was added at the end.

Missouri.— Paris Nat. Bank *v.* Nickell, 34 Mo. App. 295, upon the authority of Washington Sav. Bank *v.* Ecky, 51 Mo. 272, which last case, however, is said, in Capital Bank *v.* Armstrong, 62 Mo. 59, to have been overruled in effect by Shirts *v.* Overjohn, 60 Mo. 305.

5. Johns *v.* Harrison, 20 Ind. 317; Lowden *v.* Schoharie County Nat. Bank, 38 Kan. 533, 16 Pac. 748; Waldron *v.* Young, 9 Heisk. (Tenn.) 777. Where a note is on a printed blank, erasing the words "after date" following the words "on demand," the note having been signed in blank, is not material. Bingham *v.* Reddy, 5 Ben. (U. S.) 266, 3 Fed. Cas. No. 1,414.

6. Farmers' Nat. Bank *v.* Thomas, 79 Hun (N. Y.) 595, 29 N. Y. Suppl. 837, 61 N. Y. St. 518.

signed raises an implied authority to procure an additional signer.[7] Where one signs a blank form of a note,[8] or indorses a note with a blank for the signature of the maker, there is an implied authority to fill the blanks, even though the person to whom it is delivered exceeds his authority.[9] To fill a blank in a printed form of a contract with the name of a party is not an alteration.[10]

b. Name of Payee. The signing and delivery to another of a bill or note, blank as to the name of the payee, confers authority to fill such blank,[11] and any *bona fide* holder may fill such an instrument by inserting his own name.[12]

9. Blanks in Deeds — a. Parol Authority and Delivery — (1) *Conflict of Authority.* Upon the question of filling in blanks in deeds under parol authority, or under such authority before or after delivery of the instrument, the authorities are in irreconcilable conflict.[13] While it is the law in England that authority to fill in a blank in a deed must be under seal,[14] and this is followed in many of

7. Snyder *v.* Van Doren, 46 Wis. 602, 1 N. W. 285, 32 Am. Rep. 739.

8. Geddes *v.* Blackmore, 132 Ind. 551, 32 N. E. 567, in which case a maker signed a printed blank form of a note and delivered it to another with instructions to purchase merchandise, to fill in the blanks in the note, and to give it in payment, and it was held that there was sufficient authority for the person to whom the note was thus delivered to sign his own name as a maker. See *infra*, VII, F, 21, j.

9. Whitmore *v.* Nickerson, 125 Mass. 496, 28 Am. Rep. 257.

10. Briscoe *v.* Reynolds, 51 Iowa 673, 2 N. W. 529.

11. Gothrupt *v.* Williamson, 61 Ind. 599; Armstrong *v.* Harshman, 61 Ind. 52, 28 Am. Rep. 665; Wilson *v.* Kinsey, 49 Ind. 35.

12. *Delaware.*— Townsend *v.* France, 2 Houst. (Del.) 441; Farmers', etc., Bank *v.* Horsey, 2 Houst. (Del.) 385.

Indiana.— Rich *v.* Starbuck, 51 Ind. 87; Greenhow *v.* Boyle, 7 Blackf. (Ind.) 56.

Maryland.—Dunham *v.* Clogg, 30 Md. 284; Boyd *v.* McCann, 10 Md. 118.

Minnesota.— McIntosh *v.* Lytle, 26 Minn. 336, 3 N. W. 983, 37 Am. Rep. 410.

Missouri.— Schooler *v.* Tilden, 71 Mo. 580.

New York.—Chemung Canal Bank *v.* Bradner, 44 N. Y. 680; Hardy *v.* Norton, 66 Barb. (N. Y.) 527.

Oregon.— Thompson *v.* Rathbun, 18 Oreg. 202, 22 Pac. 837.

Tennessee.— Seay *v.* State Bank, 3 Sneed (Tenn.) 557, 67 Am. Dec. 579.

Texas.— Close *v.* Fields, 2 Tex. 232.

England.— Cruchley *v.* Clarance, 2 M. & S. 90; Attwood *v.* Griffin, R. & M. 425. Where the owner of shares borrows money and deposits with the lender certificates of the shares and transfers thereof signed by him, but with the date and name of the transferee left blank, the lender has implied power to fill in the blanks and convey good title if a deed is not required, but if a deed is required he can convey only the equitable interest. *In re* Tahiti Cotton Co., L. R. 17 Eq. 273.

Canada.— Mutual Safety Ins. Co. *v.* Porter, 7 N. Brunsw. 230.

13. Texira *v.* Evans [*cited* in Master *v.* Miller, 1 Anstr. 228] is the leading authority for the proposition that a blank in a bond may be filled in by parol authority, even in the absence of the obligor. In that case, however, the blank was filled before actual delivery to the obligee, and by the agent of the obligor. This case was overruled in Hibblewhite *v.* McMorine, 6 M. & W. 200, as indicated in Davidson *v.* Cooper, 11 M. & W. 778, the question decided in the overruling case being that a deed executed and *delivered* with a material blank could not be made a deed by filling in the blank thereafter, as the instrument, when originally executed, was inoperative and could not be perfected by parol authority. (See also Enthoven *v.* Hoyle, 9 Eng. L. & Eq. 434; *In re* Tahiti Cotton Co., L. R. 17 Eq. 273.) In a later case, Eagleton *v.* Gutteridge, 11 M. & W. 465, it was held that where a power of attorney was executed abroad, appointing one designated merely by a surname, and was delivered to a party by that name, the insertion of his christian name in the blank left for that purpose did not invalidate the instrument. This decision was made by the court which overruled Texira *v.* Evans [*cited* in Master *v.* Miller, 1 Anstr. 228], and at the term prior to the decision of Davidson *v.* Cooper, 11 M. & W. 793, and therefore must have been regarded as consistent with Hibblewhite *v.* McMorine, 6 M. & W. 200. Nevertheless it has been considered at a very recent date as an authority for the proposition that a bond made and delivered in blank may be completed by filling in the blanks, under parol authority, as opposed to the doctrine laid down in Hibblewhite *v.* McMorine, 6 M. & W. 200. See Brown *v.* Colquitt, 73 Ga. 59, 54 Am. Rep. 867, wherein it was said that when the decision in Ingram *v.* Little, 14 Ga. 173, 58 Am. Dec. 549, was rendered it was probable that the court had not seen the decision in Eagleton *v.* Gutteridge, 11 M. & W. 465. In Ingram *v.* Little, 14 Ga. 173, 58 Am. Dec. 549, the holding was that a deed with blanks for the grantee's name and the consideration could not be filled in by a third person under parol authority before delivery to a purchaser and in the absence of the grantor. But in this case the court expressly indicated that it had no doubt an immaterial blank in a deed might be filled in by parol authority.

14. See *supra*, note 13.

the American cases to such an extent that it may be said to be the rule, on the whole weight of authority, yet it would seem that, according to the weight of the more modern decisions in this country, parol authority is sufficient.[15]

(II) *Character of Blank as Affecting Authority to Fill* — (A) *Instrument Wholly Blank.* If a blank is signed, sealed, and delivered, and afterward written, it is no deed, because there is nothing of substance contained in it, and nothing can pass by it.[16] Some of the cases draw a distinction between the filling of a particular blank left to be filled when the instrument was executed, and the writing of the whole deed over the signature and seal.[17] This distinction does not always exist, however. It does not seem to influence the decision of cases which hold that a specialty may be perfected by filling material blanks after delivery,[18] and the blanks to be filled in these cases are generally such that the instrument would not be a good deed with the blank, the filling of such blank being the very thing which comes within the inhibition of the rule against parol authority to make a deed.[19]

(B) *Material and Immaterial Matter.* The existence of blanks which do not impair the validity of the instrument is not material and they may be filled without authority under seal. Such cases are not within the reason of those which hold that blanks in a deed, and constituting a material part of it, cannot, in the absence of the maker, be filled by parol authority.[20]

15. See *infra*, cases cited in note 16 *et seq.*

16. *Kentucky.*— Lockart *v.* Roberts, 3 Bibb (Ky.) 361.

Maryland.— Byers *v.* McClanahan, 6 Gill & J. (Md.) 250.

Mississippi.— Dickson *v.* Hamer, Freem. (Miss.) 284.

Ohio.— Ayres *v.* Harness, 1 Ohio 368, 13 Am. Dec. 629.

South Carolina.— Perminter *v.* McDaniel, 1 Hill (S. C.) 267, 26 Am. Dec. 179; Duncan *v.* Hodges, 4 McCord (S. C.) 239, 17 Am. Dec. 734.

Tennessee.— Wynne *v.* Governor, 1 Yerg. (Tenn.) 149, 24 Am. Dec. 448; Gilbert *v.* Anthony, 1 Yerg. (Tenn.) 69, 24 Am. Dec. 439.

17. Simms *v.* Hervey, 19 Iowa 273 (wherein, after noting many of the cases which follow or repudiate Texira *v.* Evans [*cited* in Master *v.* Miller, 1 Anstr. 228], (*supra*, note 13) it is pointed out that, of the former, one class hold that if only certain blanks are left, those may be filled in, in the absence of the obligor, pursuant to parol authority, though the cases which deny the authority of Texira *v.* Evans [*cited* in Master *v.* Miller, 1 Anstr. 228] hold otherwise; that substantially all of the cases hold that a specialty cannot be signed and sealed in blank and wholly filled, in the absence of the obligor, pursuant to parol authority); South Berwick *v.* Huntress, 53 Me. 89, 87 Am. Dec. 535 [*referring* to Burns *v.* Lynde, 6 Allen (Mass.) 305]; Ayres *v.* Harness, 1 Ohio 368, 13 Am. Dec. 629, wherein the court said that the cases against the rule requiring authority under seal to write a deed over a signature and seal were those in which all the material parts were written at the time of making the signature and seal. But see *infra*, V, C, 9, a, (IV) (A) (2).

18. Wiley *v.* Moor, 17 Serg. & R. (Pa.) 438, 17 Am. Dec. 696.

See *infra*, V, C, 9, a, (IV), (B).

19. See, for example, Cross *v.* State Bank, 5 Ark. 525. Thus Hibblewhite *v.* McMorine, 6 M. & W. 200, did not hold contrary to Texira *v.* Evans [*cited* in Master *v.* Miller, 1 Anstr. 228], (see *supra*, note 13), on the ground that the instrument involved in the first case was wholly blank, but because the matter of the blank to be filled in was necessary to the validity of the deed. And the subsequent case of Eagleton *v.* Gutteridge, 11 M. & W. 465, is consistent with Hibblewhite *v.* McMorine, 6 M. & W. 200 (see *supra*, note 13) because the blank in the former did not affect the validity of the deed. See also *infra*, note 20. So the cases which sustain the filling in of blanks by an agent, pursuant to parol authority and in the absence of the maker, proceed upon the principle of a sufficient delivery. See *infra*, V, C, 9, a, (III), (B). And those above cited to rule against writing a deed over a seal and signature (see *supra*, note 16) involve instruments which have been completely delivered.

20. *Connecticut.*— Murray *v.* Klinzing, 64 Conn. 78, 80, 29 Atl. 244, holding that where a deed recites that it is "for the consideration of —— dollars," it is not a material alteration to insert the number of dollars so as to express the actual consideration paid.

Massachusetts.— Vose *v.* Dolan, 108 Mass. 155, 11 Am. Rep. 331; Smith *v.* Crooker, 5 Mass. 538.

New York.— Kinney *v.* Schmitt, 12 Hun (N. Y.) 521.

North Carolina.— Martin *v.* Buffaloe, 121 N. C. 34, 27 S. E. 995, holding that filling a blank in a trust deed with the name of the attorney employed to defend the conveyance, and his charge for services, does not invalidate the instrument.

Virginia.— Preston *v.* Hull, 23 Gratt. (Va.) 600, 14 Am. Rep. 153; Whiting *v.* Daniel, 1

(III) *Filling before Delivery*—(A) *In General.* The rule that the signing, sealing, and delivery of a blank which is to be filled as a deed can give no authority to make the paper a deed was never intended to prescribe to the grantor the order of time in which the several parts of a deed should be written. The whole act of execution is finally consummated by delivery, and if the grantor should think proper to reverse the usual order in the manner of executing the instrument, but in the end perfect it by delivery, it is a good deed.[21]

(B) *By Agent Acting under Parol Authority.* The last general statement refers particularly to delivery by the maker. It is not necessary in all cases, however, that the grantor should in person make delivery of the deed,[22] and, upon this principle, a deed executed with blanks and afterward filled and delivered by the agent of the grantor or obligor, is good, according to the weight of the modern authorities.[23]

(IV) *Redelivery or Filling in Presence of Maker*—(A) *Where Parol Authority Not Sufficient*—(1) Filling in Presence of Maker Good Delivery. As already indicated, the mere order of perfecting a deed before actual delivery is not material.[24] Hence, even where parol authority to fill blanks in a deed is not recognized, if after delivery the blanks are filled in the presence and with the consent of the maker, this is taken to be a good delivery to consummate the execution of the perfected deed.[25]

(2) Necessity for Redelivery When Filled out of Presence of Maker.—(a) In General. In this connection a distinction is made between acts done in the presence and by the direction of the principal, and acts done in his absence. The former are regarded as done by the principal himself, but, when the principal is not present at the filling of a material blank, there must be a redelivery or the filling must have been under sealed authority.[26]

Hen. & M. (Va.) 390; Ross *v.* Overton, 3 Call (Va.) 309, 2 Am. Dec. 552. See also Keen *v.* Monroe, 75 Va. 424.

England.— See Hudson *v.* Revett, 5 Bing. 368, 15 E. C. L. 625; Eagleton *v.* Gutteridge, 11 M. & W. 465.

Canada.—Stuart *v.* Prentiss, 20 U. C. Q. B. 513; Keane *v.* Smallbone, 17 C. B. 179, 84 E. C. L. 179.

21. Lockart *v.* Roberts, 3 Bibb (Ky.) 361; Bassett *v.* Bassett, 55 Me. 127; Lockwood *v.* Bassett, 49 Mich. 546, 14 N. W. 492; Duncan *v.* Hodges, 4 McCord (S. C.) 239, 17 Am. Dec. 734.

22. Duncan *v.* Hodges, 4 McCord (S. C.) 239, 17 Am. Dec. 734.

23. *Alabama.*— Gibbs *v.* Frost, 4 Ala. 720, holding that authority to fill is authority to redeliver.

Missouri.— Field *v.* Stagg, 52 Mo. 534, 14 Am. Rep. 435.

Nebraska.—Garland *v.* Wells, 15 Nebr. 298, 18 N. W. 132. See also Reed *v.* Morton, 24 Nebr. 760, 40 N. W. 282, 8 Am. St. Rep. 247, 1 L. R. A. 736.

New York.— Hemmenway *v.* Mulock, 56 How. Pr. (N. Y.) 38; *Ex p.* Kerwin, 8 Cow. (N. Y.) 118. See also Chauncey *v.* Arnold, 24 N. Y. 330.

Oregon.— Cribben *v.* Deal, 21 Oreg. 211, 27 Pac. 1046, 28 Am. St. Rep. 746.

South Carolina.— Bank *v.* Hammond, 1 Rich. (S. C.) 281; Duncan *v.* Hodges, 4 McCord (S. C.) 239, 17 Am. Dec. 734 (following which case it was held, in Lamar *v.* Simpson, 1 Rich. Eq. (S. C.) 71, 42 Am. Dec. 345, that where the legislature authorized the circuit solicitor to convey certain property to A, and the solicitor executed deeds reciting his authority, and containing blanks for the description, which blanks were afterward filled by A as various parcels of the land were sold by him, these conveyances were sufficient). Words which properly should have been inserted in a blank in a conveyance, but which are inserted after the conveyance leaves the grantor's hands, but before delivery to the grantee and while in the hands of the grantor's agent, will not invalidate the deed in equity. Pope *v.* Chafee, 14 Rich. Eq. (S. C.) 69.

Wisconsin.— Schintz *v.* McManamy, 33 Wis. 299; Van Etta *v.* Evenson, 28 Wis. 33, 9 Am. Rep. 486 [*citing* Vliet *v.* Camp, 13 Wis. 198].

England.— Texira *v.* Evans [*cited* in Master *v.* Miller, 1 Anstr. 228].

24. See *supra*, V, C, 9, a, (III), (A).

25. People *v.* Organ, 27 Ill. 27, 79 Am. Dec. 391; Burns *v.* Lynde, 6 Allen (Mass.) 305; Hudson *v.* Revett, 5 Bing. 368, 15 E. C. L. 625. See also Doe *v.* McArthur, 9 N. C. 33, 11 Am. Dec. 738.

26. *Arkansas.*— Cross *v.* State Bank, 5 Ark. 525. *Compare* Lemay *v.* Johnson, 35 Ark. 225.

Georgia.— Ingram *v.* Little, 14 Ga. 173, 58 Am. Dec. 549. But see Brown *v.* Colquitt, 73 Ga. 59, 54 Am. Rep. 867.

Illinois.— Wilson *v.* South Park Com'rs, 70 Ill. 46; Chase *v.* Palmer, 29 Ill. 306; People *v.* Organ, 27 Ill. 27, 79 Am. Dec. 391; Gage *v.* Chicago, 2 Ill. App. 332. But see *infra*, V, C, 9, b.

(b) Instrument Evidence under Statute of Frauds. Notwithstanding this doctrine, however, where the deed is considered as void because the name of the grantee is left blank therein, and therefore cannot operate as a deed, it may still be a good contract for the sale of land and may be specifically enforced between the parties.[27]

(c) Sufficient Adoption of Instrument after Filling. While, as has been indicated, some of the cases which adhere to the strict rule that parol authority to alter a deed is not sufficient require stronger evidence of redelivery than such as merely signifies absence of objection when the alteration is not done in the presence of the maker of the instrument,[28] and the same strictness is applied to filling blanks after delivery,[29] yet if, after a blank is filled, an instrument is presented to the maker, and he ratifies the act or authorizes its delivery, it will be a valid deed.[30]

(B) *Where Parol Authority Sufficient.* On the other hand, and what would seem to be the modern rule, parol authority to fill a deed is regarded as sufficient, and therefore not only may a deed be delivered to an agent by the maker to be filled and delivered, both in the case of specialties and conveyances of land,[31] but, in the former, parol authority is sufficient to fill after delivery,[32] upon the princi-

Kansas.— See Ayres *v.* Probasco, 14 Kan. 175.

Massachusetts.— Basford *v.* Pearson, 9 Allen (Mass.) 387, 85 Am. Dec. 764; Burns *v.* Lynde, 6 Allen (Mass.) 305.

Mississippi.—Williams *v.* Crutcher, 5 How. (Miss.) 71, 35 Am. Dec. 422; Dickson *v.* Hamer, Freem. (Miss.) 284.

New York.— Chauncey *v.* Arnold, 24 N. Y. 330, holding that a paper intended to operate as a mortgage could not be delivered and put in circulation with blanks to be filled, limiting the doctrine permitting such a practice to mercantile paper.

North Carolina.— Barden *v.* Southerland, 70 N. C. 528; Bland *v.* O'Hagan, 64 N. C. 471; Blacknall *v.* Parish, 59 N. C. 70, 78 Am. Dec. 239; Graham *v.* Holt, 25 N. C. 300, 40 Am. Dec. 408; Davenport *v.* Sleight, 19 N. C. 381, 31 Am. Dec. 420; McKee *v.* Hicks, 13 N. C. 379.

Ohio.— Famulener *v.* Anderson, 15 Ohio St. 473; State *v.* Boring, 15 Ohio St. 507 (involving the insertion of the penalty in an official bond); Ayres *v.* Harness, 1 Ohio 368, 13 Am. Dec. 629. But in St. Clairsville Bank *v.* Smith, 5 Ohio 222, it was held that mere money bonds, executed with blanks filled before negotiation and received in good faith, are to be treated as commercial or business paper, and on delivery in blank to a party he has authority to fill it. See also Spencer *v.* Buchanan, Wright (Ohio) 583.

Tennessee.— Mosby *v.* Arkansas, 4 Sneed (Tenn.) 324; Gilbert *v.* Anthony, 1 Yerg. (Tenn.) 69, 24 Am. Dec. 439.

Texas.— Viser *v.* Rice, 33 Tex. 139; McCown *v.* Wheeler, 20 Tex. 372.

Virginia.— Penn *v.* Hamlett, 27 Gratt. (Va.) 337; Harrison *v.* Tiernans, 4 Rand. (Va.) 177.

Washington.—Walla Walla County *v.* Ping, 1 Wash. Terr. 339.

England.— Hibblewhite *v.* McMorine, 6 M. & W. 200. See also Enthoven *v.* Hoyle, 9 Eng. L. & Eq. 434.

27. Blacknall *v.* Parish, 59 N. C. 70, 78 Am. Dec. 239; Viser *v.* Rice, 33 Tex. 139; McCown *v.* Wheeler, 20 Tex. 372.

28. See *supra*, V, B, 2.

29. Verbal assent to the grantee by the grantor, upon being informed of what had been done after delivery, and an agreement by the grantor that the instrument should be taken to be her deed, will not make the instrument valid. Burns *v.* Lynde, 6 Allen (Mass.) 305.

30. Tucker *v.* Allen, 16 Kan. 312 (holding that while a deed executed in blank as to the name of the grantee, with the understanding that it should be filled and delivered to some person as grantee, may be assumed to be void when afterward so filled and delivered, yet, as a deed may be good by constructive delivery, any word or act showing an intention on the part of the grantor after such filling will be considered as completely executing the deed); Byers *v.* McClanahan, 6 Gill & J. (Md.) 250; Wester *v.* Bailey, 118 N. C. 193, 24 S. E. 9 (holding that, if the maker of a note under seal acknowledges the note as his after the filling of blanks, he will be liable); Bland *v.* O'Hagan, 64 N. C. 471 [*citing* Davenport *v.* Sleight, 19 N. C. 381, 31 Am. Dec. 420]; Blackwell *v.* Lane, 20 N. C. 205, 32 Am. Dec. 675.

31. See *supra*, V, C, 9, a, (III), (B).

32. In Drury *v.* Foster, 2 Wall. (U. S.) 24, 17 L. ed. 780, the rule was recognized that a deed of conveyance might be executed with a material blank to be filled by the agent of the grantor before delivery, as a blank for the name of the grantee. This case has been relied upon as authority for the rule that a deed thus left blank and delivered to the grantee will be good under parol authority to fill the blank. In Allen *v.* Withrow, 110 U. S. 119, 3 S. Ct. 517, 28 L. ed. 90, it was held that in order to make a deed operate as a conveyance when the name of the payee is left blank, two conditions are essential: (1), the blank must be filled by

ple sometimes announced that after a deed has been executed it may be altered in a material part with the consent of the parties without affecting its validity.[33]

(c) *Actual or Implied Authority.* From the cases last cited it would seem that the authority to fill a blank in a bond may be express, or implied from facts which fairly justify the inference, and this has been expressly held in some of them.[34] And under the doctrine that an agent of the maker may, by parol authority, fill blanks before delivery, such authority to fill a blank with the name of the mortgagee or grantee in a deed will be implied from the fact of the execution of the deed.[35] On the other hand, it is held that in such cases the consent of the obligor must be established, and that if an agent transcends his authority in filling a blank in a bond the instrument will be avoided;[36] and that to per-

the party authorized to fill it, and (2), this must be done before or at the time of the delivery of the deed to the grantee named. In the case of bonds it was held, in U. S. *v.* Nelson, 2 Brock. (U. S.) 64, 27 Fed. Cas. No. 15,862, that a blank bond signed and delivered was void as to sureties after the blanks had been filled, Marshall, C. J., hesitating, however, to reach this conclusion. The reason for this, under the English authorities, was that the authority of an agent to make the deed must be by deed, and also that to admit parol authority to fill the blank would in effect make a bond transferable or negotiable like a bill of exchange or exchequer bill. Hibblewhite *v.* McMorine, 6 M. & W. 200. See also Enthoven *v.* Hoyle, 9 Eng. L. & Eq. 434. But the law as otherwise held by Lord Mansfield in Texira *v.* Evans [*cited* in Master *v.* Miller, 1 Anstr. 228] has been followed by courts of the highest authority in this country, which met the fear expressed by Park, B., that the effect of parol authority would be to make bonds negotiable, by admitting the consequence. White *v.* Vermont, etc., R. Co., 21 How. (U. S.) 575, 16 L. ed. 221. The following cases support this view:

Alabama.— Boardman *v.* Gore, 1 Stew. (Ala.) 517, 18 Am. Dec. 73.

Connecticut.— Bridgeport Bank *v.* New York, etc., R. Co., 30 Conn. 231.

Georgia.— Dedge *v.* Branch, 94 Ga. 37, 20 S. E. 657; Brown *v.* Colquitt, 73 Ga. 59, 54 Am. Rep. 867.

Maine.— South Berwick *v.* Huntress, 53 Me. 89, 87 Am. Dec. 535.

Massachusetts.— Smith *v.* Crooker, 5 Mass. 538. This case was afterward distinguished in Burns *v.* Lynde, 6 Allen (Mass.) 305, in that the blank was immaterial, the latter case being a deed of conveyance, and the court holding strictly to the view that if the blanks render the instrument invalid they cannot be filled after delivery in the absence of the grantor. But it was also held in this state that when a bond is intrusted to a principal for his use it is good when filled, if the obligee had no notice. White *v.* Duggan, 140 Mass. 18, 2 N. E. 110, 54 Am. Rep. 437.

Minnesota.— State *v.* Young, 23 Minn. 551.

Missouri.— State *v.* Dean, 40 Mo. 464; Greene County *v.* Wilhite, 29 Mo. App. 459.

New Jersey.— Camden Bank *v.* Hall, 14 N. J. L. 583.

New York.— Forster *v.* Moore, 79 Hun (N. Y.) 472, 29 N. Y. Suppl. 1032, 61 N. Y. St. 628. See also Commercial Bank *v.* Kortright, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317; Woolley *v.* Constant, 4 Johns. (N. Y.) 54, 4 Am. Dec. 246.

Pennsylvania.— Bugger *v.* Cresswell, (Pa. 1888) 12 Atl. 829; Costen's Appeal, 13 Pa. St. 292 [*citing* Stahl *v.* Berger, 10 Serg. & R. (Pa.) 170, 13 Am. Dec. 666; Sigfried *v.* Levan, 6 Serg. & R. (Pa.) 308, 9 Am. Dec. 427]; Wiley *v.* Moor, 17 Serg. & R. (Pa.) 438, 17 Am. Dec. 696.

Wisconsin.— Vliet *v.* Camp, 13 Wis. 198. See also *infra*, V, C, 9, b.

33. Woolley *v.* Constant, 4 Johns. (N. Y.) 54, 4 Am. Dec. 246 [*citing* Markham *v.* Gonaston, Moore P. C. 547, and Zouch *v.* Claye, 2 Lev. 35, the first of which seems like Eagleton *v.* Gutteridge, 11 M. & W. 465]. See also Camden Bank *v.* Hall, 14 N. J. L. 583.

34. *Georgia.*— Dedge *v.* Branch, 94 Ga. 37, 20 S. E. 657, holding that where a tax-collector's bond was delivered in blank the plain inference as to the penalty was that the ordinary was expected to fill the blank, he being authorized to fix the penalty of such bonds.

Maine.— South Berwick *v.* Huntress, 53 Me. 89, 87 Am. Dec. 535.

Minnesota.—State *v.* Young, 23 Minn. 551, upon the broad principle that there is no distinction between sealed and unsealed instruments.

Missouri.— Greene County *v.* Wilhite, 29 Mo. App. 459.

Pennsylvania.— Bugger *v.* Cresswell, (Pa. 1888) 12 Atl. 829.

Wisconsin.— Vliet *v.* Camp, 13 Wis. 198.

35. Garland *v.* Wells, 15 Nebr. 298, 18 N. W. 132; Van Etta *v.* Evenson, 28 Wis. 33, 9 Am. Rep. 486. See *infra*, V, C, 9, b.

36. Richmond Mfg. Co. *v.* Davis, 7 Blackf. (Ind.) 412 [*distinguishing* St. Clairsville Bank *v.* Smith, 5 Ohio 222, as turning upon the construction of a statute relative to the negotiability of sealed bills]. See also White *v.* Duggan, 140 Mass. 18, 2 N. E. 110, 54 Am. Rep. 437. And in Clendaniel *v.* Hastings, 5 Harr. (Del.) 408, it was held that the execution of a bond in blank does not import authority to the holder to fill it and deliver it at pleasure.

Revocation of authority.— See Gibbs *v.* Frost, 4 Ala. 720 (holding that parol authority to fill blanks in a bond may be revoked

fect a conveyance of land there must be actual authority.[37] Authority to fill a blank with the name of a particular grantee is no authority to insert the name of another and different grantee,[38] and the fraudulent filling of such a blank passes no title.[39]

(D) *Formalities in Conveyance of Land.* Notwithstanding the doctrine may be recognized that parol authority to fill a blank in a deed is sufficient, a distinction is made in the case of instruments which purport to convey land,[40] by reason of the statute of frauds or requirements appertaining to the formal execution of such instrument.[41]

in the same manner, and if revoked before the bond is perfected the authority to perfect it is at an end). But where a deed of conveyance may be delivered in blank to the grantee, and his name may be filled in by him after delivery, it is held that the power, being coupled with an interest, is irrevocable. Threadgill *v.* Butler, 60 Tex. 599.

37. Allen *v.* Withrow, 110 U. S. 119, 3 S. Ct. 517, 28 L. ed. 90. See also Lindsley *v.* Lamb, 34 Mich. 509, holding that a deed executed in a foreign state, without the name of the grantee and containing other blanks, and sent into Michigan in that condition, and afterward filled by some one not shown to have had authority, in writing or otherwise, is void in the hands of one having notice of these facts.

38. Schintz *v.* McManamy, 33 Wis. 299. See also Trumby *v.* Erkenbrack, 8 Alb. L. J. 10, wherein the husband of a mortgagor purposely caused the mortgage to be executed with the space for the name of the mortgagee left blank, and afterward filled in the name of his own father.

39. Cooper *v.* Page, 62 Me. 192, wherein a deed was executed except as to the name of the grantee, and sent by the grantor to his mother with authority to fill in the blank when the occasion for use of the deed demanded it. The blank was afterward filled by another person than the mother, and without any authority from her or the grantor, and in the presence of the person whose name was inserted as grantee. To the same effect, Van Amringe *v.* Morton, 4 Whart. (Pa.) 382, 34 Am. Dec. 517, holding that a *bona fide* purchaser from the person holding such a deed stands in no better situation than the fraudulent holder, especially if the original grantor remains in possession.

40. See, for example, White *v.* Vermont, etc., R. Co., 21 How. (U. S.) 575, 16 L. ed. 221, holding that a blank for the name of the payee in a negotiable bond may be filled in after delivery, and Allen *v.* Withrow, 110 U. S. 119, 3 S. Ct. 517, 28 L. ed. 90, holding that, while parol authority to alter or add to a sealed instrument is sufficient, there are two essential conditions to make a deed executed in blank operate as a conveyance. The blank must be filled by the party authorized to fill it, and this must be done before or at the time of the delivery of the deed to the grantee. See also *supra*, V, B, 2. The rule is recognized, however, that such a deed may be executed with material blanks to be filled by an agent of the grantor before delivery, pursuant to a parol authority. Drury *v.* Foster, 2 Wall. (U. S.) 24, 17 L. ed. 780.

41. Drury *v.* Foster, 2 Wall. (U. S.) 24, 17 L. ed. 780, in relation to a provision under which a married woman is required by statute to acknowledge a deed separately and apart from her husband, and is not capable of making a power of attorney, holding that there can be no acknowledgment of the deed until the blanks are filled and the instrument is complete. So it is held in California that a delivery of a bond as security for the charter of a steamboat, with blanks for the date, name of steamer, and name of payee, authorized the filling of the blanks. Dalbeer *v.* Livingston, 100 Cal. 617, 35 Pac. 328. The court distinguished two other cases in this state, Upton *v.* Archer, 41 Cal. 85, 10 Am. Rep. 266 (which held that where an agent, with whom is left a deed with blanks for the names of the purchasers, fills in the names of other purchasers, the grantor may refuse to recognize the sale, and that, under the statute of frauds, the agent had no power to fill the blanks without authority in writing), and De Arguello *v.* Bours, 67 Cal. 447, 8 Pac. 49 (holding that a deed with the name of the grantee left blank, which name was afterward inserted without the grantor's authority, conveys no title, and that the abolition of all distinctions between sealed and unsealed instruments was not material to the question). See also Wunderlin *v.* Cadogan, 50 Cal. 613. So, also, in Iowa it was held that, notwithstanding sealing was dispensed with by statute as one of the requisites of a conveyance of land, the other essential common-law requisites were not abrogated, and regularly a deed should still, as before, be perfect before delivery, though it was said that Texira *v.* Evans [*cited* in Master *v.* Miller, 1 Anstr. 228] would undoubtedly be sound law in a like case or a case not involving the conveyance of land. Simms *v.* Hervey, 19 Iowa 273. As far as concerns the conclusions reached in this case it would seem to be of doubtful authority. It has been distinguished in several respects. Swartz *v.* Ballou, 47 Iowa 188, 29 Am. Rep. 470 (see *infra*, note 42) refers to this case as resting largely, if not entirely, on the common-law doctrine in relation to instruments under seal. See also Devin *v.* Himer, 29 Iowa 297, *infra*, note 43.

Alienation of homestead.— Under the constitutional provision that an alienation of a homestead could not be effected except by the joint consent of the husband and wife, where

(E) *Where Seals Are Abolished.* In some cases the sufficiency of parol authority to fill in blanks in deeds in accordance with the intention of the parties is good because of the abolition of seals or of the distinction between sealed and unsealed instruments,[42] and this authority is carried even to the extent of permitting the grantee to insert his own name after delivery.[43]

b. Estoppel. Where one delivers a deed, fully executed, with parol authority to fill blanks therein, he is estopped from denying the validity of the deed, after the blanks are filled, as against a subsequent purchaser for value without notice of the manner of the original execution of the deed.[44] So, even if blanks are filled in a deed after delivery, yet if the grantor or obligor claims the benefit of the contract growing out of it he thereby makes the deed as completed his own and

a mortgage was executed in blank by a husband and wife, with the understanding that the blanks should be filled so as to cover the land owned by the wife, in order to secure one thousand dollars, and the mortgage was filled in the presence and with the consent of the husband so as to secure a larger sum, it was held that the mortgage was void as to both the husband and the wife. Ayres *v.* Probasco, 14 Kan. 175.

42. Swartz *v.* Ballou, 47 Iowa 188, 29 Am. Rep. 470; Owen *v.* Perry, 25 Iowa 412, 96 Am. Dec. 49; Threadgill *v.* Butler, 60 Tex. 599. See also Lockwood *v.* Bassett, 49 Mich. 546, 14 N. W. 492.

In Louisiana the addition of a seal only confirmed the signature and added nothing to the obligatory force of the instrument, and therefore it was held that an instrument under seal may be executed in blank. Bell *v.* Keefe, 13 La. Ann. 524. See also Breedlove *v.* Johnston, 2 Mart. N. S. (La.) 517.

So, in Minnesota, the holding that where sureties sign a bond, intending thereby to bind themselves, and deliver the same with the amount of the bond left blank, this is an implied authority to fill the blank, is upon the theory that at the present day the distinction between sealed and unsealed instruments is arbitrary, meaningless, and unsustained by reason. State *v.* Young, 23 Minn. 551.

43. McCleery *v.* Wakefield, 76 Iowa 529, 41 N. W. 210, 2 L. R. A. 529; McClain *v.* McClain, 52 Iowa 272, 3 N. W. 60; Devin *v.* Himer, 29 Iowa 297 (where the deed was delivered to the grantee with a blank expressly intended to be filled with the name of the grantee, in which the case was distinguished from Simms *v.* Hervey, 19 Iowa 273, in that it was indicated in the latter case that no specific grantee was intended and there was no express authority from the owner to fill the blank and deliver the instrument, and no subsequent adoption of what had been done); Threadgill *v.* Butler, 60 Tex. 599. See also Clark *v.* Allen, 34 Iowa 190.

44. McCleery *v.* Wakefield, 76 Iowa 529, 41 N. W. 210, 2 L. R. A. 529 (wherein the deed was executed and delivered to the vendee, and by agreement the name of the grantee was left blank in order that the vendee might insert the name of the person to whom he might sell. The vendee afterward inserted the name of another and delivered the deed to him as security for a debt, and, upon paying the debt, took the deed back from such person, erased his name, and inserted the name of another person, to whom the deed was finally delivered. It was held that the title of this last person was good as against the maker of the deed in a suit to set aside the deed on account of the failure on the part of the vendee to perform his contract. The court cited Swartz *v.* Ballou, 47 Iowa 188, 29 Am. Rep. 470; Clark *v.* Allen, 34 Iowa 190; Owen *v.* Perry, 25 Iowa 412, 96 Am. Dec. 49, in each of which cases defendant was a subsequent grantee claiming under the one whose name was inserted in the deed after it passed from the hands of the grantor, and he was protected on the ground that he was an innocent purchaser from one who was apparently clothed with title as a consequence of the grantor's act; but in a case like the present one, where there is an express authority to insert the name of a subsequent purchaser and deliver the instrument to him, the equities in favor of such purchaser without notice are equally strong); Pence *v.* Arbuckle, 22 Minn. 417; Garland *v.* Wells, 15 Nebr. 298, 18 N. W. 132 (holding that a deed may be executed with a blank for the name of the grantee, the blank to be filled by the agent of the grantor pursuant to parol authority; and in such a case, even if the agent so violates his authority that as between the grantor and the person whose name is filled in the blank as grantee the deed would be voidable, a good title would pass to an innocent purchaser from such grantee); Ragsdale *v.* Robinson, 48 Tex. 379. See also Putnam *v.* Clark, 29 N. J. Eq. 412.

Fraud by husband.— Where a husband and wife join in a blank form of a deed designed to be thereafter filled so as to convey a certain piece of ground as a site for a schoolhouse, and afterward the husband, without the knowledge or consent of his wife, fills such blank deed so as to make the same a mortgage on a large tract of land in order to secure a person for a loan, such person receiving the deed in good faith, without knowledge of any defect, the husband and all subsequent judgment creditors and lienors under him are estopped from denying the validity of the mortgage, but the wife not being a party to the intended fraud, and not having joined with her husband in the execution of the instrument for the conveyance or encumbrance of her right of dower in the premises

precludes himself from objecting to its validity.[45] And, where a deed is executed in blank and delivered to an agent to be filled and finally delivered, it will be good in favor of a grantee or obligee having no knowledge of the manner of execution.[46]

VI. RATIFICATION.[47]

A. In General. Subsequent assent to a material change of a written instrument is a waiver of the right to rely upon the alteration as a defense to an action brought upon the instrument.[48] But a ratification by one of several who are parties to the instrument as originally written binds him only, and not those who do not assent.[49]

B. New Consideration. In several instances it has been held that where one is discharged by an alteration his liability cannot be revived except upon a new consideration, as in the case of a surety.[50] But the better rule seems to be that

ostensibly mortgaged, her inchoate right of dower is unaffected. Conover *v.* Porter, 14 Ohio St. 450. *Compare* Quinn *v.* Brown, 71 Iowa 376, 34 N. W. 13.

45. Devin *v.* Himer, 29 Iowa 297; Lockwood *v.* Bassett, 49 Mich. 546, 14 N. W. 492; Reed *v.* Morton, 24 Nebr. 760, 40 N. W. 282, 8 Am. St. Rep. 247, 1 L. R. A. 736 (holding that where a wife executed a deed in blank as to the name of the grantee and in other respects, and delivered it to her husband for the purpose of selling the land described, and the husband afterward sold the land, filled the blanks, and delivered the deed to the grantee, the wife will be deemed to have ratified the acts of the husband by using the consideration received); Duncan *v.* Hodges, 4 McCord (S. C.) 239, 17 Am. Dec. 734.

46. Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182; Donnell Mfg. Co. *v.* Jones, 49 Ill. App. 327; Phelps *v.* Sullivan, 140 Mass. 36, 2 N. E. 121, 54 Am. Rep. 442. See also Wright *v.* Harris, 31 Iowa 272.

47. See 2 Cent. Dig. tit. "Alteration of Instruments," § 93 *et seq.*

48. *Delaware.*— Hollis *v.* Vandergrift, 5 Houst. (Del.) 521.

Indiana.— Feeney *v.* Mazelin, 87 Ind. 226.

Michigan.— Stewart *v.* Port Huron First Nat. Bank, 40 Mich. 348.

Minnesota.— Janney *v.* Goehringer, 52 Minn. 428, 54 N. W. 481.

Missouri.— Workman *v.* Campbell, 57 Mo. 53; King *v.* Hunt, 13 Mo. 97.

New Hampshire.— Humphreys *v.* Guillow, 13 N. H. 385, 38 Am. Dec. 499.

Pennsylvania.— Wilson *v.* Jamieson, 7 Pa. St. 126.

South Carolina.— Jacobs *v.* Gilreath, 45 S. C. 46, 22 S. E. 757.

Tennessee.— The acceptor, in writing his name under the word "accept" on the face of the bill, by a stroke or flourish of his pen ran over and nearly obliterated the right-hand lower part of the figure "6," the date of the bill, so as to make it look like the figure "1" except upon very close inspection. The action was by the bank which discounted the bill, being an innocent purchaser, against the drawers, the bank having discounted the bill as of the apparently changed date, and the principle was applied that where the acceptor alters the date before he accepts, and this is concurred in by the other parties, it is a ratification which will bind them. Ratcliff *v.* Planters' Bank, 2 Sneed (Tenn.) 424.

Wisconsin.— North *v.* Henneberry, 44 Wis. 306; Kilkelly *v.* Martin, 34 Wis. 525.

United States.— Washington Bank *v.* Way, 2 Cranch C. C. (U. S.) 249, 2 Fed. Cas. No. 957.

England.— Tarleton *v.* Shingler, 7 C. B. 812, 62 E. C. L. 812 (assent by acceptor after alteration by treating the bill as one of the time as altered); Paton *v.* Winter, 1 Taunt. 420 (which appears to be distinguishable from Campbell *v.* Christie, 2 Stark 64, 3 E. C. L. 318, holding otherwise by reason of the stamp act).

Canada.— Fitch *v.* Kelly, 44 U. C. Q. B. 578.

See *supra*, V, B, 2, and V, C, 9.

49. Inglish *v.* Breneman, 9 Ark. 122, 47 Am. Dec. 735 (surety not bound by ratification of maker of note); Davis *v.* Bauer, 41 Ohio St. 257 (holding that where one of several parties to a promissory note, given for the accommodation of the payee, voluntarily pays the same after knowledge of an alteration, he cannot recover on it against another maker who has not consented to or ratified the alteration); Matlock *v.* Wheeler, 29 Oreg. 64, 40 Pac. 5, 43 Pac. 867.

Ratification by executor.— Where a testator authorized his executors to sell his real estate to pay debts, and a contract was entered into between the executors and defendant for the sale of the same, which contract contained interlineations made by one executor in the absence of the other, and afterward one executor died, and the other became sole executor, and ratified the agreement as entered into, in an action of ejectment by the heirs to recover the land it was held that the contract was binding. Shippen *v.* Clapp, 29 Pa. St. 265.

50. Mulkey *v.* Long, (Ida. 1897) 47 Pac. 949; Warren *v.* Fant, 79 Ky. 1 (upon the principle, stated in Blakey *v.* Johnson, 13 Bush (Ky.) 197, 26 Am. Rep. 254, that where a surety is released he is no more bound than if he had never signed the obligation, and that one who has never signed and whose name had been forged could not be bound by a subsequent ratification without considera-

any one of the parties to an instrument who may have become discharged because of an alteration therein may ratify the unauthorized act so as to make himself liable without any new consideration,[51] upon the principle that he who may authorize in the beginning may ratify in the end.[52]

C. Sufficiency of Ratification — 1. Acquiescence. Mere acquiescence, without objecting until the enforcement of the instrument is sought, is held to be a sufficient ratification in favor of one who had no knowledge of the alteration,[53] and, where the character of the obligation is changed before it is signed, and without the knowledge of the party signing it, acquiescence after subsequently acquired knowledge will be deemed a ratification of the contract as changed.[54] It is different, however, as against an indorser where the holder takes the instrument with knowledge that it was changed without authority.[55] So acquiescence is taken as a ratification when, after knowledge of the change, the party causes or permits action to be taken with reference to the instrument which necessarily imports a recognition by him of the validity of the instrument, or which should estop him from denying such liability.[56] Where one has received property under a contract

tion); Wilson *v.* Hayes, 40 Minn. 531, 42 N. W. 467, 12 Am. St. Rep. 754, 4 L. R. A. 196.

51. *Alabama.*— Payne *v.* Long, 121 Ala. 385, 25 So. 780; Montgomery *v.* Crossthwait, 90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140.

Illinois.— Goodspeed *v.* Cutler, 75 Ill. 534; Gardiner *v.* Harbeck, 21 Ill. 129; Scott *v.* Bibo, 48 Ill. App. 657.

Iowa.— Pelton *v.* Prescott, 13 Iowa 567.

Massachusetts.— Prouty *v.* Wilson, 123 Mass. 297.

Michigan.— Stewart *v.* Port Huron First Nat. Bank, 40 Mich. 348.

North Carolina.— Wester *v.* Bailey, 118 N. C. 193, 24 S. E. 9.

Cases distinguished.—In Westloh *v.* Brown, 43 U. C. Q. B. 402, it is held that where a note, after execution, is altered by the maker, without the consent of an indorser who subsequently comes to pay it without knowledge of the alteration, the note is void and a subsequent promise did not have the effect of ratifying it, the court in one sentence apparently going upon the principle that the note so altered is altogether incapable of being ratified, upon the authority of Brook *v.* Hook, L. R. 6 Exch. 89, though, in the next paragraph, the court further said that in order to ratify such a note actual knowledge of the alteration is necessary, upon the authority of Bell *v.* Gardiner, 4 M. & G. 11, 43 E. C. L. 16. Brook *v.* Hook, L. R. 6 Exch. 89, was a case in which defendant's name was forged, and thereafter, while the note was current, he signed a memorandum holding himself responsible in order to prevent the prosecution for the forgery, and it was held that such memorandum could not be construed as a ratification, inasmuch as the act it professed to ratify was illegal and void, and that as an agreement to treat the note as the defendant's own act it was void, because founded upon an illegal consideration. The principle of this case is the foundation of the cases cited *supra*, note 50. See also Shisler *v.* Vandike, 92 Pa. St. 447, 37 Am. St. Rep. 702; and Forgery.

52. Montgomery *v.* Crossthwait, 90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140, adopting the language and conclusions in Trenton First Nat. Bank *v.* Gay, 63 Mo. 33, 39, 21 Am. Rep. 430, wherein it is said that "No independent consideration is required in the case of an accommodation indorser, surety, etc., in the first instance, and it is difficult to see why anything more should be required on subsequent sanction than on original assent."

53. Yocum *v.* Smith, 63 Ill. 321, 14 Am. Rep. 120; Pulliam *v.* Withers, 8 Dana (Ky.) 98, 33 Am. Dec. 479 (wherein it is held that where there is no change in the body of an instrument, and no interlineation or erasure, very slight evidence of the original promisor's assent will be sufficient); Stewart *v.* Port Huron First Nat. Bank, 40 Mich. 348; Renville County *v.* Gray, 61 Minn. 242, 63 N. W. 635.

54. Linington *v.* Strong, 107 Ill. 295; Tilt *v.* La Salle Silk Mfg. Co., 5 Daly (N. Y.) 19, where the contract was retained without objection after the change, and goods, delivered in accordance with the change inserted in the contract, were received by defendant.

55. Conklin *v.* Wilson, 5 Ind. 209, holding that under such circumstances an attempt to procure indemnity did not deprive the indorser of his legal defense, and that he was under no obligation to object before suit as between these particular parties.

56. Grimsted *v.* Briggs, 4 Iowa 559 (where it appeared, in an action by an indorsee against the maker and indorser of a note, that the instrument had been altered, and that after knowledge of the alteration the maker recommended plaintiff to buy it); Sanders *v.* Bagwell, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770; Janes *v.* Ferd Heim Brewing Co., (Tex. Civ. App. 1897) 44 S. W. 896; Davis, etc., Bldg., etc., Co. *v.* Dix, 64 Fed. 406; Davis *v.* Shafer, 50 Fed. 764. But where the sureties on an official bond first learned of an alteration after the default of the principal, and then for a few days procured control of certain money to the credit of their principal, but, upon taking legal advice, became satisfied that

at the time his attention is called to an alteration, he must rescind the contract and return the property within a reasonable time, or be held to have ratified the alteration.[57]

2. NEW PROMISE. Where one, after full knowledge of an alteration, unconditionally promises to pay, this is a sufficient ratification.[58]

3. WAIVER OF PROTEST AND NOTICE. If, after knowledge of an alteration, an indorser waives protest and notice this will be considered a sufficient ratification.[59]

4. OBTAINING EXTENSION OF TIME. Where a party with knowledge of an alteration obtains an extension of the time of payment, this will be considered a ratification.[60]

5. GIVING OTHER SECURITY. Where an indorser, with full knowledge of an alteration, executes other security for the payment of the debt evidenced by the note, he will be taken to have assented to the change.[61]

6. PAYMENT. By making payment of principal or interest with knowledge of an alteration a party is held to ratify and adopt the instrument as altered;[62] but the mere payment of a prior note containing similar alterations will not constitute a ratification of alterations in the particular notes in controversy.[63]

7. BRINGING SUIT ON ALTERED INSTRUMENT. Ordinarily a plaintiff cannot avoid the effect of an alteration of which he is chargeable with knowledge after he has brought suit upon the instrument in its altered form, since by suing upon the altered instrument he is deemed to have ratified the alteration;[64] but if the

they were not bound by the bond, whereupon they relinquished all claim to the money and denied their liability, it was held that they could not be taken to have ratified the alteration. Fairhaven *v.* Cowgill, 8 Wash. 686, 36 Pac. 1093.

Permitting discharge of maker by indorser. — Where the indorser of a note agreed with the maker and holder that the former should be discharged from all liability on payment of a certain sum, without affecting the indorser's liability, it was held that he would be estopped to insist on his own discharge by reason of an alteration, made after indorsement, where the above agreement contained a copy of the note with the alleged alteration. Conable *v.* Keeney, 61 Hun (N. Y.) 624, 16 N. Y. Suppl. 719, 40 N. Y. St. 939.

Trial of appeal.— A subsequent trial of an appeal at the instance of a part of the obligors on an appeal bond will be taken as a ratification of an alteration of the bond. Oswego *v.* Kellogg, 99 Ill. 590.

57. Rescission.— See VII, D, 4, *g*.

58. Promise by maker.—Goodspeed *v.* Cutler, 75 Ill. 534; Scott *v.* Bibo, 48 Ill. App. 657; Emerson *v.* Opp, 9 Ind. App. 581, 34 N. E. 840, 37 N. E. 24; Browning *v.* Gosnell, 94 Iowa 448, 59 N. W. 340.

Promise by indorser.—National State Bank *v.* Rising, 4 Hun (N. Y.) 793; Marks *v.* Schram, (Wis. 1901) 84 N. W. 830.

Promise by signer of subscription contract. — Landwerlen *v.* Wheeler, 106 Ind. 523, 5 N. E. 888.

59. Montgomery *v.* Crossthwait, 90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140.

60. Bell *v.* Mahin, 69 Iowa 408, 29 N. W. 331. Where the obligors in a bond, with full knowledge of an alteration, offer to pay a part of the bond and ask for an extension of time in which to pay the balance, such offer and request will constitute a sufficient ratification or an assent to the alteration. Dickson *v.* Bamberger, 107 Ala. 293, 18 So. 290.

61. Fanning *v.* Farmers, etc., Bank, 8 Sm. & M. (Miss.) 139 (execution of trust deed to holder of note to secure its payment, by indorser after full knowledge of the alteration); Wright *v.* Buck, 62 N. H. 656 (executing a new note); Bradford Nat. Bank *v.* Taylor, 75 Hun (N. Y.) 297, 27 N. Y. Suppl. 96, 56 N. Y. St. 754 (execution of renewal note by indorser); Ohio Valley Bank *v.* Lockwood, 13 W. Va. 392, 31 Am. Rep. 768.

Conditional offer of renewal.— But an offer by the maker to renew a note on conditions which the payee would not accept was held not to be a waiver of an alteration. McDaniel *v.* Whitsett, 96 Tenn. 10, 33 S. W. 567.

62. *Alabama.*— Payne *v.* Long, 121 Ala. 385, 25 So. 780.

Illinois.—Richardson *v.* Mather, 77 Ill. App. 626 [*affirmed* in 178 Ill. 449, 53 N. E. 321].

Massachusetts.— Prouty *v.* Wilson, 123 Mass. 297.

Michigan.— Johnson *v.* Johnson, 66 Mich. 525, 33 N. W. 413.

Missouri.— Evans *v.* Foreman, 60 Mo. 449.

South Carolina.— And where, after making a payment within the statutory period, the maker of a note acquiesces in its alteration, the new promise implied from such payment will be regarded as a promise to pay the note as altered. Jacobs *v.* Gilreath, 45 S. C. 46, 22 S. E. 757.

63. McDaniel *v.* Whitsett, 96 Tenn. 10, 33 S. W. 567.

64. *Maine.*— Dover *v.* Robinson, 64 Me. 183.

Missouri.— Kelly *v.* Thuey, 143 Mo. 422, 45 S. W. 300; Springfield First Nat. Bank *v.* Fricke, 75 Mo. 178, 42 Am. Rep. 397; Bremen Bank *v.* Umrath, 42 Mo. App. 525.

suit is brought without knowledge of the alteration this will not amount to a ratification.[65]

8. NECESSITY FOR FULL KNOWLEDGE OF FACTS. In order that the foregoing or any acts may be construed as a ratification of an alteration, the particular act must be done with full knowledge of the alteration,[66] and if a payment is not made upon the instrument under these conditions it cannot be considered as evidencing a ratification;[67] so, if an indorser makes a payment in ignorance of an alteration he may recover back the money so paid in an action for money had and received.[68] The party must have knowledge in fact, and it is no answer to say that he had means of knowledge.[69]

VII. NATURE AND EFFECT OF MATERIAL AND IMMATERIAL CHANGES.

A. Early Doctrine Applied to Deeds. The rules with regard to the alteration of instruments were first applied to deeds, because anciently most transactions which were reduced to writing were evidenced by instruments under seal,[70] and by the law as it originally stood any change in a deed after execution, even in an immaterial point, if made by the obligee himself, or in a material point if made by a stranger, avoided it.[71] A change by a stranger in an immaterial part of the deed, however, was never considered as vitiating.[72]

B. Doctrine Extended to Other Instruments. Afterward, the law with regard to alterations was considered in connection with changes in written contracts generally, especially commercial paper,[73] and, leaving out of view the par-

Nebraska.— Perkins Windmill, etc., Co. *v.* Tillman, 55 Nebr. 652, 75 N. W. 1098.

Pennsylvania.— Fulmer *v.* Seitz, 68 Pa. St. 237, 8 Am. Rep. 172.

South Dakota.— Wyckoff *v.* Johnson, 2 S. D. 91, 48 N. W. 837, holding that where plaintiff insisted that the act was the unauthorized act of an agent the defendant might show by the books of plaintiff that the note had been carried on the books as a discount for the amount to which it had been so altered, such evidence tending to show an adoption or ratification by plaintiff of the alteration.

Texas.— Bowser *v.* Cole, 74 Tex. 222, 11 S. W. 1131.

65. Orlando *v.* Gooding, 34 Fla. 244, 15 So. 770; Bigelow *v.* Stilphen, 35 Vt. 521.

66. *Arkansas.*— State *v.* Churchill, 48 Ark. 426, 3 S. W. 352, 880, wherein the governor of the state approved a bond upon which he was a surety and actually observed the erasure therein, but, his mind being engrossed with other matters at the time, it escaped a closer scrutiny, and it was held that his official approval was not a ratification of an erasure made without his consent, being without full knowledge of the facts.

Indiana.— Koons *v.* Davis, 84 Ind. 387; Bucklen *v.* Huff, 53 Ind. 474.

Iowa.— Cutler *v.* Rose, 35 Iowa 456.

Michigan.— Pearson *v.* Hardin, 95 Mich. 360, 54 N. W. 904.

Missouri.— State *v.* Chick, 146 Mo. 645, 48 S. W. 829 (where the only knowledge imputable to the obligors on a bond was that to be derived from reading in a newspaper that the bond was for a smaller amount than that which they had executed); State *v.* McGonigle, 101 Mo. 353, 13 S. W. 758, 20 Am. St. Rep. 609, 8 L. R. A. 735; German Bank *v.* Dunn, 62 Mo. 79 (where the maker afterward saw the note, but his attention was directed only to the signature).

Montana.— McMillan *v.* Hefferlin, 18 Mont. 385, 45 Pac. 548.

Wisconsin.— Kilkelly *v.* Martin, 34 Wis. 525.

United States.— Washington Bank *v.* Way, 2 Cranch C. C. (U. S.) 249, 2 Fed. Cas. No. 957.

England.— Where a maker was discharged by an alteration, and upon application by letter for payment he answered that he would give his earliest attention to the matter, this does not show assent, because giving attention is different from giving an assent. Perring *v.* Hone, 4 Bing. 28, 13 E. C. L. 384.

67. Benedict *v.* Miner, 58 Ill. 19.

68. Fraker *v.* Little, 24 Kan. 598, 36 Am. Rep. 262; Sheridan *v.* Carpenter, 61 Me. 83.

69. Bell *v.* Gardiner, 4 M. & G. 11, 43 E. C. L. 16; Westloh *v.* Brown, 43 U. C. Q. B. 402.

70. Master *v.* Miller, 4 T. R. 320; 1 Greenleaf Ev. § 565.

71. Pigot's Case, 11 Coke 27*a* (which is the case upon which this doctrine seems to be founded); Cospey *v.* Turner, Cro. Eliz. 800; Comyns Dig. tit. Fait F, 1. See also Brown *v.* Jones, 3 Port. (Ala.) 420; Barrett *v.* Thorndike, 1 Me. 73 [*citing* 1 Sheppard Abr. 541; Marckham *v.* Gonaston, Cro. Eliz. 626, as to change by obligee]; Chessman *v.* Whittemore, 23 Pick. (Mass.) 231; Fuller *v.* Green, 64 Wis. 159, 24 N. W. 907, 54 Am. Rep. 600.

72. Pigot's Case, 11 Coke 27*a*; Waugh *v.* Bussell, 5 Taunt. 707, 1 E. C. L. 362.

73. Master *v.* Miller, 4 T. R. 320, 1 Smith Lead. Cas. 796, extended the doctrine of Pigot's Case, 11 Coke 27*a*, as regards material alterations to bills of exchange. Subsequent cases have applied the doctrine of

ticular circumstances which will render a change vitiating, it may be stated that the rules are not now peculiar to deeds, but apply equally to deeds, bills and notes, and other writings containing the evidence of the parties' rights and contracts.[74]

C. Abandonment of Early Doctrine. The doctrine that an immaterial change by the obligee or a material change by a stranger vitiated the deed seems founded upon an early English case, which was not authority to the full extent to which it is often cited.[75] This case was afterward recognized both in England[76] and America,[77] but may be said now to be entirely exploded, and to be superseded by the more reasonable doctrine that an immaterial change, by whomsoever made, at least when unaccompanied by fraudulent design, will not invalidate the deed,[78]

Pigot's Case, 11 Coke 27*a*, as regards material alterations indiscriminately to all written instruments, whether under seal or not. Aldous *v.* Cornwell, L. R. 3 Q. B. 573 [*citing* Davidson *v.* Cooper, 11 M. & W. 778, 13 M. & W. 343].

74. *Alabama.*— Brown *v.* Jones, 3 Port. (Ala.) 420.

Connecticut.— Starr *v.* Lyon, 5 Conn. 538.

New Jersey.— Vanauken *v.* Hornbeck, 14 N. J. L. 178, 25 Am. Dec. 509.

New York.— Chappell *v.* Spencer, 23 Barb. (N. Y.) 584.

Pennsylvania.— U. S. Bank *v.* Russel, 3 Yeates (Pa.) 391, wherein it was said that the rule that a material alteration will render a deed of no effect is equally applicable to bills of exchange and promissory notes; that more dangerous consequences would result from permitting alterations of the latter than of the former, because bills and notes are more readily susceptible to alteration than deeds, to which the names of witnesses are uniformly subscribed.

Rhode Island.— Arnold *v.* Jones, 2 R. I. 345.

Virginia.— Newell *v.* Mayberry, 3 Leigh (Va.) 250, 23 Am. Dec. 261.

England.— Aldous *v.* Cornwell, L. R. 3 Q. B. 573; Mollett *v.* Wackerbarth, 5 C. B. 181, 57 E. C. L. 181.

75. Aldous *v.* Cornwell, L. R. 3 Q. B. 573, wherein it was said that the fact found in Pigot's Case, 11 Coke 27*a*, was that the alteration, which was not a material one, was made by a stranger, and judgment was given for plaintiff, so that the case itself was not a decision upon the point that an immaterial change by the obligee will vitiate the instrument.

76. Davidson *v.* Cooper, 11 M. & W. 778, 13 M. & W. 343; Sanderson *v.* Symons, 1 B. & B. 426, recognizing the authority of Pigot's Case, 11 Coke 27*a*, but holding that the case of an insurance policy stands upon its own circumstances.

77. **Extent of application.**—In several American cases the doctrine of the *dictum* in Pigot's Case, 11 Coke 27*a*, seems to be fully recognized as sound law. Herdman *v.* Bratten, 2 Harr. (Del.) 396 (which, however, involved a change by the obligee); Den *v.* Wright, 7 N. J. L. 175, 11 Am. Dec. 546 (in a charge to the jury); White *v.* Williams, 3 N. J. Eq. 376. In other cases in New Jersey the same principle is recognized, though the actual point as to the effect of a material change by a stranger was not involved. Jones *v.* Crowley, 57 N. J. L. 222, 30 Atl. 871; Hunt *v.* Gray, 35 N. J. L. 227, 10 Am. Rep. 232. In West Virginia the doctrine of that case seems to have been followed as to an immaterial alteration by a party. Piercy *v.* Piercy, 5 W. Va. 199. So also in Pennsylvania. Smith *v.* Weld, 2 Pa. St. 54; Morris *v.* Vanderen, 1 Dall. (Pa.) 64. In North Carolina the doctrine of Pigot's Case, 11 Coke 27*a*, applied to a change made by the party claiming under the deed, especially if done with fraudulent design. Nunnery *v.* Cotton, 8 N. C. 222. Though in this state the full doctrine of Pigot's Case, 11 Coke 27*a*, both as to an immaterial change by a party and a material change by a stranger, has been recognized. Pullen *v.* Shaw, 14 N. C. 213. In other cases the doctrine of Pigot's Case, 11 Coke 27*a*, is confined to changes made by a party claiming under the instrument, but it is not followed to the extent of making a material change by a stranger of vitiating effect as an alteration. Powell *v.* Banks, 146 Mo. 620, 48 S. W. 664; State *v.* Scott, 104 Mo. 26, 15 S. W. 987, 17 S. W. 11; Hord *v.* Taubman, 79 Mo. 101; Lewis *v.* Payn, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427; Rees *v.* Overbaugh, 6 Cow. (N. Y.) 746; Van Brunt *v.* Van Brunt, 3 Edw. (N. Y.) 14.

78. *Connecticut.*— Murray *v.* Klinzing, 64 Conn. 78, 29 Atl. 244.

Illinois.— McKibben *v.* Newell, 41 Ill. 461.

Kentucky.— Shelton *v.* Deering, 10 B. Mon. (Ky.) 405.

Louisiana.— Barrabine *v.* Bradshears, 5 Mart. (La.) 190.

Maine.— Barrett *v.* Thorndike, 1 Me. 73, especially in the absence of fraud.

Massachusetts.— Vose *v.* Dolan, 108 Mass. 155, 11 Am. Rep. 331 [*citing* Com. *v.* Emigrant Industrial Sav. Bank, 98 Mass. 12, 93 Am. Dec. 126; Adams *v.* Frye, 3 Metc. (Mass.) 103; Chessman *v.* Whittemore, 23 Pick. (Mass.) 231; Brown *v.* Pinkham, 18 Pick. (Mass.) 172]; Hatch *v.* Hatch, 9 Mass. 307, 6 Am. Dec. 67.

Mississippi.—Gordon *v.* Sizer, 39 Miss. 805.

England.— Aldous *v.* Cornwell, L. R. 3 Q. B. 573; Trapp *v.* Spearman, 3 Esp. 57; Doe *v.* Bingham, 4 B. & Ald. 672, 6 E. C. L. 648. In Aldous *v.* Cornwell, L. R. 3 Q. B. 573, which is the leading case opposed to the doctrine above referred to in Pigot's Case, 11 Coke 27*a*, Lush, J., in delivering the opinion

and that a material change in a deed by a stranger will not operate to avoid it.[79]

D. Nature and Effect of Material Changes, Generally — 1. STATEMENT OF RULE.[80] As a general rule the effect of any alleged change in an instrument depends, first, upon the character of the change — that is, whether it is material or immaterial.[81] Any change in an instrument which causes it to speak a different language in legal effect from that which it originally spoke — which changes the legal identity or character of the instrument, either in its terms or the relation of the parties to it — is a material change or technical alteration, and such a change will invalidate the instrument against all parties not consenting to the change.[82] Not only will an alteration vitiate the instrument as between the

of the court, said that no authority was cited, nor could any be found, in which the doctrine that an immaterial alteration avoided the instrument had been acted upon. He adverted to cases in which the contrary had been held, though they could not be regarded as entirely satisfactory. Thus in Darcy's Case, 1 Leon. 282, an immaterial alteration in a bond, made by the executor of the obligee, was held not to vitiate the bond, but the court laid stress upon the fact that the alteration was in favor of the obligor. In Sanderson *v.* Symons, 1 B. & B. 426, the court held that the words added to a policy of insurance expressed no more than was already contained in the policy as signed by defendant, and that therefore he was not discharged, the real ground of the decision appearing to be that defendant was not and could not be prejudiced by the alteration, the conclusion of the court apparently limiting the doctrine to policies of insurance; but Lush, J., said that no reason could be discovered for making a distinction between that and any other species of contract.

79. *Alabama.*— Brown *v.* Jones, 3 Port. (Ala.) 420.

Florida.— Orlando *v.* Gooding, 34 Fla. 244, 15 So. 770.

Georgia.— Banks *v.* Lee, 73 Ga. 25.

Indiana.— John *v.* Hatfield, 84 Ind. 75.

Kentucky.— Lee *v.* Alexander, 9 B. Mon. (Ky.) 25, 48 Am. Dec. 412.

Minnesota.— Ames *v.* Brown, 22 Minn. 257.

Mississippi.— Croft *v.* White, 36 Miss. 455.

New York.—Gleason *v.* Hamilton, 138 N. Y. 353, 34 N. E. 283, 52 N. Y. St. 882, 21 L. R. A. 210; Waring *v.* Smyth, 2 Barb. Ch. (N. Y.) 119, 47 Am. Dec. 299.

North Carolina.— Evans *v.* Williamson, 79 N. C. 86.

For modern rule embodied in statute see Hall *v.* Weaver, 13 Sawy. (U. S.) 188, 34 Fed. 104, referring to statutes in New York and Oregon.

For modern rule applied to bonds see:

California.— Turner *v.* Billagram, 2 Cal. 520.

Idaho.— Dangell *v.* Levy, 1 Ida. 722.

Illinois.— Reed *v.* Kemp, 16 Ill. 445. See also Kelly *v.* Trumble, 74 Ill. 428.

Indiana.— Shuck *v.* State, 136 Ind. 63, 35 N. E. 993.

Kentucky.— Terry *v.* Hazlewood, 1 Duv. (Ky.) 104.

Maryland.— State *v.* Miller, 3 Gill (Md.) 335.

Massachusetts.— Smith *v.* Crooker, 5 Mass. 538.

Nebraska.—Schlageck *v.* Widhalm, 59 Nebr. 541, 81 N. W. 448.

Virginia.— Keen *v.* Monroe, 75 Va. 424.

United States.— Crawford *v.* Dexter, 5 Sawy. (U. S.) 201, 6 Fed. Cas. No. 3,368.

For modern rule applied to mortgages see Ames *v.* Brown, 22 Minn. 257; Foote *v.* Hambrick, 70 Miss. 157, 11 So. 564, 35 Am. St. Rep. 631; Robertson *v.* Hay, 91 Pa. St. 242.

80. See 2 Cent. Dig. tit. "Alteration of Instruments," §§ 1 *et seq.*, 114 *et seq.*

81. In this view the great bulk of the cases which treat of the materiality or immateriality of a change, and the effect of the change as depending upon its character as material or immaterial, cannot be placed logically in two places. For, generally, to say that a change of a particular character is material is but to say that it is vitiating, or that it is not material is but to say that it is not vitiating. See *infra*, note 82.

82. *Alabama.*—White Sewing Mach. Co. *v.* Saxton, 121 Ala. 399, 25 So. 784; Payne *v.* Long, 121 Ala. 385, 25 So. 780; Jordan *v.* Long, 109 Ala. 414, 19 So. 843; Alabama State Land Co. *v.* Thompson, 104 Ala. 570, 16 So. 440, 53 Am. St. Rep. 80 [*citing* Hollis *v.* Harris, 96 Ala. 288, 11 So. 377; Saint *v.* Wheeler, etc., Mfg. Co., 95 Ala. 362, 10 So. 539, 36 Am. St. Rep. 210; Montgomery *v.* Crossthwait, 90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140; Anderson *v.* Bellenger, 87 Ala. 334, 6 So. 82, 13 Am. St. Rep. 46, 4 L. R. A. 680; Hill *v.* Nelms, 86 Ala. 442, 5 So. 796; Sharpe *v.* Orme, 61 Ala. 263]; Green *v.* Sneed, 101 Ala. 205, 13 So. 277, 46 Am. St. Rep. 119; Lesser *v.* Scholze, 93 Ala. 338, 9 So. 273; Toomer *v.* Rutland, 57 Ala. 379, 29 Am. Rep. 722.

Arkansas.— Little Rock Trust Co. *v.* Martin, 57 Ark. 277, 21 S. W. 468; Overton *v.* Matthews, 35 Ark. 146, 37 Am. Rep. 9; Chism *v.* Toomer, 27 Ark. 108.

California.— Pelton *v.* San Jacinto Lumber Co., 113 Cal. 21, 45 Pac. 12.

Connecticut.—Murray *v.* Klinzing, 64 Conn. 78, 29 Atl. 244; Ætna Nat. Bank *v.* Winchester, 43 Conn. 391.

Delaware.— Warder *v.* Stewart, 2 Marv. (Del.) 275, 36 Atl. 88; Sudler *v.* Collins, 2

immediate parties, but also as against a *bona fide* holder or indorsee without

Houst. (Del.) 538; Newark Bank *v.* Crawford, 2 Houst. (Del.) 282.

Georgia.— Scott *v.* Walker, Dudley (Ga.) 243.

Illinois.— Merritt *v.* Boyden, (Ill. 1901) 60 N. E. 907; Ryan *v.* Springfield First Nat. Bank, 148 Ill. 349, 35 N. E. 1120; Burwell *v.* Orr, 84 Ill. 465; Gardiner *v.* Harback, 21 Ill. 129; Gillett *v.* Sweat, 6 Ill. 475; Pankey *v.* Mitchell, 1 Ill. 383; Soaps *v.* Eichberg, 42 Ill. App. 375.

Indiana.— Weir Plow Co. *v.* Walmsley, 110 Ind. 242, 11 N. E. 232; Nicholson *v.* Combs, 90 Ind. 515, 46 Am. Rep. 229; Hert *v.* Oehler, 80 Ind. 83; Bowman *v.* Mitchell, 79 Ind. 84; Grimes *v.* Piersol, 25 Ind. 246; Holland *v.* Hatch, 11 Ind. 497, 71 Am. Dec. 363.

Indian Territory.— Taylor *v.* Acom, 1 Indian Terr. 436, 45 S. W. 130.

Iowa.— Charlton *v.* Reed, 61 Iowa 166, 16 N. W. 64, 47 Am. Rep. 808; Eckert *v.* Pickel, 59 Iowa 545, 13 N. W. 708; Adair *v.* Egland, 58 Iowa 314, 12 N. W. 277; Dickerman *v.* Miner, 43 Iowa 508.

Kansas.— Davis *v.* Eppler, 38 Kan. 629, 16 Pac. 793; Horn *v.* Newton City Bank, 32 Kan. 518, 4 Pac. 1022.

Kentucky.— Phoenix Ins. Co. *v.* McKernan, 100 Ky. 97, 18 Ky. L. Rep. 617, 37 S. W. 490; Warren *v.* Fant, 79 Ky. 1; Blakey *v.* Johnson, 13 Bush (Ky.) 197, 26 Am. Rep. 254; Locknane *v.* Emmerson, 11 Bush (Ky.) 69; Jones *v.* Shelbyville F., etc., Ins. Co., 1 Metc. (Ky.) 58; Lisle *v.* Rogers, 18 B. Mon. (Ky.) 528; Shelton *v.* Deering, 10 B. Mon. (Ky.) 405; Commonwealth Bank *v.* McChord, 4 Dana (Ky.) 191, 29 Am. Dec. 398; Cotton *v.* Edwards, 2 Dana (Ky.) 106; Miles *v.* Major, 2 J. J. Marsh. (Ky.) 153; Rucker *v.* Howard, 2 Bibb (Ky.) 166.

Maine.— Lee *v.* Starbird, 55 Me. 491; Chadwick *v.* Eastman, 53 Me. 12; Waterman *v.* Vose, 43 Me. 504; Buck *v.* Appleton, 14 Me. 284.

Maryland.— Owen *v.* Hall, 70 Md. 97, 16 Atl. 376.

Massachusetts.— Osgood *v.* Stevenson, 143 Mass. 399, 9 N. E. 825; Cape Ann Nat. Bank *v.* Burns, 129 Mass. 596; Draper *v.* Wood, 112 Mass. 315, 17 Am. Rep. 92; Stoddard *v.* Penniman, 108 Mass. 366, 11 Am. Rep. 363; Fay *v.* Smith, 1 Allen (Mass.) 477, 79 Am. Dec. 752; Wade *v.* Withington, 1 Allen (Mass.) 561; Boston *v.* Benson, 12 Cush. (Mass.) 61; Chessman *v.* Whittemore, 23 Pick. (Mass.) 231; Wheelock *v.* Freeman, 13 Pick. (Mass.) 165, 23 Am. Dec. 674; Warring *v.* Williams, 8 Pick. (Mass.) 322.

Michigan.— Aldrich *v.* Smith, 37 Mich. 468, 26 Am. Rep. 536; Bradley *v.* Mann, 37 Mich. 1; Wait *v.* Pomeroy, 20 Mich. 425, 4 Am. Rep. 395; Longwell *v.* Day, 1 Mich. N. P. 286.

Mississippi.— Henderson *v.* Wilson, 6 How. (Miss.) 65; Love *v.* Shoape, Walk. (Miss.) 508.

Missouri.— Capital Bank *v.* Armstrong, 62 Mo. 59; Evans *v.* Foreman, 60 Mo. 449; Pressbury *v.* Michael, 33 Mo. 542; Ivory *v.* Michael, 33 Mo. 398; Haskell *v.* Champion, 30 Mo. 136; Trigg *v.* Taylor, 27 Mo. 245, 72 Am. Dec. 263; King *v.* Hunt, 13 Mo. 97; McMurtrey *v.* Sparks, 71 Mo. App. 126; Law *v.* Crawford, 67 Mo. App. 150; Barnett *v.* Nolte, 55 Mo. App. 184.

Nebraska.— Erickson *v.* Oakland First Nat. Bank, 44 Nebr. 622, 62 N. W. 1078, 48 Am. St. Rep. 753, 28 L. R. A. 577; Hurlbut *v.* Hall, 39 Nebr. 889, 58 N. W. 538; Walton Plow Co. *v.* Campbell, 35 Nebr. 173, 52 N. W. 883, 16 L. R. A. 468; Townsend *v.* Star Wagon Co., 10 Nebr. 615, 7 N. W. 274, 35 Am. Rep. 493; St. Joseph State Sav. Bank *v.* Shaffer, 9 Nebr. 1, 1 N. W. 980, 31 Am. Rep. 394; Oliver *v.* Hawley, 5 Nebr. 439.

New Hampshire.— Gerrish *v.* Glines, 56 N. H. 9; Burnham *v.* Ayer, 35 N. H. 351; Humphreys *v.* Guillow, 13 N. H. 385, 38 Am. Dec. 499; Haines *v.* Dennett, 11 N. H. 180; Martendale *v.* Follett, 1 N. H. 95.

New York.— Colson *v.* Arnot, 57 N. Y. 253, 15 Am. Rep. 496; Booth *v.* Powers, 56 N. Y. 22; Brownell *v.* Winnie, 29 N. Y. 400, 86 Am. Dec. 314; Bradford Nat. Bank *v.* Taylor, 75 Hun (N. Y.) 297, 27 N. Y. Suppl. 96, 56 N. Y. St. 754; Pease *v.* Barnett, 27 Hun (N. Y.) 378; Bruce *v.* Westcott, 3 Barb. (N. Y.) 374; Mt. Morris Bank *v.* Lamson, 10 Misc. (N. Y.) 359, 31 N. Y. Suppl. 18, 63 N. Y. St. 432; Flannagan *v.* National Union Bank, 2 N. Y. Suppl. 488, 18 N. Y. St. 826.

North Carolina.— Davis *v.* Coleman, 29 N. C. 424; Sharpe *v.* Bagwell, 16 N. C. 115. In ascertaining whether an instrument was intended to operate as a bond or will, words which may not change its legal effect and may therefore be considered as immaterial, supposing its character to have been established, may be necessary in ascertaining its character, and their alteration or erasure, though of no importance in the former point of view, will be material in the latter. Thus: "I give and bequeath to A B my sorrel horse," signed, sealed, and delivered, is a testamentary instrument. Expunge the word "bequeath" and it becomes a deed of gift. Smith *v.* Eason, 49 N. C. 34, 40.

North Dakota.— Decorah First Nat. Bank *v.* Laughlin, 4 N. D. 391, 61 N. W. 473.

Oklahoma.— Richardson *v.* Fellner, 9 Okla. 513, 60 Pac. 270.

Ohio.— Newman *v.* King, 54 Ohio St. 273, 43 N. E. 683, 56 Am. St. Rep. 705, 35 L. R. A. 471; Thompson *v.* Massie, 41 Ohio St. 307; Davis *v.* Bauer, 41 Ohio St. 257; Jones *v.* Bangs, 40 Ohio St. 139, 48 Am. Rep. 664; Harsh *v.* Klepper, 28 Ohio St. 200; Sturges *v.* Williams, 9 Ohio St. 443, 75 Am. Dec. 473.

Pennsylvania.— Gettysburg Nat. Bank *v.* Chisolm, 169 Pa. St. 564, 32 Atl. 730, 47 Am. St. Rep. 929; Bensinger *v.* Wren, 100 Pa. St. 500; Struthers *v.* Kendall, 41 Pa. St. 214, 80 Am. Dec. 610; Miller *v.* Reed, 27 Pa. St. 244, 67 Am. Dec. 459; Getty *v.* Shearer, 20 Pa. St. 12; Kennedy *v.* Lancaster County Bank, 18 Pa. St. 347; Simpson *v.* Stackhouse, 9 Pa. St.

notice,[83] as the latter can acquire no right or title other than that of the person under whom he claims.

2. Reason of Rule. The rule that a material alteration avoids the instrument is founded upon two reasons: First (and what is said to be the true foundation of the doctrine),[84] that no man shall be permitted, on grounds of public policy, to take the chance of committing a fraud without running any risk of loss by the event when it is detected;[85] and, second, because the identity of the instrument is destroyed, and to hold one under such circumstances would be to make for him a contract to which he never agreed, which is especially true in the case of a surety.[86]

186, 49 Am. Dec. 554; Smith *v.* Weld, 2 Pa. St. 54; U. S. Bank *v.* Russel, 3 Yeates (Pa.) 391; Lancaster *v.* Barrett, 1 Pa. Super. Ct. 9, 37 Wkly. Notes Cas. (Pa.) 251.

Rhode Island.— Keene *v.* Weeks, 19 R. I. 309, 33 Atl. 446; Manufacturers', etc., Bank *v.* Follett, 11 R. I. 92, 23 Am. Rep. 418.

South Carolina.—Burton *v.* Pressly, Cheves Eq. (S. C.) 1.

Tennessee.—McDaniel *v.* Whitsett, 96 Tenn. 10, 33 S. W. 567; Taylor *v.* Taylor, 12 Lea (Tenn.) 714; McVey *v.* Ely, 5 Lea (Tenn.) 438; Morgan *v.* Cooper, 1 Head (Tenn.) 430; Crockett *v.* Thomason, 5 Sneed (Tenn.) 341.

Texas.— Bowser *v.* Cole, 74 Tex. 222, 11 S. W. 1131; Bogarth *v.* Breedlove, 39 Tex. 561; Park *v.* Glover, 23 Tex. 469; Heath *v.* State, 14 Tex. App. 213; Meade *v.* Sandige, 9 Tex. Civ. App. 360, 30 S. W. 245.

Utah.— American Pub. Co. *v.* Fisher, 10 Utah 147, 37 Pac. 259.

Virginia.—Batchelder *v.* White, 80 Va. 103; Dobyns *v.* Rawley, 76 Va. 537.

West Virginia.— Yeager *v.* Musgrave, 28 W. Va. 90; Morehead *v.* Parkersburg Nat. Bank, 5 W. Va. 74, 13 Am. Rep. 636.

Wisconsin.— Matteson *v.* Ellsworth, 33 Wis. 488, 14 Am. Rep. 766; Low *v.* Merrill, 1 Pinn. (Wis.) 340.

United States.— Mersman *v.* Werges, 112 U. S. 139, 5 S. Ct. 65, 28 L. ed. 641; Sneed *v.* Sabinal Min., etc., Co., 73 Fed. 925, 34 U. S. App. 688, 20 C. C. A. 230; Pew *v.* Laughlin, 3 Fed. 39.

England.— Burchfield *v.* Moore, 3 E. & B. 683, 77 E. C. L. 683; Powell *v.* Divett, 15 East 29; Cowie *v.* Halsall, 4 B. & Ald. 197, 6 E. C. L. 449; Mollett *v.* Wackerbarth, 5 C. B. 181, 57 E. C. L. 181; Vance *v.* Lowther, 1 Ex. D. 176; Macintosh *v.* Haydon, R. & M. 362, 21 E. C. L. 767; Long *v.* Moore, 3 Esp. 155 note; Master *v.* Miller, 1 Anstr. 225.

Canada.— Swaisland *v.* Davidson, 3 Ont. 320.

83. See, generally, cases *supra*, note 82. See also Bills and Notes.

Issue joined on defense of bona fide purchaser.— In Winter *v.* Pool, 100 Ala. 503, 14 So. 411, the plaintiff replied to a plea of *non est factum* that he was a *bona fide* purchaser, and an issue was joined on this replication. Under this state of the pleadings it was held that whether or not there was a material alteration of the note by the payee after delivery to defeat a recovery was immaterial; that an instruction upon this point would have no application to the issue raised, and that whether the issue was material or not the judgment would be binding unless a repleader should be moved for, as the parties chose to go to trial upon that issue.

84. Getty *v.* Shearer, 20 Pa. St. 12, wherein it is said to be a mistaken notion to suppose that the principle rests solely upon the rule in pleading that the instrument after the alteration is no longer the same, and is no longer the deed of the party so as to maintain the issue of *non est factum*.

85. *Delaware.*— Sudler *v.* Collins, 2 Houst. (Del.) 538.

Georgia.— McCauley *v.* Gordon, 64 Ga. 221, 37 Am. Rep. 68.

Massachusetts.— Lee *v.* Butler, 167 Mass. 426, 46 N. E. 52, 57 Am. St. Rep. 466; Com. *v.* Emigrant Industrial Sav. Bank, 98 Mass. 12, 93 Am. Dec. 126.

New Hampshire.— Humphreys *v.* Guillow, 13 N. H. 385, 38 Am. Dec. 499.

North Carolina.— Sharpe *v.* Bagwell, 16 N. C. 115.

Pennsylvania.— Gettysburg Nat. Bank *v.* Chisolm, 169 Pa. St. 564, 32 Atl. 730, 47 Am. St. Rep. 929; Neff *v.* Horner, 63 Pa. St. 327, 3 Am. Rep. 555; Getty *v.* Shearer, 20 Pa. St. 12.

Tennessee.—McDaniel *v.* Whitsett, 96 Tenn. 10, 33 S. W. 567.

Virginia.— Newell *v.* Mayberry, 3 Leigh (Va.) 250, 23 Am. Dec. 261.

England.— Master *v.* Miller, 4 T. R. 320 (per Lord Kenyon).

86. *Delaware.*— Sudler *v.* Collins, 2 Houst. (Del.) 538.

Georgia.— Broughton *v.* West, 8 Ga. 248. The principle is that the contract remains the same in order that the rights of the parties remain the same.

Indian Territory.— Taylor *v.* Acom, 1 Indian Terr. 436, 45 S. W. 130.

Massachusetts.— Lee *v.* Butler, 167 Mass. 426, 46 N. E. 52, 57 Am. St. Rep. 466; Com. *v.* Emigrant Industrial Sav. Bank, 98 Mass. 12, 93 Am. Dec. 126; Wade *v.* Withington, 1 Allen (Mass.) 561; Doane *v.* Eldridge, 16 Gray (Mass.) 254.

New York.— Woodworth *v.* Bank of America, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239.

Virginia.—Batchelder *v.* White, 80 Va. 103; Dobyns *v.* Rawley, 76 Va. 537.

Wisconsin.—Low *v.* Merrill, 1 Pinn. (Wis.) 340.

United States.— Mersman *v.* Werges, 112 U. S. 139, 5 S. Ct. 65, 28 L. ed. 641.

3. Extent of Change — a. In General. To what extent the identity of the instrument must be changed in order that its legal effect will be altered so as to bring the case within the terms of a material alteration vitiating the instrument the adjudications are not always in accord.[87] True, if the change is one by which the party not consenting thereto would be prejudiced,[88] or which would enlarge or increase the liability of such party,[89] or is to the advantage of the party making it, it is material in the sense of a vitiating alteration.[90]

b. Liability Increased or Enlarged. In some cases, however, it seems that changes might be considered immaterial because they are not prejudicial or the liability of the party complaining would not be increased or enlarged by it.[91] This would apparently ignore the principle that any change which in the slightest degree alters the legal identity of the contract is material.

c. Change Not Prejudicial. But, on the other hand, it is undoubtedly the rule that if the legal import and effect of the instrument is in fact changed it does not matter how trivial the change may be —[92] that is material which may become material.[93] The test is not necessarily whether the pecuniary liability is increased, for in these respects the party may be no worse, yet if his rights and remedies may be seriously affected or the tampering imposes upon him a burden or peril which he would not else have incurred, the change is material.[94] The rule first

England.— Gardner *v.* Walsh, 5 E. & B. 83, 85 E. C. L. 83.

87. "It would be a hopeless task to endeavor to reconcile, and a fruitless one to even compare, the numerous conflicting decisions and oftentimes fine-spun distinctions of which the alteration of promissory notes, and the legal consequences flowing therefrom, have been the prolific theme." Per Sherwood, J., in Evans *v.* Foreman, 60 Mo. 449, 450. See similar expressions in Taylor *v.* Acom, 1 Indian Terr. 436, 45 S. W. 130; Horton *v.* Horton, 71 Iowa 448, 32 N. W. 452; Craighead *v.* McLoney, 99 Pa. St. 211.

88. Glover *v.* Robbins, 49 Ala. 219, 20 Am. Rep. 272; Gillett *v.* Sweat, 6 Ill. 475; Pankey *v.* Mitchell, 1 Ill. 383; Booth *v.* Powers, 56 N. Y. 22.

89. *Illinois.*— Black *v.* Bowman, 15 Ill. App. 166.

Indiana.—Weir Plow Co. *v.* Walmsley, 110 Ind. 242, 11 N. E. 232; Schnewind *v.* Hacket, 54 Ind. 248.

Kansas.— Johnson *v.* Moore, 33 Kan. 90, 5 Pac. 406.

Kentucky.— Locknane *v.* Emmerson, 11 Bush (Ky.) 69; Smith *v.* Lockridge, 8 Bush (Ky.) 423.

Massachusetts.— Osgood *v.* Stevenson, 143 Mass. 399, 9 N. E. 825.

Minnesota.— Coles *v.* Yorks, 28 Minn. 464, 10 N. W. 775 (holding that it is not necessary that the liability should be a personal one, but it is sufficient if it be in respect to, or on account of, any of the property, rights, or interests of the party affected); White *v.* Johns, 24 Minn. 387.

Missouri.— Law *v.* Crawford, 67 Mo. App. 150.

Tennessee.— Morgan *v.* Cooper, 1 Head (Tenn.) 430.

United States.—Miller *v.* Stewart, 9 Wheat. (U. S.) 680, 6 L. ed. 189, holding that where the instrument of appointment of a deputy collector of direct taxes is extended to another township, it is a material alteration.

90. Warren *v.* Fant, 79 Ky. 1; Arnold *v.* Jones, 2 R. I. 345.

91. Montgomery R. Co. *v.* Hurst, 9 Ala. 513; State *v.* Miller, 3 Gill (Md.) 335; Major *v.* Hansen, 2 Biss. (U. S.) 195, 16 Fed. Cas. No. 8,982.

92. Little Rock Trust Co. *v.* Martin, 57 Ark. 277, 21 S. W. 468 (holding that in such cases the maxim *de minimis non curat lex* is not applicable); Winkles *v.* Guenther, 98 Ga. 472, 25 S. E. 527; Broughton *v.* West, 8 Ga. 248; Gardiner *v.* Harback, 21 Ill. 129; American Pub. Co. *v.* Fisher, 10 Utah 147, 37 Pac. 259. But *compare* Sayre *v.* Reynolds, 5 N. J. L. 862.

93. Townsend *v.* Star Wagon Co., 10 Nebr. 615, 7 N. W. 274, 35 Am. Rep. 493.

94. Sharswood, C. J., in Craighead *v.* McLoney, 99 Pa. St. 211. To the same point see Soaps *v.* Eichberg, 42 Ill. App. 375; Coles *v.* Yorks, 28 Minn. 464, 10 N. W. 775; Quinzel *v.* Schmidt, (N. J. 1897) 38 Atl. 665. So in Vance *v.* Lowther, 1 Ex. D. 176, it was said that one of the tests of materiality is, does the change materially alter the obligation of the party, and in this case, the change being the date of a check to a later date, another test was that if the drawer of the check had money at the bank at the time of drawing it, and the bank should fail before the check was presented, the question of liability would turn on the diligence used in presenting the check, which conclusively shows that the date is a material part of the check.

Affecting proof.— The addition of a provision to a contract is material where, notwithstanding, the rights of the parties would be the same as if no contract had been made on the subject covered by the provision, yet its incorporation in the writing would have rendered parol proof of a different agreement inadmissible which would be competent as the contract was originally written. Brady *v.* Berwind-White Coal-Min. Co., 94 Fed. 28. See also Quinzel *v.* Schmidt, (N. J. 1897) 38 Atl. 665.

stated as to the character and effect of a material change generally contemplates a change of the legal identity of the instrument — one which goes to the identity of the obligation without reference to the particular nature of the change itself.[95] For it is of no consequence whether the alteration would be beneficial or detrimental to the party sought to be charged on the contract. The important question is whether the integrity and identity of the contract have been changed.[96] The character of the alteration may, however, become important upon the question of evidence, when the instrument is introduced, as influencing the presumptions as to when the change was made.[97]

4. Extent of Vitiating Effect — a. In General. The general rule is that, when the right of action depends upon the instrument, an alteration works the destruction of the paper in such sort as that no rights can be asserted under or proved by it; if there can be a recovery at all it must be upon other evidence.[98]

b. No Right or Title Conferred. An unauthorized change in an instrument, whether it be a mere spoliation or an alteration, will not deprive the party against whom it is made of any rights nor confer upon any other person any title.[99]

95. Burchfield *v.* Moore, 3 E. & B. 683, 77 E. C. L. 683, 25 Eng. L. & Eq. 123.

96. *Alabama.*— Lesser *v.* Scholtze, 93 Ala. 338, 9 So. 273; Montgomery *v.* Crossthwait, 90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140, wherein it is said that while in Toomer *v.* Rutland, 57 Ala. 379, 29 Am. Rep. 722, reference was made to the prejudicial character of the alteration, the conclusion might better have been based solely on the change of the legal identity of the contract.

Arkansas.— Chism *v.* Toomer, 27 Ark. 108.

Indiana.— Coburn *v.* Webb, 56 Ind. 96, 26 Am. Rep. 15.

Iowa.— Dickerman *v.* Miner, 43 Iowa 508.

Kansas.— McCormick Harvesting Mach. Co. *v.* Lauber, 7 Kan. App. 730, 52 Pac. 577.

Kentucky.— Phœnix Ins. Co. *v.* McKernan, 100 Ky. 97, 18 Ky. L. Rep. 617, 37 S. W. 490.

Maine.— Hewins *v.* Cargill, 67 Me. 554.

Massachusetts.— Doane *v.* Eldridge, 16 Gray (Mass.) 254.

Missouri.— Moore *v.* Hutchinson, 69 Mo. 429.

Nebraska.— St. Joseph State Sav. Bank *v.* Shaffer, 9 Nebr. 1, 1 N. W. 980, 31 Am. Rep. 394.

New Hampshire.— Humphreys *v.* Guillow, 13 N. H. 385, 38 Am. Dec. 499.

New York.— McCaughey *v.* Smith, 27 N. Y. 39; Church *v.* Howard, 17 Hun (N. Y.) 5.

Pennsylvania.— Heffner *v.* Wenrich, 32 Pa. St. 423; Smith *v.* Weld, 2 Pa. St. 54.

Rhode Island.— Keene *v.* Weeks, 19 R. I. 309, 33 Atl. 446.

Tennessee.— Organ *v.* Allison, 9 Baxt. (Tenn.) 459, notwithstanding the holding in Blair *v.* State Bank, 11 Humphr. (Tenn.) 83, that the alteration of a note which does not affect the rights or responsibilities of the parties will not render the instrument void in the absence of a fraudulent intent.

United States.— Wood *v.* Steele, 6 Wall. (U. S.) 80, 18 L. ed. 725. *Contra*, see Union Bank *v.* Cook, 2 Cranch C. C. (U. S.) 218, 24 Fed. Cas. No. 14,349.

England.— Gardner *v.* Walsh, 5 E. & B. 83, 85 E. C. L. 83.

97. See *infra*, IX, A, 3, b, (II), (H).

98. *Alabama.*— Alabama State Land Co. *v.* Thompson, 104 Ala. 570, 16 So. 440, 53 Am. St. Rep. 80.

Georgia.— Low *v.* Argrove, 30 Ga. 129.

Illinois.— Hayes *v.* Wagner, 89 Ill. App. 390.

Indiana.— Monroe *v.* Paddock, 75 Ind. 422.

Nebraska.— Erickson *v.* Oakland First Nat. Bank, 44 Nebr. 622, 62 N. W. 1078, 28 L. R. A. 577, 48 Am. St. Rep. 753, holding that, where a note is vitiated by reason of an alteration, equity has no jurisdiction to enjoin its collection, since the maker has a perfect remedy at law.

New Jersey.— Quinzel *v.* Schmidt, (N. J. 1897) 38 Atl. 665; York *v.* Jones, 43 N. J. L. 332.

New York.— Tillon *v.* Clinton, etc., Mut. Ins. Co., 7 Barb. (N. Y.) 564; Waring *v.* Smith, 2 Barb. Ch. (N. Y.) 119, 47 Am. Dec. 299.

Pennsylvania.— Babb *v.* Clemson, 10 Serg. & R. (Pa.) 419, 13 Am. Dec. 684.

Texas.— Park *v.* Glover, 23 Tex. 469.

See *infra*, VII, D, 4, j; and for altered instruments as evidence, generally, see Evidence.

In tort independently of contract.— In an action of tort for not delivering cargo, the fact that plaintiff made an alteration in the bill of lading cannot affect the rights of the parties on the question of tort. The action is not on the contract, and plaintiff might recover independently of the bill of lading. Benbury *v.* Hathaway, 28 N. C. 303.

99. *Alabama.*— Burgess *v.* Blake, (Ala. 1900) 28 So. 963; Hollis *v.* Harris, 96 Ala. 288, 11 So. 377.

District of Columbia.— Peugh *v.* Mitchell, 3 App. Cas. (D. C.) 321.

Indiana.— John *v.* Hatfield, 84 Ind. 75; Fletcher *v.* Mansur, 5 Ind. 267.

Nebraska.— Pereau *v.* Frederick, 17 Nebr. 117, 22 N. W. 235.

New Jersey.— Havens *v.* Osborn, 36 N. J. Eq. 426.

c. No Recovery on Altered or Original Terms of Instrument. An altered instrument is so far vitiated that no recovery can be had either on its original or altered terms. It cannot be considered as void for the unauthorized change and valid in other respects, but is void altogether.[1]

d. Restoration of Instrument — (1) *In General.* The vitiating effect of an alteration cannot be obviated by afterward attempting to restore the instrument, as by erasing words unauthorizedly inserted,[2] especially after an attempt to recover upon the instrument in its altered form.[3] This rule seems especially

1. *Alabama.*—Green *v.* Sneed, 101 Ala. 205, 13 So. 277, 46 Am. St. Rep. 119.

Indiana.— Dietz *v.* Harder, 72 Ind. 208; Schnewind *v.* Hacket, 54 Ind. 248; Holland *v.* Hatch, 11 Ind. 497, 71 Am. Dec. 363. *Compare* Jones *v.* Julian, 12 Ind. 274.

Iowa.— Murray *v.* Graham, 29 Iowa 520.

Kentucky.—Phoenix Ins. Co. *v.* McKernan, 100 Ky. 97, 18 Ky. L. Rep. 617, 37 S. W. 490; Locknane *v.* Emmerson, 11 Bush (Ky.) 69.

Maine.— Lee *v.* Starbird, 55 Me. 491.

Massachusetts.— Fay *v.* Smith, 1 Allen (Mass.) 477, 79 Am. Dec. 752.

New York.— Flannagan *v.* National Union Bank, 2 N. Y. Suppl. 488, 18 N. Y. St. 826.

Ohio.— Thompson *v.* Massie, 41 Ohio St. 307; Harsh *v.* Klepper, 28 Ohio St. 200. But see McAlpin *v.* Clark, 11 Ohio Cir. Ct. 524.

Pennsylvania.— Gettysburg Nat. Bank *v.* Chisolm, 169 Pa. St. 564, 32 Atl. 730, 47 Am. St. Rep. 929; Citizens Nat. Bank *v.* Williams, 74 Pa. St. 66, 35 Atl. 303, 25 L. R. A. 464 [*distinguishing* Kountz *v.* Kennedy, 63 Pa. St. 187, 3 Am. Rep. 541, which seems to be contrary to the text in that the decision was put upon the express ground that the alteration in the first instance was made with perfect innocence and in order to make the contract as it was intended to be, and was quickly restored without the slightest evidence of fraud, and pointing out that the case was not free from doubt, was very close, and was undoubtedly decided on its own peculiar circumstances, as indicated in Fulmer *v.* Seitz, 68 Pa. St. 237, 8 Am. Rep. 172]; Neff *v.* Horner, 63 Pa. St. 327, 3 Am. Rep. 555 [*distinguishing* Worrall *v.* Green, 39 Pa. St. 388, which was considered as involving exceptional circumstances].

Tennessee.—Crockett *v.* Thomason, 5 Sneed (Tenn.) 341.

Texas.—In Skelton *v.* Tillman, (Tex. 1892) 20 S. W. 71, the court seems to follow Kountz *v.* Kennedy, 63 Pa. St. 187, 3 Am. Rep. 541, *supra.* But see Otto *v.* Halff, (Tex. Civ. App. 1895) 32 S. W. 1052, in accordance with the text.

United States.— Sneed *v.* Sabinal Min., etc., Co., 73 Fed. 925, 34 U. S. App. 688, 20 C. C. A. 230, holding that all remedy on an altered instrument is gone notwithstanding the statute of limitation has run against the original cause of action.

England.— Powell *v.* Divett, 15 East 29; French *v.* Patton, 9 East 351 (under the policy of the stamp act); Gardner *v.* Walsh, 5 E. & B. 83, 85 E. C. L. 83.

Contra.— In a number of cases a contrary doctrine prevails, some of them being based upon reasons which in turn would not be recognized elsewhere. Fisher *v.* Dennis, 6 Cal. 577, 65 Am. Dec. 534; Murray *v.* Graham, 29 Iowa 520 (which involved a material change by one of several makers, for the honest purpose of making it conform to the original intention of the parties, with the implied assent of the payee, the court attempting to distinguish between such a case and one in which the change was made by the payee in person); Foote *v.* Hambrick, 70 Miss. 157, 11 So. 567, 35 Am. St. Rep. 631, and McRaven *v.* Crisler, 53 Miss. 542 (upon the ground that the change was made in an honest effort to correct a mistake and to conform the instrument to the real intention of the parties); Goss *v.* Whitehead, 33 Miss. 213; Goad *v.* Hart, 8 Sm. & M. (Miss.) 787; Hemphill *v.* Alabama Bank, 6 Sm. & M. (Miss.) 44; Johnson *v.* Blasdale, 1 Sm. & M. (Miss.) 17, 40 Am. Dec. 85 (in which cases it is held, upon principles relating to the law of agency, that when an agent exceeds his authority in filling a blank note executed by the principal the note is void only as to the excess in the hands of a party who received it with knowledge of the limited authority of the agent); Kountz *v.* Kennedy, 63 Pa. St. 187, 3 Am. Rep. 541 (already referred to in this note); Worrall *v.* Green, 39 Pa. St. 388.

2. *Delaware.*—Warpole *v.* Ellison, 4 Houst. (Del.) 322.

Illinois.— Hayes *v.* Wagner, 89 Ill. App. 390.

Iowa.— Shepard *v.* Whetstone, 51 Iowa 457, 1 N. W. 753, 33 Am. Rep. 143.

Kentucky.— Cotton *v.* Edwards, 2 Dana (Ky.) 106.

Missouri.— McMurtrey *v.* Sparks, 71 Mo. App. 126.

New Mexico.— Ruby *v.* Talbott, 5 N. M. 251, 21 Pac. 72, 3 L. R. A. 724.

Pennsylvania.—Citizens Nat. Bank *v.* Williams, 174 Pa. St. 66, 34 Atl. 303, 35 L. R. A. 464; Fulmer *v.* Seitz, 68 Pa. St. 237, 8 Am. Rep. 172.

Tennessee.—McDaniel *v.* Whitsett, 96 Tenn. 10, 33 S. W. 567; Crockett *v.* Thomason, 5 Sneed (Tenn.) 341.

See 2 Cent. Dig. tit. "Alteration of Instruments," § 112 *et seq.*

3. One who makes a voluntary and unauthorized alteration of a written contract, and insists upon it by going to trial to recover on the altered state of the instrument, has no *locus penitentiæ* which, on his failure to establish his right to recover, will enable him to undo the wrong at the trial and to stand as one who has made an innocent mistake and never has insisted upon his right to enforce it. Fulmer *v.* Seitz, 68 Pa. St. 237, 8 Am. Rep. 172.

applicable in favor of one who is subject to no liability but that created by the instrument.[4]

(II) *Exceptions — Before Delivery.* There are exceptions to this rule, however. Thus, where the instrument is changed and afterward restored, both before delivery, especially when it is in the hands of one having authority to deliver only,[5] and the change was one which would perhaps not vitiate the instrument in the first instance,[6] and in other cases (some of which would seem rather contrary to the general rule as to the vitiating effect of an alteration than exceptions thereto) it is held the instrument is not destroyed.[7]

e. Effect as to Original Consideration — (I) *Extinguishment of Debt.* It has been considered in some cases that where a party by his own act alters an instrument so that it cannot be the foundation of any legal remedy, he will not be permitted to prove the promise contained in it by any other evidence, and this principle prevents a resort to the common counts or a recovery on the original consideration,[8] and that irrespective of actual fraud, it being considered that the debt is merged in the instrument, and hence the destruction of the latter leaves nothing upon which to sue.[9]

(II) *Debt Not Extinguished in Absence of Fraud* — (A) *In General.* But where a note is not a satisfaction or extinguishment of the debt, and no actual fraud is perpetrated, a recovery may be had on the original demand,[10] and the general rule seems firmly established that in the absence of fraud the instrument only, and not the original debt, is destroyed.[11] This principle is applied to

4. Robinson *v.* Reed, 46 Iowa 219; Citizens' Nat. Bank *v.* Richmond, 121 Mass. 110.

5. Osborne *v.* Andrees, 37 Kan. 301, 15 Pac. 153.

Correction of change made in ignorance.— In Horst *v.* Wagner, 43 Iowa 373, 22 Am. Rep. 255, the payee of a note, desiring to transfer it and being ignorant of the appropriate method, erased his own name and inserted that of the transferee, but afterward, and before delivery, restored the instrument to its original form and transferred it by indorsement. It was held that the maker was not discharged and the indorsee was permitted to recover.

6. Acme Harvester Co. *v.* Butterfield, 12 S. D. 91, 80 N. W. 170 (which was the erasure of an unauthorized change in a note by the payee's clerk); Newton *v.* Bramlett, 55 Ill. App. 661, 663 (holding that where plaintiff's attorney, on a former trial, in open court, believing it was the contract between the parties, added over the signature of defendant, an indorser in blank, "And for value received I guarantee the payment of the within note," the subsequent erasure of the words, on proof that such was not the contract, is not a material alteration).

7. See Shepard *v.* Whetstone, 51 Iowa 457, 1 N. W. 753, 33 Am. Rep. 143; Kountz *v.* Kennedy, 63 Pa. St. 187, 3 Am. Rep. 541, which case is doubtful, however, as indicated *supra*, note 1. In Busjahn *v.* McLean, 3 Ind. App. 281, 29 N. E. 494, it was held that a surety would not be released, in a court having both law and equity powers, on account of a change by the maker at the request of the payee of a note, by raising the amount thereof to make it conform to the real intention of the parties, as the court would have power to reform the instrument and give judgment upon it as corrected.

8. *Alabama.*— Toomer *v.* Rutland, 57 Ala. 379, 29 Am. Rep. 722; Glover *v.* Robbins, 49 Ala. 219, 20 Am. Rep. 272; White *v.* Hass, 32 Ala. 430, 70 Am. Dec. 548.

Massachusetts.— Draper *v.* Wood, 112 Mass. 315; 17 Am. Rep. 92; Wheelock *v.* Freeman, 13 Pick. (Mass.) 165, 23 Am. Dec. 674.

Missouri.— Whitmer *v.* Frye, 10 Mo. 348.

New Hampshire.— Smith *v.* Mace, 44 N. H. 553; Martendale *v.* Follet, 1 N. H. 95.

North Carolina.— Ledford *v.* Vandyke, 44 N. C. 480 (holding that where a guardian settled with his ward by giving a bond for the sum found due, which was afterward rendered void by an alteration, the ward cannot recover on the guardian's bond); Sharpe *v.* Bagwell, 16 N. C. 115 (wherein the payee of a note tore from it the name of the subscribing witness, and it was held that the note was thereby avoided and could not be enforced in equity).

South Carolina.— Mills *v.* Starr, 2 Bailey (S. C.) 359, holding that the acceptance of a specialty in satisfaction extinguishes a simple-contract debt, and the latter is not revived if the specialty is rendered void by an alteration.

Vermont.— Bigelow *v.* Stilphen, 35 Vt. 521.

Virginia.— Newell *v.* Mayberry, 3 Leigh (Va.) 250, 23 Am. Dec. 261.

United States.— Wood *v.* Steele, 6 Wall. (U. S.) 80, 18 L. ed. 725.

See 2 Cent. Dig. tit. "Alteration of Instruments," § 192 *et seq.*

9. See *supra*, note 8.

10. Matteson *v.* Ellsworth, 33 Wis. 488, 14 Am. Rep. 766.

11. *Delaware.*— Warren *v.* Layton, 3 Harr. (Del.) 404, holding that if a note given for money loaned is altered so that recovery thereon cannot be had, plaintiff may recover on the common counts the money actually loaned.

make a mortgage available though the note which it secures has been destroyed by an alteration.[12]

(B) *As between Particular Parties.* The common counts are not available, however, where the relation of defendant is not such as to imply any such liability.[13] And where the liability can exist only by virtue of the instrument, of

Georgia.— Hotel Lanier Co. *v.* Johnson, 103 Ga. 604, 30 S. E. 558; Gwin *v.* Anderson, 91 Ga. 827, 18 S. E. 43.

Illinois.— Elliott *v.* Blair, 47 Ill. 342; Vogle *v.* Ripper, 34 Ill. 100, 85 Am. Dec. 298; Hayes *v.* Wagner, 89 Ill. App. 390; Soaps *v.* Eichberg, 42 Ill. App. 375; Yost *v.* Minneapolis Harvester Works, 41 Ill. App. 556; Springfield First Nat. Bank *v.* Ryan, 31 Ill. App. 271, 38 Ill. App. 268; Wallace *v.* Wallace, 8 Ill. App. 69.

Indian Territory.— Hampton *v.* Mayes, (Indian Terr. 1899) 53 S. W. 483.

Iowa.— Sullivan *v.* Rudisill, 63 Iowa 158, 18 N. W. 856; Eckert *v.* Pickel, 59 Iowa 545, 13 N. W. 708; Morrison *v.* Huggins, 53 Iowa 76, 4 N. W. 854; Clough *v.* Seay, 49 Iowa 111; Krause *v.* Meyer, 32 Iowa 566.

Maryland.—Owen *v.* Hall, 70 Md. 97, 16 Atl. 376; Morrison *v.* Welty, 18 Md. 169; Lewis *v.* Kramer, 3 Md. 265.

Michigan.— An account stated, which was the foundation of the note altered without fraud, would form a new basis of indebtedness and, if this was all that the court allowed, is a good basis for a recovery. Johnson *v.* Johnson, 66 Mich. 525, 33 N. W. 413.

Minnesota.— Wilson *v.* Hayes, 40 Minn. 531, 42 N. W. 467, 12 Am. St. Rep. 754, 4 L. R. A. 196.

Missouri.— Where a note executed to a bank is canceled by the cashier, through mistake, this will not affect the right of the bank to recover on the original indebtedness. Boulware *v.* State Bank, 12 Mo. 542.

Nebraska.— St. Joseph State Sav. Bank *v.* Shaffer, 9 Nebr. 1, 1 N. W. 980, 31 Am. Rep. 394.

New Jersey.— Hunt *v.* Gray, 35 N. J. L. 227, 10 Am. Rep. 232; Lewis *v.* Schenck, 18 N. J. Eq. 459, 90 Am. Dec. 631.

New York.— Booth *v.* Powers, 56 N. Y. 22; Meyer *v.* Huneke, 55 N. Y. 412; Trow *v.* Glen Cove Starch Co., 1 Daly (N. Y.) 280. So, where a debtor certifies a balance as owing him, and then draws a note stating the amount in the margin in figures, but in the body inserting an amount less than the true sum, the creditor may, without any express authority, insert the omitted words, to make the note conform to the original intent, and at all events he may recover in such a case upon an *insimul computassent.* Clute *v.* Small, 17 Wend. (N. Y.) 238.

Ohio.— Merrick *v.* Boury, 4 Ohio St. 60.

Oregon.— Savage *v.* Savage, 36 Oreg. 268, 59 Pac. 461.

Pennsylvania.— Miller *v.* Stark, 148 Pa. St. 164, 23 Atl. 1058.

Rhode Island.— Keene *v.* Weeks, 19 R. I. 309, 33 Atl. 446.

South Dakota.— Wyckoff *v.* Johnson, 2 S. D. 91, 48 N. W. 837.

Texas.— Otto *v.* Halff, (Tex. Civ. App. 1895) 32 S. W. 1052.

Wisconsin.— Gorden *v.* Robertson, 48 Wis. 493, 4 N. W. 579; Matteson *v.* Ellsworth, 33 Wis. 488, 14 Am. Rep. 766.

England.— Sloman *v.* Cox, 1 C. M. & R. 471 (holding that where a party was liable as the drawer of a bill, and in a suit upon that bill attempted to prove payment by showing a cash payment of a part of the amount and the drawing of another bill for the balance, and the latter bill turned out to have been altered by the acceptor in a material respect so that it was vitiated, the defendant remained liable upon the first bill); Atkinson *v.* Hawdon, 2 A. & E. 628, 29 E. C. L. 293 [*distinguishing* Alderson *v.* Langdale, 3 B. & Ad. 660, 23 E. C. L. 291, in that there defendant was the drawer, and plaintiff, who had altered the bill, was an indorsee, and by such alteration had deprived the drawer of his remedy against the acceptor and could not therefore sue the drawer upon the original consideration].

See 2 Cent. Dig. tit. "Alteration of Instruments," § 195.

12. See VII, F, 24, b.

13. Samson *v.* Yager, 4 U. C. Q. B. O. S. 3 (holding that where a note originally joint was altered to a joint and several note without the consent of one of the makers, who was afterward sued alone upon the note by an indorser, the plaintiff could not recover on the note because of the alteration, nor on the money counts because there was no privity between the maker and him); Gladstone *v.* Dew, 9 U. C. C. P. 439.

Indorser.— Lewis *v.* Shepherd, 1 Mackey (D. C.) 46, holding that where a note is avoided as against an indorser by reason of a material alteration there could be no recovery against him on the common counts, because the liability of an indorser does not imply further liability than that springing from the indorsement by reason of the money that was advanced upon the note. See also Burchfield *v.* Moore, 3 E. & B. 683, 77 E. C. L. 683.

Assignee.— Where the payee assigns an altered note the assignment transfers to the assignee the assignor's rights to the original consideration. St. Joseph State Sav. Bank *v.* Shaffer, 9 Nebr. 1, 1 N. W. 980, 31 Am. Rep. 394. But where the original consideration of a note, with which a power of attorney was executed for the purpose of confessing judgment, was money loaned, in a suit by an innocent holder against the maker it was held that upon declaring the note and power of attorney vitiated by a material alteration, and therefore the judgment void, still this did not necessarily extinguish the liability for the borrowed money, yet if the liability existed, it

course the destruction of the instrument discharges all liability — as in the case of a surety.[14]

(c) *Production of Note.* In order to recover upon the original indebtedness, after the destruction of a note by an alteration, the note must be produced and surrendered,[15] or it must be shown to have been lost.[16]

(III) *Fraudulent Alteration* — (A) *In General.* As indicated, the foregoing rule permitting a resort to the original indebtedness is confined to cases in which the alterations are made without fraud in fact. If, on the other hand, one voluntarily and fraudulently thus destroys the evidence of his debt, he cannot resort to the original consideration, because he cannot supply the destroyed evidence.[17]

(B) *Effect of Judgment in Action on Note.* Where the record of a judgment in an action on a note shows that the note was vitiated by a fraudulent alteration, and that it was for that cause that the judgment was for defendant, the question as to the character of the alteration, as fraudulent or otherwise, can never again be raised, and plaintiff cannot go back and maintain his suit for the original debt.[18] But, on the other hand, it is held that the mere fact that a fraudulent alteration is pleaded to an action on a note in which there is a general verdict for defendant does not sufficiently import an adjudication of the question of fraud when the note itself would be destroyed without regard to any actual fraud in the alteration.[19]

f. Equitable Relief. It is clearly within the power of a court of equity to correct a contract so as to make it agree with the intention of the parties,[20] to

was to the lender of the money, and not to his assignee; that the relation of the assignee with the matter of the borrowing could only be tried in an action in which the lender was a party. Burwell *v.* Orr, 84 Ill. 465.

14. Miller *v.* Stark, 148 Pa. St. 164, 23 Atl. 1058.

An acceptor of a bill is liable only by virtue of the instrument, and if that is vitiated by an alteration after acceptance his liability is at an end. Long *v.* Moore, 3 Esp. 155 note. But an alteration will not, of itself, release an acceptor from the claims of the holders against him, on the common counts, for money received and retained by him, knowing it to have been the proceeds of the draft. Lewis *v.* Kramer, 3 Md. 265. And as between the drawer and acceptor it was held that although the bill was vitiated by the alteration, yet, as it was still in the drawer's hands, he might recover on the original consideration. Atkinson *v.* Hawdon, 2 A. & E. 628, 29 E. C. L. 293.

15. Owen *v.* Hall, 70 Md. 97, 16 Atl. 376; Morrison *v.* Welty, 18 Md. 169; Booth *v.* Powers, 56 N. Y. 22.

16. Owen *v.* Hall, 70 Md. 97, 16 Atl. 376.

17. *Illinois.*— Vogle *v.* Ripper, 34 Ill. 100, 85 Am. Dec. 298; Yost *v.* Minneapolis Harvester Works, 41 Ill. App. 556.

Indiana.— Ballard *v.* Franklin L. Ins. Co., 81 Ind. 239.

Iowa.— Maguire *v.* Eichmeier, 109 Iowa 301, 80 N. W. 395; Woodworth *v.* Anderson, 63 Iowa 503, 19 N. W. 296, which was also on the ground that the account was merged in the certificate fraudulently altered.

Minnesota.— Warder *v.* Willyard, 46 Minn. 531, 49 N. W. 300, 24 Am. St. Rep. 250; Wilson *v.* Hayes, 40 Minn. 531, 42 N. W. 467, 12 Am. St. Rep. 754, 4 L. R. A. 196.

Missouri.— Trigg *v.* Taylor, 27 Mo. 248; Law *v.* Crawford, 67 Mo. App. 150.

Nebraska.— Walton Plow Co. *v.* Campbell, 35 Nebr. 173, 52 N. W. 883, 16 L. R. A. 468.

New Hampshire.— Gerrish *v.* Glines, 56 N. H. 9.

New York.— Trow *v.* Glen Cove Starch Co., 1 Daly (N. Y.) 280.

North Dakota.— Decorah First Nat. Bank *v.* Laughlin, 4 N. D. 391, 61 N. W. 473.

Pennsylvania.— Gettysburg Nat. Bank *v.* Chisolm, 169 Pa. St. 564, 32 Atl. 730, 47 Am. St. Rep. 929; Miller *v.* Stark, 148 Pa. St. 164, 23 Atl. 1058; Sykes *v.* Gerber, 98 Pa. St. 179.

See 2 Cent. Dig. tit. "Alteration of Instruments," § 192 *et seq.*

18. Ballard *v.* Franklin L. Ins. Co., 81 Ind. 239 (holding that where a note is declared void for a fraudulent alteration, and subsequently suit is brought on the original consideration, a plea setting up the fraudulent alteration and former judgment cannot be answered by reply alleging the alteration to have been by a stranger, as that is concluded by former judgment); Sykes *v.* Gerber, 98 Pa. St. 179.

19. Eckert *v.* Pickel, 59 Iowa 545, 13 N. W. 708.

20. Day *v.* Ft. Scott Invest., etc., Co., 53 Ill. App. 165, wherein the principle seems to be applied on behalf of a complainant in an action for the specific performance of a contract for the purchase of land which had been changed by complainant's attorney merely for the purpose of correction, without fraud and without the complainant's knowledge, the court holding that if the corrective words were essential it had the power to correct the contract.

Bill by assignee of lease.— In Rose Clare Lead Co. *v.* Madden, 54 Ill. 260, it was held

restore a deed on behalf of one against whom an alteration therein operates,[21] or to annul it at the instance of such party so as to defeat it as a conveyance of property fraudulently inserted,[22] or to enjoin a judgment on a note entered upon a fraudulently altered power of attorney.[23] But equity will not aid one who has fraudulently altered a deed to restore the instrument,[24] and where the instrument is destroyed by an alteration, and the party is under no liability except that created by the instrument, equity cannot restore the instrument.[25] On the other hand, it has been held that the debtor cannot come into equity for affirmative relief against a just debt merely because the creditor has precluded himself from enforcing his security at law according to its terms,[26] and when a bond is not suable at law, for any cause except complainant's misconduct, equity may give him relief.[27] So, when an instrument has been altered without fraudulent intent, courts of equity have exercised jurisdiction both to restore the instrument and to enforce its original terms,[28] and to enforce the original debt, assuming the instru-

that the assignee of a lease may maintain a bill to correct a mistake in the description of the premises, notwithstanding an alteration has been improperly made in the terms of the lease without his complicity. The court said that defendant could raise the question of fraudulent alteration and it would be determined upon proof instead of upon uncertain inferences upon the face of the bill.

21. **Removal of cloud.**— The erasure of the description of a part of lands conveyed, both from the deed and the record thereof after delivery, does not divest the title of the grantee, and a subsequent voluntary conveyance of the land by the grantor may be annulled, the mutilated deed and record restored, and the land subjected to the payment of claims against the estate of the grantee. These are proper subjects of equitable cognizance, the gravamen of the suit being to remove cloud upon title to land and alleged frauds. Wheeler *v.* Single, 62 Wis. 380, 22 N. W. 569.

22. Peugh *v.* Mitchell, 3 App. Cas. (D. C.) 321; Pereau *v.* Frederick, 17 Nebr. 117, 22 N. W. 235; Havens *v.* Osborn, 36 N. J. Eq. 426. See also Russell *v.* Reed, 36 Minn. 376, 31 N. W. 452; Deem *v.* Phillips, 5 W. Va. 168.

23. Hodge *v.* Gilman, 20 Ill. 437.

24. Respass *v.* Jones, 102 N. C. 5, 8 S. E. 770. See also Marcy *v.* Dunlap, 5 Lans. (N. Y.) 365.

25. Ruby *v.* Talbott, 5 N. M. 251, 21 Pac. 72, 3 L. R. A. 724.

Bond of third person received in payment. — If the vendor of land receive in payment the bond of a third person, made payable to himself, which is afterward altered with his consent, by changing the name of the payee, the bond is destroyed, and he cannot recover on the bond or have equitable relief against the obligor. Neither he nor his assignee who purchased the bond with full knowledge of the objection to it can come into equity against the vendee of the land who gave the bond in payment, although such vendee made the alteration in the bond and represented it to be good, because if the demand can be sustained at all it is a plain, legal demand against the purchaser of the land to recover the unpaid purchase price of the land, or for deceit. The fact that an action at law is barred by the statute of limitations is no reason for coming into equity when there is no new equity since the discovery of the fraud. Ryan *v.* Parker, 36 N. C. 89.

26. Goodenow *v.* Curtis, 33 Mich. 505.

27. Harrison *v.* Turbeville, 2 Humphr. (Tenn.) 241, holding that the words "fraud" and "accident" cover all erasures and alterations except those made by the obligee himself, or with his knowledge or consent. When it is necessary for a party to a bond which by statute has the force and effect of a judgment to resort to a court of chancery for relief against the bond, on the ground that it is not binding on him, the question will be considered in chancery upon the appropriate pleas as if it had arisen at law, and in such a case chancery is the appropriate forum. Gibbs *v.* Frost, 4 Ala. 720.

28. Wallace *v.* Tice, 32 Oreg. 283, 51 Pac. 733, upon the authority of Lewis *v.* Schenck, 18 N. J. Eq. 459, 90 Am. Dec. 631, holding that a court of equity has jurisdiction to restore the original conditions when the suit involves a discovery which is in some degree necessary to show the agreement and the mistake. But, where a mortgage has been fraudulently altered to embrace other land, it cannot be foreclosed as to such land, and where the suit was not brought upon the theory that parties intended that the land included in the mortgage was misdescribed by mistake, but was on the ground that the mortgage was actually executed on that land and was incorrectly recorded by mistake, a decree for foreclosure cannot be sustained. Daub *v.* Englebach, 9 Ill. App. 99.

Restraining negotiation.— In such a case a court of equity has refused to restrain the payee from negotiating the note at the instance of the surety, who was not prejudiced; and, on the other hand, has held it proper to enter a decree ordering the cancellation of the words unauthorizedly inserted. Nickerson *v.* Swett, 135 Mass. 514.

Mutilation.— An alteration by a mere stranger will not prevent its reformation by a court of equity on the ground of mistake. Thus, where a broker negotiated a loan to plaintiff, and, acting as plaintiff's scrivener, drew a mortgage to secure the loan, and a

ment itself to be destroyed,[29] for mistake and discovery are matters peculiarly within the jurisdiction of such courts.

g. Rescission. If a party has received benefits under a contract which is subsequently altered he will not be permitted to relieve himself from all liability and at the same time retain the benefits derived. He must rescind the contract *in toto* and return what he has received if he wishes to be entirely discharged on account of the alteration.[30]

h. Recovery for Conversion of Altered Instrument. The fact that a note which plaintiff has delivered to a third person as collateral security had been altered will not preclude him from suing in trover for its conversion upon a refusal to surrender it after payment of the debt.[31]

i. Recovery of Possession of Altered Instrument. If an instrument is void by reason of an alteration the maker may recover possession of it in replevin.[32]

j. Distinction between Executed and Executory Instruments—(I) *In General.* There is a well-recognized distinction between the effect of an alteration of an executory contract and an alteration of a contract which is fully executed. In the first case the rights under the instrument are gone; in the latter, as in the case of a deed of conveyance of land or a bill of sale of personalty, the title vested by the executed instrument and delivery of possession remains unaffected by any subsequent alteration.[33]

(II) *As to Vested Titles and Covenants.* In the case of a deed of conveyance of real property, generally, following the rule that the cancellation or destruction of the deed cannot destroy the title which has passed,[34] it is firmly

mistake in the description of the property was made in drafting the instrument which was not discovered until after it was recorded, and which the broker, without the consent or knowledge of any of the parties, corrected, his act was that of a mere stranger, and would not prevent its reformation by the court. Ames *v.* Brown, 22 Minn. 257.

29. Little *v.* Fowler, 1 Root (Conn.) 94; Hampton *v.* Mayes, (Indian Terr. 1899) 53 S. W. 483, also upon the authority of Lewis *v.* Schenck, 18 N. J. Eq. 459, 90 Am. Dec. 631, in which case the instrument is regarded as avoided.

30. Glover *v.* Green, 96 Ga. 126, 22 S. E. 664 (holding that where default was made in the payment of interest on a note given for the price of land, in a suit by the vendor to recover the land defendant could not defeat the action, on the ground that the note was void for an alteration, without offering to pay the amount due on the note as executed); Lowe *v.* Craig, 36 Ga. 117; Singleton *v.* McQuerry, 85 Ky. 41, 8 Ky. L. Rep. 710, 2 S. W. 652 (holding that, where a note for the purchase price of land is vitiated by an alteration, the purchaser cannot in equity escape liability for the purchase-money because of the alteration, and at the same time retain the land, but is put to his election to rescind the contract upon equitable terms, or submit to the enforcement of the lien).

Ratification will be sufficiently shown by a failure to rescind and return property, received under a contract, within a reasonable time after attention is called to an alteration. Canon *v.* Grigsby, 116 Ill. 151, 5 N. E. 362, 56 Am. Rep. 769; Emerson *v.* Opp, 9 Ind. App. 581, 34 N. E. 840, 37 N. E. 24. See VI.

31. Booth *v.* Powers, 56 N. Y. 22, which was upon the principle that the note was of its face value, because, if innocently altered, a resort could be had to the original consideration, in which event it would be necessary for plaintiff to surrender the note.

32. Smith *v.* Eals, 81 Iowa 235, 46 N. W. 1110, 25 Am. St. Rep. 486; Sigler *v.* Hidy, 56 Iowa 504, 9 N. W. 374, holding that defendant in an action on a note may attack its validity by counter-claim in the nature of a petition in replevin, contemplating that the note shall remain in the hands of plaintiff until rendition of judgment; and a dismissal of the action by plaintiff will not entitle him to a dismissal of defendant's counter-claim.

33. *Alabama.*— Alabama State Land Co. *v.* Thompson, 104 Ala. 570, 16 So. 440, 53 Am. St. Rep. 80.

Indiana.— Cochran *v.* Nebeker, 48 Ind. 459.

Iowa.— Hollingsworth *v.* Holbrook, 80 Iowa 151, 45 N. W. 561, 20 Am. St. Rep. 411; Ransier *v.* Vanorsdol, 50 Iowa 130.

Massachusetts.— Chessman *v.* Whittemore, 23 Pick. (Mass.) 231.

Ohio.— Williams *v.* Van Tuyl, 2 Ohio St. 336, holding that an alteration in a material part, made by a party beneficially interested in a bond, given by a trustee to evidence the interest of his *cestui que trust*, without the knowledge of the trustee, and subsequently to its execution, will destroy the bond, but will not operate to destroy an estate which existed before and independently of the bond.

Where a written instrument is not necessary to pass title, as in the case of a sale of a slave, an alteration of the bill of sale by the vendor will not affect a subsequent purchaser without notice. Davis *v.* Loftin, 6 Tex. 489.

34. *Alabama.*— Mallory *v.* Stodder, 6 Ala. 801.

Arkansas.— Strawn *v.* Norris, 21 Ark. 80.

established that an alteration utterly destroys the deed in so far as any new rights might have been set up thereunder — the executory provisions are rendered null and the covenants discharged — but the title which has vested by transmutation of possession remains unimpaired.[35] Therefore it is not proper to say that the altered deed is rendered void from the beginning.[36] And it is held that where plaintiff may recover the possession of land upon an equitable title, an altered deed, forming a link in the chain of his legal title, will not preclude such recovery.[37]

(III) *Mortgages.* Though, if a mortgage is found canceled in the possession of the mortgagee, it is held to be a release, but not a reconveyance so as to revest the estate of the mortgagor,[38] and, upon the principle that a vested title cannot be divested except by deed, it has been held that the mortgage is not destroyed by an alteration,[39] the better rule seems to be that an alteration of

Maine.— Barnett *v.* Thorndike, 1 Me. 73.

Massachusetts.— Chessman *v.* Whittemore, 23 Pick. (Mass.) 231.

New York.— Parshall *v.* Shirts, 54 Barb. (N. Y.) 99; Fonda *v.* Sage, 46 Barb. (N. Y.) 109; Raynor *v.* Wilson, 6 Hill (N. Y.) 469; Frost *v.* Peacock, 4 Edw. (N. Y.) 678.

Tennessee.— Morgan *v.* Elam, 4 Yerg. (Tenn.) 374.

Wisconsin.— Wilke *v.* Wilke, 28 Wis. 296; Parker *v.* Kane, 4 Wis. 1, 65 Am. Dec. 283.

United States.— Parker *v.* Kane, 22 How. (U. S.) 1, 16 L. ed. 286.

England.— Bolton *v.* Carlisle, 2 H. Bl. 259.

Canada.— Fraser *v.* Fralick, 21 U. C. Q. B. 343; Fraser *v.* Fraser, 14 U. C. C. P. 70.

35. *Alabama.*— Sharpe *v.* Orme, 61 Ala. 263.

Delaware.— Herdman *v.* Bratten, 2 Harr. (Del.) 396.

District of Columbia.—Fitzgerald *v.* Wynne, 1 App. Cas. (D. C.) 107.

Indiana.— Robbins *v.* Magee, 76 Ind. 381 (holding that no affirmative defense can be maintained on a deed by one who has altered it); Wilds *v.* Bogan, 55 Ind. 331 (as to rights of original grantee's creditors where another is fraudulently substituted as grantee); Fletcher *v.* Mansur, 5 Ind. 267 (no rights acquired by substituted grantee or his creditors).

Maine.— Bird *v.* Bird, 40 Me. 398; Barrett *v.* Thorndike, 1 Me. 73, wherein it is said that, without determining the effect of a material alteration of a deed by a stranger or an immaterial alteration thereof by a party, and whether such alteration avoids the deed or not, where the deed is one conveying land the case does not depend upon the principles applicable to those cases, but upon another principle — namely, that a vested title cannot be divested by the destruction of the deed.

Massachusetts.— Kendall *v.* Kendall, 12 Allen (Mass.) 92; Chessman *v.* Whittemore, 23 Pick. (Mass.) 231; Hatch *v.* Hatch, 9 Mass. 307, 6 Am. Dec. 67.

Missouri.— Woods *v.* Hilderbrand, 46 Mo. 284, 2 Am. Rep. 513; Alexander *v.* Hickox, 34 Mo. 496, 86 Am. Dec. 118; Tibeau *v.* Tibeau, 19 Mo. 78, 59 Am. Dec. 329.

New York.— Smith *v.* McGowan, 3 Barb. (N. Y.) 404; Herrick *v.* Malin, 22 Wend. (N. Y.) 388; Jackson *v.* Gould, 7 Wend. (N. Y.) 364; Jackson *v.* Jacoby, 9 Cow. (N. Y.) 125; Lewis *v.* Payn, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427; Waring *v.* Smyth, 2 Barb. Ch. (N. Y.) 119, 47 Am. Dec. 299.

Pennsylvania.— Rifener *v.* Bowman, 53 Pa. St. 313; Withers *v.* Atkinson, 1 Watts (Pa.) 236.

Texas.— Stanley *v.* Epperson, 45 Tex. 644 (whether the deed is recorded or not is not material); Van Hook *v.* Simmons, 25 Tex. Suppl. 323, 78 Am. Dec. 573.

Wisconsin.— Wheeler *v.* Single, 62 Wis. 380, 22 N. W. 569 (as against creditors of the grantee); North *v.* Henneberry, 44 Wis. 306.

United States.— U. S. *v.* West, 22 How. (U. S.) 315, 16 L. ed. 317, which was a public grant.

England.— Doe *v.* Bingham, 4 B. & Ald. 672, 6 E. C. L. 648.

Canada.— Fraser *v.* Fraser, 14 U. C. C. P. 70.

Contra, in North Carolina, it being there held that, where the grantee in a deed, in order to put his property beyond the reach of his creditors, without the knowledge of the grantor, erased his own name wherever it appeared in the deed and inserted that of his wife, and as thus altered had the deed registered, inasmuch as before probate and registration or the intervening of other rights, legal or equitable, a deed may be surrendered to the grantor or canceled or changed in any manner agreed upon by the grantor and grantee, this deed was inoperative, the title remained in the grantor, and equity would not render the grantee assistance to restore the title. Respass *v.* Jones, 102 N. C. 5, 8 S. E. 770.

Alteration not affecting particular land.— Where an alteration is in the description of one tract it will not affect the validity of the deed as to other tracts embraced therein. Burnett *v.* McCluey, 78 Mo. 676; Woods *v.* Hilderbrand, 46 Mo. 284, 2 Am. Rep. 513. So a deed in which the words "minerals reserved" were erased is held to be valid to convey title to the land, exclusive of the minerals. Alabama State Land Co. *v.* Thompson, 104 Ala. 570, 16 So. 440, 53 Am. St. Rep. 80.

36. Agricultural Cattle Ins. Co. *v.* Fitzgerald, 15 Jur. 489.

37. Thorne *v.* Williams, 13 Ont. 577.

38. Harrison *v.* Owen, 1 Atk. 520. See also Van Riswick *v.* Goodhue, 50 Md. 57.

39. Kendall *v.* Kendall, 12 Allen (Mass.) 92.

a mortgage destroys it,[40] as it remains executory until its enforcement, thus coming under the rule applying to executory contracts; and especially is this true where the mortgage itself is considered as a mere lien or incidental security for the debt.[41] So the alteration of a chattel mortgage may destroy it as security.[42]

(IV) *Estate Dependent upon Deed or Otherwise.* Where an estate cannot have existence but by deed, as where the subject-matter of the deed lies in grant, an alteration of the deed creating the estate avoids the deed and the estate derived under it; but where the estate may exist without deed, as a fee-simple estate in land, the fraudulent alteration of the deed destroys the deed but not the estate.[43]

(V) *Lease.* A lessor who has altered the lease destroys his right to recover under the executory clauses or the rents reserved,[44] and it has been held that if a lessee fraudulently alters a lease he cannot retain possession under it, or preclude the lessor from reëntering.[45]

k. Who May Complain. If the parties affected by a change in an instrument do not complain thereof, others who are not parties to the instrument or affected by the change cannot, ordinarily, set up the change,[46] unless there is evi-

40. *Georgia.*— Murphy *v.* Purifoy, 52 Ga. 480, in which case the mortgage was set aside and judgment rendered for the debt, without foreclosure.

Iowa.— Cutler *v.* Rose, 35 Iowa 456.

Kansas.— Johnson *v.* Moore, 33 Kan. 90, 5 Pac. 406, holding that, where the consideration of a mortgage is changed by increasing it, the security is avoided and it is not enforceable for any part of the debt therein described; that where a mortgage is given to secure the payment of money advanced by the mortgagee to pay off and discharge a prior mortgage-debt upon the same premises, and the instrument fails by reason of an irregularity in its execution, or an alteration inadvertently made by the mortgagee without fault, he is entitled to be subrogated to the rights of the prior mortgage discharged and paid off by the money which he had advanced; but where the second mortgage was materially altered by such mortgagee after its execution, acknowledgment, and delivery, without the consent of the mortgagors, which alteration injuriously affects the liability of the mortgagors, he is not entitled to the application of the equitable doctrine of subrogation.

Minnesota.— Coles *v.* Yorks, 28 Minn. 464, 10 N. W. 775.

Missouri.— Powell *v.* Banks, 146 Mo. 620, 48 S. W. 664, an alteration of deed of trust.

New York.— Marcy *v.* Dunlap, 5 Lans. (N. Y.) 365.

South Carolina.— Powell *v.* Pearlstine, 43 S. C. 403, 21 S. E. 328.

41. Russell *v.* Reed, 36 Minn. 376, 31 N. W. 452; Kime *v.* Jesse, 52 Nebr. 606, 72 N. W. 1050 [*citing* Pereau *v.* Frederick, 17 Nebr. 117, 22 N. W. 235]; McIntyre *v.* Velte, 153 Pa. St. 350, 25 Atl. 739.

42. Carlisle *v.* Peoples Bank, 122 Ala. 446, 26 So. 115; Green *v.* Smeed, 101 Ala. 205, 13 So. 277, 46 Am. St. Rep. 119 (holding that a mortgage altered as to the amount is not good as security even for the true amount); Hollingsworth *v.* Holbrook, 80 Iowa 151, 45 N. W. 561, 20 Am. St. Rep. 411 (upon the principle that a fraudulent and material alteration of an instrument of conveyance will destroy the right of recovery upon executory covenants, as applied in the case of a mortgage conveying an interest in the property described and the right to possession thereon, where the possession of the property was not taken until after the alleged alteration, and therefore an alteration destroyed the right to take possession); Bowser *v.* Cole, 74 Tex. 222, 11 S. W. 1131.

43. Lewis *v.* Payn, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427 [*citing* Miller *v.* Manwaring, Cro. Jac. 399; 1 Nelson Abr. 635]. In Bolton *v.* Carlisle, 2 H. Bl. 259, it was held that canceling a deed would not divest property which had once vested by transmutation of possession, and that the law was the same with respect to things which lie in grant. But this case supposes the deed lost, not fraudulently altered by a party to be benefited by the alteration.

Deed reserving rents.— An alteration of a deed reserving ground-rents avoids the covenants reserving rent in favor of the fraudulent grantor, but preserves the fee simple to the innocent grantee discharged from the covenants in the deed. Wallace *v.* Harmstad, 44 Pa. St. 492; Arrison *v.* Harmstead, 2 Pa. St. 191.

44. See Lewis *v.* Payn, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427; Acker *v.* Ledyard, 8 Barb. (N. Y.) 514.

45. Bliss *v.* McIntyre, 18 Vt. 466, 46 Am. Dec. 165, upon the ground that though such an act by the lessee might not operate upon his acts committed before the alteration, all future rights were destroyed, as he had destroyed all evidence of his title. See also Jones *v.* Hoard, 59 Ark. 42, 26 S. W. 193, 43 Am. St. Rep. 17.

46. Hochmark *v.* Richler, 16 Colo. 263, 26 Pac. 818.

By subcontractor after performance of contract by original parties.— Where a builder's contract is changed and the original parties thereto perform the contract in its altered condition, a subcontractor cannot set up the

dence of fraud between the parties, to the injury of the creditors.[47] The alteration must relate to the parties to the particular instrument altered.[48] The alteration of an assignment or indorsement does not affect the claim of the assignee or indorsee on the instrument itself against the maker.[49]

E. Nature and Effect of Immaterial Changes — 1. General Rule. It is not every change which will invalidate an instrument, but only a change which is material, according to the principles above stated. In other words, any change in words or form merely, even if made by an interested party, which leaves the legal effect and identity of the instrument unimpaired and unaltered, which in no manner affects the rights, duties, or obligations of the parties, and leaves the sense and meaning of the instrument as it originally stood, is not material and will not destroy the instrument or discharge the parties from liability thereon.[50] Where

change for the purpose of enlarging his right to a lien. Andrews *v.* Burdick, 62 Iowa 714, 16 N. W. 275.

Holder of collateral security.—The assignee of a note as collateral security cannot set up, as a defense to an action of trover on the note after the loan secured by the assignment has been paid, that the note was altered by the payee without the knowledge of the maker. Flint v. Craig, 59 Barb. (N. Y.) 319.

As between senior and junior mortgagees. — In Tate *v.* Fletcher, 77 Ind. 102, a senior mortgagee obtained a judgment of foreclosure in a suit in which the junior mortgagee was a party, and, the mortgagor having filed a complaint for review of the judgment and made the junior mortgagee a party, the latter was allowed to set up by cross-complaint a material alteration in the note of the senior mortgagee on which judgment of foreclosure had been obtained. But see otherwise in Gunter *v.* Addy, 58 S. C. 178, 36 S. E. 553, where the insertion in the mortgage was made with the consent of the mortgagor, without fraudulent intent, for the purpose of making the mortgage conform to the note which it secured and to make the description of the mortgaged premises more certain, this being done after the execution of the second mortgage.

Discharge of guarantor.— The discharge of a joint obligor not having the effect of discharging the others in the absence of a showing that such discharge was without the consent of the latter, an insistence by defendant in a suit to foreclose a mortgage that plaintiff was discharged from liability on his guaranty of the original debt by reason of the erasure of the name of one of the joint obligors, neither of the others claiming to be released, is without merit. Blewett *v.* Bash, 22 Wash. 536, 61 Pac. 770.

47. Ravisies *v.* Alston, 5 Ala. 297.

48. Loque *v.* Smith, Wright (Ohio) 10.

For erasure of name of guarantor or prior indorsers see Bills and Notes.

Separate contracts — Insurance policy.—A contract in a policy of insurance will not be avoided by a material alteration of another contract between the company and another party indorsed upon the same policy. Robinson *v.* Phœnix Ins. Co., 25 Iowa 430.

49. Howe *v.* Thompson, 11 Me. 152; Griffith *v.* Cox, 1 Overt. (Tenn.) 210; Minert *v.* Emerick, 6 Wis. 355, holding that the question of an alteration in an assignment of a contract concerns the parties to the instrument rather than the parties to the contract, and that, as between the assignee and the contractor, the material question is whether a valid assignment exists to give him a right to enforce the contract assigned.

50. *Alabama.*— Winter *v.* Pool, 100 Ala. 503, 14 So. 411.

California.— Humphreys *v.* Crane, 5 Cal. 173.

Colorado.— King *v.* Rea, 13 Colo. 69, 21 Pac. 1084.

Connecticut.— Nichols *v.* Johnson, 10 Conn. 192.

Delaware.— Warder *v.* Stewart, 2 Marv. (Del.) 275, 36 Atl. 88.

Georgia.— Broughton *v.* West, 8 Ga. 248.

Idaho.— Mulkey *v.* Long, (Ida. 1897) 47 Pac. 949.

Illinois.— Ryan *v.* Springfield First Nat. Bank, 148 Ill. 349, 35 N. E. 1120; Rudesill *v.* Jefferson County, 85 Ill. 446; McKibben *v.* Newell, 41 Ill. 461; Vogle *v.* Ripper, 34 Ill. 100, 85 Am. Dec. 298; Gardiner *v.* Harback, 21 Ill. 129; Magers *v.* Dunlap, 39 Ill. App. 618; Gill *v.* Hopkins, 19 Ill. App. 74.

Indiana.— Shuck *v.* State, 136 Ind. 63, 35 N. E. 993; Kline *v.* Raymond, 70 Ind. 271; Harris *v.* State, 54 Ind. 2; State *v.* Berg, 50 Ind. 496; Cochran *v.* Nebeker, 48 Ind. 459; Foote *v.* Bragg, 5 Blackf. (Ind.) 363; Casto *v.* Evinger, 17 Ind. App. 298, 46 N. E. 648; Kingan *v.* Silvers, 13 Ind. App. 80, 37 N. E. 413.

Indian Territory.— Taylor *v.* Acom, 1 Indian Terr. 436, 45 S. W. 130.

Iowa.— James *v.* Dalbey, 107 Iowa 463, 78 N. W. 51; Iowa Valley State Bank *v.* Sigstad, 96 Iowa 491, 65 N. W. 407; Starr *v.* Blatner, 76 Iowa 356, 41 N. W. 41; Horton *v.* Horton, 71 Iowa 448, 32 N. W. 452; Jackson *v.* Boyles, 64 Iowa 428, 20 N. W. 746; Rowley *v.* Jewett, 56 Iowa 492, 9 N. W. 353; Briscoe *v.* Reynolds, 51 Iowa 673, 2 N. W. 529.

Kentucky.— Phillips *v.* Breck, 79 Ky. 465; Terry *v.* Hazlewood, 1 Duv. (Ky.) 104 [*overruling* in effect Johnson *v.* U. S. Bank, 2 B. Mon. (Ky.) 310]; Jones *v.* Shelbyville F., etc., Ins. Co., 1 Metc. (Ky.) 58; Brown *v.* Warnock, 5 Dana (Ky.) 492; Tranter *v.* Hibberd, 21 Ky. L. Rep. 1710, 56 S. W. 169.

Louisiana.— Martin *v.* McMasters, 14 La. 420.

the words inserted, if taken with the original words and as an addition to them, would be wholly senseless and inoperative, or the addition is a mere nullity, it cannot affect the terms or identity of the contract.[51]

2. Cases Recognizing Ancient Rule. In two jurisdictions the ancient rule of the common law which was applicable to deeds, and which at one time was extended to bills and notes, is still applied to all instruments — namely, that even an immaterial change by the holder of, or party claiming under, the instrument, will vitiate it.[52] A qualification of this rule has been recognized, however, and it has

Maine.— Cushing *v.* Field, 70 Me. 50, 35 Am. Rep. 293.

Massachusetts.— Brown *v.* Pinkham, 18 Pick. (Mass.) 172; Smith *v.* Crooker, 5 Mass. 538.

Michigan.— Prudden *v.* Nester, 103 Mich. 540, 61 N. W. 777; White Sewing Mach. Co. *v.* Dakin, 86 Mich. 581, 49 N. W. 583, 13 L. R. A. 313; Weaver *v.* Bromley, 65 Mich. 212, 31 N. W. 839; Port Huron First Nat. Bank *v.* Carson, 60 Mich. 432, 27 N. W. 589; Leonard *v.* Phillips, 39 Mich. 182, 33 Am. Rep. 370; Gano *v.* Heath, 36 Mich. 441; Goodenow v. Curtis, 33 Mich. 505; Miller *v.* Finley, 26 Mich. 249, 12 Am. Rep. 306.

Minnesota.— Herrick *v.* Baldwin, 17 Minn. 209, 10 Am. Rep. 161.

Mississippi.— Bridges *v.* Winters, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598; Gordon *v.* Sizer, 39 Miss. 805; Moye *v.* Herndon, 30 Miss. 110.

Missouri.— American Nat. Bank *v.* Bangs, 42 Mo. 450, 97 Am. Dec. 349.

Nebraska.— Fisherdick *v.* Hutton, 44 Nebr. 122, 62 N. W. 488; Barnes *v.* Van Keuren, 31 Nebr. 165, 47 N. W. 848; Townsend *v.* Star Wagon Co. 10 Nebr. 615, 7 N. W. 274, 35 Am. Rep. 493; Palmer *v.* Largent, 5 Nebr. 223, 25 Am. Rep. 479; Oliver *v.* Hawley, 5 Nebr. 439.

New Hampshire.— Cole *v.* Hills, 44 N. H. 227; Burnham *v.* Ayer, 35 N. H. 351; Pequawket Bridge v. Mathes, 8 N. H. 139; Bowers *v.* Jewell, 2 N. H. 543; State *v.* Cilley [*cited* in Martendale *v.* Follet, 1 N. H. 95].

New York.— Casoni *v.* Jerome, 58 N. Y. 315; Ludekens *v.* Pscherhofer, 76 Hun (N. Y.) 548, 28 N. Y. Suppl. 230, 58 N. Y. St. 241; Kinney *v.* Schmitt, 12 Hun (N. Y.) 521; People *v.* Muzzy, 1 Den. (N. Y.) 239.

Ohio.— Sturges *v.* Williams, 9 Ohio St. 443, 75 Am. Dec. 473; Huntington *v.* Finch, 3 Ohio St. 445; Carlile *v.* Lamb, 16 Ohio Cir. Ct. 578; Hayes *v.* Dumont, 2 Ohio Cir. Ct. 229.

Pennsylvania.— Express Pub. Co. *v.* Aldine Press Co., 126 Pa. St. 347, 17 Atl. 608; Robertson *v.* Hay, 91 Pa. St. 242; Kountz *v.* Kennedy, 63 Pa. St. 187, 3 Am. Rep. 541; Clark *v.* Eckstein, 22 Pa. St. 507, 62 Am. Dec. 307 (holding that the mere removal of a blot on a note after execution will not avoid it); Miller *v.* Gilleland, 19 Pa. St. 119; Gardinier *v.* Sisk, 2 Pa. St. 326; Latshaw *v.* Hiltebeitel, 2 Pennyp. (Pa.) 257.

Rhode Island.— Arnold *v.* Jones, 2 R. I. 345.

Tennessee.— Blair *v.* State Bank, 11 Humphr. (Tenn.) 83.

Texas.— Tutt *v.* Thornton, 57 Tex. 35; Marx *v.* Luling Co-Operative Assoc., 17 Tex. Civ. App. 408, 45 S. W. 596; Chamberlain *v.* Wright, (Tex. Civ. App. 1896) 35 S. W. 707; Churchill *v.* Bielstein, 9 Tex. Civ. App. 445, 29 S. W. 392; Yost *v.* Watertown Steam-Engine Co., (Tex. Civ. App. 1894) 24 S. W. 657; Gragg *v.* State, 18 Tex. App. 295.

Vermont.— Derby *v.* Thrall, 44 Vt. 413, 8 Am. Rep. 389; Langdon *v.* Paul, 20 Vt. 217.

West Virginia.— Yeager *v.* Musgrave, 28 W. Va. 90.

Wisconsin.— Fuller *v.* Green, 64 Wis. 159, 24 N. W. 907, 54 Am. Rep. 600 (holding that in determining the materiality of a particular change the court will be governed entirely by the effect of the change according to the laws of the state where the question is raised); Krouskop *v.* Shontz, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817.

Wyoming.— McLaughlin *v.* Venine, 2 Wyo. 1.

United States.— Gordon *v.* Chattanooga Third Nat. Bank, 144 U. S. 97, 12 S. Ct. 657, 36 L. ed. 360; Butte First Nat. Bank *v.* Weidenbeck, 97 Fed. 896, 38 C. C. A. 131; U. S. *v.* Hatch, 1 Paine (U. S.) 336, 26 Fed. Cas. No. 15,325; Crawford *v.* Dexter, 5 Sawy. (U. S.) 201, 6 Fed. Cas. No. 3,368.

England.— Suffell *v.* Bank of England, 7 Q. B. D. 270 [*reversed*, on the ruling as to the materiality of the particular change, in 9 Q. B. D. 555]; London, etc., Bank *v.* Roberts, 22 Wkly. Rep. 402; Lowe *v.* Fox, 12 App. Cas. 206; Trapp *v.* Spearman, 3 Esp. 57; Waugh *v.* Bussell, 5 Taunt. 707, 1 E. C. L. 362; Catton *v.* Simpson, 8 A. & E. 136, 35 E. C. L. 518 [*overruled* afterward in Gardner *v.* Walsh, 5 E. & B. 83, 85 E. C. L. 83, 24 L. J. Q. B. 285, not, however, on the ground that an immaterial change affected the instrument, but on the ground that the particular change was a material one].

51. Cole *v.* Pennington, 33 Md. 476; Granite R. Co. *v.* Bacon, 15 Pick. (Mass.) 239.

Idle and unnecessary interlineations do not affect the contract and are immaterial. Yeager *v.* Musgrave, 28 W. Va. 90.

52. **Missouri.**— Kelly *v.* Thuey, 143 Mo. 422, 45 S. W. 300; Hord *v.* Taubman, 79 Mo. 101; Morrison *v.* Garth, 78 Mo. 434; Springfield First Nat. Bank *v.* Fricke, 75 Mo. 178, 42 Am. Rep. 397; Moore *v.* Hutchinson, 69 Mo. 429; German Bank *v.* Dunn, 62 Mo. 79; Allen *v.* Dornan, 57 Mo. App. 288; Kingston Sav. Bank *v.* Bosserman, 52 Mo. App. 269; Farmers' Bank *v.* Myers, 50 Mo. App. 157; Moore *v.* Macon Sav. Bank, 22 Mo. App. 684. In this state the court has not been consistent with itself on all occasions, and, aside from its arbitrary adoption of the common-law rule which applied originally to deeds

been held that the principle could not be applied to an executory contract which is not for the payment of money nor to affect title to real estate.[53]

3. Supplying What the Law Implies. Any change, made in an instrument after its execution, which merely expresses what would otherwise be supplied by intendment is immaterial even as to parties not assenting to the change, for they would be liable to the same extent without the change, and the contract is not altered by it.[54]

only, seems without strong support. Side by side with Springfield First Nat. Bank *v.* Fricke, 75 Mo. 178, 42 Am. Rep. 397 [*referred* to in Morrison *v.* Garth, 78 Mo. 434, as putting the question to rest] stands Williams *v.* Jensen, 75 Mo. 681, which held that the particular change under consideration did not constitute an alteration because it did not change the legal liabilities of the parties to the instrument, or, in other words, because the legal effect of the instrument was not altered, which is the very distinguishing feature between a material and an immaterial change which will or will not vitiate an instrument, according to the modern rule. Haskell *v.* Champion, 30 Mo. 136, is taken as the controlling adjudication on this subject, but it is apprehended that the decision in this case did not turn on the point that the change was made by the holder of the instrument any more than upon the point that the change was of an immaterial character. The court cites 1 Greenleaf Ev. § 565, upon the reason of the rule that an alteration of an instrument vitiates it. The last sentence of this section would seem to indicate that the author referred to the effect of a material change. Furthermore, in section 568 of the same work the vitiating effect accorded to an immaterial change is confined to cases in which the change is made fraudulently, whereas, in Missouri, the intent with which an alteration is made is altogether an immaterial consideration. See *supra*, III, C.

In Evans *v.* Foreman, 60 Mo. 449, the court relies upon several authorities from Pennsylvania which do not seem to support the view contended for. In addition to this, as pointed out by Barclay, J., in Kelly *v.* Thuey, (Mo. 1896) 37 S. W. 516 [*citing* Morrison *v.* Garth, 78 Mo. 434; Springfield First Nat. Bank *v.* Fricke, 75 Mo. 178, 42 Am. Rep. 397; Moore *v.* Hutchinson, 69 Mo. 429; German Bank *v.* Dunn, 62 Mo. 79; Evans *v.* Foreman, 60 Mo. 449], in a number of decisions in that state the changes before the court were distinctly of a material character and were held so to be, so that any observations in those cases of wider reach should not be properly considered as overturning the rule that an immaterial change will not vitiate the instrument. He further points out that in many other cases in this state the materiality of the change entered into the consideration of its effect [Woods *v.* Hilderbrand, 46 Mo. 284, 2 Am. Rep. 513; State *v.* Dean, 40 Mo. 464; Patterson *v.* Fagan, 38 Mo. 70; Owings *v.* Arnot, 33 Mo. 406; Ivory *v.* Michael, 33 Mo. 398; Trigg *v.* Taylor, 27 Mo. 245, 72 Am. Dec. 263; Whitmer *v.* Frye, 10 Mo. 348; Aubuchon *v.* McKnight, 1 Mo. 312, 13 Am. Dec. 502]. When this case was referred to the court in banc, however (Kelly *v.* Thuey, 143 Mo. 422, 45 S. W. 300), Judge Barclay's opinion was not adhered to.

New Jersey.— York *v.* Janes, 43 N. J. L. 332; Hunt *v.* Gray, 35 N. J. L. 227, 10 Am. Rep. 232; Vanauken *v.* Hornbeck, 14 N. J. L. 178, 25 Am. Dec. 509, holding that the principle upon which a deed is avoided, if changed by the party to whom it belongs even in an immaterial particular, applies with equal force to all written contracts, and with greater propriety to bills of exchange and promissory notes.

But in this state, too, it has been held in a late case that the alteration in question considerably enlarged the scope of the instrument as a means of evidence, and therefore was a material one, and that, having been made by the other party to the instrument, it was annulled as a contract, or as evidence of a contract, in his favor. The instrument involved was a memorandum of sale of land. Quinzel *v.* Schmidt, (N. J. 1897) 38 Atl. 665 [*citing* Jones *v.* Crowley, 57 N. J. L. 222, 30 Atl. 871, and Hunt *v.* Gray, 35 N. J. L. 227, 10 Am. Rep. 232, the former, however, involving a change in a deed by the party to whom it belonged, and in which case it was held that, even though the change was in an immaterial part of the instrument, it would be avoided as a conveyance].

53. New England L. & T. Co. *v.* Brown, 59 Mo. App. 461.

54. *Alabama.*— Anderson *v.* Bellenger, 87 Ala. 334, 6 So. 82, 13 Am. St. Rep. 46, 4 L. R. A. 680.

Illinois.— Kelly *v.* Trumble, 74 Ill. 428; Swigart *v.* Weare, 37 Ill. App. 258.

Indiana.— Harris *v.* State, 54 Ind. 2; State *v.* Berg, 50 Ind. 496.

Iowa.— James *v.* Dalbey, 107 Iowa 463, 78 N. W. 51; Briscoe *v.* Reynolds, 51 Iowa 673, 2 N. W. 529.

Massachusetts.— Hunt *v.* Adams, 6 Mass. 519.

Mississippi.— Bridges *v.* Winters, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598.

Missouri.— Western Bldg., etc., Assoc. *v.* Fitzmaurice, 7 Mo. App. 283. But see *supra*, VII, E, 2.

Nebraska.— Consaul *v.* Sheldon, 35 Nebr. 247, 52 N. W. 1104.

New Hampshire.— Cole *v.* Hills, 44 N. H. 227; Burnham *v.* Ayer, 35 N. H. 351; State *v.* Cilley [*cited* in Martendale *v.* Follet, 1 N. H. 95].

New York.— Kinney *v.* Schmitt, 12 Hun (N. Y.) 521.

North Carolina.— Houston *v.* Potts, 64 N. C. 33.

4. INTENT. In many cases the vitiating effect of an immaterial change is made to depend in part upon the intent with which the act is done, at least to the extent of holding that such a change will not vitiate in the absence of a fraudulent design ;[55] but the better rule, especially in view of the doctrine generally announced that the intent with which an alteration is made is immaterial,[56] would seem to be that if the change is immaterial the motive will be immaterial, as the motive becomes a pertinent inquiry only when the act itself affects the rights of the parties.[57]

F. Character and Effect of Particular Changes — 1. ADDING, CHANGING, OR DESTROYING COVENANTS AND CONDITIONS IN GENERAL. Any change which makes a new stipulation or condition in the contract of the parties is material,[58] as a stipula-

Tennessee.— Blair *v.* State Bank, 11 Humphr. (Tenn.) 83.

Washington.—Kleeb *v.* Bard, 12 Wash. 140, 40 Pac. 733.

England.—Waugh *v.* Bussell, 5 Taunt. 707, 1 E. C. L. 362; Sanderson *v.* Symons, 1 B. & B. 426; Aldous *v.* Cornwell, L. R. 3 Q. B. 573.

55. *California.*— Oakland First Nat. Bank *v.* Wolff, 79 Cal. 69, 21 Pac. 551, 748; Turner *v.* Billagram, 2 Cal. 520.

Massachusetts.— Ford *v.* Ford, 17 Pick. (Mass.) 418.

North Carolina.— Dunn *v.* Clements, 52 N. C. 58.

Rhode Island.— Arnold *v.* Jones, 2 R. I. 345.

Tennessee.—McDaniel *v.* Whitsett, 96 Tenn. 10, 33 S. W. 567; Blair *v.* State Bank, 11 Humphr. (Tenn.) 83.

Virginia.— Keen *v.* Monroe, 75 Va. 424.

United States.— Crawford *v.* Dexter, 5 Sawy. (U. S.) 201, 6 Fed. Cas. No. 3,368.

56. See *supra*, III, C.

57. *Illinois.*— Vogle *v.* Ripper, 34 Ill. 100, 85 Am. Dec. 298.

Iowa.— Robinson *v.* Phœnix Ins. Co., 25 Iowa 430.

Kentucky.— Tranter *v.* Hibbard, 21 Ky. L. Rep. 1710, 56 S. W. 169.

Mississippi.— Moye *v.* Herndon, 30 Miss. 110.

Pennsylvania.— Miller *v.* Reed, 27 Pa. St. 244, 67 Am. Dec. 459.

Wisconsin.— Fuller *v.* Green, 64 Wis. 159, 24 N. W. 907, 54 Am. Rep. 600.

Wyoming.— McLaughlin *v.* Venine, 2 Wyo. 1.

58. *Alabama.*— Payne *v.* Long, 121 Ala. 385, 25 So. 780, which involved the incorporation into a note of the words "subject to settlement between us."

Georgia.— Johnson *v.* Brown, 51 Ga. 498, which involved the extension of the terms of a letter of credit guaranteeing the payment of purchases by the holder in a certain state so as to authorize purchases in another and different place.

Illinois.— Kelly *v.* Trumble, 74 Ill. 428, which involved the interlining, into a bond for title, of a provision granting and surrendering immediate possession to the purchaser.

Indiana.—Weir Plow Co. *v.* Walmsley, 110 Ind. 242, 11 N. E. 232, extending guaranty of the performance of a contract. But in State *v.* Berg, 50 Ind. 496, it was held that where the conditions of a bond of a township trustee recited that the officer should account to the board of commissioners at its March term in 1868, the insertion of the figures "1869" and "1870" after the figures "1868" was immaterial, because without them it was still the officer's duty to account for those years.

Massachusetts.— Osgood *v.* Stevenson, 143 Mass. 399, 9 N. E. 825, holding that the insertion into a book subscription of the word "cloth," indicating the binding, and the figures "$6.25," indicating the price for each volume, is material where the subscriber understood that the whole work was sold to him for six dollars and twenty-five cents.

Pennsylvania.— McIntyre *v.* Velte, 153 Pa. St. 350, 25 Atl. 739, involving the insertion into a mortgage, by the mortgagee, of a clause to the effect that scire facias may issue in case of twenty days' default in payment.

Texas.— Alteration of bail-bond by changing time of appearance. Wegner *v.* State, 28 Tex. App. 419, 13 S. W. 608; Heath *v.* State, 14 Tex. App. 213; Butler *v.* State, 31 Tex. Crim. 63, 19 S. W. 676.

Utah.— American Pub. Co. *v.* Fisher, 10 Utah 147, 37 Pac. 259, involving a change, in a written offer to manufacture goods at a specified price, by interlining the words "all terms and conditions included in above, approved, read and agreed."

England.— Powell *v.* Divett, 15 East 29, wherein a sale note in its original form read "Sold for your account to Messrs. Divett & Co. the following parcels of Spanish wool, (a few bags more or less,) of each mark, viz. (specifying them and the rates of price) customary tear and allowance. To be paid for by acceptances at two, four, six, and eight months," and was changed by the broker by inserting a memorandum: "such part as may be deemed to be taken at such allowance as shall be settled by two experienced brokers."

Immaterial changes.— Insertion of a mere clerical omission, by the scrivener of a bond, to make it conform to his notion of the requirements of the statute, and which in no way varies the meaning of the instrument or its operation, is immaterial, as held where, upon the execution of a new bond by an officer in pursuance of a notice by the surety on a former bond that the latter did not wish longer to be bound, the county clerk, on the return of the bond to him, and without the

tion waiving the benefit of a legal defense or exemption,[59] or a stipulation in a note retaining a lien upon land.[60] So of the erasure by a covenantor of one of his covenants,[61] or of a condition affecting the operation of the instrument,[62] as by changing a conditional into an absolute liability.[63]

2. Character or Quality of Goods. The addition to a contract for the delivery of goods of words qualifying the character or quality thereof, is material,[64] unless the words inserted convey no meaning other than the original terms of the contract import.[65]

3. As to Separate Estate. Where the separate estate of a married woman can be bound only by express authority, a change in a note, executed by a married woman, by adding a clause charging her separate estate, is material and vitiates the instrument.[66]

4. Risk in Insurance Policy. A change in a policy of insurance which alters the risk is material, and avoids the policy.[67]

knowledge or consent of the sureties, inserted a recital that the surety had given up the former bond and that the officer was required to file this as a new one. Rudesill *v.* Jefferson County, 85 Ill. 446. Martin *v.* McMasters, 14 La. 420 (holding that the words "without recourse," written at the end of a transfer of a note, had no effect, because under the code a transferee has no recourse on the transferrer when the debt existed at the time of the transfer); Prudden *v.* Nester, 103 Mich. 540, 542, 61 N. W. 777 (where the words "I do not, however, guarantee its payment," were added to an assignment of a debt which did not contain a guaranty, and afterward removed by cutting them out, and it was held that the addition did not change the effect of the assignment, and cutting them out was not material); Krouskop *v.* Shontz, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817 (where the indorsement on a note that it was to be extended "if desired by makers" was held to have no legal significance, and the unauthorized addition of the words "on payment of the interest, as expressed until" a day named, being equally without significance, constituted no alteration).

59. Jordan *v.* Long, 109 Ala. 414, 19 So. 843 (the unauthorized insertion of a waiver of exemption); Davis *v.* Carlisle, 6 Ala. 707 (the addition of the words "without defalcation or set-off"). But the addition to a mortgage of a clause waiving the benefit of a specific act of assembly which had been repealed prior to the execution of the mortgage is immaterial, as the legal effect of the mortgage remains the same. Robertson *v.* Hay, 91 Pa. St. 242.

60. McDaniel *v.* Whitsett, 96 Tenn. 10, 33 S. W. 567.

61. Burgwin *v.* Bishop, 91 Pa. St. 336.

62. Johnson *v.* Heagan, 23 Me. 329; Marr *v.* Hobson, 22 Me. 321 (which was an alteration by erasing a condition in a deed which had become void by reason of the non-performance of the condition erased); Campbell *v.* McKinnon, 18 U. C. Q. B. 612 (erasure or obliteration of a condition in a note so as to render it negotiable).

63. Tate *v.* Fletcher, 77 Ind. 102; Longwell *v.* Day, 1 Mich. N. P. 286.

64. Martendale *v.* Follet, 1 N. H. 95 (the insertion of the word "young" before the word "merchantable" in a note payable in "merchantable neat stock"); Schwalm *v.* McIntyre, 17 Wis. 232 (adding "it is to be good, hard wood" in a contract for the delivery of a certain quantity of wood); Mollett *v.* Wackerbarth, 5 C. B. 181, 57 E. C. L. 181 (wherein a sold-note in the following form: "Sold for Messrs. Wackerbarths & Coling, one hundred tons of crushed sugar (as per sample), in hogsheads," was changed by the buyer, without the privity of the seller, by adding at the foot of the paper "of their own manufacture," with an asterisk as a mark of reference and a corresponding asterisk in the body of the note after the word "sample," and it was held that the words inserted purported that the sample was of the manufacture of Wackerbarths & Coling and constituted a material change, avoiding the contract as against the buyer).

65. State *v.* Cilley [*cited* in Martendale *v.* Follet, 1 N. H. 95, 97], writing the word "good" before "merchantable" in a contract for "merchantable wool."

66. Taddiken *v.* Cantrell, 69 N. Y. 597, 25 Am. Rep. 253; Pease *v.* Barnett, 27 Hun (N. Y.) 378; Reeves *v.* Pierson, 23 Hun (N. Y.) 185. But, under a later statute providing that a separate estate of a married woman shall be liable for her contracts without expressly charging such estate, it is held that the insertion of a stipulation over a married woman's indorsement charging her separate estate is not material. Clapp *v.* Collins, 7 N. Y. Suppl. 98, 26 N. Y. St. 95. In Missouri, however, it was held, over the objection that the addition of a stipulation charging the separate estate of the signer of the note could in no way be a material modification of the contract, unless the instrument was executed by a married woman, that the note was avoided, without reference to the material or immaterial character of the change. Kingston Sav. Bank *v.* Bosserman, 52 Mo. App. 269.

67. Campbell *v.* Christie, 2 Stark. 64, 3 E. C. L. 318.

Insertion of property after loss is material. Phoenix Ins. Co. *v.* McKernan, 100 Ky. 97, 18 Ky. L. Rep. 617, 37 S. W. 490.

Warranty of time of sailing, in a policy of

5. Consideration. If an instrument is changed in respect of the consideration, which appears only as a recital to show the basis of the instrument, it would seem to be immaterial;[68] but if such a change relates to the liability of the party, as by enlarging the security, changing the penalty of a bond, or otherwise altering the ultimate responsibility of a party,[69] or the instrument as evidence of a fact, it is material and constitutes an alteration of the contract.[70]

6. Amount. The amount representing the pecuniary liability as expressed in a bill, note, or other written instrument is a material part thereof, the changing of which will constitute an alteration so as to discharge the party not consenting thereto.[71] It does not matter how trivial the change may be where the amount is

insurance, is a material part thereof, and a change therein is material. Fairlie *v.* Christie, 7 Taunt. 416, 2 E. C. L. 425.

Permission of call off a port not contemplated in the original terms of the contract is material. Forshaw *v.* Chabert, 3 B. & B. 158 [*distinguishing* Sanderson *v.* Symons, 1 B. & B. 426].

68. Westmoreland *v.* Westmoreland, 92 Ga. 233, 17 S. E. 1033; Gardiner *v.* Harback, 21 Ill. 129 (holding that the addition of "$10 dollars and fifty interest" after the words "value received" in a note did not change the legal import of the instrument, but may be considered to mean that the portion of the value received by the makers consisted of ten dollars and fifty cents interest); Reed *v.* Kemp, 16 Ill. 445 (a change in the amount expressed as the consideration inducing one to enter into a bond to secure the faithful performance of a particular act); Magers *v.* Dunlap, 39 Ill. App. 618 (holding that the insertion of the words "for labor" into a note executed for physician's services did not import wages due as a laborer, or services within the meaning of the exemption act); Bridges *v.* Winters, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598 (wherein a note was executed for "loaned money" and afterward the words "in gold" were inserted after the words above mentioned, and it was held that the legal liability of the maker was not changed, and therefore the insertion was immaterial).

Indorsement of basis of credit.— Where a statement as a basis of credit was indorsed upon a note of a husband and wife, which statement showed that the wife owned a farm worth four thousand dollars and personalty worth six hundred dollars, a subsequent unauthorized change of the last amount to one thousand dollars was held to be immaterial, because the farm and six hundred dollars were as good as a basis of credit as the farm and one thousand dollars. Krouskop *v.* Shontz, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817.

69. Consideration of mortgage.—Change by increasing it is material. Johnson *v.* Moore, 33 Kan. 90, 5 Pac. 406; Russell *v.* Reed, 36 Minn. 376, 31 N. W. 452. So where a recital is inserted into a mortgage so as to make it secure additional notes. Carlisle *v.* People's Bank, 122 Ala. 446, 26 So. 115. See also VII, D, 4, j.

Consideration of note changed by inserting a statement that it is for a tract of land, and thus making it apparently a lien on the land, is material. Low *v.* Argrove, 30 Ga. 129. See also Richardson *v.* Fellner, 9 Okla. 513, 60 Pac. 270.

70. Benjamin *v.* McConnell, 9 Ill. 536, 46 Am. Dec. 474.

71. *Alabama.*— Green *v.* Sneed, 101 Ala. 205, 13 So. 277, 46 Am. St. Rep. 119, changing the amount secured by mortgage.

Arkansas.— Fordyce *v.* Kosminski, 49 Ark. 40, 3 S. W. 892, 4 Am. St. Rep. 18; Chism *v.* Toomer, 27 Ark. 108.

California.— People *v.* Kneeland, 31 Cal. 288, increasing the penalty of an official bond.

Connecticut.— Ætna Nat. Bank *v.* Winchester, 43 Conn. 391.

Delaware.— Newark Bank *v.* Crawford, 2 Houst. (Del.) 282.

Idaho.— Mulkey *v.* Long, (Ida. 1897) 47 Pac. 949.

Illinois.—Sans *v.* People, 8 Ill. 327 (changing the penalty of a bond); Pankey *v.* Mitchell, 1 Ill. 383.

Indiana.— Collier *v.* Waugh, 64 Ind. 456; Schneider *v.* Rapp, 33 Ind. 270.

Iowa.— Maguire *v.* Eichmeier, 109 Iowa 301, 80 N. W. 395; Knoxville Nat. Bank *v.* Clark, 51 Iowa 264, 1 N. W. 491, 33 Am. Rep. 129.

Maryland.— Burrows *v.* Klunk, 70 Md. 451, 17 Atl. 378, 14 Am. St. Rep. 371, 3 L. R. A. 576.

Massachusetts.— Greenfield Sav. Bank *v.* Stowell, 123 Mass. 196, 25 Am. Rep. 67; Citizens' Nat. Bank *v.* Richmond, 121 Mass. 110; Agawam Bank *v.* Sears, 4 Gray (Mass.) 95; Wade *v.* Withington, 1 Allen (Mass.) 561; Doane *v.* Eldridge, 16 Gray (Mass.) 254, where a bond was given for the collection of a tax or assessment, and thereafter the assessor reduced the amount of the assessment and altered the amount of the bond to correspond.

Minnesota.— Renville County *v.* Gray, 61 Minn. 242, 63 N. W. 635, changing the penalty of a bond.

Missouri.— State *v.* Chick, 146 Mo. 645, 48 S. W. 829, changing penalty of bond.

New Mexico.— Ruby *v.* Talbott, 5 N. M. 251, 21 Pac. 72, 3 L. R. A. 724.

New York.— Flannagan *v.* National Union Bank, 2 N. Y. Suppl. 488, 18 N. Y. St. 826.

North Carolina.— Cheek *v.* Nall, 112 N. C. 370, 17 S. E. 80.

South Carolina.— Mills *v.* Starr, 2 Bailey (S. C.) 359.

increased,[72] nor does it matter that the amount is reduced instead of increased, because the identity of the contract may be effectually destroyed in this manner.[73] The general rule applies, however, that changes in this regard which in no manner alter the identity or legal effect of the instrument are not material, as where the change is in the marginal numerals, which form no part of the instrument, leaving the amount expressed in the body of the instrument intact,[74] or where the insertion merely makes the instrument conform with itself and supplies nothing further than that which would be implied without it.[75]

7. Costs and Attorney's Fees. Increasing the fees in a power of attorney to confess judgment,[76] or inserting a provision into a note for the payment of attorney's fees, is material and constitutes an alteration.[77] In like manner, erasing such a provision,[78] or a condition annexed to such a provision, will constitute an alteration.[79] But where costs are by operation of law included in the conditions of a bond,[80] or by statute a recovery on a penal bond is limited to the penalty fixed, the insertion of a provision for costs in the first case, or for the payment of attorney's fees in the latter, will be immaterial.[81]

8. Interest. An interest clause is a material part of a bill, note, or other instrument, and any change of the instrument which alters the terms of the con-

South Dakota.— Searles *v.* Seipp, 6 S. D. 472, 61 N. W. 804.

Virginia.—Batchelder *v.* White, 80 Va. 103.

England.— Taylor *v.* Mosely, 6 C. & P. 273, 25 E. C. L. 429.

72. Winkles *v.* Guenther, 98 Ga. 472, 25 S. E. 527.

73. *Arkansas.*— Chism *v.* Toomer, 27 Ark. 108.

Indiana.—Johnston *v.* May, 76 Ind. 293, referring to the identity of contract of surety.

Maine.— Hewins *v.* Cargill, 67 Me. 554, holding that the indorser or signer is released by such a change.

Nebraska.— St. Joseph State Sav. Bank *v.* Shaffer, 9 Nebr. 1, 1 N. W. 980, 31 Am. Rep. 394.

England.— Gardner *v.* Walsh, 5 E. & B. 83, 85 E. C. L. 83.

74. *Illinois.*—Merritt *v.* Boyden, (Ill. 1901) 60 N. E. 907.

Iowa.— Horton *v.* Horton, 71 Iowa 448, 32 N. W. 452.

Kentucky.— Woolfolk *v.* Bank of America, 10 Bush (Ky.) 504.

Rhode Island.— Smith *v.* Smith, 1 R. I. 398, 53 Am. Dec. 652.

Wisconsin.— Johnston Harvester Co. *v.* McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39.

England.— Garrard *v.* Lewis, 10 Q. B. D. 30.

Where no marginal figures.— It may be otherwise, however, where there are no marginal figures, and an amount in figures is placed in the margin inconsistent with the amount written in the body of the instrument, and an addition made to the latter so as to make it conform to the altered amount in the margin. Searles *v.* Seipp, 6 S. D. 472, 61 N. W. 804.

75. Houghton *v.* Francis, 29 Ill. 244 (which involved the insertion of a dollar mark in the body of the note before the figures corresponding with the written amount); Boyd *v.* Brotherson, 10 Wend. (N. Y.) 93 (where a note was intended to be made for eight hundred dollars and was indorsed by the payee for the accommodation of the maker and delivered to him, and by mistake the words "hundred dollars" were omitted, so that the note purported to be for "eight ———," and the maker, without the assent of the indorser, inserted the words "hundred dollars," the indorser will not be discharged); Waugh *v.* Bussell, 5 Taunt. 707, 1 E. C. L. 362 (which was a bond to pay one hundred pounds in six equal instalments, and the change consisted in inserting the word "hundred" between the word "one" and the word "pounds" and it was held that the sense was sufficiently manifest before the change, and therefore the insertion was immaterial).

76. Burwell *v.* Orr, 84 Ill. 465.

77. Monroe *v.* Paddock, 75 Ind. 422.

78. Decorah First Nat. Bank *v.* Laughlin, 4 N. D. 391, 61 N. W. 473, holding that the erasure of an agreement to pay the expenses incurred in the collection of a note, including attorney's fees, was an alteration of the instrument, because without those words it was negotiable, and the erasure thus converted a non-negotiable into a negotiable instrument.

79. Koons *v.* Davis, 84 Ind. 387, holding that the erasure of a condition limiting liability for attorney's fees was material, because, under the statute in that state, where such a condition is expressly annexed the provision itself for the payment of attorney's fees is void, and thus the erasure creates a liability which the provision with the condition annexed precluded.

80. Kleeb *v.* Bard, 12 Wash. 140, 40 Pac. 733.

81. White Sewing Mach. Co. *v.* Dakin, 86 Mich. 581, 49 N. W. 583, 13 L. R. A. 313, holding that the penalty of the bond was for a fixed amount and no recovery could be had exceeding that amount; that the promise was no part of the penalty and could in no possible event affect the judgment to be rendered.

tract in this regard, is material and vitiates it — as where a word or clause is added or inserted to make the instrument bear interest[82]— unless the addition is a mere memorandum of an independent agreement of one of the parties.[83] Thus, such consequence attends changes which increase[84] or reduce the rate;[85] which alter the legal rate;[86] which affect the time from which the instrument is to begin to bear interest, though it be by making it bear interest after maturity instead of

82. *Alabama.*— Lamar *v.* Brown, 56 Ala. 157; Glover *v.* Robbins, 49 Ala. 219, 20 Am. Rep. 272; Brown *v.* Jones, 3 Port. (Ala.) 420.

California.— In this state the unauthorized insertion of a rate of interest avoids the instrument as to the excess over the legal rate which the instrument otherwise would have borne, but not as to the latter, if the change was innocently made. Oakland First Nat. Bank *v.* Wolff, 79 Cal. 69, 21 Pac. 551, 748; Fisher *v.* Dennis, 6 Cal. 577, 65 Am. Dec. 534.

Delaware.— Warpole *v.* Ellison, 4 Houst. (Del.) 322, though the words inserted were erased before maturity.

District of Columbia.— Lewis *v.* Shepherd, 1 Mackey (D. C.) 46.

Georgia.— Gwin *v.* Anderson, 91 Ga. 827, 18 S. E. 43.

Illinois.— Yost *v.* Minneapolis Harvester Works, 41 Ill. App. 556.

Indiana.— Hert *v.* Oehler, 80 Ind. 83 (holding that striking out words in an instrument, indicating that interest on the note had been paid to maturity, discharged the accommodation indorser); Hart *v.* Clouser, 30 Ind. 210; Kountz *v.* Hart, 17 Ind. 329.

Iowa.— Derr *v.* Keaough, 96 Iowa 397, 65 N. W. 339; Grand Haven First Nat. Bank *v.* Hall, 83 Iowa 645, 50 N. W. 944; Smith *v.* Eals, 81 Iowa 235, 46 N. W. 1110, 25 Am. St. Rep. 486; Woodworth *v.* Anderson, 63 Iowa 503, 19 N. W. 296.

Kentucky.— Locknane *v.* Emmerson, 11 Bush (Ky.) 69.

Maine.— Waterman *v.* Vose, 43 Me. 504.

Maryland.— Owen *v.* Hall, 70 Md. 96, 16 Atl. 376.

Massachusetts.— Fay *v.* Smith, 1 Allen (Mass.) 477, 79 Am. Dec. 752.

Michigan.— Bradley *v.* Mann, 37 Mich. 1; Swift *v.* Barber, 28 Mich. 503; Holmes *v.* Trumper, 22 Mich. 427, 7 Am. Rep. 661.

Missouri.— Capital Bank *v.* Armstrong, 62 Mo. 59; Washington Sav. Bank *v.* Ecky, 51 Mo. 272.

Nebraska.— Hurlbut *v.* Hall, 39 Nebr. 889, 58 N. W. 538; Davis *v.* Henry, 13 Nebr. 497, 14 N. W. 523.

New York.— Schmarz *v.* Oppold, 74 N. Y. 307; McGrath *v.* Clark, 56 N. Y. 34, 15 Am. Rep. 372; Meyer *v.* Huneke, 55 N. Y. 412; Kennedy *v.* Crandell, 3 Lans. (N. Y.) 1; Mt. Morris Bank *v.* Lawson, 10 Misc. (N. Y.) 359, 31 N. Y. Suppl. 18, 63 N. Y. St. 432.

North Carolina.— Long *v.* Mason, 84 N. C. 15.

Ohio.— Jones *v.* Bangs, 40 Ohio St. 139, 48 Am. Rep. 664.

Pennsylvania.— Gettysburg Nat. Bank *v.* Chisolm, 169 Pa. St. 564, 32 Atl. 730, 47 Am. St. Rep. 929; Boustead *v.* Cuyler, 116 Pa. St. 551, 8 Atl. 848; Winters *v.* Mowrer, 1 Pa. Super. Ct. 47.

Tennessee.— McVey *v.* Ely, 5 Lea (Tenn.) 438.

Texas.— Farmers, etc., Nat. Bank *v.* Novich, 89 Tex. 381, 34 S. W. 914.

Canada.— Halcrow *v.* Kelly, 28 U. C. C. P. 551.

83. See VII, F, 20.

84. *Indiana.*— Palmer *v.* Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; Bowman *v.* Mitchell, 79 Ind. 84; Schnewind *v.* Hacket, 54 Ind. 248; Shanks *v.* Albert, 47 Ind. 461.

Maine.— Lee *v.* Starbird, 55 Me. 491.

Massachusetts.— Draper *v.* Wood, 112 Mass. 315, 17 Am. Rep. 92.

Missouri.— Presbury *v.* Michael, 33 Mo. 542; Ivory *v.* Michael, 33 Mo. 398.

Ohio.— Thompson *v.* Massie, 41 Ohio St. 307; Harsh *v.* Klepper, 28 Ohio St. 200.

South Carolina.— Heath *v.* Blake, 28 S. C. 406, 5 S. E. 642.

Virginia.— Dobyns *v.* Rawley, 76 Va. 537.

England.— Warrington *v.* Early, 2 E. & B. 763, 75 E. C. L. 763.

Overdue bond.— Where the rate of interest in a bond was increased from four and one half per cent to four and three quarters per cent per annum, but when the change was made the bond was overdue, and therefore bore six per cent, and the first year's interest had been paid, the change was held immaterial. Burkholder *v.* Lapp, 31 Pa. St. 322.

85. Fillmore County *v.* Greenleaf, 80 Minn. 242, 83 N. W. 157 (as to sureties in bond); Moore *v.* Hutchinson, 69 Mo. 429; Whitmer *v.* Frye, 10 Mo. 348; Keene *v.* Weeks, 19 R. I. 309, 33 Atl. 446.

86. Hoopes *v.* Collingwood, 10 Colo. 107, 13 Pac. 909, 3 Am. St. Rep. 565; Craighead *v.* McLoney, 99 Pa. St. 211; Sanders *v.* Bagwell, 32 S. C. 238, 10 S. E. 946, 7 L. R. A. 743, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770; Kilkelly *v.* Martin, 34 Wis. 525.

Contra.— But where a note bore six per cent. interest before the change, and was changed to an illegal rate, it was held that, as the note still bore a legal rate of interest and was void as to the illegal rate, the legal effect of the instrument was not changed. Keene *v.* Miller, 103 Ky. 628, 20 Ky. L. Rep. 279, 45 S. W. 1041.

Addition of place of execution.— In Houston *v.* Potts, 64 N. C. 33, where a note was actually made in South Carolina, it was held that it would have borne the South Carolina rate of interest, and therefore the addition to the note of its place of execution would not constitute a material change, though plaintiff and surety lived in North Carolina, where the rate of interest was smaller.

from date,[87] or to make it bear interest from an earlier date[88]— as where the instrument originally bore interest from maturity, and that word is stricken out so as to make it bear interest generally;[89] which add stipulations as to the time of payment, as that interest is to be paid annually,[90] or semiannually,[91] unless the original terms of the instrument are such that the addition can be considered to mean nothing more than the rate of interest already provided for, and not to change the time of payment.[92] But, where a note by its terms draws interest at a certain rate, it is not affected by the insertion of that rate after execution.[93]

9. Time of Performance or Payment. The time for the performance of a contract or the doing of a particular act under stipulations of a written contract,[94] or for the payment of money thereunder,[95] is a material part of the instrument,

87. Coburn *v.* Webb, 56 Ind. 96, 26 Am. Rep. 15, holding that the instrument is not the one executed by the party under these conditions, and it does not matter that the change is not, in fact, to his prejudice. This is especially true as against a surety, as where a note is signed by a maker and surety and intrusted by the latter to the former to negotiate. Franklin L. Ins. Co. *v.* Courtney, 60 Ind. 134, and the case first above cited, which is of the same kind.

88. Benedict *v.* Miner, 58 Ill. 19, where a note dated March 3d, and payable May 1st, was changed so as to bear interest after April 1st, intervening between the two dates above mentioned.

During period of grace.— By causing it to bear interest during the period of grace, when, by its terms, it would not have borne interest during that time. Little Rock Trust Co. *v.* Martin, 57 Ark. 277, 21 S. W. 468.

89. *Illinois.*— Black *v.* Bowman, 15 Ill. App. 166.

Indiana.— Dietz *v.* Harder, 72 Ind. 208; Brooks *v.* Allen, 62 Ind. 401.

Iowa.— Murray *v.* Graham, 29 Iowa 520 which case, however, was distinguishable, on account of its peculiar facts, from others holding that a recovery could not be had on the original terms of the instrument.

Kansas.— Shely *v.* Sampson, 5 Kan. App. 465, 46 Pac. 994, erasing "from maturity" and inserting "from date."

Michigan.—Nelson *v.* Dutton, 51 Mich. 416, 16 N. W. 791.

Nebraska.— Courcamp *v.* Weber, 39 Nebr. 533, 58 N. W. 187, changing a note bearing interest at ten per cent. from maturity to one bearing interest at seven per cent. from date.

Wisconsin.— Page *v.* Danaher, 43 Wis. 221.

90. Marsh *v.* Griffin, 42 Iowa 403; Boalt *v.* Brown, 13 Ohio St. 364; Kennedy *v.* Moore, 17 S. C. 464 (which was the addition of words to a sealed note, converting it from a simple-interest into an annual-interest obligation); Gorden *v.* Robertson, 48 Wis. 493, 4 N. W. 579 (where the words added were "payable annually," which enabled a recovery before it became due).

91. Blakey *v.* Johnson, 13 Bush (Ky.) 197, 26 Am. Rep. 254; Dewey *v.* Reed, 40 Barb. (N. Y.) 16; Fulmer *v.* Seitz, 68 Pa. St. 237, 8 Am. Rep. 172; Neff *v.* Horner, 63 Pa. St. 327, 3 Am. Rep. 555.

92. Leonard *v.* Phillips, 39 Mich. 182, 33 Am. Rep. 370 (where the word "annually" only was added to a stipulation for "interest at the rate of ten per cent."); Patterson *v.* McNeeley, 16 Ohio St. 348 (wherein it was held that in a clause, "the above to be at ten per cent. interest annually," the word "annually" would be understood as relating to and defining the rate of interest only as so much per annum, but that to insert the word "paid" before the word "annually" was material, and constituted an alteration).

Words without legal effect to change the meaning of the instrument in regard to its provisions as to interest, are immaterial. Thus a bond was given to pay one hundred dollars, twenty-five dollars a year, the first payment to be made seventeen months after date, and it was held that the insertion of "on the whole" after the word "interest" was not material. Gardinier *v.* Sisk, 3 Pa. St. 326.

93. James *v.* Dalbey, 107 Iowa 463, 78 N. W. 51; Port Huron First Nat. Bank *v.* Carson, 60 Mich. 432, 27 N. W. 589.

94. Hodge *v.* Gilman, 20 Ill. 437 (which involved a change in a power of attorney to enter up judgment at "any time after" the same became due, by inserting the words "before or" between the words "time" and "after"); U. S. Glass Co. *v.* West Virginia Flint Bottle Co., 81 Fed. 993 (which was a license for the use of machines, providing that the lessee might call upon the licensor "for as many additional machines as the licensee deemed expedient," without fixing the time of delivery, and the change consisted in the insertion of a provision limiting the time within which the machines should be shipped after notice given).

Change not altering sense.— Where an order for goods was made subject to countermand "by a certain time," it was held that the legal effect of the instrument was not changed by adding the word "before" over the word "by," and therefore such a change was immaterial. Express Pub. Co. *v.* Aldine Press Co., 126 Pa. St. 347, 17 Atl. 608, 24 Wkly. Notes Cas. (Pa.) 165.

95. Acker *v.* Ledyard, 8 Barb. (N. Y.) 514, holding that the insertion of the words "in advance," in a lease indicating time of payment of rent, is a material change.

A mere memorandum in this connection is not material. Mente *v.* Townsend, 68 Ark. 391, 59 S. W. 41.

the change of which will constitute an alteration, vitiating the instrument as against parties not consenting.[96]

10. Medium of Payment. A change in the medium of payment of a note is material and will constitute an alteration, as by inserting a provision for payment in gold,[97] or in specie,[98] or by otherwise changing the mode of payment already specified in the instrument.[99]

11. Place of Payment — a. General Rule. A change of a place of payment of a bill or note is material, and, when not made with the consent of all parties, constitutes an alteration as against such as do not consent.[1] So a change, by fix-

96. *Arkansas.*— Gist *v.* Gans, 30 Ark. 285; Chism *v.* Toomer, 27 Ark. 108.

Indiana.— Stayner *v.* Joice, 82 Ind. 35; Bell *v.* State Bank, 7 Blackf. (Ind.) 456.

Iowa.— Eckert *v.* Pickel, 59 Iowa 545, 13 N. W. 708.

Kentucky.— Lisle *v.* Rogers, 18 B. Mon. (Ky.) 528; Ft. Worth First Nat. Bank *v.* Payne, 19 Ky. L. Rep. 839, 42 S. W. 736.

Massachusetts.— Ives *v.* Farmers' Bank, 2 Allen (Mass.) 236. But mere insertion of the word "year" is immaterial in a clause indicating payment on a particular day and month in "the ——— of our Lord 1805." Hunt *v.* Adams, 6 Mass. 519, 522.

Minnesota.— Flanigan *v.* Phelps, 42 Minn. 186, 43 N. W. 1113, insertion of clause granting privilege of extension for a certain number of days.

Mississippi.—Bay *v.* Shrader, 50 Miss. 326; Henderson *v.* Wilson, 6 How. (Miss.) 65. But where a word in the clause indicating the time of payment is omitted by mistake, its insertion to show the time intended is held to be immaterial, as the insertion of the word "months" in the clause "twenty-four after date." Conner *v.* Routh, 7 How. (Miss.) 176, 40 Am. Dec. 59.

Missouri.— King *v.* Hunt, 13 Mo. 97.

New York.— National Ulster County Bank *v.* Madden, 114 N. Y. 280, 21 N. E. 408, 23 N. Y. St. 220, 11 Am. St. Rep. 633 (change of time of payment of check so as to make it payable at a future day, without indorser's consent); Farmers' Nat. Bank *v.* Thomas, 79 Hun (N. Y.) 595, 29 N. Y. Suppl. 837, 61 N. Y. St. 518 (making a note payable on demand).

Pennsylvania.— Hartley *v.* Corboy, 150 Pa. St. 23, 24 Atl. 295.

Tennessee.— Crockett *v.* Thomason, 5 Sneed (Tenn.) 341.

England.— Gardner *v.* Walsh, 5 E. & B. 83, 85 E. C. L. 83; Alderson *v.* Langdale, 3 B. & Ad. 660, 23 E. C. L. 291; Desbrow *v.* Weatherley, 6 C. & P. 758, 25 E. C. L. 675; Paton *v.* Winter, 1 Taunt. 420. But inserting "on demand" in a note which specifies no time of payment is not material, because the legal effect of the instrument is not changed. Aldous *v.* Cornwell, L. R. 3 Q. B. 573.

Canada.— Westloh *v.* Brown, 43 U. C. Q. B. 402.

Contra, Drexler *v.* Smith, 30 Fed. 754.

As affecting grace.— Inserting the word "fixed" into a note, thereby making it payable absolutely without grace, whereas it originally carried grace, is material. Steinau *v.* Moody, 100 Ga. 136, 28 S. E. 30. But, where days of grace are allowed on all bills of exchange or on promissory notes placed on the same footing, the insertion of the word "fixed" into a note is immaterial, for the note was never placed on a footing of the bill of exchange. Tranter *v.* Hibbard, 21 Ky. L. Rep. 1710, 56 S. W. 169. And the erasure of the words "and grace" is not material where, by the law prevailing, the note is entitled to grace without such words. Portsmouth Sav. Bank *v.* Wilson, 5 App. Cas. (D. C.) 8.

Change as to date of instrument or interest.— The rule as to the effect of the change of the time of payment is also involved in the sections treating of the effect of the change in the date of an instrument as accelerating or retarding the time of payment, and of changes respecting interest clauses. See *infra,* VII, F, 13; and *supra,* VII, F, 8.

97. Hanson *v.* Crawley, 41 Ga. 303; Wills *v.* Wilson, 3 Oreg. 308; Bogarth *v.* Breedlove, 39 Tex. 561.

Where nothing but gold is legal tender the insertion of the words "in gold," indicating the medium of payment, is not material. Bridges *v.* Winters, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598.

98. Darwin *v.* Rippey, 63 N. C. 318, because an instrument payable in dollars generally is payable in legal tender notes.

99. Angle *v.* Northwestern L. Ins. Co., 92 U. S. 330, 23 L. ed. 556, which was an alteration, of an application for a loan, by making the amount payable in "current funds" instead of by "drafts to the order of." See also *supra,* VII, F, 2.

Erasure of gold clause.— The erasure of a provision for payment "in gold or its equivalent," by the direction of the maker and payee of the note, without the knowledge or consent of the surety thereon, discharges the surety. Church *v.* Howard, 17 Hun (N. Y.) 5.

1. *Alabama.*— Holmes *v.* Ft. Gaines Bank, 120 Ala. 493, 24 So. 959; White *v.* Hass, 32 Ala. 430, 70 Am. Dec. 548, erasure of place of payment as discharging maker.

Iowa.— Adair *v.* Egland, 58 Iowa 314, 12 N. W. 277.

New York.— Woodworth *v.* Bank of America, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239.

West Virginia.—Ohio Valley Bank *v.* Lockwood, 13 W. Va. 392, 31 Am. Rep. 768.

England.— Rex *v.* Treble, 2 Taunt. 328.

Canada.— McQueen *v.* McIntyre, 30 U. C. C. P. 426.

Contra, Major *v.* Hansen, 2 Biss. (U. S.) 195, 16 Fed. Cas. No. 8,982, non-prejudicial effect upon maker of erasure of place of payment.

ing a specific place of payment in a note which is made payable generally, is material,[2] as where the note is made payable at a bank and is thus converted into negotiable paper, subject to the law merchant.[3] So, changing the place of payment in a bill of exchange, or inserting a particular place of payment in a general acceptance, is material.[4]

b. Qualification of Rule. These rules have been restricted to cases in which the place of payment added — to the acceptance of a bill, for instance — is different from that in which the bill is drawn,[5] and the same distinction has been applied to the addition of a place of payment in a note made payable generally.[6]

c. Memorandum. The materiality of the addition of a place of payment further depends upon the question whether a change is made in the contract or is only the addition of a memorandum for convenience. In the former case the addition is material;[7] in the latter it is not.[8]

2. *California.*—Pelton *v.* San Jacinto Lumber Co., 113 Cal. 21, 45 Pac. 12.

Delaware.— Sudler *v.* Collins, 2 Houst. (Del.) 538.

Georgia.— Gwin *v.* Anderson, 91 Ga. 827, 18 S. E. 43.

Illinois.— Pahlman *v.* Taylor, 75 Ill. 629.

Iowa.— Black *v.* De Camp, 75 Iowa 105, 39 N. W. 215; Charlton *v.* Reed, 61 Iowa 166, 16 N. W. 64, 47 Am. Rep. 808. But where the payee of a note became the administratrix of the estate of the maker, and thereafter a place of payment was indorsed on the note, it was held that the addition was not material — the integrity of the maker's contract was not affected. Horton *v.* Horton, 71 Iowa 448, 32 N. W. 452.

Mississippi.— Simmons *v.* Atkinson, 69 Miss. 862, 12 So. 263, 23 L. R. A. 599; Oakey *v.* Wilcox, 3 How. (Miss.) 330.

Nebraska.— Townsend *v.* Star Wagon Co., 10 Nebr. 615, 7 N. W. 274, 35 Am. Rep. 493.

New York.— Nazro *v.* Fuller, 24 Wend. (N. Y.) 374; Woodworth *v.* Bank of America, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239.

Ohio.— Sturges *v.* Williams, 9 Ohio St. 443, 75 Am. Dec. 473.

Pennsylvania.— Hill *v.* Cooley, 46 Pa. St. 259; Southwark Bank *v.* Gross, 35 Pa. St. 80; Simpson *v.* Stackhouse, 9 Pa. St. 186, 49 Am. Dec. 554.

3. Holmes *v.* Ft. Gaines Bank, 120 Ala. 493, 24 So. 959; Winter *v.* Pool, 100 Ala. 503, 14 So. 411; Toomer *v.* Rutland, 57 Ala. 379, 29 Am. Rep. 722; Ballard *v.* Franklin L. Ins. Co., 81 Ind. 239; McCoy *v.* Lockwood, 71 Ind. 319; Shanks *v.* Albert, 47 Ind. 461; Morehead *v.* Parkersburg Nat. Bank, 5 W. Va. 74, 13 Am. Rep. 636.

4. Whitesides *v.* Northern Bank, 10 Bush (Ky.) 501, 19 Am. Rep. 74; Woolfolk *v.* Bank of America, 10 Bush (Ky.) 504 (holding that, where the holder of a bill of exchange changes the acceptance by the addition of a place of payment, the instrument is avoided as to all parties not consenting); Desbrow *v.* Weatherley, 6 C. & P. 758, 25 E. C. L. 675; Taylor *v.* Moseley, 6 C. & P. 273, 25 E. C. L. 429; Cowie *v.* Halsall, 4 B. & Ald. 197, 6 E. C. L. 449; Burchfield *v.* Moore, 3 E. & B. 683, 77 E. C. L. 683, 25 Eng. L. & Eq. 123; Tidmarsh *v.* Grover, 1 M. & S. 735.

5. Thus, while the drawee of a bill may accept it payable at a particular place in the same town, an acceptance, making the bill payable at a different place from that in which the drawee resides, is material. Troy City Bank *v.* Lauman, 19 N. Y. 477; Niagara Dist. Bank *v.* Fairman, etc., Mach. Tool Mfg. Co., 31 Barb. (N. Y.) 403; Walker *v.* State Bank, 13 Barb. (N. Y.) 636; Myers *v.* Standart, 11 Ohio St. 29, wherein it is said that cases as to the alteration of a note or accepted bill, by inserting or striking out words designating a place of payment, do not apply to the case of a bill of exchange addressed generally to a drawee in a city, and accepted by him payable at a particular bank in the same city, the question in the latter case being whether the contract of the acceptor was so made as to affect the rights of the drawer under the latter's contract with the payee.

Accommodation bill — Implied authority. In Todd *v.* State Bank, 3 Bush (Ky.) 626, it was held that the acceptor of an accommodation bill had an implied authority to appoint the place of payment if none were fixed in the bill, and this was a case of fixing the place of payment in another town.

6. Etz *v.* Place, 81 Hun (N. Y.) 203, 30 N. Y. Suppl. 765, 62 N. Y. St. 707; Shuler *v.* Gillette, 12 Hun (N. Y.) 278; Woodworth *v.* Bank of America, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239.

7. Woodworth *v.* Bank of America, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239, wherein a note was made payable in a particular city, and there was a marginal memorandum, signed by the maker, that it was payable in another city, which memorandum was made after the indorsement, and it was held that this was an alteration of the note itself, and discharged the indorser. In Tidmarsh *v.* Grover, 1 M. & S. 735, it was held that the substitution of one place for another for the payment of a bill of exchange, after acceptance, was material, *distinguishing* Marson *v.* Petit, 1 Campb. 82 note, in that probably in the latter case the matter was not written immediately under the acceptance, but was only a memorandum as to where to find the money when the bill became due, while the case in hand caused the bill to carry with it the appearance of solvency by being directed to a solvent house instead of to the insolvent house to which it was originally directed.

8. Nugent *v.* Delhomm, 2 Mart. (La.) 307, 309 (holding that the memorandum at the

12. PLACE OF EXECUTION. The insertion in a note, as the place of execution, of the place where the contract was actually made and in accordance with the laws of which the note is to be governed, is not material;[9] but it is otherwise where the insertion of the place of execution is intended to change the legal operation and effect of the instrument.[10]

13. DATE OF INSTRUMENT — a. General Rule. The date of an instrument is, in various aspects, a material part thereof.[11] It is material as contributing to the features of the instrument by which the particular contract of the party is identified.[12] A change in the date may alter the apparent liability of a party,[13] or embarrass his remedies under the instrument, whether the time of payment be extended or accelerated, as by affecting the computation of interest, or by retarding or accelerating the operation of the statute of limitations, or the presumption of payment from the lapse of time.[14] It is material, as furnishing *prima facie* evidence of the time of the execution of the contract and of the relation in which the parties then stood,[15] and as fixing the period from which the parties

foot of a note, "Payable at the domicile of Dukeilus," is not such an alteration as avoids the note, upon the authority of Trapp *v.* Spearman, 3 Esp. 57, wherein it was held that the insertion in a bill, after it is given, of these words, "when due, at the Cross-keys, Blackfriars road," was not a material change); American Nat. Bank *v.* Bangs, 42 Mo. 450, 97 Am. Dec. 349. So in Jacobs *v.* Hart, 2 Stark. 45, 3 E. C. L. 310, Lord Ellenborough held that where the payee changes a general acceptance into a special one by inserting the place of payment, after acceptance and shortly before the draft is due, and without the knowledge of the acceptor, and then indorses it over, the objection on the ground of the alteration rested upon whether the place of payment was to be considered as a part of the contract, or merely as a direction, and concluded that the objection was without foundation.

See *infra*, VII, F, 20.

9. Houston *v.* Potts, 64 N. C. 33.

10. Commercial, etc., Bank *v.* Patterson, 2 Cranch C. C. (U. S.) 346, 6 Fed. Cas. No. 3,056, holding that where a note was made in Pennsylvania, an addition by plaintiff or the payee of the words "Washington, D. C.," to the signature of the maker, with the intent to use the addition as a part of the date of the note in order to make it negotiable according to the laws of the District of Columbia, is material, and discharges the maker.

11. **Date of deed.**— The date of a deed is material as between persons contesting the title to the property embraced therein. In such cases the unauthorized change of the date of a deed is an alteration. Galland *v.* Jackman, 26 Cal. 79, 85 Am. Dec. 172 (holding that, as between two persons claiming through or under the same grantor, the change in the date of the deed to one of such parties affects its admissibility in evidence); Alkire *v.* Kahle, 123 Ill. 496, 17 N. E. 693, 5 Am. St. Rep. 540; Den *v.* Wright, 7 N. J. L. 175, 11 Am. Dec. 546.

12. Heffner *v.* Wenrich, 32 Pa. St. 423; Lowe *v.* Merrill, 1 Pinn. (Wis.) 340; Vance *v.* Lowther, 1 Ex. D. 176.

Immaterial changes.— The erasing of the number of the day of the month after the name of the month, and putting it before, does not constitute an alteration. Reed *v.* Kemp, 16 Ill. 445. In State *v.* Miller, 3 Gill (Md.) 335, it was held that the change in the date of a guardian's bond after execution from "—— day of December, 1823," to the "3d day of May, 1824," was immaterial, as it did not tend to alter or enlarge the liability of defendant. A ruling to the same effect was made in Terry *v.* Hazlewood, 1 Duv. (Ky.) 104, though this case seems to be distinguished in Smith *v.* Lockridge, 8 Bush (Ky.) 423, upon the theory that the bond in question was not an instrument for the payment of money.

Assignee's claim against maker.— Changing the date of an assignment of a note is held not to affect the assignee's claim against the maker, as the date is not an essential part of the assignment. Griffith *v.* Cox, 1 Overt. (Tenn.) 210.

13. Owings *v.* Arnott, 33 Mo. 406, wherein the date, as altered, showed that defendant was chargeable as an indorser of a negotiable instrument, whereas, as the note originally stood, it was already past due, and defendant was chargeable as an assignor of a debt.

Date of release.— Change of the date of a general release which purports to discharge the releasee from all claims "to the day of the date" is material. Maybee *v.* Sniffen, 2 E. D. Smith (N. Y.) 1.

14. *Georgia.*— Armstrong *v.* Penn, 105 Ga. 229, 31 S. E. 158.

Indiana.— Hamilton *v.* Wood, 70 Ind. 306.

Kansas.—See also Fraker *v.* Cullum, 21 Kan. 555.

Pennsylvania.— Heffner *v.* Wenrich, 32 Pa. St. 423; Getty *v.* Shearer, 20 Pa. St. 12.

England.— Vance *v.* Lowther, 1 Ex. D. 176, holding that, where the date of a check is changed to a later date, it is material, upon the ground, in addition to the change in the identity of the obligation, that if the drawer of a check had money in the bank at the time of drawing it, and the bank should fail before the check is presented, the question of liability of the drawer might turn on the diligence used in presenting the check.

15. Getty *v.* Shearer, 20 Pa. St. 12, holding that the legal effect of the change might

are entitled to calculate the day of payment or performance, and therefore it is a well-recognized rule that a change in the date, whether it postpones or accelerates the time of payment or performance, is material, and constitutes an alteration which will vitiate the instrument.[16]

b. When Time of Performance Is Fixed. Where the time for payment is fixed, and does not depend upon the lapse of a particular period from the date of the instrument, it is held that the change of a day in the date is not material.[17]

14. Description of Property — As to Identity or Quantity. A change in the description of property conveyed, so as to give it an entirely different name and thus destroy its original identity[18] — so as to make the instrument cover property different from that originally conveyed — whether or not operating to destroy the validity of the instrument as a conveyance of the property originally described,[19] cannot, in any event, give to the instrument validity as a conveyance of that which is indicated by the changed or added description. In other words, such an

embarrass a party in respect of payments or settlements made after the original date but before the substituted date.

16. *Alabama.*— Lesser *v.* Scholze, 93 Ala. 338, 9 So. 273.

Arkansas.— Lemay *v.* Williams, 32 Ark. 166; Inglish *v.* Breneman, 5 Ark. 377, 41 Am. Dec. 96, 9 Ark. 122, 47 Am. Dec. 735.

Delaware.— Warren *v.* Layton, 3 Harr. (Del.) 404.

Illinois.— Wyman *v.* Yeomans, 84 Ill. 403, which was the change of the date in a note and *cognovit*, held material, at least as to a surety.

Kansas.— Fraker *v.* Cullum, 21 Kan. 555; McCormick Harvesting Mach. Co. *v.* Lauber, 7 Kan. App. 730, 52 Pac. 577.

Kentucky.— Lisle *v.* Rogers, 18 B. Mon. (Ky.) 528; Miles *v.* Major, 2 J. J. Marsh. (Ky.) 153; Limestone Bank *v.* Penick, 5 T. B. Mon. (Ky.) 25; Stout *v.* Cloud, 5 Litt. (Ky.) 205.

Maine.— Hervey *v.* Harvey, 15 Me. 357.

Maryland.— Lewis *v.* Kramer, 3 Md. 265; Mitchell *v.* Ringgold, 3 Harr. & J. (Md.) 159, 5 Am. Dec. 433.

Missouri.— Britton *v.* Dierker, 46 Mo. 591, 2 Am. Rep. 553; Aubuchon *v.* McKnight, 1 Mo. 312, 13 Am. Dec. 502.

Montana.— McMillan *v.* Hefferlin, 18 Mont. 385, 45 Pac. 548.

Nebraska.— Brown *v.* Straw, 6 Nebr. 536, 29 Am. Rep. 369.

New Hampshire.— Bowers *v.* Jewell, 2 N.H. 543.

New Jersey.— In Sayre *v.* Reynolds, 5 N. J. L. 862, where a note was changed so as to make the difference of one day in the time of payment, it was said that the change, so slight in its effect as to save the defendant a few cents interest, might well be considered as insufficient to raise a presumption of forgery.

New Mexico.— Ruby *v.* Talbott, 5 N. M. 251, 21 Pac. 72, 3 L. R. A. 724.

New York.— Crawford *v.* West Side Bank, 100 N. Y. 50, 2 N. E. 881, 53 Am. Rep. 152; Rogers *v.* Vosburgh, 87 N. Y. 228.

Ohio.— Newman *v.* King, 54 Ohio St. 273, 43 N. E. 683, 56 Am. St. Rep. 705, 35 L. R. A. 471.

Pennsylvania.— Miller *v.* Stark, 148 Pa. St. 164, 23 Atl. 1058; Heffner *v.* Wenrich, 32 Pa. St. 423; Clark *v.* Eckstein, 22 Pa. St. 507, 62 Am. Dec. 307; Getty *v.* Shearer, 20 Pa. St. 12; Paine *v.* Edsell, 19 Pa. St. 178; Miller *v.* Gilleland, 19 Pa. St. 119; Kennedy *v.* Lancaster County Bank, 18 Pa. St. 347; Hocker *v.* Jamison, 2 Watts & S. (Pa.) 438; Stephens *v.* Graham, 7 Serg. & R. (Pa.) 505, 10 Am. Dec. 485; U. S. Bank *v.* Russel, 3 Yeates (Pa.) 391; Mechling *v.* Hartzell, 4 Pennyp. (Pa.) 500.

Tennessee.— Taylor *v.* Taylor, 12 Lea (Tenn.) 714.

Wisconsin.— Low *v.* Merrill, 1 Pinn. (Wis.) 340.

United States.— Wood *v.* Steele, 6 Wall. (U. S.) 80, 18 L. ed. 725. *Contra*, Union Bank *v.* Cook, 2 Cranch C. C. (U. S.) 218, 24 Fed. Cas. No. 14,349, holding that a change extending the time was a change for the advantage of defendant, and was not material.

England.— Hirschman *v.* Budd, L. R. 8 Exch. 171 (holding that the change in the date of a bill of exchange, which change makes the bill payable at a different date, is material and avoids it as to the acceptor, which seems to be opposed to Parry *v.* Nicholson, 13 M. & W. 778, though the court in the first case thought that the learned judge in the last case did not intend to lay down the principle that the date of a bill is not material, and that the decision in that case must have turned upon the particular facts thereof); Atkinson *v.* Hawdon, 2 A. & E. 628, 29 E. C. L. 293; Sloman *v.* Cox, 1 C. M. & R. 471; Master *v.* Miller, 4 T. R. 320, 1 Anstr. 225; Bell *v.* Gardiner, 4 M. & G. 11, 43 E. C. L. 16; Clifford *v.* Parker, 2 M. & G. 909, 40 E. C. L. 917; Outhwaite *v.* Luntley, 4 Campb. 179.

Canada.— Meredith *v.* Culver, 5 U. C. Q. B. 218; Gladstone *v.* Dew, 9 U. C. C. P. 439.

17. Prather *v.* Zulauf, 38 Ind. 155. See also Lee *v.* Lee, 83 Iowa 565, 50 N. W. 33, as to change of date of lease to begin at fixed day in future.

18. Marcy *v.* Dunlap, 5 Lans. (N. Y.) 365; Collins *v.* Ball, 82 Tex. 259, 17 S. W. 614, 27 Am. St. Rep. 877.

19. For altered deed as evidence see Evidence.

act will constitute an alteration of the instrument.[20] So of the addition of words affecting the quantity of land embraced in an agreement of sale,[21] or a change, in a description of property in a chattel mortgage, by inserting property not originally embraced therein.[22] Where, however, the change supplies nothing which would not be intended by law without it, or is altogether immaterial, neither changing the legal effect of the instrument nor operating to perfect an instrument which otherwise would be invalid — as by merely adding to the description of the identical property — it is not considered material.[23]

20. *Illinois.*— Montag *v.* Linn, 23 Ill. 551 (holding that the alteration of the number of a section in a deed is material, and is not rendered immaterial by reference to the land as that patented to a person for certain services during the late civil war, without proof that there was but one person answering such description; that the grantee has no more right to strike out and alter one part of a description of land than he has to strike out and alter another part of such description, unless the part retained completely fits the subject claimed, and the rejected part does not); Daub *v.* Englebach, 9 Ill. App. 99 (involving the fraudulent change of a mortgage by causing it to embrace other land).

Iowa.— Cutler *v.* Rose, 35 Iowa 456, involving a change in a mortgage so as to give it the force of a lien upon the homestead, as well as upon other lands covered by the mortgage.

Missouri.— Smith *v.* Smith, 132 Mo. 681, 34 S. W. 471, which was a suit to remove a cloud from the title to land, the description of which was thus forged into a deed.

New Hampshire.— Chesley *v.* Frost, 1 N.H. 145.

New Jersey.— Havens *v.* Osborn, 36 N. J. Eq. 426.

Nebraska.— Pereau *v.* Frederick, 17 Nebr. 117, 22 N. W. 235, involving a change in a mortgage made by the notary who took the acknowledgment of the mortgagor, after execution and without the consent of the mortgagor, by causing the mortgage to operate upon the homestead.

South Carolina.— Powell *v.* Pearlstine, 43 S. C. 403, 21 S. E. 328.

West Virginia.— Deem *v.* Phillips, 5 W. Va. 168.

United States.— Moelle *v.* Sherwood, 148 U. S. 21, 13 S. Ct. 426, 37 L. ed. 350, holding that the old execution and acknowledgment are not continued in existence as to the property added, and that, even if it could be so between the original parties, such a deed, as to the added property, could not take effect and be enforced as against subsequent purchasers without notice whose deeds had already been recorded.

21. Sherwood *v.* Merritt, 83 Wis. 233, 53 N. W. 512.

22. Hollingsworth *v.* Holbrook, 80 Iowa 151, 45 N. W. 561, 20 Am. St. Rep. 411; Bowser *v.* Cole, 74 Tex. 222, 11 S. W. 1131. Where property is so described in a chattel mortgage as not to convey sufficient notice to a purchaser from the mortgagor, the addition of words of description — such as words showing the location of the property — is material and cannot operate to perfect the original description as against purchasers from the mortgagor without notice. McKinney *v.* Cabell, 24 Ind. App. 676, 57 N. E. 598.

23. *Illinois.*— Chicago Sanitary Dist. *v.* Allen, 178 Ill. 330, 53 N. E. 109. See also Day *v.* Ft. Scott Invest., etc., Co., 53 Ill. App. 165.

Iowa.— Rowley *v.* Jewett, 56 Iowa 492, 9 N. W. 353.

Kentucky.— Shelton *v.* Deering, 10 B. Mon. (Ky.) 405, which involved a change, by describing the number of acres conveyed, in a deed by the husband after it had been acknowledged by the wife.

Louisiana.— Barrabine *v.* Bradshears, 5 Mart. (La.) 190.

Massachusetts.— Where a deed of conveyance of land, upon which there were situated a well and pump, was interlined with the words "with pump and well of water" after the description of the land by metes and bounds, the change was immaterial, because the effect of the deed was not altered. Brown *v.* Pinkham, 18 Pick. (Mass.) 172.

Mississippi.— Gordon *v.* Sizer, 39 Miss. 805.

Montana.— See Chicago Title, etc., Co. *v.* O'Marr, 18 Mont. 568, 46 Pac. 809, 47 Pac. 4.

New York.— Domestic Sewing Mach. Co. *v.* Barry, 2 Misc. (N. Y.) 264, 21 N. Y. Suppl. 970, 51 N. Y. St. 219 (holding that where a lease of a machine, which contained a clause granting the privilege to purchase, was changed by the insertion of the number of a new machine which was delivered to the lessee in lieu of the first machine delivered under the lease, and returned by the lessee as unsatisfactory, the change is immaterial, because it merely conforms the lease to the facts and goes to the identity of the machine, without changing the terms of the contract); People *v.* Muzzy, 1 Den. (N. Y.) 239.

South Carolina.— Gunter *v.* Addy, 58 S. C. 178, 183, 36 S. E. 553, adding a description of premises conveyed in a mortgage "containing one hundred and sixty-five acres, more or less."

Texas.— Churchill *v.* Bielstein, 9 Tex. Civ. App. 445, 29 S. W. 392, holding that a contract, by which a party was to erect a dwelling on a lot belonging to another and situated on a designated street, is not altered by the addition of a further description by lot and block.

Correction of mistake.— See Hatch *v.* Hatch, 9 Mass. 307, 6 Am. Dec. 67 (where it was held that a change in a deed, made by the covenantor at the grantee's suggestion, by correct-

15. As to Serial Numbers. The change of the serial numbers of negotiable bonds or bank-bills is not material. Such numbers are extrinsic to the contract, and a change in them cannot affect the liability which the instrument represents.[24]

16. Changes Affecting Negotiability — a. In General. Changes which affect the negotiability of commercial paper are material, as those which render negotiable that which before was non-negotiable.[25]

b. Making Payable to Order or to Bearer. Thus where, after execution, the holder of a note, without the consent of a maker, changes its terms so as to make it payable to order instead of to bearer, the evident purpose of the alteration is to add to the negotiability of the note, and the change is material and renders the paper uncollectible.[26] So the insertion of words making a note payable to bearer,

ing the christian name of one of the owners of land to which the land in the deed was described as adjoining, would not impair the credit of the deed); Burnham *v.* Ayer, 35 N. H. 351 (involving the changing of the word "southeasterly" to "southwesterly" in the description of land conveyed in a mortgage, and it was held not to vitiate, on the ground that an immaterial change will not constitute a vitiating alteration, as well as upon the ground that a change which supplies nothing that would not be intended by law will not constitute an alteration, the latter ground being based upon the fact that, in this particular case, the law would have supplied the word introduced, upon the principle of construction that in the description of land in a deed or will fixed monuments govern rather than courses and distances).

24. *Alabama.*— State *v.* Cobb, 64 Ala. 127.

Massachusetts.— Com. *v.* Emigrant Industrial Sav. Bank, 98 Mass. 12, 93 Am. Dec. 126, which was a bill of interpleader, by the attorney-general of the state, under a special statute, to determine whether certain bonds of the commonwealth had become void by reason of the alteration of their numbers. The bonds had been stolen, the numbers thereon changed, and thereafter purchased in good faith. To the argument that a number on a bond constituted a part of the identity of the instrument, the court said that this was an ambiguous use of the term "instrument," and that the number was a part of the identity of the paper, but not of the contract any more than other devices, as a picture or impression, would be.

New Jersey.— Elizabeth *v.* Force, 29 N. J. Eq. 587, which was a bill by the original owner to recover money due on bonds which had been stolen from her, the number of one of which had been altered before it was presented for payment to the city, and which had been paid by the city, although a bond bearing the same number had been previously paid. It was held that the change was immaterial and that the city was liable to the innocent holder of the bond.

New York.— Birdsall *v.* Russell, 29 N. Y. 220, incidentally recognizing the rule stated in the text.

Tennessee.— Tennessee Bank Note Holders *v.* Funding Board, 16 Lea (Tenn.) 46, 57 Am. Rep. 211, a case of bank-bills.

United States.— Wylie *v.* Missouri Pac. R. Co., 41 Fed. 623, 7 R. & Corp. L. J. 250; Brown *v.* U. S., 20 Ct. Cl. 416, applying to stolen bonds so changed the principle that the innocent holder of a negotiable security payable to bearer does not take his title from that of any previous holder, but under the original contract of the promisor. See also Morgan *v.* U. S., 113 U. S. 476, 5 S. Ct. 588, 28 L. ed. 1044.

England.— *Contra*, Suffell *v.* Bank of England, 9 Q. B. D. 555 [*reversing* 7 Q. B. D. 270], upon the ruling in favor of a *bona fide* holder of bank-notes fraudulently obtained by the person from whom he purchased them, and altered by erasing the numbers upon them.

25. *Alabama.*— Winter *v.* Pool, 100 Ala. 503, 14 So. 411.

Indiana.— Ballard *v.* Franklin L. Ins. Co., 81 Ind. 239.

Iowa.— State *v.* Stratton, 27 Iowa 420, 1 Am. Rep. 282.

New Hampshire.— Gerrish *v.* Glines, 56 N. H. 9.

North Dakota.— Decorah First Nat. Bank *v.* Laughlin, 4 N. D. 391, 61 N. W. 473.

West Virginia.— Morehead *v.* Parkersburg Nat. Bank, 5 W. Va. 74, 13 Am. Rep. 636.

Canada.— Campbell *v.* McKinnon, 18 U. C. Q. B. 612; Swaisland *v.* Davidson, 3 Ont. 320.

26. *Delaware.*— Hollis *v.* Vandergrift, 5 Houst. (Del.) 521.

Kentucky.— Johnson *v.* U. S. Bank, 2 B. Mon. (Ky.) 310.

New Hampshire.— Haines *v.* Dennett, 11 N. H. 180, as against a surety in an action by a *bona fide* indorsee.

New York.— Bruce *v.* Westcott, 3 Barb. (N. Y.) 374.

Ohio.— But, where the note was sought to be enforced between the original parties, it was held that where the words "or order" were written "or oder," and were not placed in the proper position in the note, they might be held not to change the obligation in any manner. Carlile *v.* Lamb, 16 Ohio Cir. Ct. 578.

South Carolina.— Pepoon *v.* Stagg, 1 Nott & M. (S. C.) 102.

Texas.— Taylor *v.* Moore, (Tex. 1892) 20 S. W. 53.

England.— In Kershaw *v.* Cox, 2 Esp. 246, an insertion of the words "or order" by the drawer of a bill was by consent of the parties; the instrument having actually passed by indorsement it was held that the indorser could hardly be said not to have consented

or the erasure of the words "or order" and the substitution therefor of the words "or bearer," is material, upon the same principle.[27] But it seems that the interlineation of the words "or bearer" is not material if the note had been indorsed in blank before the change, and was thus payable to bearer at the time of the change.[28]

17. As to Attesting Witnesses — a. General Rule. Where the addition of an attesting witness to an instrument has the effect of extending liability under the statute of limitations, or of facilitating or interfering in any manner with the proof of the execution of the instrument, the procuring of a witness to sign as an attesting witness after the execution of the instrument, and without the consent of the maker, is material and constitutes an alteration.[29] So an instrument may be vitiated by tearing from it the name of a subscribing witness.[30] But, where subscribing witnesses have no influence upon the operation of the statute of limi-

to the change making the instrument negotiable, because by the indorsement he considered it as negotiable. But in Knill *v.* Williams, 10 East 431, Le Blanc, J., said that the opinion in the first case above cited could only be supported on the ground that the change was made by consent to correct a mistake, and that there was strong evidence in that case to show this fact.

27. *Georgia.*— McCauley *v.* Gordon, 64 Ga. 221, 37 Am. Rep. 68; Scott *v.* Walker, Dudley (Ga.) 243.

Iowa.— Needles *v.* Shaffer, 60 Iowa 65, 14 N. W. 129.

Maine.— Croswell *v.* Labree, 81 Me. 44, 16 Atl. 331, 10 Am. St. Rep. 238, holding, however, that while the change is material it will not vitiate the note if done without fraudulent intent.

Mississippi.— Simmons *v.* Atkinson, 69 Miss. 862, 12 So. 263, 23 L. R. A. 599.

Nebraska.— Walton Plow Co. *v.* Campbell, 35 Nebr. 173, 52 N. W. 883, 16 L. R. A. 468.

New York.— Booth *v.* Powers, 56 N. Y. 22.

Tennessee.— McDaniel *v.* Whitsett, 96 Tenn. 10, 33 S. W. 567, involving a change in the terms of a note by making it payable to "holder" instead of to "order."

Wisconsin.— Union Nat. Bank *v.* Roberts, 45 Wis. 373.

Contra, McLaughlin *v.* Venine, 2 Wyo. 1.

Conditional note.— In Goodenow *v.* Curtis, 33 Mich. 505, it was held that where a note was not payable absolutely, but only upon certain contingencies, it could not be affected as to its negotiability by the use of the words "bearer" or "order," and the insertion of the words "or bearer" was immaterial.

By stranger.— An interlineation of the words "or bearer" by a stranger will not affect the rights or liabilities of the parties. Andrews *v.* Calloway, 50 Ark. 358, 7 S. W. 449.

28. McCauley *v.* Gordon, 64 Ga. 221, 37 Am. Rep. 68, holding, however, that an indorsement of the payee's name, by a member of the firm of which the payee was a member, is not sufficient, even if the note was partnership property, without special authority. So in Weaver *v.* Bromley, 65 Mich. 212, 31 N. W. 839, it was held, in an action by the holder of a note against the payee, who had indorsed the note in blank to plaintiff, that the insertion of the words "or order" after the name of the payee, the note being thus made payable to the order of the payee or bearer, was not material.

29. *Alabama.*— White Sewing Mach. Co. *v.* Saxon, 121 Ala. 399, 25 So. 784.

Maine.—Milbery *v.* Storer, 75 Me. 69, 46 Am. Rep. 361; Thornton *v.* Appleton, 29 Me. 298; Brackett *v.* Mountfort, 11 Me. 115.

Massachusetts.— Homer *v.* Wallis, 11 Mass. 309, 6 Am. Dec. 169.

North Carolina.— Allen *v.* Jordan, 3 N. C. 298. *Contra,* see Blackwell *v.* Lane, 20 N. C. 205, 32 Am. Dec. 675, holding that the addition of the name of a subscribing witness to a bond, without the knowledge or consent of the obligor, was immaterial, a subscribing witness not being material to the due making of a bond, upon which point the case was afterward approved in State *v.* Gherkin, 29 N. C. 206, which, however, was on the question of what constituted forgery of a bond, and the addition seemed to have been made by one of the obligors, who was defendant. before delivery. The first case was decided upon the principle of McCrow *v.* Gentry, 3 Campb. 232, which was an action against the maker of a note purporting to be attested by two witnesses who did not put their names to the instrument in the presence of defendant, and were never called upon by defendant to attest it, but saw defendant deliver the instrument as his note of hand to the payee, and afterward put their names thereto without defendant's knowledge, and it was held that the evidence of the witnesses could not be received as that of attesting witnesses, because they were mere volunteers, but defendant's acknowledgment was considered sufficient to fix his liability. The cases would seem not to be entirely analogous.

Pennsylvania.— Henning *v.* Werkheiser, 8 Pa. St. 518; Marshall *v.* Gougler, 10 Serg. & R. (Pa.) 164.

30. Sharpe *v.* Bagwell, 16 N. C. 115; Nunnery *v.* Cotton, 8 N. C. 222, from which case it appears that even if no witnesses' names have been added to the attestation, and that parts of the letters which formed the word "test" were still remaining, the cutting of this word by the party claiming under the bond would avoid it.

tations or upon the proof of execution, such an addition does not change the legal effect of the instrument, and is immaterial,[31] and the fact that such considerations may have weight in the event the note is sued upon in another state, is of no importance.[32] So, if a note is attested by one witness, and this is sufficient to attract to it every incident of an attested paper, then the mere signing of another witness, adding nothing to the effect of the first attestation, is immaterial.[33]

b. Qualifications of Rule — (I) *Absence of Fraud.* On the other hand, the rule making the addition of an attesting witness material is subject to qualification. If the act is done fraudulently, with design to impair the rights of the parties, it is held to be material, but if done innocently it is held to be immaterial.[34]

(II) *Where Witness Saw Execution.* So, if the attesting witnesses actually see the execution of the instrument, it will not be material if they sign subsequently and in the absence of the makers, and these circumstances would seem to be sufficient to overcome any presumption of fraud arising from the act itself.[35]

(III) *Before Delivery to Payee or Obligee.* Further, assuming the materiality of such a change in general, an attestation made before the completion of the execution of the instrument by delivery to the payee or obligee, and without his procurement, is considered as not constituting an alteration of the contract.[36]

(IV) *Signature Placed by Mistake.* If one, through inadvertence or mistake, signs in a place appropriate for the name of a witness, intending, however, to sign for an entirely different purpose, the instrument will not be avoided,[37]

31. Fuller *v.* Green, 64 Wis. 159, 24 N. W. 907, 54 Am. Rep. 600.

32. Fuller *v.* Green, 64 Wis. 159, 24 N. W. 907, 54 Am. Rep. 600. But where a note made in another state was sued upon in Illinois as an unwitnessed note, and defendant objected to the note upon the ground only that the declaration did not count on a witnessed note, and that by the laws of Vermont there was a material difference between a witnessed note and one not witnessed, the objection was properly overruled, because the law of Vermont was not in evidence, and the court could not judicially know that it was as stated in the objection. Richardson *v.* Mather, 178 Ill. 449, 53 N. E. 321 [*affirming* 77 Ill. App. 626].

33. Ford *v.* Ford, 17 Pick. (Mass.) 418. But see Allen *v.* Jordan, 3 N. C. 298, wherein it seems to be held otherwise, because the second subscribing witness might know nothing of some condition upon which the note was given and which was known to the first subscribing witness, and therefore, if the second subscription should be held to be immaterial, the plaintiff might thus be enabled to prove the note and recover, notwithstanding the condition upon which it was executed.

34. Milbery *v.* Storer, 75 Me. 69, 46 Am. Rep. 361; Thornton *v.* Appleton, 29 Me. 298; Eddy *v.* Bond, 19 Me. 461, 36 Am. Dec. 767; Adams *v.* Frye, 3 Metc. (Mass.) 103 (holding that such a change is *prima facie* evidence of a fraudulent intent on the part of the obligee, and that the inference of fraud may be rebutted by proof); Ford *v.* Ford, 17 Pick. (Mass.) 418; Smith *v.* Dunham, 8 Pick. (Mass.) 246.

35. Governor *v.* Lagow, 43 Ill. 134; Milbery *v.* Storer, 75 Me. 69, 46 Am. Rep. 361; Thornton *v.* Appleton, 29 Me. 298; Rollins *v.* Bartlett, 20 Me. 319; Brackett *v.* Mountfort, 11 Me. 115; Smith *v.* Dunham, 8 Pick. (Mass.) 246. In Adams *v.* Frye, 3 Metc. (Mass.) 103, the usual qualification of the rule against the addition of attesting witnesses, that such an act innocently done is immaterial, is applied where the attesting witness procured was one who knew the signature of the obligor, but was not present when the bond was signed.

36. *Maine.*— Eddy *v.* Bond, 19 Me. 461, 36 Am. Dec. 767.

Massachusetts.— Church *v.* Fowle, 142 Mass. 12, 6 N. E. 764, holding that where an attestation is made before delivery, without the maker's knowledge and without the parties' procurement, and there was no fraudulent intent on the part of the witness, the attestation would be considered as unauthorized and as no part of the contract.

New York.— Re-signing an instrument in the presence of attesting witnesses is not a material change. The signing and sealing of a covenant in a lease was held to be the original execution and delivery, and defendant, who was the surety, having signed it and delivered it to the lessee to deliver to the lessor, was held to have given authority to the lessee to complete the delivery, both of the lease and the guaranty. Dusenberry *v.* O'Sheil, 2 Hill (N. Y.) 410.

Pennsylvania.— Fritz *v.* Montgomery County, 17 Pa. St. 130 (wherein the addition did not appear to have been made at the request of the obligee, but, on the contrary, it appeared to have been done at the request of at least one of the obligors in the presence of the obligee, in this respect being distinguished from other cases in this state above cited in this section); Beary *v.* Haines, 4 Whart. (Pa.) 17 (one promisor considered the agent of others).

United States.— Hall *v.* Weaver, 13 Sawy. (U. S.) 188, 34 Fed. 104.

37. Fisher *v.* King, 153 Pa. St. 3, 25 Atl. 1029, 31 Wkly. Notes Cas. (Pa.) 515 (holding that, where one attempts to indorse a note

and the same is true if the attestation appears to be to all the signatures, instead of being confined to the execution of a particular party.[38]

18. As to Signature. The mere change in, or addition to, a signature which in no manner changes the relation or number of the parties, or the character of their liability, is immaterial.[39] The affixing of a signature in an improper place, by mistake, is not material.[40] So an affix, or the erasure of an affix, which does not affect the liability of the parties is immaterial.[41] Where, however, a change of this kind does affect the character of the liability of the parties, it is material.[42]

19. As to Seal — a. Addition. The addition of a seal is a material change. It converts a simple contract into a specialty, thereby making the contract of a different grade and character. Such a change avoids the instrument as to him whose signature is altered as well as to others who have signed with, or as sureties for, him on the simple undertaking.[43]

and, through ignorance, writes his name as a witness, the act does not come within the reason of the rule against alterations); Marshall *v.* Gougler, 10 Serg. & R. (Pa.) 164 (involving the signature, as an attesting witness, by one who intended to witness the assignment of the bill, and not the execution of the bill itself).

38. Richardson *v.* Mather, 178 Ill. 449, 53 N. E. 321 [*affirming* 77 Ill. App. 626]; Hilton *v.* Houghton, 35 Me. 143; Rollins *v.* Bartlett, 20 Me. 319; Foust *v.* Renno, 8 Pa. St. 378.

39. Martin *v.* Good, 14 Md. 398, 74 Am. Dec. 545, holding that the insertion of the word "and" between the signatures of two parties in a sealed note does not change their liability, and is not material. See also Burrows *v.* Stoddard, 3 Conn. 160.

40. Fournier *v.* Cyr, 64 Me. 32 (holding that a mistake on the part of selectmen in placing their signatures of approval in the wrong place on an officer's bond cannot make the officer a trespasser); Fisher *v.* King, 153 Pa. St. 3, 25 Atl. 1029, 31 Wkly. Notes Cas. (Pa.) 515; Marshall *v.* Gougler, 10 Serg. & R. (Pa.) 164. See also Cason *v.* Wallace, 4 Bush (Ky.) 388; Wallace *v.* Jewell, 21 Ohio St. 163, 8 Am. Rep. 48.

41. *Colorado.*— King *v.* Rea, 13 Colo. 69, 21 Pac. 1084. Adding the letter "x" to a signature is an immaterial change.

Illinois.— Burlingame *v.* Brewster, 79 Ill. 515, 22 Am. Rep. 177, wherein the words following a blank for a signature were torn off by the payee before obtaining the signature of the person for whom the blank was left, but as they were such words as did not change the personal engagement of those who had signed before the instrument was delivered to the payee the validity of the instrument was not affected.

Indiana.— Hayes *v.* Matthews, 63 Ind. 412, 30 Am. Rep. 226, holding that the erasure of the addition of the words "trustees of the ——— church" is immaterial, because the words themselves did not make the instrument the obligation of the church.

Rhode Island.— Manufacturers', etc., Bank *v.* Follett, 11 R. I. 92, 23 Am. Rep. 418, holding that the addition of the word "agent" to the signature of the maker of a note is immaterial as against an indorser, because the contract of the indorser was not changed.

Texas.— Marx *v.* Luling Co-Operative Assoc., 17 Tex. Civ. App. 408, 43 S. W. 596, wherein one of the signers of a contract of guaranty affixed "Mgr." to his signature, and after the signing of the instrument by the other parties this affix was erased without their knowledge; it was held in legal effect that the guaranty was not changed, and therefore the erasure was immaterial.

42. Sheriden *v.* Carpenter, 61 Me. 83 (involving the change of a maker's signature by altering the affix "Treasurer of St. Paul's Parish," which made the signer personally liable, so as to make it read "Treasurer for St. Paul's Parish," so as to bind the parish); Sharpe *v.* Bellis, 61 Pa. St. 69, 100 Am. Dec. 618. So, addition of "& Co." to the signature of the maker is material. Montgomery *v.* Crossthwait, 90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140; Haskell *v.* Champion, 30 Mo. 136.

See also *infra*, VII, F, 21, e.

Where one signs a note expressly as agent for another, makes it payable to his own order and indorses it in his own name, and thereupon presents it to plaintiff for discount, the latter cannot strike out the words indicating for whom the maker was agent, erase the maker's name as payee and indorser, and substitute a new payee and indorser, without the maker's consent. Louisiana State Bank *v.* Fuselier, 9 Rob. (La.) 26.

"Surety" erased from the name of a signer of a note by the payee before indorsement is material. Laub *v.* Paine, 46 Iowa 550, 26 Am. Rep. 163; Rogers *v.* Tapp, 1 Tex. App. Civ. Cas. § 1308. *Contra*, Humphreys *v.* Crane, 5 Cal. 173, upon the principle that the liability was the same whether the party signed as principal or surety.

Correction of a clerical error in a note signed by officers of a corporation, by adding to the official signatures the name of the corporation, will not be material. Produce Exch. Trust Co. *v.* Bieberbach, 176 Mass. 577, 58 N. E. 162.

43. *Delaware.*— State *v.* Smith, 9 Houst. (Del.) 143, 31 Atl. 516, sureties on bond discharged by addition of seal to signature of maker.

Maryland.—Morrison *v.* Welty, 18 Md. 169.

Massachusetts.— Warring *v.* Williams, 8 Pick. (Mass.) 322.

Michigan.— Rawson *v.* Davidson, 49 Mich.

b. Tearing Off. In like manner the tearing off of a seal changes the character of the contract and is material as against non-consenting parties. The instrument is void as to all, and not merely as to the party whose signature is changed,[44] unless the obligation is a several one, in which event tearing off a seal of one obligor will not destroy the bond as to the others.[45]

20. Indorsements, Memoranda, and Marginal Writings — a. Materiality — (1) *In General.* *Prima facie*, it has been held, words written on the back of a note are no part of the body thereof.[46] But upon the question of the materiality of matter added to or taken from an instrument, as constituting an alteration, the effect of the contract is to be gathered from all within the four corners (referring to its face),[47] or from all within its eight corners (referring both to its

607, 14 N. W. 565, holding that such a change destroyed the negotiability of the instrument by converting it into one simply in covenant, whereby the period of limitation to an action upon it had been enlarged.

Missouri.— Fred Heim Brewing Co. *v.* Hazen, 55 Mo. App. 277, holding a surety discharged by affixing a seal to the signature of the maker, and referring to what is perhaps the strongest case opposed to this rule [Fullerton *v.* Sturges, 4 Ohio St. 529], which seems to proceed upon the theory that such a change by a signer intrusted by other signers with the paper to negotiate it is as the act of a stranger.

New York.— Farmers' L. & T. Co. *v.* Siefke, 144 N. Y. 354, 39 N. E. 358, 63 N. Y. St. 662; Metropolitan L. Ins. Co. *v.* McCoy, 41 Hun (N. Y.) 142.

Pennsylvania.— Biery *v.* Haines, 5 Whart. (Pa.) 563, holding that a note signed by three makers, and afterward changed by affixing a seal by one of the makers to his own signature in the absence of the others, is void as to the latter because their obligation was no longer the same — that is to say, they were no longer bound jointly and severally with the first maker.

South Carolina.— Vaughan *v.* Towler, 14 S. C. 355, 37 Am. Rep. 731, no plea of want of consideration can be made.

Texas.—Muckleroy *v.* Bethany, 23 Tex. 163, because a payee cannot impeach the consideration otherwise than by a sworn plea.

Vermont.— Barnet *v.* Abbott, 53 Vt. 120.

England.— Davidson *v.* Cooper, 11 M. & W. 778.

Effect of sealing clause.— Where one sued on what purports to be a sealed bond sets up that the seal was added to the instrument after its delivery and without his assent, except as implied by the words "sealed with our seals" on the bond before its delivery, it was held that he was entitled to go to the jury on this evidence, and that to direct a verdict for plaintiff was error. That the above clause raised no implication against the intention of defendant that the instrument was to remain unchanged as it left his hands. Metropolitan L. Ins. Co. *v.* McCoy, 41 Hun (N. Y.) 142. Barnet *v.* Abbott, 53 Vt. 120, was similar to this except it seems the court did consider the words above mentioned as indicating the intention that the bond was to be sealed, and the question turned upon the finding and report of the master, which negatived this inference.

Where seal unnecessary.—Where one signed a blank piece of paper and delivered it to his agent to have it filled as a power of attorney to confess judgment, and after it was so filled the agent affixed a scroll to the maker's signature, it was held that, as a seal was not necessary to the validity of a power of attorney and defendant was properly in court, a judgment under the power of attorney would not be set aside. Truett *v.* Wainwright, 9 Ill. 411. See also Solon *v.* Williamsburgh Sav. Bank, 114 N. Y. 122, 21 N. E. 168, 23 N. Y. St. 138.

44. *North Carolina.*— Evans *v.* Williamson, 79 N. C. 86.

Pennsylvania.— Rittenhouse *v.* Levering, 6 Watts & S. (Pa.) 190.

South Carolina.— Porter *v.* Dauby, 2 Rich. Eq. (S. C.) 49, upon the effect of the finding of a sealed note among the papers of the payee after his death, but having the seal carefully cut out.

Tennessee.— Organ *v.* Allison, 9 Baxt. (Tenn.) 459, holding that without the seal the statute of limitations of six years would protect the party against a recovery, while with a seal he would have no such protection against his co-sureties.

Vermont.— Dewey *v.* Bradbury, 1 Tyler (Vt.) 186.

West Virginia.— Piercy *v.* Piercy, 5 W. Va. 199.

England.— Seaton *v.* Henson, 2 Show. 29; Mathewson *v.* Lydiate, 5 Coke 44.

See *supra*, III, B.

Immaterial change.— In Keen *v.* Monroe, 75 Va. 424, it was held that where a scroll on a paper had been erased and another scroll placed in juxtaposition to the name of the obligor, such a change was not material, did not alter the legal effect of the instrument, and, in the absence of fraud, did not vitiate it.

45. Rittenhouse *v.* Levering, 6 Watts & S. (Pa.) 190; Collins *v.* Prosser, 1 B. & C. 682, 8 E. C. L. 287; Mathewson *v.* Lydiate, 5 Coke 44.

46. Howe *v.* Thompson, 11 Me. 152; Com. *v.* Ward, 2 Mass. 397; Bay *v.* Shrader, 50 Miss. 326; Kimball *v.* Lamson, 2 Vt. 138; State *v.* McLearn, 1 Aik. (Vt.) 311.

47. Warrington *v.* Early, 2 E. & B. 763, 75 E. C. L. 763.

face and its back).[48] And, while the general rule seems not to be applied alike in all cases, as when the memorandum refers to the place of payment,[49] or the rate of interest,[50] it may be stated to be that if a memorandum, either indorsed on the back of the instrument or written on the face and at the foot thereof, is made before or contemporaneously with the execution of the instrument, it is considered as a part of it;[51] that if it affects the operation of the terms of the body of the instrument it is material, and the unauthorized addition of such matter, or its erasure or detachment, or the detachment of such matter annexed to the instrument, will constitute an alteration and avoid the instrument.[52]

48. 1 Daniel Neg. Instr. § 151; Johnston *v.* May, 76 Ind. 293; Meade *v.* Sandidge, 9 Tex. Civ. App. 360, 30 S. W. 245. See also Farmers' Bank *v.* Ewing, 78 Ky. 264, 39 Am. Rep. 231; Morris *v.* Cain, 39 La. Ann. 712, 1 So. 797, 2 So. 418.

49. Place of payment.— In Light *v.* Killinger, 16 Ind. App. 102, 44 N. E. 760, it was held that a memorandum in pencil of the name of a bank, inserted in a blank left for the words "payable at," made by an agent of the holder of the note left for collection, was a mere memorandum to remind the agent where it should be presented. In Woodworth *v.* Bank of America, 19 Johns (N. Y.) 391, 10 Am. Dec. 239, which was a marginal memorandum signed by the maker that a note made payable in a particular city was to be paid in another city, it was held that such memorandum was an alteration of the note and discharged the indorser. But in Missouri it was held that a statement designating the place of payment, written at the foot of a note and to the left of the signature, was a mere memorandum, though the note, as copied in the reported statement of the case, seems to indicate that the matter complained of was in fact in the body of the instrument and before the signature of the maker. The case seems to turn upon another point, however, namely, that as against the maker of the note such words would be immaterial because the maker's liability is general in any event. American Nat. Bank *v.* Bangs, 42 Mo. 450, 97 Am. Dec. 349. Upon this last doctrine see, *contra,* Nazro *v.* Fuller, 24 Wend. (N. Y.) 374. And for the construction, generally, of particular words on a bill or note, as a part thereof or otherwise, as well as for the liability of a maker or acceptor to pay, generally, without regard to the place of payment designated, see BILLS AND NOTES.

50. Interest.— Thus an addendum providing for a rate of interest, signed by one of the parties to the instrument, is held to be merely a memorandum of a collateral undertaking. Littlefield *v.* Coombs, 71 Me. 110; Tremper *v.* Hemphill, 8 Leigh (Va.) 623, 31 Am. Dec. 673. So in Carr *v.* Welch, 46 Ill. 88, a memorandum upon one of the lower corners on the face of a note, "ten per cent. after due," written in a different colored ink from that of the body of the instrument, was held to be merely a memorandum and not an alteration. But, on the other hand, Warrington *v.* Early, 2 E. & B. 763, 75 E. C. L. 763, holds that where a note was payable "with lawful interest" an addition of the words "interest at 6% per annum" in the corner, the lawful rate of interest being lower, was an alteration of the note. The court remarked that when it is said that the naming of a place of payment in the corner (as in Exon *v.* Russell, 4 M. & S. 505) does not make it a part of the contract, it is not on the principle that the writing is in the corner, but because what is there written is from commercial usage a mere memorandum for the convenience of the parties. So, in Sanders *v.* Bagwell, 32 S. C. 238, 10 S. E. 946, 7 L. R. A. 743, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770, a note which expressed no rate of interest had a memorandum added reciting that "the above note is to be accounted for with interest at 8 per cent. per annum," signed by the principal alone, and it was held to be an alteration of the original note and to discharge the surety.

51. *Alabama.*— Payne *v.* Long, 121 Ala. 385, 25 So. 780.

Maine.— Johnson *v.* Heagan, 23 Me. 329; Tuckerman *v.* Hartwell, 3 Me. 147, 14 Am. Dec. 225.

Massachusetts.— Wheelock *v.* Freeman, 13 Pick. (Mass.) 165, 23 Am. Dec. 674.

Mississippi.— Bay *v.* Shrader, 50 Miss. 326, holding, however, that, being disconnected from the body of the instrument to which the maker's name is signed, it forms no part of it until shown to have been upon it when executed.

New York.— Benedict *v.* Cowden, 49 N. Y. 396, 10 Am. Rep. 382.

England.— Fitch *v.* Jones, 5 E. & B. 238, 85 E. C. L. 238.

Canada.— Swaisland *v.* Davidson, 3 Ont. 320.

52. *Alabama.*— Payne *v.* Long, 121 Ala. 385, 25 So. 780.

Illinois.— Benjamin *v.* McConnell, 9 Ill. 536, 46 Am. Dec. 474.

Indiana.— Cochran *v.* Nebeker, 18 Ind. 459.

Iowa.— Scofield *v.* Ford, 56 Iowa 370, 9 N. W. 309; State *v.* Stratton, 27 Iowa 420, 1 Am. Rep. 282.

Kentucky.— Warren *v.* Fant, 79 Ky. 1, where the words were written on the face of the paper containing the obligations and above the signatures of the obligors.

Maine.— Johnson *v.* Heagan, 23 Me. 329, holding that such words will be presumed to have been a material part of the instrument, and could not be taken from it without rendering it void, unless the holder clearly shows the immateriality thereof.

Massachusetts.— Wheelock *v.* Freeman, 13 Pick. (Mass.) 165, 168, 23 Am. Dec. 674,

(II) *Immaterial or Collateral Matter.* On the other hand, if the condition is immaterial, tearing it off will be immaterial,[53] and if what is written upon an instrument is altogether collateral to the body thereof, and does not restrict or alter its operation, it will be considered as a mere memorandum and without effect,[54]

wherein it is said: "There is no magic in the word 'memorandum.'"

Michigan.— Wait *v.* Pomeroy, 20 Mich. 425, 4 Am. Rep. 395; Longwell *v.* Day, 1 Mich. N. P. 286.

Missouri.— Law *v.* Crawford, 67 Mo. App. 150.

Nebraska.— Davis *v.* Henry, 13 Nebr. 497, 14 N. W. 523; Palmer *v.* Largent, 5 Nebr. 223, 25 Am. Rep. 479.

New Hampshire.— Gerrish *v.* Glines, 56 N. H. 9.

New Jersey.— The cutting off of a receipt written on the margin of the bond by the obligee is not an alteration of the bond. The strongest presumptions may be raised against the party touching the instrument mutilated or destroyed, but it is no mutilation or alteration of the bond itself, and cannot vitiate that instrument. Goodfellow *v.* Inslee, 12 N. J. Eq. 355. But in Price *v.* Tallman, 1 N. J. L. 511, it was held that, where one has mutilated a bond by tearing off a writing attached to it, he cannot prove by parol testimony the nature of the contents of the part torn off. The court divided upon the question whether the bond should be admitted, and the evidence was accordingly rejected.

New York.— Benedict *v.* Cowden, 49 N. Y. 396, 10 Am. Rep. 382, holding that it is in all cases a question to be determined upon the circumstances whether a memorandum or indorsement is intended as a part of the contract and a modification of the instrument, or whether it is merely an earmark for the purposes of identification.

Tennessee.— Stephens *v.* Davis, 85 Tenn. 271, 2 S. W. 382, which held that, where a condition was written on a stub to which a note was attached in a book of blank notes, tearing off the note from the stub by the payee constituted an alteration.

Texas.— Meade *v.* Sandidge, 9 Tex. Civ. App. 360, 30 S. W. 245.

United States.— Winnipisiogee Paper Co. *v.* New Hampshire Land Co., 59 Fed. 542 (holding that the addition of a map or plan to a copy of a deed for the purpose of making the claim of the grantee more specific, and without any fraudulent intent to make it appear as a part of the original deed, would not make the grant inoperative); Davis *v.* Shafer, 50 Fed. 764.

England.— Mollett *v.* Wackerbarth, 5 C. B. 181, 57 E. C. L. 181 (wherein material words were written at the bottom of the paper containing the contract, and an asterisk was inserted in the body of the paper referring to the words at the bottom); Crookewit *v.* Fletcher, 1 H. & N. 893, 26 L. J. Exch. 153 (holding that a material change in a charter-party, by writing words in the margin, will avoid the contract if done without the consent of the owner after he had executed it). So, by striking out with a pen the time of warranty of sailing as it stood in the body of a policy, and inserting a memorandum in the margin of a different time, the policy is destroyed. Fairlie *v.* Christie, 7 Taunt. 416 2 E. C. L. 425. Where a schedule is material to show what passed by the deed the deed was held to be avoided by proof that the schedule referred to in the deed was annexed after its execution. Weeks *v.* Maillardet, 14 East 568.

Canada.— Campbell *v.* McKinnon, 18 U. C. Q. B. 612 (which was the obliteration of a condition on the back of a note by pasting over it a piece of paper); Swaisland *v.* Davidson, 3 Ont. 320.

53. Palmer *v.* Largent, 5 Nebr. 223, 25 Am. Rep. 479 (which involved the removal of the words: "This note is given upon condition," but not showing what the condition was). So, tearing off a memorandum of a privilege, after the time for exercising the option granted has expired, does not affect the validity of the note. Mater *v.* American Nat. Bank, 8 Colo. App. 325, 46 Pac. 221.

54. *Alabama.*— Maness *v.* Henry, 96 Ala. 454, 11 So. 410 (which was a pencil indorsement on a note, reciting that the note was on an indebtedness of a particular person, and it was held that this was a mere memorandum and did not render the instrument inadmissible in evidence); Manning *v.* Maroney, 87 Ala. 563, 6 So. 343, 13 Am. St. Rep. 67 (which was a memorandum indorsed on a bill, by an officer who took depositions in the case, for the purpose of identification).

Arkansas.— Mente *v.* Townsend, 68 Ark. 391, 59 S. W. 41, involving the addition, in an assignment of a policy of insurance, of a statement that the loan which was the consideration of the assignment was to be repaid by the assignee upon a certain notice.

Massachusetts.— Bachellor *v.* Priest, 12 Pick. (Mass.) 399, "left with A as collateral," written by the drawer under his name on a bill of exchange indorsed in blank and left with the drawer and by him transferred to A, was held to be a mere memorandum of a collateral agreement between the maker and the indorsee, having no more effect than if written upon a separate paper.

Minnesota.— White *v.* Johns, 24 Minn. 387.

Nebraska.— Oliver *v.* Hawley, 5 Nebr. 439, 443, wherein, after the execution of a written contract for the sale of flaxseed in which the vendee agreed to sow the seed and sell the entire crop, less fifty bushels, at a fixed price to the vendor, the vendor privately added to the contract, below the signature, "$5 commission to be charged on the fifty bushels reserved," and it was held that this was a memorandum and no part of the contract.

New Hampshire.— Morrill *v.* Otis, 12 N. H. 466, which involved a memorandum upon a plan that certain persons desired to purchase one of the lots, showing to whom and

and in such a case the general rule as to immaterial changes is applied, and the tearing off of such matter is not an alteration which is material.[55]

(III) *Marginal Figures.* Unless not supplied by words in the body of a bill or note,[56] the marginal notation constitutes no part of it, but is simply a memorandum or abridgement for the convenience of reference, the contract being perfect without it.[57]

b. As to Indorsements in Particular — (I) *Immaterial Changes in General.* A mere verbal change in, or addition to, an indorsement which in no way affects the meaning of the indorsement or the operation of the instrument is not material.[58]

(II) *As to Character or Extent of Liability.* While the holder of a note may fill a blank indorsement with any matter not inconsistent with the liability of the indorser,[59] he cannot change the character or extent of the indorser's liability, or deprive the latter of any defense, and any change made in the indorsement which will have this effect will amount to an alteration. Thus, vitiating effect has been given to the filling out of a blank indorsement by writing in the consideration therefor,[60] converting the liability into an absolute one — as by the addition of a waiver of demand, notice, and protest[61] — writing the word "security" over an indorser's name,[62] inserting a waiver of exemptions,[63] erasing the condition "without recourse,"[64] and writing over the indorsement a contract of guaranty.[65] Where such changes as the foregoing do not affect the liability which the indorse-

when other lots were sold, without varying the courses and distances of the lines of the lots, or the relative situations thereof.

New York.— Chase *v.* Washington Mut. Ins. Co., 12 Barb. (N. Y.) 595, being pencil memoranda of suggested corrections in insurance policy.

North Carolina.— Hubbard *v.* Williamson, 27 N. C. 397, which was a direction at the foot of an accommodation bill, signed by the last indorser, and directing the proceeds to be credited to the drawer, and it was held that it was no more than a memorandum to enable the bank to pay the proper person, as between plaintiff and the drawer, and did not amount to an alteration.

South Carolina.— Kinard *v.* Glenn, 29 S. C. 590, 8 S. E. 203, notation to call attention to a mistake.

Texas.— Yost *v.* Watertown Steam-Engine Co., (Tex. Civ. App. 1894) 24 S. W. 657, memorandum on a note that it was secured by a mortgage.

55. Humphreys *v.* Crane, 5 Cal. 173; Vandervoort v. Rockford Ins. Co., 49 Ill. App. 457, holding that the application for insurance is no part of the note executed for such insurance at the time of the making of the application, though written on the same sheet of paper, and the detachment of such application is no defense in an action on the note.

Schedule.—Under a statute requiring a bill of sale and every schedule or inventory annexed thereto to be registered, it was held that where, on account of the emergency of the case, a schedule of a bill of sale was roughly drawn and was afterward disannexed and a fair copy appended, this did not affect the title to the goods which passed under the bill of sale. Green *v.* Attenborough, 3 H. & C. 468.

56. See Bills and Notes.

57. See *supra*, VII, F, 6.

58. Cushing *v.* Field, 70 Me. 50, 35 Am. Rep. 293 (changing an indorsement "This note is subject to a contract," to "This note is subject of contract"); Howe *v.* Thompson, 11 Me. 152 (holding that, in an action by an indorsee against the promisor in a note, the addition of a date to an indorsement of a partial payment on the back of the note is not an alteration of the instrument); Struthers *v.* Kendall, 41 Pa. St. 214, 80 Am. Dec. 610 (noting the residences of indorsers after their names); Krouskop *v.* Shontz, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817 (which was an unauthorized addition, having no significance, to an indorsement which was itself without legal significance).

59. See Bills and Notes.

60. Hood *v.* Robbins, 98 Ala. 484, 13 So. 574. But the insertion of "value received" after an indorsement has been held to be immaterial unless done with the privity of plaintiff. Riggs *v.* St. Clair, 1 Cranch C. C. (U. S.) 606, 20 Fed. Cas. No. 11,829.

61. Hill *v.* Martin, 12 Mart. (La.) 177, 13 Am. Dec. 372; Clawson *v.* Gustin, 5 N. J. L. 964; Comparree *v.* Brockway, 11 Humphr. (Tenn.) 355; Catlin *v.* Jones, 1 Pinn. (Wis.) 130.

62. Andrews *v.* Simms, 33 Ark. 771; Robinson *v.* Reed, 46 Iowa 219; Davis *v.* Eppler, 38 Kan. 629, 16 Pac. 793; Farmer *v.* Rand, 16 Me. 453; Buck *v.* Appleton, 14 Me. 284.

63. Jordan *v.* Long, 109 Ala. 414, 19 So. 843.

64. Howlett *v.* Bell, 52 Minn. 257, 53 N. W. 1154.

65. Newlan *v.* Harrington, 24 Ill. 206 (distinguishing between a guaranty of a note and a guaranty of its collection); Belden *v.* Hann, 61 Iowa 42, 15 N. W. 591; Needhams *v.* Page, 3 B. Mon. (Ky.) 465; Smith *v.* Frye, 14 Me. 457.

ment imports in law or by reason of the nature of the instrument, in this event, of course, they will not constitute an alteration.[66]

(III) *Independent Memoranda.* Where the indorsement on the back of a note is merely a memorandum of an independent collateral agreement by one of the parties, it will not be an alteration of the body of the instrument affecting the agreement of other parties thereto.[67]

(IV) *Indorsement of Payment or Performance of Condition.* Though the holder of an instrument has no right to defraud the debtor by erasing credits which have been fairly entered, he may erase credits entered by mistake,[68] and if an instrument appears with credits erased, it is held that this will not vitiate the whole paper, and the most that the party can claim is that he should be restored to the benefit of the indorsement as originally made.[69] So indorsements upon a note of an admission of the performance of one of the conditions on the face thereof is not an alteration of the note.[70] But the indorsement of a fictitious credit on a note, for the purpose of reducing the amount and perverting its use, under an arrangement between the maker and the payee, is an alteration which will discharge the surety.[71]

21. As to Number, Character, and Relation of Parties — a. In General. Any change in the personality, number, or relations of the parties to an instrument is material.[72]

b. Correction of Name without Changing Identity of Person. The mere change of a name as it is written in an instrument is not necessarily material, however, as where the christian name of the person actually intended is wrongly written, and afterward changed to correct the clerical error.[73] So it has been held

66. Iowa Valley State Bank *v.* Sigstad, 96 Iowa 491, 65 N. W. 407; Levi *v.* Mendell, 1 Duv. (Ky.) 77.

67. Cambridge Sav. Bank *v.* Hyde, 131 Mass. 77, 41 Am. Rep. 193, which was a memorandum that after a certain day the rate of interest would be less than that stated in the body of the note. To the same effect see Huff *v.* Cole, 45 Ind. 300; Moore *v.* Macon Sav. Bank, 22 Mo. App. 684. But in Post *v.* Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677, it was held that the indorsement of an agreement between the payee and the principal debtor, to extend the time upon a different rate of interest, substituted an entirely new agreement for the original one and discharged the surety, and in Bucklen *v.* Huff, 53 Ind. 474, which was an indorsement of an agreement by the maker to pay an increased rate of interest after maturity, it was held not to discharge the surety, the act being considered a mere spoliation, one of the grounds of the decision appearing to be that the indorsement was not such a valid agreement to extend the time of payment as to affect the liability of the surety.

68. Tubb *v.* Madding, Minor (Ala.) 129; Burtch *v.* Dent, 13 Ind. 542.

69. *Illinois.*— Bryan *v.* Dyer, 28 Ill. 188. See also Chamberlin *v.* White, 79 Ill. 549.

Minnesota.— Theopold *v.* Deike, 76 Minn. 121, 78 N. W. 977.

North Carolina.— Simms *v.* Paschall, 27 N. C. 276.

Vermont.— Kimball *v.* Lamson, 2 Vt. 138, holding that, in an action on a note containing an indorsement of a credit of a small payment which had been erased, the note may be read without explanation of the erasure, one of the grounds being that the indorsement itself was no part of the note, though it further appeared in the case that the erasure was fairly made. But as to the first ground mentioned it was held, in McElroy *v.* Caldwell, 7 Mo. 587, that the payee suing upon a note containing an erased indorsement of a payment had the burden of explaining the erasure.

Erasure of unauthorized indorsement.— Where a sale agent has authority to sell only for a fixed amount, and the purchaser has notice of this limited authority from the printed terms of the contract of sale, an erasure of a credit, entered by the agent on the note executed by the purchaser, to make the note represent a less amount than that at which the agent had authority to sell, is not an alteration. Waldorf *v.* Simpson, 15 N. Y. App. Div. 297, 44 N. Y. Suppl. 921.

70. Jackson *v.* Boyles, 64 Iowa 428, 20 N. W. 746.

71. Johnston *v.* May, 76 Ind. 293.

72. Mackay *v.* Dodge, 5 Ala. 388; Ford *v.* Cameron First Nat. Bank, (Tex. Civ. App. 1896) 34 S. W. 684; Texas Printing, etc., Co. *v.* Smith, (Tex. App. 1889) 14 S. W. 1074 [*citing* 2 Daniel Neg. Instr. § 1367].

73. See Hanrick *v.* Patrick, 119 U. S. 156, 7 S. Ct. 147, 30 L. ed. 396, name of grantor.

Names descriptive of subject-matter.—Pardee *v.* Lindley, 31 Ill. 174, 83 Am. Dec. 219; Outtoun *v.* Dulin, 72 Md. 536, 20 Atl. 134.

Correction of immaterial part of instrument.— Where an award by an umpire mistakenly recited the christian name of one of the original arbitrators it was held that the award was not vitiated, as the mistake was in an immaterial part, and therefore a change subsequent to the publication of the award, by striking out the mistaken name and in-

that the change of the name of a payee in a note, without changing the identity of the person intended, or to correct a mere clerical error, is not material.[74]

c. Change of Name of Payee, Obligee, or Grantee. The change of a payee by substituting a different payee from that originally in the instrument is a material change and vitiates the instrument as against the parties not consenting thereto,[75] unless it can be justified under some other principle — as where plaintiff's (the original payee) name was erased and the name of another inserted for the purpose of furnishing plaintiff with an indorser[76] — or the change is to correct a mistake,[77] or words inserted after the name are merely *descriptio personæ*.[78] So,

serting the correct christian name, did not vitiate the award. Trew *v.* Burton, 1 Cr. & M. 533.

But a mere clerical change, as by scratching out a dot over the letter "i," in the name of the grantee in a patent, is not material. Morgan *v.* Curtenius, 4 McLean (U. S.) 366, 17 Fed. Cas. No. 9,799.

74. Oakland First Nat. Bank *v.* Wolff, 79 Cal. 69, 21 Pac. 551, 748, holding that the insertion in a note payable to the "First National Bank of this city" of the words "of Oak'd" after the words "First National Bank" is immaterial, the note being dated at Oakland.

Christian or surname.— Cole *v.* Hills, 44 N. H. 227 (holding that where both parties intended a note to be payable to Benjamin Cole, whose name was accidentally written "Benjamin R. Cole," the erasure of the middle initial would not affect the validity of the note); Derby *v.* Thrall, 44 Vt. 413, 8 Am. Rep. 389 (wherein a note was by mistake drawn payable to Franklin Derby instead of Francis E. Derby, and upon delivery the payee, with the consent of the maker, made the change so as to conform to the fact, and it was held that the surety on the note was not discharged, distinguishing Broughton *v.* Fuller, 9 Vt. 373, which was an alteration by adding the word "junior" to the name of the payee, thus making the instrument payable to another and different person); Mouchet *v.* Cason, 1 Brev. (S. C.) 307 (surname of payee supplied).

Name of partnership.— Where a note payable to a partnership was indorsed by a surety and afterward altered by the maker and payee, without the knowledge of the surety, by changing the name of the payee so as to make the note payable to the same partnership under a different name, it was held that the surety was not discharged, as the change was immaterial. Arnold *v.* Jones, 2 R. I. 345.

75. *Idaho.*— Mulkey *v.* Long, (Ida. 1897) 47 Pac. 949.

Iowa.— Bell *v.* Mahin; 69 Iowa 408, 29 N. W. 331.

Kansas.— Horn *v.* Newton City Bank, 32 Kan. 518, 4 Pac. 1022.

Massachusetts.— Stoddard *v.* Penniman, 108 Mass. 366, 11 Am. Rep. 363. But where a note recited "I promise to pay to Quincy Railway Company or order," it was held that the insertion of the words "the order of Edward Prescott" over the words "Quincy Railway Company or order," without erasing the latter words, was not material, because the words inserted, if taken with the original words as an addition to them, would be wholly senseless and inoperative. Granite R. Co. *v.* Bacon, 15 Pick. (Mass.) 239.

Missouri.— German Bank *v.* Dunn, 62 Mo. 79 (holding, however, in accordance with the general rule in that state, that the change was vitiating, whether material or not, having been made by payee); Robinson *v.* Berryman, 22 Mo. App. 509 (holding the change material, but recognizing same principle announced in the last preceding case).

Nebraska.—Erickson *v.* Oakland First Nat. Bank, 44 Nebr. 622, 62 N. W. 1078, 48 Am. St. Rep. 753, 28 L. R. A. 577.

Ohio.— Davis *v.* Bauer, 41 Ohio St. 257.

Vermont.— Broughton *v.* Fuller, 9 Vt. 373, wherein the note was originally drawn to Ebenezer Broughton, the father, and was subsequently changed by adding the word "junior" to the name of the payee, thus making it payable to another and different person.

United States.—Sneed *v.* Salinal Min., etc., Co., 73 Fed. 925, 34 U. S. App. 688, 20 C. C. A. 230.

76. See Levois *v.* Burguieres, 10 La. Ann. 111. So, in Illinois, it was held that where a note was payable to a bank, and the bank required a guaranty of a third person, who signed his name below the signature of the makers, and the note was delivered in that condition to the bank, but thereafter such third person had his name erased as one of the makers and written in the body of the note as the payee, and then assigned the note to the bank with a guaranty of payment, the change did not affect the validity of the note. Ryan *v.* Springfield First Nat. Bank, 148 Ill. 349, 35 N. E. 1120. But, on the other hand, where a note payable to the maker's order was indorsed by him and, after its accommodation indorsement, the payee is changed by inserting the name of the person with whom the note is negotiated, the accommodation indorser will be discharged. Stoddard *v.* Penniman, 108 Mass. 366, 11 Am. Rep. 363. See also VII, F, 21, j.

77. Latshaw *v.* Hiltebeitel, 2 Pennyp. (Pa.) 257.

To make note conform to trust deed.— See Cook *v.* Moulton, 59 Ill. App. 428, holding that after a note and trust deed have been executed and tendered to the officer of a bank, changing the payee in the note by making it payable to the officer upon his demand because the trust deed ran to him, instead of to the bank as trustee, was not material.

78. Casto *v.* Evinger, 17 Ind. App. 298, 46 N. E. 648. But the insertion of the word

to strike out the name of an indorsee in a special indorsement and substitute another without the consent of the indorser, is a material change in a contract and releases the indorser.[79] Where the obligee in a bond is changed by the substitution of another obligee, obligors not consenting to the change will not be bound thereby.[80] So the unauthorized substitution of a grantee in a deed is material so as to avoid it;[81] it can confer no rights upon the inserted grantee as against the original grantee or his creditors,[82] and cannot bind the grantor when made before delivery by one having no authority to make it.[83]

d. Changes to Conform Different Parts of Instrument. The mere insertion into the body of an instrument of the name of an obligor or maker who has signed as such is not material. His liability would be the same in the absence of the insertion.[84]

e. Change of Maker, Grantor, etc. A change in the name of the maker of the instrument is material.[85]

"cashier" after the name of a payee was held to be material because of previous decisions that as to banks the act of a cashier is the act of the bank, and that the bank may sue upon a note payable to its cashier as such. Hodge *v.* Farmers' Bank, 7 Ind. App. 94, 34 N. E. 123. And where a note, payable to an individual and signed by him and a co-maker, was altered by the former by adding the abbreviation, "Pres'd't. O. F. B. Ass'n.," where his name appeared as maker, and "Pres'd't." where his name appeared as payee, it was held that the change was material and avoided the note as to the co-maker not consenting. Springfield First Nat. Bank *v.* Fricke, 75 Mo. 178, 42 Am. Rep. 397.

79. Grimes *v.* Piersol, 25 Ind. 246, holding that the change was a material one because, as the assignment purported to be directly to plaintiff, it deprived defendant, the indorser, of any defense he might have under the statute as against the person to whom the assignment was in fact made.

80. Dolbier *v.* Norton, 17 Me. 307; Smith *v.* Weld, 2 Pa. St. 54.

Mistake.— But where a bond was made by mistake to the acting sheriff instead of to the party who was to be protected by it, it was held that the correction of the mistake by erasing the name of the sheriff as obligee and inserting that of the proper officer would not vitiate the bond. Turner *v.* Billagram, 2 Cal. 520. So, in Maine, it was held that where the principal in a bail-bond erased the name of the sheriff as obligee and inserted that of the constable who had served the writ, before delivery of the bond and after it had been signed by the surety, the consent of the surety would be presumed, without deciding whether the change was material or immaterial, as the surety when he signed the bond intended to become bail, and it did not appear that he ever knew who was the obligee named in the bond, which was to him a matter of no consequence. Hale *v.* Russ, 1 Me. 334.

81. Simpkins *v.* Windsor, 21 Oreg. 382, 28 Pac. 72. In New Jersey it was held that the erasure, by the owner of a deed, of the middle initial of the name of the grantee therein rendered the deed void, but in this state any change in a deed made by the owner thereof without the consent of other parties, whether the change is material or immaterial, is vitiating. Jones *v.* Crowley, 57 N. J. L. 222, 30 Atl. 871.

82. Hollis *v.* Harris, 96 Ala. 228, 11 So. 377; John *v.* Hatfield, 84 Ind. 75; Goodwin *v.* Norton, 92 Me. 532, 43 Atl. 111, holding that, where a grantor in a deed is not present, a change therein by consent of another who joined in the deed, but who was not the owner of the land, by substituting another grantee, does not take the title out of the grantee whose name was originally written in the deed, even if this could be done by consent of the real grantor.

83. Hollis *v.* Harris, 96 Ala. 288, 11 So. 377.

84. *Illinois.*— Reed *v.* Kemp, 16 Ill. 445, which was a change by inserting the name of the obligor in the beginning of an instrument as "I, J. G. Reed," etc.

Indiana.— State *v.* Pepper, 31 Ind. 76.

Maine.— Fournier *v.* Cyr, 64 Me. 32; Bird *v.* Bird, 40 Me. 398, insertion in the body of deed of names of grantors who had executed.

Massachusetts.— Smith *v.* Crooker, 5 Mass. 538.

United States.— Davis, etc., Bldg., etc., Co. *v.* Dix, 64 Fed. 406.

Address of bill to conform to acceptance.— If the bill is addressed to "A and B" by the name of "A B & Co.," and they accept it by the name of "A and B" and the address of the bill is afterward altered to "A and B," the change is immaterial and will not discharge the acceptor. Farquhar *v.* Southey, M. & M. 14, 22 E. C. L. 460.

85. *Maine.*— Chadwick *v.* Eastman, 53 Me. 12, holding that even though a note for a partnership debt began: "We, or either of us, promise jointly and severally to pay," and was signed by one of the partners alone, a subsequent change, without the knowledge of either defendant, by the payee, by inserting immediately above the signature the words "for Enos & Wm. Eastman," the names of the firm, was material and available as a defense to both defendants.

Missouri.— Springfield First Nat. Bank *v.* Fricke, 75 Mo. 178.

North Carolina.— Davis *v.* Coleman, 29 N. C. 424.

f. **Joint and Several Obligations.** If an instrument is changed in character by the insertion of words which convert it into a joint and several obligation,[86] or which convert a joint and several liability into one which is merely joint, the change is a material one and discharges the parties not consenting.[87] But, under a statute extinguishing the common-law distinction between instruments joint and those joint and several, the insertion of words into an instrument making it joint and several is not material.[88]

g. **Erasure of Names** — (1) *In General.* The erasure of names in an instrument, so as to affect its identity or make it speak of a different character of liability, is material,[89] as where the instrument is thus converted into one with different parties.[90] The erasure of the name of one of the obligors on a bond will avoid it as to other obligors not consenting thereto.[91] Where a note is executed by several, erasing or cutting off the name of one, without the consent of the other, is material, and discharges the latter.[92] So cutting off or erasing the signa-

Texas.— Texas Printing, etc., Co. *v.* Smith, (Tex. App. 1889) 14 S. W. 1074.

Wisconsin.— North *v.* Henneberry, 44 Wis. 306, wherein a change in a deed, actually executed by an attorney in fact but in such manner as to make it his own personal deed, by converting it into the deed of the principal, was material.

See also *supra*, VII, F, 18.

Principal in recognizance.— A change in a recognizance by a justice before it is taken, by striking out the principal's name and substituting the name of another, will release the cognizor. Vincent *v.* People, 25 Ill. 500.

Erasure of middle initial.— The erasure of the middle initial of the grantor's name in a deed was held to be immaterial where there was no conflict as to the identity of the grantor. Banks *v.* Lee, 73 Ga. 25.

86. Warring *v.* Williams, 8 Pick. (Mass.) 322; Perring *v.* Hone, 4 Bing. 28, 13 E. C. L. 384; Samson *v.* Yager, 4 U. C. Q. B. O. S. 3. See also Landauer *v.* Sioux Falls Imp. Co., 10 S. D. 205, 72 N. W. 467.

Changing "we guarantee" to "I guarantee" is immaterial where the obligation is several. Kline *v.* Raymond, 70 Ind. 271.

87. Humphreys *v.* Guillow, 13 N. H. 385, 38 Am. Dec. 499, changing "I promise to pay" into "we promise to pay," thereby converting a joint and several note into a joint one [*citing* Hemmenway *v.* Stone, 7 Mass. 58, 5 Am. Dec. 27; March *v.* Ward, Peake 177; Clerk *v.* Blackstock, Holt N. P. 474, 3 E. C. L. 188].

See also *infra*, VII, F, 21, g.

A surety on a joint note is discharged by a change, made after it was executed by him, so as to make the note a joint and several one. Eckert *v.* Louis, 84 Ind. 99.

88. Miller *v.* Reed, 27 Pa. St. 244, 67 Am. Dec. 459, holding that the terms of the statute, though limited to undertakings that were joint and several, were applicable to contracts that were joint and not several.

89. Hindustan, etc., Bank *v.* Smith, 36 L. J. C. P. 241. But in Justus *v.* Cooper, 7 Blackf. (Ind.) 7, the partial erasure of the name of a payee in a note so as to make it illegible was held not to release the maker when it appeared that the note was executed by him and was payable and delivered to plaintiff, that the latter had possession of the note when the suit was begun, and his name had been erased under circumstances showing the validity of the note not to be affected by the erasure. See also *supra*, III, B.

90. See *supra*, VII, F, 21, e; and VII, F, 18.

91. *Indiana.*— State *v.* Blair, 32 Ind. 313.

Iowa.— State *v.* Craig, 58 Iowa 238, 12 N. W. 301.

Kentucky.— Bracken County *v.* Daum, 80 Ky. 388.

Delaware.— Herman *v.* Bratten, 2 Harr. (Del.) 396, holding that where sureties sign a bond upon condition that others named therein as sureties shall sign, and thereafter those names are erased, the first surety is discharged.

Mississippi.—Love *v.* Shoape, Walk. (Miss.) 508.

Missouri.— State *v.* Findley, 101 Mo. 217, 14 S. W. 185; Briggs *v.* Glenn, 7 Mo. 572.

Pennsylvania.— Rittenhouse *v.* Levering, 6 Watts & S. (Pa.) 190; Barrington *v.* Washington Bank, 14 Serg. & R. (Pa.) 405.

Texas.— Bail-bond. Collins *v.* State, 16 Tex. App. 274; Kiser *v.* State, 13 Tex. App. 201.

Vermont.— Dewey *v.* Bradbury, 1 Tyler (Vt.) 186.

United States.— Smith *v.* U. S., 2 Wall. (U. S.) 219, 17 L. ed. 788.

See also *infra*, VII, F, 21, h, i.

Suit by obligor after discharge of co-obligors.— But, since a discharge of one joint obligor does not discharge the others, in the absence of a showing that such discharge was without their consent, defendant's contention, in a suit to foreclose a mortgage, brought by a guarantor who has paid the debt and become subrogated to the rights of the guarantee, that plaintiff was discharged from liability on his guaranty of the original debt by reason of the erasure of the name of one of his co-obligors, is not tenable. Blewett *v.* Bash, 22 Wash. 536, 61 Pac. 770.

92. Gillett *v.* Sweat, 6 Ill. 475; Davis *v.* Coleman, 29 N. C. 424. Where a note is signed by three persons payable to one of them, and the latter's signature as maker is

ture or name of a surety will discharge another surety not consenting thereto;[93] but it is held that, as the release of a surety in this manner does not affect the maker's liability or the identity of his contract, it will not invalidate a note against the principal.[94]

(II) *Of Minor Who Repudiates Contract.* Where one of the makers of a note was a minor and, after arriving at majority, repudiated the contract, an erasure of his name is not material.[95]

(III) *Rescission Not Effected by.* But after the complete execution and delivery of the contract one of the parties thereto cannot rescind it by obtaining possession of the paper and erasing his name therefrom.[96]

(IV) *Several Undertakings in One Instrument.* If the signing of an instrument by more than one party evidences entirely separate and several undertakings, the erasure of the name of one does not affect the liability of the other — as in the case of contracts for the subscription of corporate stock —[97] and, in such cases, a change in the separate contract of one, aside from questions of fraud, will not affect the liabilities of the others.[98]

h. Effect on Relation of Suretyship — (I) *In General.* A surety has a right to stand upon the precise terms of the contract into which he has entered, and the rule that any change in the instrument which affects the legal identity of the contract destroys the instrument is applied with especial strictness to such cases.[99]

afterward erased, and he indorses the note, the other two makers are discharged. Morrison *v.* Garth, 78 Mo. 434.

Custom of erasing names upon taking up draft.— Where it is shown to be the custom to erase all names upon a draft after it is taken up by the acceptors, the erasure of the name of a drawer on the bill paid by the acceptor for the drawer's accommodation will not destroy the acceptor's right of recovery. Matter of O'Flaherty, 7 La. Ann. 640.

93. McCramer *v.* Thompson, 21 Iowa 244; Hall *v.* McHenry, 19 Iowa 521, 87 Am. Dec. 451.

Forged signature.— York County Mut. F. Ins. Co. *v.* Brooks, 51 Me. 506, where a surety signed a bond on file, with the signature of another surety which had been forged by the principal, who, before delivery to the obligee, erased the forged name, it was held that the surety so signing was bound, apparently upon the ground that he was negligent in relying upon the genuineness of the forged signature.

94. Broughton *v.* West, 8 Ga. 248; People *v.* Call, 1 Den. (N. Y.) 120, 43 Am. Dec. 655 (holding that the instrument was one of value, so as to be the subject of larceny); Huntington *v.* Finch, 3 Ohio St. 445; Tutt *v.* Thornton, 57 Tex. 35 (holding that the erasure of the name of one who had indorsed a note at its inception, as surety for the maker, and who afterward took up the note and sued the maker upon it, was not material).

See Bills and Notes.

95. Young *v.* Currier, 63 N. H. 419.

96. Natchez *v.* Minor, 9 Sm. & M. (Miss.) 544, 48 Am. Dec. 727. To the same point see Burton *v.* Shotwell, 13 Bush (Ky.) 271.

97. Whittlesey *v.* Frantz, 74 N. Y. 456; Rensselaer, etc., Plank Road Co. *v.* Wetsel, 21 Barb. (N. Y.) 56. *Contra*, Texas Printing, etc., Co. *v.* Smith, (Tex. App. 1889) 14 S. W. 1074, holding that where a subscription was signed by "The Fort Worth Printing House. J. K. Millican, Manager," and when the corporation was formed the contract was so changed as to make it the personal subscription of Millican, the change was material as making the contract speak a different language, though the liabilities of the parties were several.

Attaching signatures of different papers.— Where one signs a subscription paper and others sign another subscription paper for the same purpose, the papers being identical, except that the one signed by the latter contains the words "the amounts set opposite our names," and the signatures to the latter are detached and appended to the first, it is not an alteration. Defendant, who signed the first subscription paper to which the latter signatures were appended, is not discharged by such act. The contracts were identical, therefore there was no alteration. Davis *v.* Campbell, 93 Iowa 524, 61 N. W. 1053. To the same point see Sodus Bay, etc., R. Co. *v.* Hamlin, 24 Hun (N. Y.) 390.

98. Jewett *v.* Valley R. Co., 34 Ohio St. 601.

99. *Alabama.*— Brown *v.* Johnson, (Ala. 1900) 28 So. 579; Glover *v.* Robbins, 49 Ala. 219, 20 Am. Rep. 272; Mackay *v.* Dodge, 5 Ala. 388.

Arkansas.—State *v.* Churchill, 48 Ark. 426, 3 S. W. 352, 880.

California.— People *v.* Kneeland, 31 Cal. 288.

Delaware.— Herdman *v.* Bratten, 2 Harr. (Del.) 396.

Georgia.— Hanson *v.* Crawley, 41 Ga. 303; Taylor *v.* Johnson, 17 Ga. 521.

Illinois.— Benedict *v.* Miner, 58 Ill. 19; Newlan *v.* Harrington, 24 Ill. 206.

Indiana.— Weir Plow Co. *v.* Walmsley, 110 Ind. 242, 11 N. E. 232; Stayner *v.* Joice, 82 Ind. 35; Hert *v.* Oehler, 80 Ind. 83; Hart *v.* Clouser, 30 Ind. 210.

Iowa.— Berryman *v.* Manker, 56 Iowa 150, 9 N. W. 103; Marsh *v.* Griffin, 42 Iowa 403;

Any alteration which, if made without the consent of the principal, will not bind him, will discharge the surety if made without the latter's consent.[1] The liability of an indorser cannot be extended beyond the stipulations of his original contract, and therefore it is no answer to an alteration of the instrument itself that the indorser's contract is distinct from that of the maker.[2] On the other hand, the general rule is that the alteration of a note discharges the indorser without regard to the effect as to the maker (as is particularly shown by the instances of alterations of accommodation paper made before negotiation).[3]

(II) *Character of Change.* If, however, the change in no way affects the identity of the contract or the sureties' liabilities, then the general rule that an immaterial change is not vitiating will be applied,[4] and, in accordance with the

McCramer *v.* Thompson, 21 Iowa 244; Hall *v.* McHenry, 19 Iowa 521, 87 Am. Dec. 451.

Kentucky.— Blakey *v.* Johnson, 13 Bush (Ky.) 197, 26 Am. Rep. 254.

Massachusetts.— Agawam Bank *v.* Sears, 4 Gray (Mass.) 95; Howe *v.* Peabody, 2 Gray (Mass.) 556.

Michigan.— People *v.* Brown, 2 Dougl. (Mich.) 9.

Minnesota.— Fillmore County *v.* Greenleaf, 80 Minn. 242, 83 N. W. 157; Renville County *v.* Gray, 61 Minn. 242, 63 N. W. 635.

Missouri.— Britton *v.* Dierker, 46 Mo. 591, 2 Am. Rep. 553.

Nebraska.— Townsend *v.* Star Wagon Co., 10 Nebr. 615, 7 N. W. 274, 35 Am. Rep. 493; Brown *v.* Straw, 6 Nebr. 536, 29 Am. Rep. 369.

New Hampshire.— Haines *v.* Dennett, 11 N. H. 180.

New York.— Church *v.* Howard, 17 Hun (N. Y.) 5.

Ohio.— Thompson *v.* Massie, 41 Ohio St. 307; Harsh *v.* Klepper, 28 Ohio St. 200.

Pennsylvania.—Bensinger *v.* Wren, 100 Pa. St. 500; Fulmer *v.* Seitz, 68 Pa. St. 237, 8 Am. Rep. 172; Neff *v.* Horner, 63 Pa. St. 327, 3 Am. Rep. 555; Lancaster *v.* Barrett, 1 Pa. Super. Ct. 9, 37 Wkly. Notes Cas. (Pa.) 251.

South Carolina.— Sanders *v.* Bagwell, 32 S. C. 238, 10 S. E. 946, 7 L. R. A. 743; 37 S. C. 145, 15 S. E. 714, 16 S. E. 770.

Tennessee.— Organ *v.* Allison, 9 Baxt. (Tenn.) 459.

Texas.— Bogarth *v.* Breedlove, 39 Tex. 561.

West Virginia.—Ohio Valley Bank *v.* Lockwood, 13 W. Va. 392, 31 Am. Rep. 768.

United States.— Wood *v.* Steele, 6 Wall. (U. S.) 80, 18 L. ed. 725; Martin *v.* Thomas, 24 How. (U. S.) 315, 16 L. ed. 689.

Canada.—Henderson *v.* Vermilyea, 27 U. C. Q. B. 544; Halcrow *v.* Kelly, 28 U. C. C. P. 551; Carrique *v.* Beaty, 24 Ont. App. 302.

1. Mackay *v.* Dodge, 5 Ala. 388.

2. Reeves *v.* Pierson, 23 Hun (N. Y.) 185. The alteration of a note while in the hands of an indorsee discharges the indorser. Sheridan *v.* Carpenter, 61 Me. 83.

3. *Alabama.*— Montgomery *v.* Crossthwait, 90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140.

District of Columbia.— Lewis *v.* Shepherd, 1 Mackey (D. C.) 46.

Indiana.— Bell *v.* State Bank, 7 Blackf. (Ind.) 456.

Maine.— Sheridan *v.* Carpenter, 61 Me. 83; Waterman *v.* Vose, 43 Me. 504.

Massachusetts.— Citizens' Nat. Bank *v.* Richmond, 121 Mass. 110; Stoddard *v.* Penniman, 108 Mass. 366, 11 Am. Rep. 363.

Michigan.— Aldrich *v.* Smith, 37 Mich. 468, 26 Am. Rep. 536; Bradley *v.* Mann, 37 Mich. 1.

Missouri.— Capital Bank *v.* Armstrong, 62 Mo. 59.

Montana.—McMillan *v.* Hefferlin, 18 Mont. 385, 45 Pac. 548.

New Mexico.— Ruby *v.* Talbott, 5 N. M. 251, 21 Pac. 72, 3 L. R. A. 724.

New York.—Weyerhauser *v.* Dun, 100 N. Y. 150, 2 N. E. 274; Reeves *v.* Pierson, 23 Hun (N. Y.) 185.

Pennsylvania.— Hartley *v.* Corboy, 150 Pa. St. 23, 24 Atl. 295.

4. *Georgia.*— Taylor *v.* Johnson, 17 Ga. 521, 534, wherein it was held that in the case of a surety it is no answer to say that the alteration is not material, the court adding, however, that "no man can alter his engagement," from which it would seem that the case is not different from those holding that an immaterial change will not discharge a surety when it is considered that a change which does not alter the legal identity of the engagement is not a material one. See also U. S. Glass Co. *v.* West Virginia Flint Bottle Co., 81 Fed. 993, and *supra*, VII, D.

Illinois.— Rudesill *v.* Jefferson County, 85 Ill. 446, wherein the insertion was regarded as the insertion of a mere clerical omission of the scrivener for the purpose of making the bond conform to a supposed requirement of the statute, and did not vary the meaning of the instrument or affect its operation, and for this reason it did not render the bond void as to the sureties.

Indiana.— Shuck *v.* State, 136 Ind. 63, 35 N. E. 993, wherein, after a county officer had been duly elected and so declared by the county canvassing board, and after the sureties had signed his bond and in their absence, the principal struck out of the bond the word "commission," the governor having refused him a commission, and it was held that the word so stricken out was not necessary to the validity of the bond, and therefore the change was immaterial.

Minnesota.— Herrick *v.* Baldwin, 17 Minn. 209, 10 Am. Rep. 161.

Rhode Island.—Arnold *v.* Jones, 2 R. I. 345.

United States.— Crawford *v.* Dexter, 5 Sawy. (U. S.) 201, 6 Fed. Cas. No. 3,368.

general rule hereinbefore stated,[5] applied especially to contracts of parties standing in the relation of sureties, it is not necessary that the change in the instrument should do more than alter its legal identity, and it does not matter whether the particular change is to the advantage or detriment of the surety.[6]

(III) *BEFORE DELIVERY.* A surety may be discharged from liability notwithstanding the alteration is made before the instrument is delivered.[7]

i. Alteration of Bond Before or After Acceptance. If a bond is altered by a co-obligor before delivery, it is avoided as against the non-assenting obligor.[8] So the alteration of a bond before approval or acceptance will discharge the sureties,[9] and where a recognizance is altered by the justice before whom it is taken the cognizor will be released,[10] though, after delivery of a bond to an officer, an alteration by the principal obligor, with the consent of the officer, may discharge the other obligors.[11] Usually, where the officer is the mere custodian of

5. See *supra*, VII, D, 3.

6. *Alabama.*— White Sewing Mach. Co. *v.* Saxon, 121 Ala. 399, 25 So. 784; Montgomery *v.* Crossthwait, 90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140; Anderson *v.* Bellenger, 87 Ala. 334, 6 So. 82, 13 Am. St. Rep. 46, 4 L. R. A. 680; Mackay *v.* Dodge, 5 Ala. 388.

Georgia.— Taylor *v.* Johnson, 17 Ga. 521.

Kentucky.— Limestone Bank *v.* Penick, 2 T. B. Mon. (Ky.) 98, 15 Am. Dec. 136.

Michigan.— People *v.* Brown, 2 Dougl. (Mich.) 9.

Minnesota.— Fillmore County *v.* Greenleaf, 80 Minn. 242, 83 N. W. 157.

Missouri.— Fred Heim Brewing Co. *v.* Hazen, 55 Mo. App. 277.

New York.— Reeves *v.* Pierson, 23 Hun (N. Y.) 185; Church *v.* Howard, 17 Hun (N. Y.) 5.

Ohio.—Sturges *v.* Williams, 9 Ohio St. 443, 75 Am. Dec. 473.

Pennsylvania.—Bensinger *v.* Wren, 100 Pa. St. 500; Smith *v.* Weld, 2 Pa. St. 54; Lancaster *v.* Barrett, 1 Pa. Super. Ct. 9, 37 Wkly. Notes Cas. (Pa.) 251.

South Carolina.— Sanders *v.* Bagwell, 32 S. C. 238, 10 S. E. 946, 7 L. R. A. 743, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770.

Tennessee.— Organ *v.* Allison, 9 Baxt. (Tenn.) 459.

United States.— Wood *v.* Steele, 6 Wall. (U. S.) 80, 18 L. ed. 725; Martin *v.* Thomas, 24 How. (U. S.) 315, 16 L. ed. 689.

7. *Iowa.*— Marsh *v.* Griffin, 42 Iowa 403.

Michigan.—Aldrich *v.* Smith, 37 Mich. 468, 26 Am. Rep. 536; Bradley *v.* Mann, 37 Mich. 1.

Missouri.— Capital Bank *v.* Armstrong, 62 Mo. 59; Britton *v.* Dierker, 46 Mo. 591, 2 Am. Rep. 553; Ivory *v.* Michael, 33 Mo. 398; Haskell *v.* Champion, 30 Mo. 136; Trigg *v.* Taylor, 27 Mo. 245, 72 Am. Dec. 263.

North Carolina.— Cheek *v.* Nall, 112 N. C. 370, 17 S. E. 80.

Ohio.— Jones *v.* Bangs, 40 Ohio St. 139, 48 Am. Rep. 664; Sturges *v.* Williams, 9 Ohio St. 443, 75 Am. Dec. 473.

Pennsylvania.— Neff *v.* Horner, 63 Pa. St. 327, 3 Am. Rep. 555.

Tennessee.— Organ *v.* Allison, 9 Baxt. (Tenn.) 459.

Texas.— Bogarth *v.* Breedlove, 39 Tex. 561.

West Virginia.—Ohio Valley Bank *v.* Lockwood, 13 W. Va. 392, 31 Am. Rep. 768.

United States.— Wood *v.* Steele, 6 Wall. (U. S.) 80, 18 L. ed. 725.

8. State *v.* Blair, 32 Ind. 313; State *v.* Craig, 58 Iowa 238, 12 N. W. 301; Renville County *v.* Gray, 61 Minn. 242, 63 N. W. 635; Cheek *v.* Nall, 112 N. C. 370, 17 S. E. 80. *Contra*, Orlando *v.* Gooding, 34 Fla. 244, 15 So. 770, which seems to proceed upon the theory that the unauthorized change by a principal in a bond, after it had been signed by the sureties and turned over to him for delivery, and without the knowledge of the obligee, is in the nature of a spoliation by a stranger.

9. *Arkansas.*— State *v.* Churchill, 48 Ark. 426, 3 S. W. 352, 880.

California.— People *v.* Kneeland, 31 Cal. 288, holding that the liability of the sureties depends upon the bond itself, which must be delivered before liability is proved, and that therefore the bond which they executed was not delivered because the one approved was not the one signed; that no recovery could be had against the sureties on the original bond because it had never been delivered and approved, nor on the altered bond because it was not their deed.

Georgia.— Taylor *v.* Johnson, 17 Ga. 521.

Indiana.—State *v.* Polke, 7 Blackf. (Ind.) 27.

Kentucky.— Bracken County *v.* Daum, 80 Ky. 388, wherein several persons signed a power of attorney authorizing the clerk of a court to sign their names to the sheriff's levy-bond, and, before the power was delivered to the clerk, the sheriff erased the name of one of the signers and the clerk affixed the names of the others as sureties upon the bond, and it was held that the change was material and discharged the sureties.

Massachusetts.— Howe *v.* Peabody, 2 Gray (Mass.) 556, change by probate judge of penal sum in bond.

Michigan.— People *v.* Brown, 2 Dougl. (Mich.) 9.

Washington.—Fairhaven *v.* Cowgill, 8 Wash. 686, 36 Pac. 1093.

United States.— Smith *v.* U. S., 2 Wall. (U. S.) 219, 17 L. ed. 788. See also Oneale *v.* Long, 4 Cranch (U. S.) 60, 2 L. ed. 550.

10. Vincent *v.* People, 25 Ill. 500.

11. Martin *v.* Thomas, 24 How. (U. S.) 315, 16 L. ed. 689, alteration of replevin bond by principal obligor, with the consent of the marshal.

the bond,[12] or the change is made after approval, either by the approving officers or by parties thereto without the knowledge of such officers, the act is regarded as a spoliation by a stranger.[13]

j. Adding Parties, Makers, Obligors, etc. — (1) *Rule against Addition — Conflict of Authority.* There is much confusion in the authorities upon the effect of the addition of new makers or obligors to an instrument after its original execution. In the first place, especially after the complete execution and delivery of the instrument — but not always so — such a change is material as rendering all the promisors apparently jointly and equally liable to the holder as well as between themselves, and so far tending to lessen the ultimate liability of the original maker or makers, as well as affecting the remedy on the instrument.[14] The addition of

12. State *v.* Berg, 50 Ind. 496.

13. *Alabama.*— Anderson *v.* Bellenger, 87 Ala. 334, 6 So. 82, 13 Am. St. Rep. 46, 4 L. R. A. 680; Harris *v.* Bradford, 4 Ala. 214.

Indiana.— Robinson *v.* State, 60 Ind. 26, wherein defendant, who was a surety on the official bond of a township trustee, was also a member of the board of commissioners which had cognizance of such trustee's bond and reports, and, as a measure of public policy, he erased his name from such bond and procured an additional surety thereon, with the consent of the county auditor, the trustee, and the board of commissioners, and it was held that such erasure was a mere spoliation, and defendant was not released thereby.

Missouri.— State *v.* Scott, 104 Mo. 26, 15 S. W. 987, 17 S. W. 11.

Nebraska.—Schlageck *v.* Widhalm, 59 Nebr. 541, 81 N. W. 448; Bingham *v.* Shadle, 45 Nebr. 82, 63 N. W. 143 [*distinguishing* Martin *v.* Thomas, 24 How. (U. S.) 315, 16 L. ed. 689, *supra*, note 11, in that the signature to the bond there in question was erased with the consent of the obligee, and without the consent of the other obligors].

Tennessee.—Harrison *v.* Turbeville, 2 Humphr. (Tenn.) 241, holding that where the administrator procured his bond from the clerk's office, and struck out the name of an obligor and inserted the name of another, the person whose name was so stricken out was not discharged in equity, and that the words "fraud" and "accident," with regard to the jurisdiction of the chancery court to give relief in all cases where a bond has not been satisfied and the obligee is prevented from suing at common law by reason of its loss or defacement, covered all erasures and alterations except those made by the obligee himself, or with his knowledge and consent.

New York.— Casoni *v.* Jerome, 58 N. Y. 315.

Texas.— Peveler *v.* Peveler, 54 Tex. 53.

United States.— See also U. S. *v.* Hatch, 1 Paine (U. S.) 336, 26 Fed. Cas. No. 15,325.

Act not spoliation.—But in Dover *v.* Robinson, 64 Me. 183, it was held that where an official bond of a collector was changed by the principal, with consent of the selectmen of the town, after delivery and approval, and without the knowledge or consent of the sureties, the latter were discharged, as the act could not be deemed a spoliation.

Alteration of bail-bond.—A material alteration in an obligation of record — as a bail-bond — without the consent of the obligors, at the instance of the officer of the state, will discharge the obligors. Wegner *v.* State, 28 Tex. App. 419, 13 S. W. 608; Gragg *v.* State, 18 Tex. App. 295; Collins *v.* State, 16 Tex. App. 274; Heath *v.* State, 14 Tex. App. 213; Grant *v.* State, 8 Tex. App. 432; Butler *v.* State, 31 Tex. Crim. Rep. 63, 19 S. W. 676. But the alteration must be a material one. Gragg *v.* State, 18 Tex. App. 295.

14. *Alabama.*— Brown *v.* Johnson, (Ala. 1900) 28 So. 579; Montgomery *v.* Crossthwait, 90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140, which involved the change by a maker of his signature by adding "& Co." after indorsement, the court holding that the indorser was discharged, upon the principle that the addition of a maker as such discharges parties already bound by the paper. The change was made by the maker before negotiating the note, at the instance of the plaintiff.

Illinois.— One of the effects of the alteration is to destroy the identity of the note, and this, if another maker be a security and have indemnity, may greatly embarrass or possibly entirely defeat its enforcement. If the original makers have a demand against the payee which they could lawfully set off against the note, the addition of another maker would destroy that right. The place of residence of an additional maker may be such as to permit the payee or holder to institute suit upon the note in a different county from that in which he otherwise could have brought it, and thus some of the makers may be required to go to a foreign county to present any defenses that may exist to the note, or if the name of the additional maker be so placed upon the note as to indicate him as the principal maker, as it is claimed it does in this case, then all makers who are merely sureties may be greatly prejudiced and damaged, and doubtless such an alteration in a note might prejudice the makers in other ways which cannot be anticipated and suggested in advance. Soaps *v.* Eichberg, 42 Ill. App. 375.

Indiana.— Houck *v.* Graham, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727; Nicholson *v.* Combs, 90 Ind. 515, 46 Am. Rep. 229; Bowers *v.* Briggs, 20 Ind. 139 (which was the addition of a maker living in another county, thus affecting the venue of the action on the note); Henry *v.* Coats, 17 Ind. 161 (discharge of indorser by addition of maker); Emerson

a surety to a completed bond after execution and delivery by the original sureties is an alteration which will discharge the latter.[15] The substitution of one name for another as surety is an alteration which will avoid the instrument as to the first surety unless it is ratified by him.[16]

v. Opp, 9 Ind. App. 581, 34 N. E. 840, 37 N. E. 24 (holding that the maker will be discharged by the addition of other makers without the former's knowledge).

Iowa.— Browning *v.* Gosnell, 91 Iowa 448, 59 N. W. 340 (holding that, if a second signature is added by the payee, the original maker is discharged and the additional parties liable, and that if, subsequently, another signature is procured, then the first and additional signer are released and the last is liable); Sullivan *v.* Rudisill, 63 Iowa 158, 18 N. W. 856 (holding that the addition of the maker, though intended as a surety only, will discharge the original maker); Berryman *v.* Manker, 56 Iowa 150, 9 N. W. 103; Hamilton *v.* Hooper, 46 Iowa 515, 26 Am. Rep. 161; Hall *v.* McHenry, 19 Iowa 521, 87 Am. Dec. 451.

Kentucky.— Singleton *v.* McQuerry, 85 Ky. 41, 8 Ky. L. Rep. 710, 2 S. W. 652 (holding that the reason of the rule is that the identity of the instrument is altered and its integrity affected by the change); Shipp *v.* Suggett, 9 B. Mon. (Ky.) 5; Limestone Bank *v.* Penick, 5 T. B. Mon. (Ky.) 25. In Pulliam *v.* Withers, 8 Dana (Ky.) 98, 33 Am. Dec. 479, the note, after issuance by the principal, was signed by a surety at the instance of the obligee but without the knowledge of the principal, and the doctrine of Limestone Bank *v.* Penick, 5 T. B. Mon. (Ky.) 25, was reaffirmed, but, it being unnecessary to do so, the court declined to decide whether the mere addition of another obligor would vitiate the paper in the absence of any change in the body of it. The question, however, was decided in the affirmative in Shipp *v.* Suggett, 9 B. Mon. (Ky.) 5.

Missouri.—Allen *v.* Dornan, 57 Mo. App. 288; Farmers' Bank *v.* Myers, 50 Mo. App. 157 (where it was held that the addition of a forged signature to a note after its execution and delivery was material); Lunt *v.* Silver, 5 Mo. App. 186. But in Williams *v.* Jensen, 75 Mo. 681, it was held, inconsistently with the general doctrine in this state, that any change by the party holding the instrument will vitiate it, as well as with the subsequent holding in Farmers' Bank *v.* Myers, 50 Mo. App. 157, which was consistent with the doctrine referred to, that the addition of the signature of a married woman to a note would not constitute an alteration unless it appeared that she had a separate estate.

New York.— McVean *v.* Scott, 46 Barb. (N. Y.) 379 (involving the addition of names to a note as makers intended as sureties for the original maker, which was held to furnish a valid defense to the original surety on the note, the court following Chappell *v.* Spencer, 23 Barb. (N. Y.) 584, which involved the addition, by the payee of a note, of his own name in order to negotiate it). So, on the authority of the last case, it was held that where a lease was so changed by the landlord as to make other parties to it without the consent of those who were already parties, they were discharged. Wright *v.* Kelley, 4 Lans. (N. Y.) 57.

Ohio.— Wallace *v.* Jewell, 21 Ohio St. 163, 8 Am. Rep. 48, recognizing the rule where the maker is added as such, but not where he is intended merely as a surety or guarantor — as where the new party so signed through inadvertence or mistake — the court saying that such a case would fall within the principle decided in *Ex p.* Yates, 2 De G. & J. 191, 59 Eng. Ch. 191.

Texas.— Harper *v.* Stroud, 41 Tex. 367; Ford *v.* Cameron First Nat. Bank, (Tex. Civ. App. 1896) 34 S. W. 684, adhering to the rule stated in the text, even if the maker so signing was intended as surety only.

England.— Gardner *v.* Walsh, 5 E. & B. 83, 85 E. C. L. 83, 32 Eng. L. & Eq. 162 [*overruling* Catton *v.* Simpson, 8 A. & E. 136, 35 E. C. L. 518]. So, in Clerk *v.* Blackstock, Holt N. P. 474, 3 E. C. L. 188, it was held that the signing of a surety as maker, after execution and delivery of a simple promissory note, without the assent of the maker and not in accordance with the original agreement, made a new contract, and as such required a new stamp under the stamp act, and, as pointed out in Chappell *v.* Spencer, 23 Barb. (N. Y.) 584, this would have been the case if the change had not been material, or had been made to complete the instrument.

Canada.— Carrique *v.* Beaty, 24 Ont. App. 302 (holding that the addition of another maker to a note which was made by two originally, one for the accommodation of the other, discharged the original accommodation maker where the additional maker was not added as surety); Reid *v.* Humphrey, 6 Ont. App. 403 (from which it appears the added signature was not genuine).

15. Taylor *v.* Johnson, 17 Ga. 521; Harper *v.* State, 7 Blackf. (Ind.) 61; Oneale *v.* Long, 4 Cranch (U. S.) 60, 2 L. ed. 550.

Sureties separately bound.— The addition of two other sureties, separately bound, cannot affect the liability of other sureties who have already bound themselves severally at the time of the acceptance of the bond. State *v.* Dunn, 11 La. Ann. 549.

16. *Indiana.*— State *v.* Van Pelt, 1 Ind. 304; State *v.* Polke, 7 Blackf. (Ind.) 27.

Missouri.— State *v.* Scott, 104 Mo. 26, 15 S. W. 987, 17 S. W. 11; State *v.* McGonigle, 101 Mo. 353, 13 S. W. 758, 20 Am. St. Rep. 609, 8 L. R. A. 735.

New York.—Cobb *v.* Lackey, 6 Duer (N. Y.) 649.

Washington.— Fairhaven *v.* Cowgill, 8 Wash. 686, 36 Pac. 1093 (notwithstanding the sureties were chargeable with separate

(II) *Rule Permitting Addition.* On the other hand, the question is controlled by considerations of the character of the change, as whether it is in the body of the instrument or otherwise; of the extent to which the instrument has been completed in its execution, and of authority to be implied from the condition of the instrument, as to its state of completeness, in connection with the relation of the parties.[17] Thus, upon the principle that the change must be made after the complete execution and delivery of the instrument, if a maker is added, whether as such or as surety only, before the note is fairly launched so as to become an available security for the purposes for which it was intended, as instanced by such a change while the instrument is in the hands of a principal in order to discount it, it is not considered an alteration.[18] The same principle is

limited liabilities by statute); King County *v.* Ferry, 5 Wash. 536, 32 Pac. 538, 34 Am. St. Rep. 880, 19 L. R. A. 500.

Canada.—Henderson *v.* Vermilyea, 27 U. C. Q. B. 544.

17. *Illinois.*— Trainor *v.* Adams, 54 Ill. App. 523.

Indiana.— State *v.* Pepper, 31 Ind. 76 (wherein it was held that where a surety signs a bond before the names of other sureties have been inserted in the body thereof, and in this condition delivers it to the principal obligor, he would be held as agreeing that the names of additional sureties may be filled in and added to the bond, the court saying that other cases would seem to rest upon the fact that a perfect instrument had been executed by the original surety, and thereafter the names of other sureties had been inserted into the body of the instrument in disregard of the technical rule at common law concerning the alteration of sealed instruments, and that Harper *v.* State, 7 Blackf. (Ind.) 61, and Oneale *v.* Long, 4 Cranch (U. S.) 60, 2 L. ed. 550, *supra*, note 15, if to be sustained, must rest upon this latter hypothesis); Bowser *v.* Rendell, 31 Ind. 128.

Kentucky.— Jones *v.* Shelbyville F., etc., Ins. Co., 1 Metc. (Ky.) 58 (which involved the erasure of the name of a surety from the body of a note and the procurement of the signature of another surety, after signing by one also named in the body of the note as surety, without his consent, and though the payee of the note (which was in renewal of another note) knew of the original arrangement for the execution thereof with the parties first written in the note as sureties); Commonwealth Bank *v.* McChord, 4 Dana (Ky.) 191, 29 Am. Dec. 398.

Minnesota.— Ward *v.* Hackett, 30 Minn. 150, 14 N. W. 578, 44 Am. Rep. 187, wherein it is said that cases which hold a material alteration of a note, made by one of the promisors before delivery, without the consent of the other promisor, to avoid it as against the latter are cases where the body of the contract itself was changed.

Washington.— King County *v.* Ferry, 5 Wash. 536, 32 Pac. 538, 34 Am. St. Rep. 880, 19 L. R. A. 500 [in effect *overruling* Walla Walla County *v.* Ping, 1 Wash. Terr. 339] holding that the erasure of the name of a surety from the body of an official bond, and the substitution of another surety, would not release sureties who had already signed and delivered to the principal, and where the bond, when finally delivered by him to the obligee, was regular on its face, the principal obligor being considered the agent of the surety rather than the agent of the obligee. See also State *v.* Craig, 58 Iowa 238, 12 N. W. 301 (where the surety whose name was erased had actually signed the bond); McCramer *v.* Thompson, 21 Iowa 244 (where the signing had been actually done and the payee had notice); Hagler *v.* State, 31 Nebr. 144, 47 N. W. 692, 28 Am. St. Rep. 514, in all of which cases the character of the change would seem to distinguish it from King County *v.* Ferry, 5 Wash. 536, 32 Pac. 538, 34 Am. St. Rep. 880, 19 L. R. A. 500, though not necessarily a point of the decisions.

United States.— Mersman *v.* Werges, 112 U. S. 139, 5 S. Ct. 65, 28 L. ed. 641, 642, wherein, speaking of the character of a change involving the effect of the addition of signatures, the court said: "The present case is not one of a change in the terms of the contract, as to amount or time of payment, but simply of the effect of adding another signature, without otherwise altering or defacing the note. An erasure of the name of one of several obligors is a material alteration of the contract of the others, because it increases the amount which each of them may be held to contribute" [*referring* to Smith *v.* U. S., 2 Wall. (U. S.) 219, 17 L. ed. 788, and Martin *v.* Thomas, 24 How. (U. S.) 315, 16 L. ed. 689].

Canada.— Halcrow *v.* Kelly, 28 U. C. C. P. 551.

18. *Indiana.*— Bowser *v.* Rendell, 31 Ind. 128, signing by party into whose hands the instrument was placed to have it discounted, at the instance of the bank, before the latter would discount it, and with the understanding that the signing was as guarantor for both the original maker and his surety, and not as a joint maker with them.

Iowa.— Graham *v.* Rush, 73 Iowa 451, 35 N. W. 518.

Minnesota.— Babcock *v.* Murray, 58 Minn. 385, 59 N. W. 1038; Ward *v.* Hackett, 30 Minn. 150, 14 N. W. 578, 44 Am. Rep. 187.

New York.— See Norton *v.* Coons, 3 Den. (N. Y.) 130; Warner *v.* Price, 3 Wend. (N. Y.) 397.

Ohio.— In Tarbill *v.* Richmond City Mill Works, 2 Ohio Cir. Ct. 564, it was held that the forging of the name of a cosurety to a note by the principal, and without the knowl-

applied in the case of the addition of an obligor in a bond.[19] Going still further, it has been stated in general terms that the addition of a principal promisor is not a material change which will discharge the original maker;[20] but the general current of authorities which permit such a change tends to this conclusion: that although the addition of a maker is in the form of a joint promisor, whether made before or after the negotiation of the instrument, it is not an alteration which will discharge the maker where the addition is in fact that of a surety or guarantor only.[21] So the indorsement of a bill of exchange by the individual members of

edge of the first surety, was immaterial as to the latter. *Compare* State *v.* Pepper, 31 Ind. 76.

Vermont.— Keith *v.* Goodwin, 31 Vt. 268, 73 Am. Dec. 345; Peake *v.* Dorwin, 25 Vt. 28.

Virginia.— Stout *v.* Vause, 1 Rob. (Va.) 179.

United States.— Bingham *v.* Reddy, 5 Ben. (U. S.) 266, 3 Fed. Cas. No. 1,414.

England.— Deering *v.* Winchelsea, 1 White & T. Lead. Cas. 157 note [*cited* in State *v.* Pepper, 31 Ind. 76].

Knowledge of payee.— Sometimes it seems that the fact that the payee had no knowledge of the change has been given some effect. See Hall *v.* McHenry, 19 Iowa 521, 87 Am. Dec. 451; Gano *v.* Heath, 36 Mich. 441; Ward *v.* Hackett, 30 Minn. 150, 14 N. W. 578, 44 Am. Rep. 187. But from the other cases cited in this note it may be said that this consideration is not material under the conditions stated in the text.

19. Governor *v.* Lagow, 43 Ill. 134; State *v.* Pepper, 31 Ind. 76; Matson *v.* Booth, 5 M. & S. 223, holding that where a bond for release from arrest on mesne process was presented by one of the attesting witnesses, containing a blank for another obligor, and before acceptance by the sheriff another obligor is added, the addition is made with the concurrence of the obligors at a time when the bond could be considered in no other light than as in the nature of an escrow, and is thus brought within the authority of Zouch *v.* Clay, 1 Vent. 185.

20. Rudulph *v.* Brewer, 96 Ala. 189, 11 So. 314; Montgomery R. Co. *v.* Hurst, 9 Ala. 513. The last case has been criticized by the observation that the court admitted therein that the identity of the instrument might have been destroyed by the change (Chappell *v.* Spencer, 23 Barb. (N. Y.) 584; Harper *v.* Stoud, 41 Tex. 367); but both the first cases cited may be reconciled with those in note 21, *infra*, because it appears from them that the change was probably made to enable the holder to negotiate the paper by adding sureties thereto, and not by adding makers as such, though if not they may be said not to state the law in Alabama. See Brown *v.* Johnson, (Ala. 1900) 28 So. 579.

Collateral undertaking.— And an indorsement on a note guaranteeing payment is a collateral undertaking which does not affect the liability of the original parties. Burnham *v.* Gosnell, 47 Mo. App. 637; Hutches *v.* J. I. Case Threshing Mach. Co., (Tex. Civ. App. 1896) 35 S. W. 60. See PRINCIPAL AND SURETY.

21. *Alabama.*—Rudulph *v.* Brewer, 96 Ala. 189, 11 So. 314; Montgomery R. Co. *v.* Hurst, 9 Ala. 513.

Georgia.— Lynch *v.* Hicks, 80 Ga. 200, 4 S. E. 255, in which case defendant executed his note to his creditor and the latter signed it as security, but, failing to negotiate it, erased his name as security and indorsed it, and it was held that the change was not material.

Illinois.— Ryan *v.* Springfield First Nat. Bank, 148 Ill. 349, 35 N. E. 1120; Ives *v.* McHard, 2 Ill. App. 176, where the additional signature was as surety, though the court expresses the opinion that the addition of a maker will not discharge the original maker.

Indian Territory.— Taylor *v.* Acom, 1 Indian Terr. 436, 45 S. W. 130.

Kentucky.—Casson *v.* Wallace, 4 Bush (Ky.) 388, in which case the payee, with the intention of becoming a guarantor, by mistake signed a note subscribing his name under that of the maker.

Massachusetts.— Stone *v.* White, 8 Gray (Mass.) 589, holding that the signature by a third party added to a note payable on demand, after its execution and delivery by the original makers and for a new consideration, is an independent contract not requiring the consent of the original promisors.

Nebraska.— Royse *v.* St. Joseph State Nat. Bank, 50 Nebr. 16, 69 N. W. 301; Barnes *v.* Van Keuren, 31 Nebr. 165, 47 N. W. 848, in which case it was held that, where additional signatures were procured after the execution and delivery of the note, the original maker was not discharged, because his liability was neither increased nor lessened and, being added after the execution of the note, plaintiff could not insist that the release of the original maker was sufficient consideration to support the action against the additional signers.

New York.— Brownell *v.* Winnie, 29 N. Y. 400, 408, 86 Am. Dec. 314 (involving the addition by a payee of his own name as original maker, distinguishing Gardner *v.* Walsh, 5 E. & B. 83, 85 E. C. L. 83, in that the question in that case involved the addition of a name to a joint and several note signed by two makers, Mullin, J., saying: "I have found no case, and none has been cited, holding that a name added to a several note is such a material alteration as avoids it);" McCaughey *v.* Smith, 27 N. Y. 39 (which recognizes as the result of later authorities that the addition of another maker to a note made by one or more is an alteration of the contract, because, instead of being the several or the joint obligation of the original party or

the firm which drew it, after acceptance and without knowledge on the part of the acceptor, is not material.[22]

k. Effect on Prior and Subsequent Signers. If a note is changed by one of several makers after it is signed by them, persons who subsequently sign the instrument will not be discharged unless the change is of such a character as to discharge those who have previously signed.[23] But if, on the other hand, after an instrument is executed by sureties, it is so altered as to discharge them, and subsequently it is executed by other sureties, the latter will be bound,[24] as where sureties execute an instrument after it has been altered by striking out the names of the other sureties who have previously signed so as to discharge others who had signed before the alteration.[25] But if sureties sign as co-obligors, without knowledge of the fact of an alteration which has discharged prior signers, they will not be bound.[26] So, while the addition of a maker as surety may discharge prior makers or sureties not assenting to the change, the subsequent signers will nevertheless be liable. The rule that the addition of a party will discharge those previously signing applies only to non-consenting parties.[27]

parties, it becomes the joint or joint and several undertaking of different contractors, but distinguishes the principle from that involved in this case, which was a note transferred to plaintiff for goods sold, and afterward, at the request of plaintiff, for the purpose of adding the security of the name of a particular person, that person was procured to sign his name to the note, and it was held that this was not adding a joint maker, because the note had already been negotiated, but was subscribing to become security upon the note already made and negotiated); Denick *v.* Hubbard, 27 Hun (N. Y.) 347 (involving the addition of the name of a payee under that of the two original makers upon transferring it to another person, as well as the addition of the name of the last holder above the signatures of all the other parties upon his transferring it to still another person); Card *v.* Miller, 1 Hun (N. Y.) 504; Burton *v.* Baker, 31 Barb. (N. Y.) 241; Partridge *v.* Colby, 19 Barb. (N. Y.) 248; Cobb *v.* Titus, 13 Barb. (N. Y.) 45, 10 N. Y. 198.

Ohio.— Wallace *v.* Jewell, 21 Ohio St. 163, 8 Am. Rep. 48, holding that the addition of a maker to a joint and several promissory note discharged the original signers; but the court was of the opinion that if the object of the signature had been to guarantee payment or furnish additional security otherwise than by becoming or assuming to become a joint maker, there could be no objection to the accomplishment of such an object in this manner. The court refused to assent to the proposition that because the pronoun "I" was used in the body of the note it was the several note of each signer, and not the joint note of all, contrary to Brownell *v.* Winnie, 29 N. Y. 400, 86 Am. Dec. 314.

Michigan.— Union Banking Co. *v.* Martin, 113 Mich. 521, 71 N. W. 867; Miller *v.* Finley, 26 Mich. 249, 12 Am. Rep. 306, holding that the addition of a maker after delivery would not discharge the original maker, upon the authority of which case it was held in Gano *v.* Heath, 36 Mich. 441, that the procuring of an additional maker at the instance of one of two joint makers, without knowledge on the part of the payee, would not discharge the other original maker.

United States.— Mersman *v.* Werges, 112 U. S. 139, 5 S. Ct. 65, 28 L. ed. 641; Butte First Nat. Bank *v.* Weidenbeck, 97 Fed. 896, 38 C. C. A. 131.

England.— *Ex p.* Yates, 2 De G. & J. 191, 59 Eng. Ch. 191. This case has been understood as based upon some evidence that the name was in fact added as an indorser. See Reid *v.* Humphrey, 6 Ont. App. 403.

22. Blair *v.* State Bank, 11 Humphr. (Tenn.) 83.

23. Burlingame *v.* Brewster, 79 Ill. 515, 22 Am. Rep. 177.

24. People *v.* Brown, 2 Dougl. (Mich.) 9, holding that where a joint and several bond for the faithful performance of the duties of a public officer was changed by the judge of the circuit court by reducing the penal sum therein after the officer and six co-obligors as sureties had signed, and thereafter the instrument was executed by a number of other sureties, and approved and filed according to the statute, the bond was void as to the sureties who signed before the change, but good as to those who signed after.

25. State *v.* Van Pelt, 1 Ind. 304, holding that the fact that the substituted surety did not know, or believe, or suspect that the striking out of the particular surety's name was without the knowledge or consent of the other sureties would not affect his liability, because if he did not wish to be bound unless as co-obligor with the other sureties he should have ascertained before he executed the bond whether or not they had agreed to the alteration.

26. Howe *v.* Peabody, 2 Gray (Mass.) 556; State *v.* McGonigle, 101 Mo. 353, 13 S. W. 758, 20 Am. St. Rep. 609, 8 L. R. A. 735.

27. Hochmark *v.* Richler, 16 Colo. 263, 26 Pac. 818; Thompson *v.* Williams, 1 Fla. 56; Cotten *v.* Williams, 1 Fla. 37; Houck *v.* Graham, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727; Crandall *v.* Auburn First Nat. Bank, 61 Ind. 349; Rhoades *v.* Leach, 93 Iowa 337, 61 N. W. 988, 57 Am. St. Rep. 281; Browning *v.* Gosnell, 91 Iowa 448, 59 N. W. 340; Hamil-

22. Retracing Original Writing. To retrace words already written is not of itself to vary the legal effect of the instrument — as where pencil writing is retraced with ink — and constitutes no alteration.[28]

23. Instruments in Duplicate. Where an instrument is executed in duplicate, though an unauthorized change in one may destroy it,[29] this will not affect the estate under the contract or the duplicate instrument which remains intact.[30]

24. Alteration of One of Several Dependent Instruments — a. In General. The alteration of any one of several writings, all of which are material to show the actual agreement of the parties, will invalidate all of the papers.[31] Changes in one of such instruments, however, may be authorized by the terms of the other.[32]

b. Note and Mortgage. The authorities are not in accord as to the effect upon a mortgage of an alteration of a note or bond secured thereby. In some it is considered that both the note and mortgage are destroyed, though, if there is no actual fraud, the original consideration is not destroyed, and therefore the mortgage is enforceable.[33] In others, while the note may be destroyed, it is con-

ton *v.* Hooper, 46 Iowa 515, 26 Am. Rep. 161; Dickerman *v.* Miner, 43 Iowa 508.

Who may object.—If the surety who might have been released by such a change does not take advantage of it, those who subsequently signed with knowledge of the change cannot escape liability to contribute to him by objecting that the change discharged him from liability. Houck *v.* Graham, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727. So a surety cannot set up that he signed without the knowledge or consent of the principal, as the principal's relations or liabilities are not altered thereby. Hughes *v.* Littlefield, 18 Me. 400.

Consideration.— If, after the complete execution and delivery of a note, the payee procures the signature of an additional promisor as surety only, the last signer is not bound in the absence of a new consideration. Favorite *v.* Stidham, 84 Ind. 423; Stone *v.* White, 8 Gray (Mass.) 589; Barnes *v.* Van Keuren, 31 Nebr. 165, 47 N. W. 848. But in Hughes *v.* Littlefield, 18 Me. 400, it was held that, where a note was signed, after its original execution and delivery, by another as surety, the contract between the original parties was a good consideration, and the last signer was liable as a joint promisor.

28. Reed *v.* Roark, 14 Tex. 329, 65 Am. Dec. 127. So where, in attempting to retrace a part of the obligor's name in a bond which had been blotted in ink, the obligee misspelled the name, but no fraud was imputed to him and the sound of the name was not changed, the act was held to be immaterial and not to avoid the instrument. Dunn *v.* Clements, 52 N. C. 58.

29. Jones *v.* Hoard, 59 Ark. 42, 26 S. W. 193, 43 Am. St. Rep. 17, holding that the unauthorized change by a lessee in his counterpart of duplicate leases, though it annuls his counterpart, does not affect his rights under the contract.

30. Lewis *v.* Payn, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427. To the same effect see Day *v.* Ft. Scott Invest., etc., Co., 53 Ill. App. 165, which was an action for specific performance of a contract to purchase land, the complainant's copy having been changed by his attorney without any fraudulent intent and under a misapprehension, the court holding that, as the matter added was not necessary to the efficiency of the instrument, it would not affect the validity of the original instrument, and that if material, then, under the circumstances, equity could correct the contract. So in Rhoades *v.* Castner, 12 Allen (Mass.) 130, it was held that where a memorandum of a contract of sale was in duplicate, one only signed by the buyer and in possession of the seller, and the other accepted by the seller and given to the buyer, the subsequent addition by the latter of his own signature to his part, without fraudulent intention, was not a material alteration affecting the character of the memorandum. See also Young *v.* Cohen, 42 S. C. 328, 20 S. E. 62; Young *v.* Wright, 4 Wis. 144, 65 Am. Dec. 303. But in Hayes *v.* Wagner, 89 Ill. App. 390, proof by a duplicate seems to be confined to cases where the alteration in the other copy is innocently made.

31. Meyer *v.* Huncke, 55 N. Y. 412; French *v.* Graves, 50 N. Y. App. Div. 522, 64 N. Y. Suppl. 74; Miller *v.* Stewart, 9 Wheat. (U. S.) 680, 6 L. ed. 189.

Collateral note.— Where the holder of a note erased the names of the indorsers on a collateral note it was held that the maker on the principal note was released. Burgess *v.* Brooklyn Clock Co., 2 N. Y. City Ct. 168.

32. Consaul *v.* Sheldon, 35 Nebr. 247, 52 N. W. 1104, holding that, where specifications calling for glazed doors are expressly made a part of a building contract, the insertion of the word "glazed" in the contract as descriptive of the doors is immaterial. See also McLennan *v.* Wellington, 48 Kan. 756, 30 Pac. 183; Kretschmar *v.* Gross, (Wis. 1900) 84 N. W. 429.

33. *Illinois.*— Elliott *v.* Blair, 47 Ill. 342; Vogle *v.* Ripper, 34 Ill. 100, 85 Am. Dec. 298.

Indiana.— Bowman *v.* Mitchell, 79 Ind. 84 (on demurrer to an answer setting up the alteration); Tate *v.* Fletcher, 77 Ind. 102 (upon the ground that a note payable at a bank in that state was *prima facie* the payment of a debt, and the note being the only debt described in the mortgage and the mortgage and

sidered that the security remains unimpaired for the original debt.[34] The latter cases have been assimilated to those which hold that a mortgage given to secure the same debt represented by a note remains an available security notwithstanding the note has become barred by the statute of limitations.[35] It does not follow, however, that a material alteration of a mortgage, and its consequent annulment, also renders the debt, the payment of which is secured by it, incapable of collection, or any instrument by which the debt is evidenced, void.[36]

25. CERTIFICATE OF ACKNOWLEDGMENT. Where an acknowledgment is not essential to the validity of a conveyance,[37] but merely dispenses with other proof of execution and delivery, an alteration in the acknowledgment does not affect the validity of the deed or its admissibility in evidence.[38]

note being together only one transaction, whatever destroyed the note discharged the mortgage also). But when the first case above cited came up again on a replication to the answer (Bowman *v.* Mitchell, 97 Ind. 155), it was held that the change in the note complained of having been made with the consent of the husband, who was the sole maker of the note, the note was not destroyed thereby, and therefore the change complained of by the wife, who had joined with her husband in the mortgage to secure the note, could not affect the validity of the mortgage as against the wife. To the last point also see Brock *v.* Brock, 29 Ill. App. 334. But in Crawford *v.* Hazelrigg, 117 Ind. 63, 18 N. E. 603, 2 L. R. A. 139, after the execution by man and wife of a mortgage to secure a note indorsed by the mortgagee for the husband and wife, the note was altered with the husband's consent, but without the consent of the wife, and it was held that the wife's inchoate interest in the land was fully discharged from the lien of the mortgage.

Iowa.— Clough *v.* Seay, 49 Iowa 111.

Nebraska.— Walton Plow Co. *v.* Campbell, 35 Nebr. 173, 52 N. W. 883, 16 L. R. A. 468, upon the ground that the fraudulent alteration of the note destroyed the right of action on the note, as well as for the original consideration.

New York.— Gillette *v.* Smith, 18 Hun (N. Y.) 10.

Wisconsin.— Gorden *v.* Robertson, 48 Wis. 493, 4 N. W. 579, holding that the mortgage is security for the debt and not merely for the note, and as an alteration of the note, not fraudulent, does not destroy the debt, the mortgage may be foreclosed in such a case.

34. Cheek *v.* Nall, 112 N. C. 370, 17 S. E. 80 (upon the ground that a mortgage is not regarded as merely subsidiary to the debt, but is a direct appropriation of property to its security and payment; that the remedies on a note or bond and on a mortgage are different and either may be resorted to, and that the loss of one does not cut off a resort to the other. This holding is apparently without reference to the doctrine that a fraudulent alteration destroys the original indebtedness); Heath *v.* Blake, 28 S. C. 406, 5 S. E. 842; Smith *v.* Smith, 27 S. C. 166, 3 S. E. 78, 13 Am. St. Rep. 633; Plyler *v.* Elliott, 19 S. C. 257; Gillett *v.* Powell, Speers Eq. (S. C.) 142, 144, all of which cases go upon the principle that the note is not the debt itself and that the alteration will not destroy the security of the mortgage, irrespective of the intent with which the alteration was made. In the first case it is said that there seems to be an idea that, in the event of the destruction of a note by an alteration, "the act, being fraudulent, reaches beyond the security altered, and, as a sort of penalty, avoids the debt itself and all other securities. . . . Gillett *v.* Powell, Speers Eq. (S. C.) 142, is our leading case on the subject, and it is suggested that, though a case of alteration, the alteration was 'innocent,' and therefore the punishment of avoiding the debt was not applied. I do not clearly see how it can be assumed that the alteration in that case was 'innocent.'"

35. Cheek *v.* Nall, 112 N. C. 370, 17 S. E. 80; Smith *v.* Smith, 27 S. C. 166, 3 S. E. 78, 13 Am. St. Rep. 633; Plyler *v.* Elliott, 19 S. C. 257. See also Gillette *v.* Smith, 18 Hun (N. Y.) 10, in which case, however, the change does not appear to have been made fraudulently. But, on the other hand, this position is combatted upon the ground that the statute of limitations only takes away the remedy, while the fraudulent alteration of a note goes further and reaches to the debt itself and extinguishes it. Walton Plow Co. *v.* Campbell, 35 Nebr. 173, 52 N. W. 883, 16 L. R. A. 468.

36. Kime *v.* Jesse, 52 Nebr. 606, 72 N. W. 1050.

Sureties entitled to benefit of mortgage.— Where, by agreement between the principal and holder of a note, the description of a part of land conveyed in a mortgage to secure the note was erased in order to enable the mortgagor to sell the land to an innocent purchaser, and the surety and indorser on the note defend on the ground of such erasure, it is error to say that because the land was sold by the mortgagor before the mortgage was recorded the consent of the indorser and surety to the erasure became immaterial. These parties had the right to expect the mortgage to be held for their protection, as well as for the protection of its holder. Williams *v.* Barrett, 52 Iowa 637, 3 N. W. 690.

37. See ACKNOWLEDGMENTS.

38. Arn *v.* Matthews, 39 Kan. 272, 18 Pac. 65. To the same effect see Devinney *v.* Reynolds, 1 Watts & S. (Pa.) 328.

VIII. PLEADING.

A. Declaration on Altered or Original Instrument. Notwithstanding a mere spoliation does not affect the rights of the parties under the instrument, it does not follow that an action can be maintained on the instrument in its altered form;[39] but in such a case the declaration should be framed as upon the instrument in its original form,[40] and, upon showing that the change is a mere spoliation, there would be no variance.[41] If the terms of the instrument are changed by consent so that the parties are bound by the new terms of the contract, it is proper to declare upon the instrument as changed;[42] but if plaintiff alleges an alteration, without also showing that it was authorized, his pleading will be bad.[43] By suing on the instrument in its altered form the plaintiff will be taken to have ratified the alteration,[44] and will not be permitted to go to trial in such a case and then fall back upon the original terms of the instrument by amendment.[45] So, in an action on a bond[46] which had been changed — as by the defendant tearing off the seal[47] — it is held that the instrument cannot be declared on with profert, but the facts should be stated as an excuse for not making a profert.[48]

39. Cochran *v.* Nebeker, 48 Ind. 459. See 2 Cent. Dig. tit. "Alteration of Instruments," § 216 *et seq.*

40. Orlando *v.* Gooding, 34 Fla. 244, 15 So. 770; Drum *v.* Drum, 133 Mass. 566; Perkins Windmill, etc., Co. *v.* Tillman, 55 Nebr. 652, 75 N. W. 1098.

Where matter in the printed form of a note is erased by drawing lines through it, it is proper in such a case to declare upon the note in its changed form, and when produced with the erasures it will not constitute a variance. Corcoran *v.* Doll, 32 Cal. 82.

41. Drum *v.* Drum, 133 Mass. 566. See also Bledsoe *v.* Graves, 5 Ill. 382; Newell *v.* Mayberry, 3 Leigh (Va.) 250, 23 Am. Dec. 261.

42. Tarleton *v.* Shingler, 7 C. B. 812, 62 E. C. L. 812. If a note be altered with the consent of one maker, but without the consent of the other maker, and is declared on as the joint note of both, a recovery may be had against the maker who consented. Broughton *v.* Fuller, 9 Vt. 373.

Time of performance of condition.— A bond for performing an award which was dated Sept. 19, 1825, conditioned that the award should be made, etc., on or before the first day of December then next, and afterward the parties extended the time for the award twice, by erasure and interlineation, the last time to Jan. 18, 1826. It was held that plaintiff might declare on the bond as both dated and made on the nineteenth day of September, or as dated that day and made afterward; that, though the legal effect of altering the time limited to do an act in the condition of a bond, leaving the original date to stand, is to destroy the bond as the preëxisting one and to give it effect from the time of the alteration, the bond may be declared on as bearing its original date, with or without averment that it was changed after it was delivered. Tompkins *v.* Corwin, 9 Cow. (N. Y.) 255.

43. Allen *v.* Dornan, 57 Mo. App. 288. So though an alteration increasing the rate of interest was made under such circumstances as to deprive the surety of the right to rely upon it as a defense, if the plaintiff's complaint does not seek to recover the interest according to the changed rate and no amendment is asked he will be entitled to recover only the rate according to the original terms of the instrument. Sanders *v.* Bagwell, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770.

44. See *supra*, VI, C, 7.

45. Perkins Windmill, etc., Co. *v.* Tillman, 55 Nebr. 652, 75 N. W. 1098; Fulmer *v.* Seitz, 68 Pa. St. 237, 8 Am. Rep. 172. But in Union Nat. Bank *v.* Roberts, 45 Wis. 373, where an alteration set up was made by a trespasser, it was held that a mere mistake in pleading the note as it was originally written would not be taken for the adoption or ratification of the alteration, as a variance founded on mistake is amendable on the trial, and that the court would consider the pleading as amended where the identity of the note as made was fully established by the findings of the trial court. See also Murray *v.* Peterson, 6 Wash. 418, 33 Pac. 969.

46. **Form.**— For count on bond against a substituted surety by which other sureties were released, showing these facts, see State *v.* Van Pelt, 1 Ind. 304.

47. Powers *v.* Ware, 2 Pick. (Mass.) 451. So, in U. S. *v.* Spalding, 2 Mason (U. S.) 478, 27 Fed. Cas. No. 16,365, it is held that if the alteration is made by the obligee himself — as by tearing off a seal or canceling a bond in consequence of fraud or imposition practised by the obligor — the obligee may still declare on the bond as the deed of the party, and set forth the special facts in the profert.

48. Lee *v.* Alexander, 9 B. Mon. (Ky.) 25, 48 Am. Dec. 412; Medlin *v.* Platte County, 8 Mo. 235, 40 Am. Dec. 135; Mathis *v.* Mathis, 20 N. C. 46; Waugh *v.* Bussell, 5 Taunt. 707, 1 E. C. L. 362, wherein plaintiff first declared on the bond and on oyer craved set out the condition as it appeared in the bond as changed, and, upon the plea of *non est factum*

B. Setting up Original Consideration.[49] In cases announcing the rule that an innocent alteration will not preclude a recovery on the original consideration, it appears that the pleading is generally framed with that view, as by adding the common counts;[50] but plaintiff should be allowed to amend his declaration by setting up the original consideration of a note.[51] He should allege, however, the absence of fraudulent intent, though a failure to do so will be cured by verdict if the answer alleges the intent, and plaintiff denies it in his reply.[52]

C. Pleading Alteration — 1. General Issue or Special Plea. The general rule, supported by the weight of authority, is that, when an instrument is declared on in its altered form, an alteration therein may be shown under *non est factum*, *non assumpsit*, *non acceptavit*, or that defendant did not indorse, etc., as the case may be appropriate, and need not be specially pleaded.[53] But where the defense

and proof of a change by a stranger, plaintiff was nonsuited. Thereupon he brought another action and upon oyer craved set out the condition as it was originally executed, and there was a verdict for plaintiff on the issue of *non est factum*.

The earlier doctrine that a deed altered in an immaterial point by a party, or by a stranger in a material part, etc., became void, "not without good reason, has been supposed to have been derived from the ancient technical forms of pleading in cases of deeds, and from principles applicable to proferts." Nichols *v.* Johnson, 10 Conn. 192, 197, further indicating that, whatever was the origin of the principle, it has been relaxed in modern times, and that in Read *v.* Brookman, 3 T. R. 151, it was for the first time settled that the loss or destruction of a deed would excuse a profert.

49. For form of petition setting up innocent change of note and to recover an original consideration see Krause *v.* Meyer, 32 Iowa 566.

50. See *supra*, VII, D, 4, e, (II).

51. St. Joseph State Sav. Bank *v.* Shaffer, 9 Nebr. 1, 1 N. W. 980, 31 Am. Rep. 394.

Pleadings taken as amended.— Though plaintiff may recover on the original contract if the alteration complained of is not shown to be fraudulent, he does not recover on the original contract as alleged in defendant's answer, but, when he abandons the note as a cause of action and proceeds on the original indebtedness, it will be taken as if he had amended the complaint, substituting that cause of action, and to meet this defendant is entitled to amend his answer. Wyckoff *v.* Johnson, 2 S. D. 91, 48 N. W. 837. But see Bowser *v.* Cole, 74 Tex. 222, 11 S. W. 1131.

52. Savage *v.* Savage, 36 Oreg. 268, 59 Pac. 461.

53. *Connecticut.*— Mahaiwe Bank *v.* Douglass, 31 Conn. 170, general issue without notice.

Delaware.— Herdman *v.* Bratten, 2 Harr. (Del.) 396, holding that where a surety signs a bond upon condition that others named in the body thereof should also sign, and the latter never sign, but the bond is presented with their names erased, the proper plea is *non est factum*.

Illinois.— Conkling *v.* Olmstead, 63 Ill. App. 649; Soaps *v.* Eichberg, 42 Ill. App. 375 (wherein, however, it is said that a special plea would be more appropriate); Pankey *v.* Mitchell, 1 Ill. 383.

Indiana.—McKinney *v.* Cabell, 24 Ind. App. 676, 57 N. E. 598, holding that, as an alteration is provable under *non est factum*, an answer setting up an alteration is bad, or, at least, that sustaining a demurrer to such an answer will be harmless error. See also Emmons *v.* Meeker, 55 Ind. 321.

Maryland.— Edlen *v.* Sanders, 8 Md. 118; Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324.

Mississippi.— Henderson *v.* Wilson, 6 How. (Miss.) 65.

Missouri.— Whitmer *v.* Frye, 10 Mo. 348. But in Paris Nat. Bank *v.* Nickell, 34 Mo. App. 295, where a note was signed by a surety and indorsed by him to be delivered to a discounting bank, and was altered by the bank at the time of the delivery, it was held that the alteration could be shown under a general denial, because the change was made before the delivery, the court saying, however, that if the change had been made after delivery to the bank it would have been matter in avoidance, to be specially pleaded.

Pennsylvania.— *Non est factum* puts in issue not only the execution of the instrument, but its continuance as the deed of both parties, without material alteration, to the date of the plea. Burgwin *v.* Bishop, 91 Pa. St. 336; Smith *v.* Weld, 2 Pa. St. 54; Barrington *v.* Washington Bank, 14 Serg. & R. (Pa.) 405.

United States.— Wood *v.* Steele, 6 Wall. (U. S.) 80, 18 L. ed. 725.

England.— Hirschman *v.* Budd, L. R. 8 Exch. 171; Cock *v.* Coxwell, 2 C. M. & R. 291; Knight *v.* Clements, 8 A. & E. 215, 35 E. C. L. 559; Calvert *v.* Baker, 4 M. & W. 417.

Canada.— Meredith *v.* Culver, 5 U. C. Q. B. 218 [*citing* Byles on Bills (ed. 1862), 303].

See 2 Cent. Dig. tit. "Alteration of Instruments," § 216 *et seq.*

Amended bail-bond.— In Gragg *v.* State, 18 Tex. App. 295, a proceeding to forfeit a bail-bond, the court permitted the district attorney to amend the recital in the bond without the knowledge or consent of the obligor, and upon a plea of *non est factum* it was held that the plea had reference only to the bond as amended; that as defendant had actually executed the identical bond which had been amended, the proper practice was to plead

is not that defendant did not in fact make the contract charged in the declaration, but is that, by reason of some unlawful practice, the holder has disabled himself from suing upon that contract, the matter should be specially pleaded. The authorities, however, are not entirely harmonious on this subject.[54]

2. STATUTORY DENIALS. Assimilating the statutory general denial to the general

specially. See also Heath *v.* State, 14 Tex. App. 213.

54. Chitty on Bills (ed. 1859), 381, qualifies the rule laid down in Byles on Bills (ed. 1862), 302, that when plaintiff declares on an instrument in its altered state the alteration need not be pleaded specially, in this: that when plaintiff so declares he must prove the instrument in its altered state, but that the defense is open to the drawee on *non acceptavit*, because then it may be said that he has pleaded specially by saying that he did not accept the bill declared on and produced in evidence, as observed by Alderson, B., in Cock *v.* Coxwell, 2 C. M. & R. 291. In Hirschman *v.* Budd, L. R. 8 Exch. 171, it was held that an alteration in the date of a bill of exchange, which was declared upon with its altered date, was available to the acceptor under a traverse of the acceptance. The distinction is clearly pointed out between declarations on bills in their original and in their altered forms. In Hemming *v.* Trenery, 9 A. & E. 926, 36 E. C. L. 480, the instrument appeared to have been interlined; without the interlineation it corresponded to the declaration, and it was held that plaintiff was entitled to a verdict upon finding that the interlineation was made after the instrument was executed whether he was privy to the alteration or not, because the effect of the alteration was only to discharge or modify the original contract, and therefore constituted a defense, which under rule of Hil. T. 4 Wm. IV, was required to be shown by way of confession and avoidance. This case is distinguished in Hirschman *v.* Budd, L. R. 8 Exch. 171, *supra*, in that there were two counts, one of which declared upon the instrument in its original form. In Parry *v.* Nicholson, 13 M. & W. 778, the court said that there had been no decision permitting evidence under such a plea as in the case of Calvert *v.* Baker, 4 M. & W. 417, and Knight *v.* Clements, 8 A. & E. 215, 35 E. C. L. 559, since the decision of Hemming *v.* Trenery, 9 A. & E. 926, 36 E. C. L. 480, and that the latter case had been acted upon in Mason *v.* Bradley, 11 M. & W. 590, and Davidson *v.* Cooper, 11 M. & W. 778. The court seems not to have noticed the decision in Cock *v.* Coxwell, 2 C. M. & R. 291, and apparently overrules Knight *v.* Clements, 8 A. & E. 215, 35 E. C. L. 559, and Calvert *v.* Baker, 4 M. & W. 417, by holding that if an alteration is made after acceptance it is not available under the plea that defendant did not accept the bill sued on, though the decision seems also to turn upon the materiality of the change in question. But in Mason *v.* Bradley, 11 M. & W. 590 [*cited* in Parry *v.* Nicholson, 13 M. & W. 778], defendant was sued as a maker of a note which he and six others had signed. The signature of one was cut off, and he endeavored to set that up as a defense under a plea denying the making of the note declared on, and it was held that the defense should be specially pleaded, because the real defense was not that he did not make the note declared on, but that the one which he did make had been rendered void afterward. So, in Davidson *v.* Cooper, 11 M. & W. 778, in assumpsit on a guaranty the defendant pleaded *non assumpsit*, and in proof of the agreement the plaintiff produced a writing and defendant proved that when he signed it it had no seal, but that a seal had been set opposite his name afterward, and the court held that the evidence did not show that defendant had not promised, but that the defense was in avoidance. So in Leslie *v.* Emmons, 25 U. C. Q. B. 243, the court said that, as long as Parry *v.* Nicholson, 13 M. & W. 778, stood unreversed, it would seem that, where a plaintiff declares upon a note made by defendant jointly and severally, in order to raise the issue that the words "jointly and severally" were inserted after the execution of the note, a special plea would be necessary, because a general-issue plea would put in issue only that defendant made the note declared on. But in Meredith *v.* Culver, 5 U. C. Q. B. 218, it was held that where the time of the payment of a bill had been altered after acceptance, the evidence of the alteration was admissible under the plea of did not accept by the acceptor and did not indorse by the indorser. The court said that there could be no difference between this and the question whether *non est factum* to a bond admitted the proof of an alteration to sustain the issue for defendant, and cited Knight *v.* Clements, 8 A. & E. 215, 35 E. C. L. 559; Calvert *v.* Baker, 4 M. & W. 417, and further indicated that Hemming *v.* Trenery, 9 A. & E. 926, 36 E. C. L. 480; Davidson *v.* Cooper, 11 M. & W. 778, and Mason *v.* Bradley, 11 M. & W. 590, while appearing opposed to this decision at first sight, were distinguished by the difference between such cases as this and cases where the instrument is sued upon as it originally stood, and the defense is that by tearing off a seal, cutting off a signature of a joint maker, or interlining something in order to change the effect of the instrument, the party precludes himself from recovering on the instrument. In Crotty *v.* Hodges, 4 M. & G. 561, 43 E. C. L. 292, under a plea of *non acceptavit*, the bill produced did not support the issue for plaintiff; the court recognized a conflict between Calvert *v.* Baker, 4 M. & W. 417, and Hemming *v.* Trenery, 9 A. & E. 926, 36 E. C. L. 480, but held that in this case the defendant cannot be said to have accepted the bill which was produced at the trial, and thus got rid of the difficulty of reconciling those two cases.

issue at common law, the defense of an alteration is available under a general denial of all the allegations of the complaint. Such a defense is not new matter under a provision requiring new matter to be pleaded affirmatively.[55] An answer specifically denying the execution of the instrument sued on is sufficient.[56]

3. Necessity of Pleading — a. In General. When defendant has notice of an alteration of an instrument which is the foundation of the action, it is held that he should raise the issue by his pleading[57] — as where the note or bond is set out or annexed — if he wishes to cast the burden of proof upon plaintiff to explain the apparent change.[58] It is otherwise, however, where the question arises incidentally as one of evidence purely,[59] or the matter complained of is no part of the instrument in suit.[60] So, in a suit on a lost note, an offer to plead so as to raise the issue of an alteration is in time if made as soon as the evidence discloses the fact of the alteration.[61] On the other hand, if, in proving the execution of a note, the testimony discovers the fact that it was designedly changed by the payee, the court will exclude the instrument when it is offered in evidence.[62]

b. Issue on Indorsements Only. In an action by an indorsee against a prior indorser, alleging the several indorsements before that of plaintiff, if the only issue tendered is on the indorsements the bill is admissible to prove the indorsements, notwithstanding an apparent change in the face of the bill.[63]

55. *Kansas.*— J. I. Case Threshing Mach. Co. *v.* Peterson, 51 Kan. 713, 33 Pac. 470.

Massachusetts.— Cape Ann Nat. Bank *v.* Burns, 129 Mass. 596.

Nebraska.— Walton Plow Co. *v.* Campbell, 35 Nebr. 173, 52 N. W. 883, 16 L. R. A. 468, answer, in an action to foreclose a mortgage, denying each and every allegation of the petition.

New York.— Farmers' L. & T. Co. *v.* Siefke, 144 N. Y. 354, 39 N. E. 358, 63 N. Y. St. 662; Boomer *v.* Koon, 6 Hun (N. Y.) 645; Schwarz *v.* Oppold, 7 Daly (N. Y.) 121, 74 N. Y. 307.

Wisconsin.— Schwalm *v.* McIntyre, 17 Wis. 232.

56. Lincoln *v.* Lincoln, 12 Gray (Mass.) 45; Paris Nat. Bank *v.* Nickell, 34 Mo. App. 295. See also Conner *v.* Sharpe, 27 Ind. 41.

Parol evidence is admissible to show that a bond sued on was executed in blank and filled up contrary to authority, under a denial of execution and delivery. Richards *v.* Day, 137 N. Y. 183, 33 N. E. 146, 50 N. Y. St. 389, 33 Am. St. Rep. 704, 23 L. R. A. 601.

Denial of subscription.— The defense that a subscription for shares was altered by increasing the number of shares may be raised by an answer denying that defendant subscribed or made the contract mentioned in the petition. Bery *v.* Marietta, etc., R. Co., 26 Ohio St. 673.

57. After admitting the execution of a bond pleaded in the complaint with the alleged alteration, the defendant cannot avail himself as a defense of an interlineation appearing in the bond. Kleeb *v.* Bard, 12 Wash. 140, 40 Pac. 733.

58. Zeigler *v.* Spreenkle, 7 Watts & S. (Pa.) 175 (holding that where a suit is on a bond, with the words or interlineations claimed by defendant to be alterations, and defendant wishes to cast upon plaintiff the burden of explaining such alterations, he must plead *non est factum;* otherwise the bond will be admissible without such explanation, as where the defendant pleads *nil debet*); Matossy *v.* Frosh, 9 Tex. 610 (wherein defendant pleaded certain payments and in reconvention without attacking the validity of the note sued on, and it was held that the objection could not be taken at the trial, there being no variance).

Alteration not apparent on copy filed.— Where there is a manifest alteration on the face of a bond, which alteration does not appear in the copy filed, a rule of court making it necessary for plaintiff to prove the execution of a bond unless defendant, at or before the time of filing his plea, shall deny the execution of the instrument, does not apply, and the burden of explaining the alteration is on plaintiff. Nesbitt *v.* Turner, 155 Pa. St. 429, 26 Atl. 750.

59. Instrument not part of pleading.— In Moorman *v.* Barton, 16 Ind. 206, it was held, in an action on a note, that a general denial, not verified by affidavit, was insufficient to admit evidence of an alteration; but the court said that, had the alteration arisen upon an instrument offered in evidence which had not been made a part of the pleading, the point might have arisen as to the presumption touching erasures and interlineations.

60. Matter no part of bond.— Where there is a note preceding the signatures of the makers of a bond to the effect that certain words have been inserted in the bond before the signature thereto, such note is no part of the bond itself, but is simply a piece of evidence, and in order to set up an alteration of the bond it is not necessary to make any allegation with reference to the note. The note being available only as an admission or piece of evidence, it is competent for defendant to confront it by evidence going to show that he never made it, and to do this it is obviously unnecessary to plead that he never made it. White *v.* Johns, 24 Minn. 387.

61. Pankey *v.* Mitchell, 1 Ill. 383.

62. York *v.* Janes, 43 N. J. L. 332.

63. Sibley *v.* Fisher, 7 A. & E. 444, 34 E. C. L. 243, because the making of the bill itself was admitted on the record.

4. Denial of Signature or Execution under Oath. Statutes making proof of execution of an instrument unnecessary, and providing that the genuineness of the signature shall be deemed to be admitted unless such execution or signature shall be denied under oath, are sometimes applied to the defense of an alteration.[64] In other cases such statutes are not applied to so full an extent as in some of those last cited. The instrument, it seems, is admissible and only the original execution is admitted, but defendant is not precluded from showing that subsequent to the execution the instrument had been altered.[65]

5. Affirmative Relief in Equity. If a defendant relies upon the avoidance of an instrument which is the foundation of the complaint in equity, he cannot have affirmative relief by cancellation unless he makes his answer a cross-bill, although the court will refuse to enforce the instrument and will dismiss the bill.[66]

6. Plea as Admission of Execution. A plea which raises the issue of an alteration operates as an admission of the original execution of the instrument.[67]

7. Special Plea — a. In General. Though an alteration since the execution of an instrument may be shown under a general-issue plea, this would seem to be no reason why it may not be pleaded specially.[68]

b. Sufficiency[69] — (1) *In General.* It may be stated in general terms that

64. *Alabama.*— Lesser *v.* Scholze, 93 Ala. 338, 9 So. 273, holding, however, that if plaintiff's demurrer to the plea is overruled on the merits of the plea, and issue is joined and tried and found against defendant, and he appeals, the plea will be taken as presenting the defense as efficaciously as if verified.

Colorado.— Thackaray *v.* Hanson, 1 Colo. 365.

Indiana.— Moorman *v.* Barton, 16 Ind. 206 (holding that the code restricts evidence under the general denial to that which tends to negative what the opposite party is bound to prove, and that evidence of an alteration is inadmissible under a plea which amounts merely to a *non est factum* and is not verified); Riley *v.* Harkness, 2 Blackf. (Ind.) 34.

Mississippi.— Hemphill *v.* Alabama Bank, 6 Sm. & M. (Miss.) 44, holding that a defendant could not, under a plea of *non assumpsit*, avail himself of the defense that the note on which he is sued had been changed from the note which he authorized to be executed for him; that such a defense is admissible only when the pleadings are under oath, upon the authority of Green *v.* Robinson, 3 How. (Miss.) 105, holding that by pleading in chief defendant admits the execution of the note. But in Goss *v.* Whitehead, 33 Miss. 213, where the maker of a promissory note signed the same in blank, restricting his agent as to the amount to be inserted, it was held that the maker might prove under the general issue a violation of his instructions by the agent and notice of that fact in the holder, in avoidance of the excess so inserted; that in such a case, the note being valid as to some amount inserted and only void as to an excess, its execution could not be denied under oath.

Virginia.— Archer *v.* Ward, 9 Gratt. (Va.) 622, under a statute providing in effect that in an action upon an indorsement, in which the indorsement is alleged, such indorsement shall be taken as genuine, without proof of the handwriting unless defendant shall file his affidavit denying the indorsement, holding that without such affidavit an alteration of the indorsement cannot be shown.

Affidavit of fraud in procurement of signature.— In Longwell *v.* Day, 1 Mich. N. P. 286, which was a suit on a promissory note, the defendant filed an affidavit setting forth circumstances under which he was induced to sign the instrument, amounting to a fraud in the execution of the note, by inducing defendant to sign a paper with a condition, whereas the paper presented was one without a condition; and it was held that the language used in the affidavit must be taken as a denial of the execution of the note declared upon so as to cast upon plaintiff the burden of proving its execution.

65. Hewins *v.* Cargill, 67 Me. 554; Henderson *v.* Wilson, 6 How. (Miss.) 65; Bigelow *v.* Stilphen, 35 Vt. 521 (holding that a rule, requiring notice that upon the trial the defendant would deny the execution of the note, would not apply to a defense of an alteration, but only to a denial of the genuineness of the signature); Schwalm *v.* McIntyre, 17 Wis. 232; Low *v.* Merrill, 1 Pinn. (Wis.) 340.

66. Bay *v.* Shrader, 50 Miss. 326.

67. Barclift *v.* Treece, 77 Ala. 528 (holding that under such a plea proof of the original signature of defendant is not necessary); Winters *v.* Mowrer, 163 Pa. St. 239, 29 Atl. 916; Wells *v.* Moore, 15 Tex. 521; Crews *v.* Farmers Bank, 31 Gratt. (Va.) 348.

68. Langton *v.* Lazarus, 5 M. & W. 629. See also Daniel *v.* Daniel, Dudley (Ga.) 239; Soaps *v.* Eichberg, 42 Ill. App. 375; Davis *v.* Cole, 1 Tyler (Vt.) 262.

Answer not frivolous.— In an action on a promissory note, an answer admitting the execution of the note, but alleging that it was materially altered by plaintiff after execution by changing the date thereof, is not sham and frivolous, and cannot be stricken out as such. Rogers *v.* Vosburgh, 87 N. Y. 228.

69. For forms of pleas and answers in whole, in part, or in substance, see:

the plea or answer which sets up substantially that the instrument relied upon by the opposite party has been altered in particular respects after execution, with the knowledge or consent of the other party and without the knowledge or consent of the pleader, is good.[70]

(II) *Character of Change*—(A) *In General.* A plea setting up an alteration should aver in what way or manner the instrument has been changed, and not the mere conclusion of the pleader.[71]

(B) *Denial of Execution and Setting up Character of Instrument Actually Signed.* Where a defendant denies the execution of the instrument sued on, but admits the execution of an instrument which he sets out, the plea is held to be good.[72]

(III) *Time of Change.* A plea or answer setting up an alteration should allege that it was made after the execution and delivery of the instrument.[73]

(IV) *Knowledge or Privity of Parties.* On the one hand it is held that a plea or answer setting up an alteration should allege that it was done

Alabama.— Jordan *v.* Long, 109 Ala. 414, 19 So. 843; Lesser *v.* Scholze, 93 Ala. 338, 9 So. 273 (in which the plea was formally bad for want of verification); Montgomery *v.* Crossthwait, 90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140; Hill *v.* Nelms, 86 Ala. 442, 5 So. 796.

Arkansas.— Overton *v.* Matthews, 35 Ark. 146, 37 Am. Rep. 9 (answer good as between maker and payee but not as between maker and innocent purchaser); Gist *v.* Gans, 30 Ark. 285.

California.— Sherman *v.* Rollberg, 11 Cal. 38, answer held sufficient though loosely drawn.

Colorado.— Hoopes *v.* Collingwood, 10 Colo. 107, 13 Pac. 909, 3 Am. St. Rep. 565.

Georgia.— McCauley *v.* Gordon, 64 Ga. 221, 37 Am. Rep. 68; Johnson *v.* Brown, 51 Ga. 498; Wheat *v.* Arnold, 36 Ga. 479.

Illinois.— Benjamin *v.* McConnell, 9 Ill. 536, 46 Am. Dec. 474.

Indiana.— Monroe *v.* Paddock, 75 Ind. 422 (affidavit setting up alteration as basis for setting aside default judgment on note); Meikel *v.* State Sav. Inst., 36 Ind. 355; Runnion *v.* Crane, 4 Blackf. (Ind.) 466 (*non assumpsit*, with affidavit of alteration appended).

Iowa.— Maguire *v.* Eichmeier, 109 Iowa 301, 80 N. W. 395 (an answer substantially sufficient in absence of direct attack); Black *v.* De Camp, 75 Iowa 105, 39 N. W. 215.

Kansas.— Horn *v.* Newton City Bank, 32 Kan. 518, 4 Pac. 1022.

Massachusetts.—Draper *v.* Wood, 112 Mass. 315, 17 Am. Rep. 92, answer by one promisor first denying execution of note, and setting up in the event the signature is proved that a material alteration was made by his co-promisor without defendant's knowledge and before delivery to the payee.

Missouri.— Paris Nat. Bank *v.* Nickell, 34 Mo. App. 295, answer in nature of *non est factum*.

United States.— Speake *v.* U. S., 9 Cranch (U. S.) 28, 3 L. ed. 645.

England.— Bell *v.* Gardiner, 4 M. & G. 11, 43 E. C. L. 16; Gardner *v.* Walsh, 5 E. & B. 83, 85 E. C. L. 83; Warrington *v.* Early, 2 E. & B. 763, 75 E. C. L. 763; Mollett *v.* Wackerbarth, 5 C. B. 181, 57 E. C. L. 181; Atkinson *v.* Hawdon, 2 A. & E. 628, 29 E. C. L. 293.

Canada.— Campbell *v.* McKinnon, 18 U. C. Q. B. 612.

70. Collier *v.* Waugh, 64 Ind. 456.

Language construed according to ordinary meaning.— In determining the effect of a plea its language should be taken in its plain and ordinary meaning. Law *v.* Crawford, 67 Mo. App. 150.

Affidavit of forgery.— In Georgia, under a statute providing for an affidavit of forgery in order to require explanatory testimony of apparent alterations in a deed, it does not lie in the mouth of the party producing the instrument to object that he is fully notified by the affidavit of the nature of the forgery. Hill *v.* Nisbet, 58 Ga. 586.

71. Hart *v.* Sharpton, 124 Ala. 638, 27 So. 450; Payne *v.* Long, 121 Ala. 385, 25 So. 780 (holding a plea of *non est factum* bad which averred that the note was not executed by defendant or by his authority, because plaintiff, without defendant's knowledge or consent, altered it by detaching therefrom a material memorandum, without setting out the memorandum); Brown *v.* Warnock, 5 Dana (Ky.) 492.

72. Muckleroy *v.* Bethany, 23 Tex. 163. So of an answer denying an indorsement sued on except that defendant indorsed "without recourse." Howlett *v.* Bell, 52 Minn. 257, 53 N. W. 1154.

73. Richardson *v.* Mather, 178 Ill. 449, 53 N. E. 321; Emmons *v.* Meeker, 55 Ind. 321; Lockart *v.* Roberts, 3 Bibb (Ky.) 361 (holding that although a blank paper, sealed and delivered, cannot become a deed, a plea that the paper was blank when signed is not sufficient, because it is immaterial whether it was signed before or after filling, as the obligation takes effect from delivery); Langton *v.* Lazarus, 5 M. & W. 629, holding that a plea, in an action of assumpsit by an indorsee against an acceptor, that, before the bill became due and while "it was in full force and effect," the date was materially altered by the drawer, whereby it became void, was bad for want of an allegation that the alteration was made after acceptance, but the court gave opportunity to amend.

by plaintiff, or with his privity or consent,[74] though an alternative allegation in this respect has been held sufficient,[75] as well as that it was done without the authority or consent of the pleader.[76] On the other hand, a plea setting up an alteration, after execution and delivery of the instrument, without defendant's knowledge or consent, is deemed sufficient without an allegation of knowledge or privity on the part of plaintiff.[77]

(v) *Fraud.* Where a wilful change, irrespective of actual fraudulent purpose, is sufficient to defeat an instrument, fraud need not be alleged in the plea or answer setting up the alteration.[78]

(vi) *Ratification.* An answer setting up an alteration need not aver that defendant had never ratified it, as this is matter to be pleaded in reply.[79]

(vii) *Notice of Excess of Authority.* A plea by an accommodation indorser of a note left to be filled up by the maker should aver that the indorsee had knowledge at the time he received the note that the maker exceeded his authority in filling the blank.[80]

8. Joinder of Defenses. The defendant may at the same time plead that he did not execute the instrument sued on, and that if his signature is in fact genuine it was obtained by fraud. These defenses are not contradictory.[81]

D. In Avoidance of Alteration Alleged — 1. In General. Where a defendant sets up a defense of alteration the plaintiff should frame his pleadings so as to lay the foundation for testimony explanatory of apparent alterations;[82] and so, if one wishes to avoid the effect of an alteration set up against an instrument under which he claims, he cannot do so if his pleadings are framed upon the theory that there is in fact no alteration.[83] A replication to a plea of *non est factum*, setting

74. *California.*— Humphreys *v.* Crane, 5 Cal. 173. But where an answer sets up an alteration and that defendant paid the note before assignment, and that the assignment was made to plaintiff after maturity, it was held that the defense was not that of alteration, over the objection that the answer did not allege the alteration to have been made with knowledge or by authority or direction of plaintiff. Sherman *v.* Rollberg, 11 Cal. 38.

Florida.— Cotten *v.* Williams, 1 Fla. 37.

Georgia.— By statute in Georgia, in order to have a vitiating effect, an alteration was required to be made by the party claiming a benefit under the instrument. Under such provision a plea is held to be bad unless it contains an allegation that the alteration was made by the person claiming a benefit under the instrument. Gwin *v.* Anderson, 91 Ga. 827, 18 S. E. 43.

Mississippi.— Bridges *v.* Winters, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598.

Ohio.— Tarbill *v.* Richmond City Mill Works, 2 Ohio Cir. Ct. 564.

United States.— U. S. *v.* Linn, 1 How. (U. S.) 104, 11 L. ed. 64.

75. Hamblen *v.* Knight, 60 Tex. 36, which was a suit to enjoin judgment on a note, the allegation by the surety being that the note had been fraudulently altered "either by the administrator to whom it was executed, or by the principal in the note, and that this was done without the knowledge of the surety," and this was held to be sufficiently definite.

76. Cotten *v.* Williams, 1 Fla. 37 (holding that it does not follow that, because such an allegation is of a negative character, it is not essential to the validity of the plea); Reed *v.* Roark, 14 Tex. 329, 65 Am. Dec. 127.

77. Hill *v.* Nelms, 86 Ala. 442, 5 So. 796; Palmer *v.* Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; Bowman *v.* Mitchell, 79 Ind. 84 [*citing* Cochran *v.* Nebeker, 48 Ind. 459, upon the principle that, upon an alteration after execution, the presumption is that it was made by the party claiming under the instrument, and therefore it is not necessary that the answer should allege what is thus presumed]; McVey *v.* Ely, 5 Lea (Tenn.) 438 (which was an answer to a suit by a creditor to set aside a conveyance of land, setting up an alteration in certain notes held by complainant).

78. Eckert *v.* Pickel, 59 Iowa 545, 13 N. W. 708.

By statute in Georgia a special plea, alleging an alteration in a note sued on, was required to set up that the alteration was made with intent to defraud defendant. Gwin *v.* Anderson, 91 Ga. 827, 18 S. E. 43. *Compare* Steinau *v.* Moody, 100 Ga. 136, 28 S. E. 30.

79. Whitesides *v.* Northern Bank, 10 Bush (Ky.) 501, 19 Am. Rep. 74.

80. Grissom *v.* Fite, 1 Head (Tenn.) 331. And should the holder of an instrument containing a blank as to date exceed his implied authority by inserting an improper date, a plea alleging such matter as a defense against a third person must allege that the note passed to him with notice. Overton *v.* Matthews, 35 Ark. 146, 37 Am. Rep. 9.

81. Citizens Bank *v.* Closson, 29 Ohio St. 78.

82. Bogarth *v.* Breedlove, 39 Tex. 561.

83. Russell *v.* Reed, 36 Minn. 376, 31 N. W. 452, holding that, in an action in equity to restrain the foreclosure of a mortgage on the

up that the plea is based upon the alleged material alteration, and averring facts in avoidance, is not an admission of an alteration.[84]

2. CONSENT AND RATIFICATION — a. In General. To a plea setting up an alteration the plaintiff may reply consent by all of the parties,[85] though it would seem that such a reply would be necessary only where defendant is not required to allege in his plea that the alteration was without his consent;[86] and when the consent is after the alteration, or, in other words, is a ratification or estoppel, it may be replied by the plaintiff,[87] and if not pleaded it will not be available.[88]

b. Ratification and Denial of Alteration. There is no inconsistency in fact or law between a denial of an alleged alteration and an allegation that defendant has waived or ratified the act, or has created an estoppel.[89]

IX. EVIDENCE.

A. Presumption and Burden of Proof — 1. GENERAL BURDEN ON ISSUE OF ALTERATION — a. The Rule. The general rule is that the burden of establishing an alteration of an instrument is upon the party setting it up, if the instrument offered is fair on its face,[90] or where no presumption is indulged from the appear-

ground of an alleged fraudulent alteration thereof, where the answer alleges the execution of the notes specifically described in the mortgage, and that they and none others were inserted in the mortgage, and that the mortgage was given to secure them and was not altered in any particular, the theory that defendant altered the mortgage through an honest mistake is not within the issues made by the pleadings.

84. Holmes *v.* Ft. Gaines Bank, 120 Ala. 493, 24 So. 959, which see for form of such replication, in substance.

85. See Speake *v.* U. S., 9 Cranch (U. S.) 28, 3 L. ed. 645.

86. See *supra*, VIII, C, 7, b, (IV).

But where the rule prevails that, when the drawer of a bill or the maker of a note by his own negligence leaves the instrument in such condition as that an alteration may be made without defacing the instrument or exciting the suspicion of a careful man, he will be liable to a *bona fide* holder, it is held that a replication to a plea of *non est factum* need not set up that the alleged and admitted alteration has been made with the consent of the promisor, or that it was made by a stranger having no interest. Winter *v.* Pool, 104 Ala. 580, 16 So. 543. See also BILLS AND NOTES.

For form of replication showing the restoration of instrument by consent see Collins *v.* Makepeace, 13 Ind. 448.

87. Montgomery *v.* Crossthwait, 90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140; Davis *v.* Shafer, 50 Fed. 764 (which cases see for form of replication in substance); Henderson *v.* Vermilyea, 27 U. C. Q. B. 544.

88. Capital Bank *v.* Armstrong, 62 Mo. 59; Erickson *v.* Oakland First Nat. Bank, 44 Nebr. 622, 62 N. W. 1078, 48 Am. St. Rep. 753, 28 L. R. A. 577.

As to one defendant not verifying answer. — In Feeney *v.* Mazelin, 87 Ind. 226, it was held that, where two defendants answered jointly and alleged a material alteration after the execution of a note, and only one of them swore to the answer, this would put plaintiff to prove only the execution of the note by the defendant who swore to the answer; that as to the other defendant the production of the note was sufficient, and a reply as to the defendant alone who verified the answer that he ratified the change is good.

89. Davis *v.* Shafer, 50 Fed. 764. See also Mattingly *v.* Riley, 20 Ky. L. Rep. 1621, 49 S. W. 799, construing the particular language of the pleading involved.

90. *Alabama.*— Glover *v.* Gentry, 104 Ala. 222, 16 So. 38; Montgomery *v.* Crossthwait, 90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140; Barclift *v.* Treece, 77 Ala. 528.

Arkansas.— Chism *v.* Toomer, 27 Ark. 108.

Florida.— Harris *v.* Jacksonville Bank, 22 Fla. 501, 1 So. 140, 1 Am. St. Rep. 201.

Georgia.— Brown *v.* Colquitt, 73 Ga. 59, 54 Am. Rep. 867.

Illinois.— Lowman *v.* Aubery, 72 Ill. 619.

Indiana.— Insurance Co. of North America *v.* Brim, 111 Ind. 281, 12 N. E. 315; Brooks *v.* Allen, 62 Ind. 401; Meikel *v.* State Sav. Inst., 36 Ind. 355; Johns *v.* Harrison, 20 Ind. 317.

Iowa.— McGee *v.* Allison, 94 Iowa 527, 63 N. W. 322; Farmers' L. & T. Co. *v.* Olson, 92 Iowa 770, 61 N. W. 199; Potter *v.* Kennelly, 81 Iowa 96, 46 N. W. 856; Wing *v.* Stewart, 68 Iowa 13, 25 N. W. 905; Odell *v.* Gallup, 62 Iowa 253, 17 N. W. 502.

Kansas.— J. I. Case Threshing Mach. Co. *v.* Peterson, 51 Kan. 713, 33 Pac. 470.

Kentucky.— Thacker *v.* Booth, 9 Ky. L. Rep. 745, 6 S. W. 460.

Nebraska.—McClintock *v.* Table Rock State Bank, 52 Nebr. 130, 71 N. W. 978.

New York.— Conable *v.* Keeney, 61 Hun (N. Y.) 624, 16 N. Y. Suppl. 719, 40 N. Y. St. 939. See also Solon *v.* Williamsburgh Sav. Bank, 114 N. Y. 122, 21 N. E. 168, 23 N. Y. St. 138.

Tennessee.— Douglas *v.* Brandon, 6 Baxt. (Tenn.) 58; Farnsworth *v.* Sharp, 4 Sneed (Tenn.) 54; Bumpas *v.* Timms, 3 Sneed (Tenn.) 459; Brown *v.* Phelon, 2 Swan (Tenn.) 628.

ance of the instrument that it has been altered (the whole question of the time when, by whom, etc., the change was made being left to the jury);[91] or where the presumption is that a change appearing upon the face of an instrument was made at or before the execution of the instrument.[92] Where the question is as to the unauthorized filling of a bill signed and indorsed in blank, as between the receiver and the drawer and indorser the burden of proof that there was an agreement, and that it was violated, is upon defendant.[93] He must also show that the holder took it with notice of the particular fraud.[94]

b. Burden Shifted When Alteration Shown. When an alteration is once made to appear, either by reason of a suspicion raised from the appearance of the instrument,[95] or when such suspicion is raised or the alteration is proved by extraneous evidence, the party producing the instrument then has the burden of explaining the alteration — he must show that the change was made under circumstances rendering it lawful.[96] In such cases the burden may be said to be shifted,

Texas.— Wells *v.* Moore, 15 Tex. 521.

United States.— Sturm *v.* Boker, 150 U. S, 312, 14 S. Ct. 99, 37 L. ed. 1093, holding that where the signature to a contract was admitted the burden is upon the party attacking it to prove that the matter over the signature is a forgery.

See 2 Cent. Dig. tit. "Alteration of Instruments," §§ 208 *et seq.*, 230 *et seq.*

Order of proof.— In a suit for a breach of warranty, while plaintiff is on the stand and before he has rested his case, it is not error to refuse to permit defendant to break in to prove an alteration in the instrument containing the warranty. Huston *v.* Plato, 3 Colo. 402.

91. Hagan *v.* Merchants', etc., Ins. Co., 81 Iowa 321, 46 N. W. 1114, 25 Am. St. Rep. 493.

92. Wolferman *v.* Bell, 6 Wash. 84, 32 Pac. 1017, 36 Am. St. Rep. 126 (holding that an alteration is a fact in a case to be determined by the jury, subject to the same rule of presumption as any other fact to be presented in the case); Yakima Nat. Bank *v.* Knipe, 6 Wash. 348, 33 Pac. 834.

93. Davidson *v.* Lanier, 4 Wall. (U. S.) 447, 18 L. ed. 377. But the burden is on the holder to show that a surety knew that blanks left in the instrument at the time of its execution and delivery had been filled in excess of authority. Limestone Bank *v.* Penick, 2 T. B. Mon. (Ky.) 98, 15 Am. Dec. 136.

94. Torry *v.* Fisk, 10 Sm. & M. (Miss.) 590.

95. Glover *v.* Gentry, 104 Ala. 222, 16 So. 38; Smith *v.* U. S., 2 Wall. (U. S.) 219, 17 L. ed. 788. See also *infra*, IX, A, 3, b, (II), (H).

Erasure of indorsement of payment.— In debt on a bond, under a plea of payment, the bond contained an indorsement of a payment which appeared to have been erased by drawing a pen through it, and it was held the burden was on plaintiff to prove to the jury that the indorsement was made without his consent, as the indorsement of payment is *prima facie* evidence of payment. McElroy *v.* Caldwell, 7 Mo. 587.

96. *Alabama.*— Winter *v.* Pool, 100 Ala. 503, 14 So. 411; Fontaine *v.* Gunter, 31 Ala. 258.

Arkansas.— Inglish *v.* Breneman, 5 Ark. 377, 41 Am. Dec. 96, 9 Ark. 122, 47 Am. Dec. 735.

California.— Sheils *v.* West, 17 Cal. 324, where the testimony showed an alteration of an entry in an account-book.

Indiana.—Emerson *v.* Opp, 9 Ind. App. 581, 34 N. E. 840, 37 N. E. 24.

Iowa.—Maguire *v.* Eichmeier, 109 Iowa 301, 80 N. W. 395; Shroeder *v.* Webster, 88 Iowa 627, 55 N. W. 569; Robinson *v.* Reed, 46 Iowa 219; Van Horn *v.* Bell, 11 Iowa 465, 79 Am. Dec. 506. But in Warren *v.* Chickasaw County, 13 Iowa 588, it seems to be held that if, in a suit against a county upon a warrant, the execution of the instrument not being denied under oath, the defendant relies upon alteration the plaintiff has only to introduce the instrument, and defendant cannot stop by showing a mere change, but must show that the change was done without his consent.

Maine.— Croswell *v.* Labree, 81 Me. 44, 16 Atl. 331, 10 Am. St. Rep. 238; Dolbier *v.* Norton, 17 Me. 307. But *compare* Martin *v.* Tuttle, 80 Me. 310, 14 Atl. 207.

Michigan.— Von Eherenkrook *v.* Webber, 100 Mich. 314, 58 N. W. 665, 60 N. W. 761; Swift *v.* Barber, 28 Mich. 503.

Mississippi.— Everman *v.* Robb, 52 Miss. 653, 24 Am. Rep. 682.

New Hampshire.— Humphreys *v.* Guillow, 13 N. H. 385, 38 Am. Dec. 499.

New Jersey.— Havens *v.* Osborn, 36 N. J. Eq. 426, holding that where the grantee in a deed admits that interlineations and alterations therein were made by him, but alleges that he did so with the knowledge and consent of the grantor, the former has the burden of proof.

New York.—Gleason *v.* Hamilton, 138 N. Y. 353, 34 N. E. 283, 52 N. Y. St. 882, 21 L. R. A. 210; National Ulster County Bank *v.* Madden, 114 N. Y. 280, 21 N. E. 408, 23 N. Y. St. 220, 11 Am. St. Rep. 633. See also Herrick *v.* Malin, 22 Wend. (N. Y.) 388; Waring *v.* Smyth, 2 Barb. Ch. (N. Y.) 119, 47 Am. Dec. 299.

North Carolina.— Martin *v.* Buffaloe, 121 N. C. 34, 27 S. E. 995.

Ohio.— Bery *v.* Marietta, etc., R. Co., 26 Ohio St. 673.

or the opposite party is under the necessity of meeting a *prima facie* presumption raised against the instrument. Thus, if a change is shown to have been made after the execution of the instrument, it will be presumed to have been made by the party producing it, or with his privity and fraudulently in so far as legal fraud attaches to a wilful change of an instrument by one of the parties thereto.[97]

2. Plaintiff's Burden to Prove Execution — a. In General. When the execution of an instrument is proved generally, this is all that is necessary, and the party producing it is not required to proceed further, upon a mere suggestion of an alteration, when there are no indications of forgery upon the paper, and after this general proof of execution the law presumes that the instrument is genuine in all its particulars,[98] though where the execution is not put in issue it need not be proved.[99]

b. Under Verified Pleadings. So, where the statute requires a sworn plea of *non est factum*, or a sworn plea denying on oath the making of an alteration with the consent or by the authority of defendant, the instrument is admissible in evi-

Texas.— Dewees *v.* Bluntzer, 70 Tex. 406, 7 S. W. 820; Davis *v.* State, 5 Tex. App. 48.

Wisconsin.— Low *v.* Merrill, 1 Pinn. (Wis.) 340.

United States.—Sneed *v.* Sabinal Min., etc., Co., 73 Fed. 925, 34 U. S. App. 688, 20 C. C. A. 230.

97. *Alabama.*— White *v.* Hass, 32 Ala. 430, 70 Am. Dec. 548.

Arkansas.— Inglish *v.* Breneman, 9 Ark. 122, 47 Am. Dec. 735.

Illinois.— Burwell *v.* Orr, 84 Ill. 465.

Indiana.— Eckert *v.* Louis, 84 Ind. 99; Cochran *v.* Nebeker, 48 Ind. 459; Green *v.* Beckner, 3 Ind. App. 39, 29 N. E. 172.

Iowa.— Maguire *v.* Eichmeier, 109 Iowa 301, 80 N. W. 395; Shroeder *v.* Webster, 88 Iowa 627, 55 N. W. 569; Robinson *v.* Reed, 46 Iowa 219.

Louisiana.— Martin *v.* His Creditors, 14 La. Ann. 393.

Minnesota.— Warder *v.* Willyard, 46 Minn. 531, 49 N. W. 300, 24 Am. St. Rep. 250; Russell *v.* Reed, 36 Minn. 376, 31 N. W. 452.

New Hampshire.—Bowers *v.* Jewell, 2 N. H. 543.

North Carolina.— Long *v.* Mason, 84 N. C. 15; Dunn *v.* Clements, 52 N. C. 58.

Missouri.— To raise an estoppel against a surety discharged by an alteration it devolves on the obligee to prove knowledge on the part of the surety. State *v.* Findley, 101 Mo. 368, 14 S. W. 111.

Pennsylvania.— Hartley *v.* Corboy, 150 Pa. St. 23, 24 Atl. 295, holding that the instrument will be excluded from evidence unless the presumption is rebutted.

Texas.— Bowser *v.* Cole, 74 Tex. 222, 11 S. W. 1131.

Correction of mistake.— In Houston *v.* Jordan, 82 Tex. 352, 18 S. W. 702, it appeared that after the execution of a conveyance by a husband and wife, and before the instrument was acknowledged by them, a material mistake in the description of property was discovered and the deed handed back to the husband, who promised to have it corrected, and that, prior to the delivery of the deed by the husband, the correction was made, and it was held that, in the absence of evidence to the contrary, it would be presumed that the correction was made prior to the acknowledgment by the wife rather than that the husband perpetrated, or intended to perpetrate, a fraud upon the wife or the purchaser. See also Gleason *v.* Hamilton, 64 Hun (N. Y.) 96, 19 N. Y. Suppl. 103, 45 N. Y. St. 491 [*affirmed* in 138 N. Y. 353, 34 N. E. 283, 52 N. Y. St. 882, 21 L. R. A. 210].

98. *Georgia.*— Gwin *v.* Anderson, 91 Ga. 827, 18 S. E. 43, holding that on a plea of *non est factum* the note is admissible in evidence on proof of defendant's admission that he signed it without any explanation of its contents which do not appear as alterations on its face.

Indiana.— Insurance Co. of North America *v.* Brien, 111 Ind. 281, 12 N. E. 315; Brooks *v.* Allen, 62 Ind. 401; Johns *v.* Harrison, 20 Ind. 317.

Maine.— Pullen *v.* Hutchinson, 25 Me. 249.

Massachusetts.— Davis *v.* Jenney, 1 Metc. (Mass.) 221.

New York.— Conable *v.* Keeney, 61 Hun (N. Y.) 624, 16 N. Y. Suppl. 719, 40 N. Y. St. 939.

South Dakota.— Cosgrove *v.* Fanebust, 10 S. D. 213, 72 N. W. 469 [*citing* Landauer *v.* Sioux Falls Imp. Co., 10 S. D. 205, 72 N. W. 467; Moddie *v.* Breiland, 9 S. D. 506, 70 N. W. 637].

Texas.—Wells *v.* Moore, 15 Tex. 521; Heath *v.* State, 14 Tex. App. 213. Special plea of *non est factum* assumes the genuineness of the signature, and therefore the burden of proving the alteration is on the party complaining. Muckleroy *v.* Bethany, 27 Tex. 551.

99. Crews *v.* Farmers Bank, 31 Gratt. (Va.) 348. Under a statute providing that, when a copy of a note sued on is filed with the declaration, this will waive the necessity of all proof of execution, the defense of an alteration is still available as a defense, but cannot be raised as a mere matter of objection to the introduction of the instrument in evidence. Mitchell *v.* Woodward, 2 Marv. (Del.) 311, 43 Atl. 165, upon the authority of Hollis *v.* Vandergrift, 5 Houst. (Del.) 521.

dence without explanation, in the absence of such plea,[1] for the purpose of proving the bare execution of the instrument,[2] and it has been held that a special plea setting up merely an alteration is not such a plea as will cast the burden upon plaintiff to explain the alterations which do not appear upon the face of the instrument.[3] Where, however, the instrument shows upon its face evidences of changes therein, and defendant sets up the alteration by a sworn plea, the plaintiff has the burden of explaining the appearance of the instrument.[4]

c. General Burden as in Other Cases. The burden of proof would seem to rest upon plaintiff in such cases as the foregoing in the same sense that plaintiff has the burden of proving his cause of action in all other cases, and this is true whenever the defense of an alteration puts in issue directly the cause of action, which plaintiff must establish *prima facie* in order to recover, even though the execution of the instrument is not denied on oath.[5] While proof of defendant's

1. Thompson *v.* Gowen, 79 Ga. 70, 3 S. E. 910; Tedlie *v.* Dill, 2 Ga. 128; Warren *v.* Chickasaw County, 13 Iowa 588.

2. Conkling *v.* Olmstead, 63 Ill. App. 649, holding that while a general plea denying the execution of an instrument is sufficient to admit proof of an alteration, yet in such a state of the pleading the plaintiff may, upon proving the signature, introduce the instrument in evidence if the alteration does not appear upon its face; the burden of proof to sustain the instrument against the charge rests upon the whole evidence with plaintiff, and therefore it is proper to allow the introduction of the note.

3. Brown *v.* Colquitt, 73 Ga. 59, 54 Am. Rep. 867.

4. *Alabama.*— Barclift *v.* Treece, 77 Ala. 528, holding that a special plea of *non est factum* requires no proof of execution, but plaintiff must explain alterations which are disclosed by the face of the instrument.

Georgia.— Wheat *v.* Arnold, 36 Ga. 479. Under the statute the presumption of alteration before execution arises unless there is a denial under oath of the execution of the instrument sued on. Thrasher *v.* Anderson, 45 Ga. 538. Where there is such denial no presumption is indulged, but the whole question is left to the jury on the evidence in the case. Winkles *v.* Guenther, 98 Ga. 472, 25 S. E. 527; Planters', etc., Bank *v.* Erwin, 31 Ga. 371. In the absence of the statutory affidavit to attack the genuineness of a duly registered deed, the presumption is that it was executed as it is when offered in evidence; but if the affidavit is made the burden is shifted upon the other party to show what the law would otherwise presume. Collins *v.* Boring, 96 Ga. 360, 23 S. E. 401; Banks *v.* Lee, 73 Ga. 25; Hill *v.* Nisbet, 58 Ga. 586 [*distinguishing* Matthews *v.* Castleberry, 43 Ga. 346, in that the burden of proof was not shifted in that case, because the deed appeared on its face to be genuine and bore no marks of alteration]. See also Norton *v.* Conner, (Tex. 1890) 14 S. W. 193.

Illinois.— Walters *v.* Short, 10 Ill. 252.

Kansas.— Under a verified general denial it is incumbent upon plaintiff to prove the execution of just such an instrument as is set out in his pleading. J. I. Case Threshing Mach. Co. *v.* Peterson, 51 Kan. 713, 33 Pac. 470; State *v.* Roberts, 37 Kan. 437, 15 Pac. 593.

Missouri.— Workman *v.* Campbell, 57 Mo. 53, holding that, in a suit on a subscription, an answer denying the execution of the subscription sued for, and setting up the alteration, throws on plaintiff the burden of proving the amount subscribed.

Pennsylvania.— Where there is a manifest alteration on the face of an instrument sued on which does not appear by the copy filed, a rule making it necessary for plaintiff to prove execution only when defendant denies the execution of the instrument does not apply, and the burden of explaining the alteration is on plaintiff. Nesbitt *v.* Turner, 155 Pa. St. 429, 26 Atl. 750.

5. *Maine.*— Dodge *v.* Haskell, 69 Me. 429; Belfast Nat. Bank *v.* Harriman, 68 Me. 522.

Massachusetts.— Cape Ann Nat. Bank *v.* Burns, 129 Mass. 596; Simpson *v.* Davis, 119 Mass. 269, 20 Am. Rep. 324; Lincoln *v.* Lincoln, 12 Gray (Mass.) 45; Davis *v.* Jenney, 1 Metc. (Mass.) 221, holding that proof or admission of the signature of the party to an instrument is *prima facie* evidence that the whole of the instrument written over the signature is the act of the party, and this *prima facie* case will stand unless defendant can rebut it by showing from the appearance of the instrument itself or otherwise that it has been altered.

Michigan.— Willett *v.* Shepard, 34 Mich. 106 (holding that where the only controversy relates to whether an erasure of certain words was made before or after execution of a note, and there is evidence on both sides relating to the issue, it is error to charge that the burden of proof is upon defendant); Comstock *v.* Smith, 26 Mich. 306. So, in Von Eherenkrook *v.* Webber, 100 Mich. 314, 58 N. W. 665, 60 N. W. 761, plaintiff's denial raised an issue respecting a writing which defendant relied upon, and it was held that defendant had the affirmative of the issue. The alteration complained of was not an interlineation, but consisted of the addition of words over plaintiff's blank indorsement, such addition being in the handwriting of defendant, who relied upon the indorsement and the words thus written over it, the existence of which words at the time of her signature the plaintiff denied.

signature is *prima facie* evidence that the whole body of the note written over it is his act, still the burden of proof, on the whole evidence, is on plaintiff to show that the note declared on is defendant's act.[6] So, where the issue arises in a suit in which plaintiff is seeking relief against an alleged alteration in an instrument upon which he would otherwise be liable, it is held that plaintiff has the burden of proving the alteration.[7]

3. Presumptions and Burden Arising from Apparent Changes — a. The Ancient Rule. Anciently it appears that the matter of interlineations and erasures appearing upon the face of a deed was tried by the judges on a view of the deed,[8] and the rule of the civil law seems to be that writings erased or interlined are presumed to have been false.[9]

b. Control of Extrinsic Facts under Modern Views — (1) *General Rule.* The practice last stated no longer prevails. The mere fact of a change in an instrument does not of itself constitute a vitiating alteration, nor does the mere fact that the instrument appears to contain interlineations or erasures destroy its evidentiary character,[10] even though such changes are not noted.[11]

New York.— Where plaintiff alleges that defendant executed a sealed instrument, and the defense is that the seal was added after execution of the instrument, as the pleadings stand the fact of the execution of a sealed instrument is issuable, and as it was put in issue plaintiff is bound to establish it as a part of his case. Farmers' L. & T. Co. *v.* Siefke, 144 N. Y. 354, 39 N. E. 358, 63 N. Y. St. 662.

Wisconsin.—Low *v.* Merrill, 1 Pinn. (Wis.) 340.

See also Baxter *v.* Camp, 71 Conn. 245, 41 Atl. 803, 71 Am. St. Rep. 169, 42 L. R. A. 514.

Instrument appearing to be vitiated.— Where an action is brought on an instrument which, when produced, shows that the name of defendant is erased, such erasure being a complete cancellation of the note, the defendant was not under the necessity of pleading *non est factum* and the burden was still on plaintiff to show that the erasure was effected by fraud or imposition on the part of the promisor. Daniel *v.* Daniel, Dudley (Ga.) 239. See also Stoner *v.* Ellis, 6 Ind. 152; Slocum *v.* Watkins, 1 Rob. (La.) 214; Porter *v.* Doby, 2 Rich. Eq. (S. C.) 49; Blewett *v.* Bash, 22 Wash. 536, 61 Pac. 770; Abbe *v.* Rood, 6 McLean (U. S.) 106, 1 Fed. Cas. No. 6. But the instrument is admissible in evidence when accompanied by other evidence explaining the erasure. Frazer *v.* Boss, 66 Ind. 1. See also Robinson *v.* State, 60 Ind. 26.

6. Belfast Nat. Bank *v.* Harriman, 68 Me. 522; Simpson *v.* Davis, 119 Mass. 269, 20 Am. Rep. 324; Longwell *v.* Day, 1 Mich. N. P. 286.

In Stoner *v.* Ellis, 6 Ind. 152, it is said that the often-quoted language that plaintiff must prove an alteration to have been made before the instrument was executed means no more than that he must prove his case, and usually has no reference to the burden of proof between the parties as to who made the alteration.

7. Putnam *v.* Clark, 33 N. J. Eq. 338 (distinguishing the rule as to the burden of proof in cases involving the validity of altered papers where the actor grounds his right of action on the altered instrument, in which cases no presumption arises to invalidate the instrument from a mere inspection of apparent changes, though it is said that it is probably equally true that the appearance of the alteration itself, or slight circumstances connected therewith, may exhibit indicia of unfairness, which, while falling short of proof thereof, would throw upon the propounder of the instrument the burden of showing that the alteration was fairly made, and that the failure of such proof on his part would support a finding against the validity of the instrument); Riley *v.* Riley, 9 N. D. 580, 84 N. W. 347. And in Harris *v.* Jacksonville Bank, 22 Fla. 501, 1 So. 140, 1 Am. St. Rep. 201, upon the last point suggested in Putnam *v.* Clark, 33 N. J. Eq. 338, it was held that if, upon the production of the bill which complainant sought to have canceled and delivered up on the ground of an alteration, the alteration was apparent it would make out complainant's *prima facie* case, and throw the burden on the holder to explain the alteration; but that if nothing appeared upon the bill to indicate that the change had been made complainant must prove his case by extraneous testimony. See also Solon *v.* Williamsburgh Sav. Bank, 114 N. Y. 122, 21 N. E. 168, 23 N. Y. St. 138; O'Donnell *v.* Harmon, 3 Daly (N. Y.) 424.

8. Ravisies *v.* Alston, 5 Ala. 297 [*citing* Sheppard Touch. 69]; Bailey *v.* Taylor, 11 Conn. 531, 29 Am. Dec. 321; Printup *v.* Mitchell, 17 Ga. 558, 63 Am. Dec. 258 [*citing* Coke Litt. 35, note 7.]

9. Pipes *v.* Hardesty, 9 La. Ann. 152, 61 Am. Dec. 202 [*citing* Febrero. pt. II. bk. III. c. 1. No. 341]; Hanrick *v.* Dodd, 62 Tex. 75.

10. Ward *v.* Cheney, 117 Ala. 238, 22 So. 996; Mayer *v.* Clark, 40 Ala. 259; Roberts *v.* Unger, 30 Cal. 676; Harlan *v.* Berry, 4 Greene (Iowa) 212; Tutt *v.* Morgan, 18 Tex. Civ. App. 627, 42 S. W. 578, 46 S. W. 122. See *supra*, II, A; IV, C, and V, A, B.

11. Sill *v.* Reese, 47 Cal. 294 (holding that a change in a word or words in a document, not noted before the signing, will not render

(II) *Presumption of Alteration — Burden to Explain Appearance* — (A) *Conflict of Authority.* While the question always depends upon extrinsic facts, stronger inferences may be drawn in some jurisdictions than in others from the appearance of the paper, and whether such extrinsic facts may be so far presumed from the appearance of the instrument as to require explanatory testimony, and as to the effect of such appearance upon the burden of proof, the authorities are in conflict, and distinguished judges have recognized the utter futility of attempting to reconcile or extract a rule from them.[12]

(B) *Rule Requiring Explanation* — (1) In General. In many cases the doctrine is recognized that changes apparent on the face of an instrument will raise a presumption that they were made after the execution of the instrument, and will require explanation, or, to the same purpose, that the production of an instrument bearing evidences of such a change throws upon the party producing it the burden of accounting for its appearance,[13] at least, if the appearance is sus-

it void as evidence); Cairo, etc., R. Co. *v.* Parrott, 92 Ill. 194; White *v.* Williams, 3 N. J. Eq. 376.

Propriety of noting changes.— But, in view of the rules with regard to the necessity for explaining interlineations apparent upon the face of an instrument, a party who receives such an instrument should see that the interlineation is noted if he does not wish to assume the burden of explaining it. Hodge *v.* Gilman, 20 Ill. 437. See also Bailey *v.* Taylor, 11 Conn. 531, 29 Am. Dec. 321 [*citing* 4 Cruise Dig. 388, tit. 32, c. 26, §§ 10, 11]; Smith *v.* U. S., 2 Wall. (U. S.) 219, 17 L. ed. 788. And if the alteration is noted in the attestation clause as having been made before the execution of the instrument, it is sufficiently accounted for, and the instrument is relieved of suspicion. 1 Greenleaf Ev. § 564; Crossman *v.* Crossman, 95 N. Y. 145; Howell *v.* Hanrick, 88 Tex. 383, 29 S. W. 762, 30 S. W. 856, 31 S. W. 611. See also Wills.

Refusal to receive instrument.— Britton *v.* Stanley, 4 Whart. (Pa.) 114, holding that one cannot refuse to receive a deed because erasures made before execution are not noted. So a registrar has no right to refuse to register a deed because alterations appear on its face. See also Graystock *v.* Barnhart, 26 Ont. App. 545. But on an application for a liquor license under statute, it was held that a bond might be rejected where the name of one of the sureties had been erased, as the state was entitled to a clear bond such as would not cast upon it the burden of showing how the apparent alteration was made. Nordstrom's Petition, 127 Pa. St. 542, 18 Atl. 601. See also Thorpe *v.* Keeler, 18 N. J. L. 251. For appeal bonds see Appeal and Error.

12. "The question . . . is one upon which there is a wilderness of authorities and much conflict of opinion. Any attempt to cite or consider the innumerable cases on this question would be both impracticable and useless." Per Mitchell, J., in Wilson *v.* Hayes, 40 Minn. 531, 535, 42 N. W. 467, 12 Am. St. Rep. 754, 4 L. R. A. 196. Among other cases in which such expressions may be encountered see Comstock *v.* Smith, 26 Mich. 306; Dorsey *v.* Conrad, 49 Nebr. 443, 68 N. W. 645; Norfleet *v.* Edwards, 52 N. C. 455; Cass County *v.* American Exch. State Bank, 9 N. D. 263, 83 N. W. 12; Page *v.* Danaher, 43 Wis. 221.

13. *Arkansas.*— Chism *v.* Toomer, 27 Ark. 108.

California.— Miller *v.* Luco, 80 Cal. 257, 22 Pac. 195; Roberts *v.* Unger, 30 Cal. 676, under statutory provision that where a deed is produced by a party claiming under it, and it appears on its face to have been altered, the burden of explaining the alteration is on the party producing the instrument. But in Galland *v.* Jackman, 26 Cal. 79, 85 Am. Dec. 172, it was held that where a deed is produced in evidence by the party claiming under it, and it presents on its face evidence of having been altered in a material particular to the interest of the party producing it, he must explain the change by satisfactory evidence or the deed will be deemed to read as before the alteration.

Delaware.— Herdman *v.* Bratten, 2 Harr. (Del.) 396.

Hawaii.— Kahai *v.* Kamai, 8 Hawaii 694.

Illinois.— Merritt *v.* Boyden, (Ill. 1901) 60 N. E. 907; Catlin Coal Co. *v.* Lloyd, 180 Ill. 398, 54 N. E. 214, 72 Am. St. Rep. 216; Pyle *v.* Oustatt, 92 Ill. 209; Hodge *v.* Gilman, 20 Ill. 437; Walters *v.* Short, 10 Ill. 252; Gillett *v.* Sweat, 6 Ill. 475; Sisson *v.* Pearson, 44 Ill. App. 81; McAllister *v.* Avery, 17 Ill. App. 568.

Louisiana.— Pipes *v.* Hardesty, 9 La. Ann. 152, 61 Am. Dec. 202 (wherein it is said that the presumption is not *juris et de jure*; that it yields to contrary proof and even to such circumstances as create a strong presumption that the interlineation was made before the execution and delivery of the deed); Fletcher *v.* Cavelier, 4 La. Ann. 267; Union Bank *v.* Brewer, 2 La. Ann. 835; McMicken *v.* Beauchamp, 2 La. 290 (declaring the rule of the civil law to be in conformity with the law merchant).

Mississippi.— Ellison *v.* Mobile, etc., R. Co., 36 Miss. 572; Wilson *v.* Henderson, 9 Sm. & M. (Miss.) 375, 48 Am. Dec. 716; Commercial, etc., Bank *v.* Lum, 7 How. (Miss.) 414.

New York.— Kelly *v.* Indemnity F. Ins. Co., 38 N. Y. 322 (holding that where testimony is introduced in order to meet a pre-

picious;[14] but, where a party demands the production of a written contract mentioned by a witness, it is held that it will not be incumbent upon the opposite party, who does not claim under the instrument, to explain its appearance.[15]

(2) Accounts. An original entry in an account-book will be presumed, in the absence of explanation of an apparent alteration, to be in accordance with the facts at the time of its entry.[16]

(3) Erasure of Special Indorsement. The holder of a note, having the right to erase a prior special indorsement, is not under the necessity to explain such erasure.[17]

(c) *Presumption of Change before Execution.* In other cases the general rule is adopted that, where an instrument presents the appearance of having

sumption raised by interlineations of entries of purchases in books of accounts, the opposite party cannot complain that it was submitted to the jury to determine whether or not the books were fraudulently altered, especially when he did not object to the admission of the books); Pease *v.* Barnett, 27 Hun (N. Y.) 378; Acker *v.* Ledyard, 8 Barb. (N. Y.) 514; Smith *v.* McGowan, 3 Barb. (N. Y.) 404; Herrick *v.* Malin, 22 Wend. (N.Y.) 388; Jackson *v.* Osborn, 2 Wend. (N. Y.) 555, 20 Am. Dec. 649; Taylor *v.* Crowninshield, 5 N. Y. Leg. Obs. 209.

Oregon.— Hillsboro First Nat. Bank *v.* Mack, 35 Oreg. 122, 57 Pac. 326 (from which it appears that it was provided by statute that a writing which appears to have been altered after its execution in a part material to the question in dispute is not competent evidence unless the alteration is explained); Simpkins *v.* Windsor, 21 Oreg. 382, 28 Pac. 72; Wren *v.* Fargo, 2 Oreg. 19. But where, even after the instrument is admitted over objection, it is shown that the alteration was made after execution, the statute referred to does not apply. Nickum *v.* Gaston, 28 Oreg. 322, 42 Pac. 130.

Pennsylvania.—Morris *v.* Vanderen, 1 Dall. (Pa.) 64, which case seems never to have been followed in Pennsylvania to its full extent.

South Carolina.— Kennedy *v.* Moore, 17 S. C. 464; Burton *v.* Pressly, Cheves Eq. (S. C.) 1.

Tennessee.— Riseden *v.* Harrison, (Tenn. Ch. 1897) 42 S. W. 884.

Texas.— Jacoby *v.* Brigman, (Tex. 1887) 7 S. W. 366; Miller *v.* Alexander, 13 Tex. 497, 65 Am. Dec. 73; Kansas Mut. L. Ins. Co. *v.* Coalson, (Tex. Civ. App. 1899) 54 S. W. 388; Davis *v.* State, 5 Tex. App. 48.

Virginia.— Hodnett *v.* Pace, 84 Va. 873, 6 S. E. 217; Elgin *v.* Hall, 82 Va. 680, holding that, on a reference to take an account, one producing receipts which bear patent alterations in dates and amounts on the face thereof must explain such appearances.

United States.—Prevost *v.* Gratz, Pet. C. C. (U. S.) 364, 19 Fed. Cas. No. 11,406. See also The Richard Vaux, 20 Fed. 654.

England.— Johnson *v.* Marlborough, 2 Stark. 313, 3 E. C. L. 424, wherein plaintiff was required to prove that the alteration of a bill was made before acceptance, else the bill would be deemed void for want of a new stamp. See also Knight *v.* Clements, 8 A. & E. 215, 35 E. C. L. 559; Henman *v.* Dickinson, 5 Bing. 183, 15 E. C. L. 533; Clifford *v.* Parker, 2 M. & G. 909, 40 E. C. L. 917; Desbrow *v.* Weatherley, 6 C. & P. 758, 25 E. C. L. 675; Thompson *v.* Mosely, 5 C. & P. 501, 24 E. C. L. 676. But in Tomlins *v.* Lawrence, 6 Bing. 376, 19 E. C. L. 175, which was an action by an indorsee against an acceptor on a bill of exchange, the defendant obtained a rule on plaintiff to show why the proceedings should not be stayed on payment of debt and costs, and why the bill should not be delivered up to defendant, and upon an offer to deliver up the bill, which contained extraordinary erasures made upon it while in plaintiff's hands, it was held that the delivery of the paper was a compliance with the requisition of the rule, and that if defendant suffered injury he must resort to ulterior proceedings.

For wills containing alterations see Wills.

For ancient deeds containing alterations see Evidence.

14. See *infra*, IX, A, 3, b, (II), (H).

15. Priest *v.* Whiteacre, 78 Va. 151, holding that in such a case, in the absence of evidence tending to show that the contract had been altered, the jury are bound to take it as produced. See, generally, Evidence.

16. Adams *v.* Adams, 22 Vt. 50, wherein, on an appeal by the heirs of an estate against the administrators, it appeared that the decedent at the time of his death held a note for one thousand dollars against the administrators, and also had a credit of one thousand dollars on the account-books of the administrators, and it was held that the latter could not avail themselves of an alteration of the words in which the credit was written on their books without evidence of their right to make the alteration. See also Sheils *v.* West, 17 Cal. 324; Wilson *v.* O'Day, 5 Daly (N. Y.) 354, holding that, where the books of a warehouse were altered to show that certain goods were received on a day different from that originally shown by the books, the possession, by the person storing the goods, of a warehouseman's receipt corresponding with the altered books is no evidence that the holder of the receipt knew of the alteration.

17. Jones *v.* Berryhill, 25 Iowa 289; Finney *v.* Turner, 10 Mo. 208. For the right to erase special indorsements see Bills and Notes.

been changed, the presumption is that the change was made before, or contemporaneously with, the execution of the instrument, and it is for the party attacking the instrument to show otherwise,[18] for the reason that the presumption of law is always in favor of honesty and upright conduct,[19] and the whole question in such cases is for the jury, the usual proof of execution being all that is required.[20] This presumption does not apply, however, to an erasure of

18. *Alabama.*— Ward *v.* Cheney, 117 Ala. 238, 22 So. 996.

Florida.— Kendrick *v.* Latham, 25 Fla. 819, 6 So. 871.

Georgia.— Westmoreland *v.* Westmoreland, 92 Ga. 233, 17 S. E. 1033 (as to effect of an instrument as evidence, the alterations serving to render the instrument consistent with itself); Thrasher *v.* Anderson, 45 Ga. 538 (holding that it would be absurd to say that *prima facie* the presumption is one way, but that the jury may treat that presumption as of no weight); Printup *v.* Mitchell, 17 Ga. 558, 63 Am. Dec. 258.

Idaho.—Fraud will not be presumed. Dangell *v.* Levy, 1 Ida. 742, which, however, in any event, was an immaterial change.

Minnesota.—Wilson *v.* Hayes, 40 Minn. 531, 42 N. W. 467, 12 Am. St. Rep. 754, 4 L. R. A. 196.

Missouri.—Stillwell *v.* Patton, 108 Mo. 352, 18 S. W. 1075; Burnett *v.* McCluey, 78 Mo. 676.

Nebraska.—Dorsey *v.* Conrad, 49 Nebr. 443, 68 N. W. 645 [*following*, upon the same point, Goodin *v.* Plugge, 47 Nebr. 284, 66 N. W. 407; Cass County Bank *v.* Morrison, 17 Nebr. 341, 22 N. W. 782, 52 Am. Rep. 417, and *overruling* Courcamp *v.* Weber, 39 Nebr. 533, 58 N. W. 187; Johnson *v.* Plum Creek First Nat. Bank, 28 Nebr. 792, 45 N. W. 161].

New Jersey.— North River Meadow Co. *v.* Christ Church, 22 N. J. L. 424, 53 Am. Dec. 258.

North Carolina.— In Norfleet *v.* Edwards, 52 N. C. 455, the court distinguished the case in hand from those in which the contrariety of opinion existed as to the burden and presumptions arising from the appearance of changes in an instrument in that the latter generally dealt with deeds, negotiable securities, and instruments whose nature and character were fixed, while in the instant case the alteration was made for the very purpose of determining and fixing the character of the instrument; and held that where a note was on a paper in a form that had been prepared for a bond, but with the scroll containing the word "seal" scratched and cross-marked with ink, it was error to charge that plaintiff had the burden of showing that the obliteration took place before or at the time the instrument was executed.

North Dakota.— Cass County *v.* American Exch. State Bank, 9 N. D. 263, 83 N. W. 12; Decorah First Nat. Bank *v.* Laughlin, 4 N. D. 391, 61 N. W. 473.

Ohio.— Franklin *v.* Baker, 48 Ohio St. 296, 27 N. E. 550, 29 Am. St. Rep. 547 [*distinguishing* Huntington *v.* Finch, 3 Ohio St. 445, in that while the observations of the court in that case may indicate an opinion that the burden of explaining what are termed alterations of a suspicious character is on plaintiff, no such question was before the court].

Washington.— Blewett *v.* Bash, 22 Wash. 536, 61 Pac. 770; Kleeb *v.* Bard, 12 Wash. 140, 40 Pac. 733; Fairhaven *v.* Cowgill, 8 Wash. 686, 36 Pac. 1093; Yakima Nat. Bank *v.* Knipe, 6 Wash. 348, 33 Pac. 834; Wolferman *v.* Bell, 6 Wash. 84, 32 Pac. 1017, 36 Am. St. Rep. 126.

United States.— Hanrick *v.* Patrick, 119 U. S. 156, 7 S. Ct. 147, 30 L. ed. 396, a case involving a deed.

19. Stillwell *v.* Patton, 108 Mo. 352, 18 S. W. 1075; Dorsey *v.* Conrad, 49 Nebr. 443, 68 N. W. 645; Cass County *v.* American Exch. State Bank, 9 N. D. 263, 83 N. W. 12; Wolferman *v.* Bell, 6 Wash. 84, 32 Pac. 1017, 36 Am. St. Rep. 126. See also cases generally in note 18, *supra*.

20. *Georgia.*— Printup *v.* Mitchell, 17 Ga. 558, 63 Am. Dec. 258.

Indiana.— Stoner *v.* Ellis, 6 Ind. 152. See also Stayner *v.* Joyce, 120 Ind. 99, 22 N. E. 89.

Minnesota.—Wilson *v.* Hayes, 40 Minn. 531, 42 N. W. 467, 12 Am. St. Rep. 754, 4 L. R. A. 196.

Missouri.— McCormick *v.* Fitzmorris, 39 Mo. 24; Noah *v.* German Ins. Co., 69 Mo. App. 332.

Nebraska.—Dorsey *v.* Conrad, 49 Nebr. 443, 68 N. W. 645.

New Jersey.— Without reference to the character of the apparent change the question is entirely one of fact and should be left to the jury. Hoey *v.* Jarman, 39 N. J. L. 523; Hunt *v.* Gray, 35 N. J. L. 227, 10 Am. Rep. 232. See also North River Meadow Co. *v.* Christ Church, 22 N. J. L. 424, 53 Am. Dec. 258; Den *v.* Farlee, 21 N. J. L. 279; Den *v.* Wright, 7 N. J. L. 175, 11 Am. Dec. 546; Cumberland Bank *v.* Hall, 6 N. J. L. 215; Sayre *v.* Reynolds, 5 N. J. L. 862. But while this is true, it is said to be probably equally true that the appearance of the alteration itself, or slight circumstances connected therewith, may exhibit indicia of unfairness which, while falling short of proof thereof, would throw upon the propounder of the instrument the burden of showing that the alteration was fairly made, and that a failure upon his part to make such proof would support a finding against the validity of the instrument. Putnam *v.* Clark, 33 N. J. Eq. 338.

South Dakota.—Where an instrument is attacked on the ground of an alteration, proof of due execution is all that is necessary to admit it in evidence, and the question of alteration is then to be determined from the evidence in the case, including the appearance of the instrument. Cosgrove *v.* Fanebust, 10

the signature of an obligor, since, in the nature of the case, such erasure must have occurred after execution.[21]

(D) *No Presumption.* Again, it is held that the mere appearance of a change raises no presumption as to when or by whom the change was made, though it may be that the instrument presented would so tend to sustain the charge of alteration as to require the court to submit the issue to the jury.[22]

(E) *Distinction between Deeds and Other Instruments.* The authorities sometimes make a distinction between deeds and other instruments, especially negotiable paper, in determining what inferences should be drawn from changes appearing in the face of the instrument, some of them, while admitting the presumption in favor of deeds, holding that it does not apply to negotiable instruments.[23] Others, however, recognize no such distinction, but consider the same reasons for the presumption which arises from the appearance of changes upon the face of a deed to apply to other instruments, where the presumption thus raised is in favor of, as well as where it is against, the instrument.[24]

S. D. 213, 72 N. W. 469; Moddie *v.* Breiland, 9 S. D. 506, 70 N. W. 637.

21. Blewett *v.* Bash, 22 Wash. 536, 61 Pac. 770. See also Stoner *v.* Ellis, 6 Ind. 152.

22. Hagan *v.* Merchants', etc., Ins. Co., 81 Iowa 321, 46 N. W. 1114, 25 Am. St. Rep. 493. To the same point see Benton County Sav. Bank *v.* Strand, 106 Iowa 606, 76 N. W. 1001; MaGee *v.* Allison, 94 Iowa 527, 63 N. W. 322; *In re* Brown, 92 Iowa 379, 60 N. W. 659; Neil *v.* Case, 25 Kan. 510, 37 Am. Rep. 259. *Compare* Wing *v.* Stewart, 68 Iowa 13, 25 N. W. 905, wherein the court held that an objection to the admission in evidence of the contract, which appeared to have been altered or interlined, without first requiring an explanation of the alteration, could not be entertained by the appellate court unless the instrument itself was brought up and the court could thus be enabled to determine from an inspection whether any explanation was required. See also *infra*, IX, A, 3, b, (II), (H).

23. *Mississippi.*— See Ellison *v.* Mobile, etc., R. Co., 36 Miss. 572.

Pennsylvania.— Citizens Nat. Bank *v.* Williams, 174 Pa. St. 66, 35 Atl. 303, 25 L. R. A. 464 [*citing* Gettysburg Nat. Bank *v.* Chisolm, 169 Pa. St. 564, 32 Atl. 730, 47 Am. St. Rep. 929; Hartley *v.* Corboy, 150 Pa. St. 23, 24 Atl. 295]; Nagle's Estate, 134 Pa. St. 31, 19 Atl. 434, 19 Am. St. Rep. 669; Neff *v.* Horner, 63 Pa. St. 327, 3 Am. Rep. 555; Hill *v.* Cooley, 46 Pa. St. 259; Heffner *v.* Wenrich, 32 Pa. St. 423; Miller *v.* Reed, 27 Pa. St. 244, 67 Am. Dec. 459; Clark *v.* Eckstein, 22 Pa. St. 507, 62 Am. Dec. 307; Simpson *v.* Stackhouse, 9 Pa. St. 186, 49 Am. Dec. 554; Mechling *v.* Hartzell, 4 Pennyp. (Pa.) 500. Generally it would seem from these cases that in the instance of commercial paper an apparent interlineation will raise in some degree a presumption against the instrument and requires explanation before the instrument can be admitted. But it is also held in this state that the preliminary question, if doubtful, is for the jury. Clark *v.* Eckstein, 22 Pa. St. 507, 62 Am. Dec. 307.

United States.— Hanrick *v.* Patrick, 119 U. S. 156, 7 S. Ct. 147, 30 L. ed. 396; Little *v.* Herndon, 10 Wall. (U. S.) 26, 19 L. ed. 878 (holding that, in the absence of proof as to an erasure in a deed, the presumption is that it was made before execution of the deed); Smith *v.* U. S., 2 Wall. (U. S.) 219, 17 L. ed. 788, holding the general rule that where the suspicion is raised as to the genuineness of an altered instrument, whether by inspection of the instrument or by extraneous evidence, the party producing it is bound to remove the suspicion. The instrument involved in this case was a bond.

England.— Doe *v.* Catomore, 16 Q. B. 745, 71 E. C. L. 745, 5 Eng. L. & Eq. 349, 15 Jur. 728 (presumption that deed was changed at the time of execution); Johnson *v.* Marlborough, 2 Stark. 313, 3 E. C. L. 424, requiring explanation of apparent changes in negotiable paper. But see English cases distinguished in note 24, *infra*.

Canada.— See Graystock *v.* Barnhart, 26 Ont. App. 545.

24. *Kansas.*—Neil *v.* Case, 25 Kan. 510, 37 Am. Rep. 259.

Minnesota.—Wilson *v.* Hayes, 40 Minn. 531, 42 N. W. 467, 12 Am. St. Rep. 754, 4 L. R. A. 196, presumption in favor of instruments without distinction.

Missouri.—The principle that it will be presumed that the change was made before the execution of the instrument, where there is nothing suspicious in the appearance of the change, applied to negotiable instruments as well as to deeds. Stillwell *v.* Patton, 108 Mo. 352, 18 S. W. 1075. See Holton *v.* Kemp, 81 Mo. 661, where the principle was applied to a deed, and Paramore *v.* Lindsey, 63 Mo. 63, where the principle was applied to a note.

Nebraska.— Stough *v.* Ogden, 49 Nebr. 291, 68 N. W. 516; Goodin *v.* Plugge, 47 Nebr. 284, 66 N. W. 407.

New Hampshire.— Presumption of change after execution applied to notes and deeds indiscriminately. Dow *v.* Jewell, 18 N. H. 340, 45 Am. Dec. 371 [*citing* Hills *v.* Barnes, 11 N. H. 395].

New Jersey.—Presumption in favor of notes and deeds indiscriminately. Hunt *v.* Gray, 35 N. J. L. 227, 10 Am. Rep. 232. See also Den *v.* Wright, 7 N. J. L. 175, 11 Am. Dec. 546.

New York.— The rule that no presumption

(F) *Changes in Official Documents or Those Coming from Official Custody.* Interlineations or erasures cast less suspicion upon official acts or documents than upon mere private papers.[25] If an interlineation or erasure appears on the face of an officer's return, or an official document, or one coming from proper official custody, and there is no evidence to show when it was done, it will be presumed to have been done when the officer had authority to do it.[26] So papers filed in court will not be presumed to have been fraudulently altered on account of interlineations or erasures.[27]

(G) *Changes by Attesting or Authenticating Officer.* Interlineations in a deed in the handwriting of the officer who attested it will be presumed to have been made at or before the execution of the deed,[28] and where an exemplification of a public record contains interlineations and alterations, marked and verified as such by the initials of the authenticating clerk, they will be presumed to have been noted by him at the time of authentication.[29]

(H) *Suspicious Appearance* — (1) IN GENERAL. The foregoing general views as to the burden of proof and presumption which attend an apparent alteration are subject, in many if not most of the cases, to the qualification as to the appearance of the instrument, as suspicious or otherwise. Thus the rule requiring a

arises, but that the whole question is submitted to the jury, applied where the instrument is under seal or otherwise. Maybee *v.* Sniffen, 2 E. D. Smith (N. Y.) 1. And the rule requiring explanation of an apparent change, first applied to the case of a simple contract in Johnson *v.* Marlborough, 2 Stark. 313, 3 E. C. L. 424, was applied to a deed in Jackson *v.* Osborn, 2 Wend. (N. Y.) 555, 20 Am. Dec. 649.

Ohio.— See Franklin *v.* Baker, 48 Ohio St. 296, 27 N. E. 550, 29 Am. St. Rep. 547, presumption that change was made before execution.

Vermont.— Beaman *v.* Russell, 20 Vt. 205, 49 Am. Dec. 775.

English cases distinguished.— In several cases (Bailey *v.* Taylor, 11 Conn. 531, 29 Am. Dec. 321; Franklin *v.* Baker, 48 Ohio St. 296, 27 N. E. 550, 29 Am. St. Rep. 547, and especially in Beaman *v.* Russell, 20 Vt. 205, 49 Am. Dec. 775) the distinction is pointed out, between the rule of the early English authorities, that an alteration appearing in the face of a deed would be presumed to have been made at the time of its execution, as in Trowel *v.* Castle, 1 Keb. 22, and Fitzgerald *v.* Fauconberge, Fitzg. 207, and several later English authorities (Johnson *v.* Marlborough, 2 Stark. 313, 3 E. C. L. 424; Bishop *v.* Chambre, 3 C. & P. 55, 14 E. C. L. 448; Leykariff *v.* Ashford, 12 Moore C. P. 281, 22 E. C. L. 643; Taylor *v.* Mosely, 6 C. & P. 273, 25 E. C. L. 429; Knight *v.* Clements, 8 A. & E. 215, 35 E. C. L. 559; Sibley *v.* Fisher, 7 A. & E. 444, 34 E. C. L. 243; Clifford *v.* Parker, 2 M. & G. 909, 40 E. C. L. 917; Henman *v.* Dickinson, 5 Bing. 183, 15 E. C. L. 533), requiring explanation of apparent changes in negotiable instruments, in that the latter cases were decided solely with reference to the stamp act.

25. Tyree *v.* Rives, 57 Ala. 173. See also State *v.* Boisseau, 1 Rob. (La.) 388.

26. *Georgia.*— Collins *v.* Boring, 96 Ga. 360, 23 S. E. 401.

Kentucky.— Welch *v.* Chandler, 13 B. Mon. (Ky.) 420.

Maine.— Boothby *v.* Stanley, 34 Me. 515.

New York.—People *v.* Minck, 21 N. Y. 539; Devoy *v.* New York, 35 Barb. (N. Y.) 264, 22 How. Pr. (N. Y.) 226.

North Carolina.— Sloan *v.* Stanly, 33 N. C. 627.

Pennsylvania.— Stevens *v.* Martin, 18 Pa. St. 101, presumption that interlineation in patent was made by the clerk of the commonwealth before the patent was issued.

Texas.— Miller *v.* Alexander, 13 Tex. 497, 65 Am. Dec. 73. So the burden of proving an alteration of the amount of an administrator's bond is upon defendant sued thereon, where the bond was executed on the day of the filing of the inventory and appraisement, and is in the amount required by law, and has remained in official custody from the date of its execution. Peveler *v.* Peveler, 54 Tex. 53.

27. Friedman *v.* Shamblin, 117 Ala. 454, 23 So. 821.

An indictment is not bad because it contains interlineations, and, in the absence of anything appearing upon the face thereof, or extrinsic, to show that the interlineations were made after it was completed, it will be presumed to have been made before. French *v.* State, 12 Ind. 670, 74 Am. Dec. 229, which, however, was upon the general principle that, in the absence of anything appearing upon the face of a written instrument, or extrinsic proof tending to show that the interlinations were made subsequent to the execution of the instrument, the presumption is that they were made before or at the time of its execution.

An order of sale directed to "Carl Bradley, deputy sheriff," will not be invalidated by having a pen-stroke through the first three of said words, in the absence of proof of the time of alteration. Parsons First Nat. Bank *v.* Franklin, 20 Kan. 264.

28. Bedgood *v.* McLain, 89 Ga. 793, 15 S. E. 670.

29. Lazier *v.* Westcott, 26 N. Y. 146, 82 Am. Dec. 404.

party to explain apparent changes is applied where those changes are of such a character as to raise a suspicion against the instrument.[30] This burden is sometimes considered in the light of a presumption against the validity of the instrument, although the ultimate questions of the time when and by whom the change was made are for the jury.[31] But the rule which would seem to be the view best supported by the authorities is that the suspicious appearance of an instrument raises no presumption against it, but the entire question is left to the jury upon the evidence introduced, though the party producing the instrument has the burden of explaining the suspicious appearance;[32] the ultimate question as to when and by whom the change was made is one of fact. On the one hand, if the court considers the appearance of the instrument suspicious, the party producing it will be required to explain the appearance before the instrument is admitted,

30. *Alabama.*— Hart *v.* Sharpton, 124 Ala. 638, 27 So. 450; Hill *v.* Nelms, 86 Ala. 442, 5 So. 796; Barclift *v.* Treece, 77 Ala. 528; Martin *v.* King, 72 Ala. 354; Fontaine *v.* Gunter, 31 Ala. 258.

California.—Under statute requiring explanation of apparent alteration. Miller *v.* Luco, 80 Cal. 257, 22 Pac. 195.

Delaware.— Warren *v.* Layton, 3 Harr. (Del.) 404.

New York.— Jackson *v.* Osborn, 2 Wend. (N. Y.) 555, 20 Am. Dec. 649.

Pennsylvania.— Hill *v.* Cooley, 46 Pa. St. 259.

Texas.— Collins *v.* Ball, 82 Tex. 259, 17 S. W. 614, 27 Am. St. Rep. 877.

South Carolina.— Wicker *v.* Pope, 12 Rich. (S. C.) 387, 75 Am. Dec. 732.

Wisconsin.— Page *v.* Danaher, 43 Wis. 221.

United States.— Cox *v.* Palmer, 1 McCrary (U. S.) 431, 3 Fed. 16.

But where it is clear that no one having any interest under the instrument in question could have had a motive in altering it, but that others who had been in possession of the instrument would have been advanced by its destruction, it is fair to presume that if the alterations were made by anyone they were not made by those claiming under the instrument. Coulson *v.* Walton, 9 Pet. (U. S.) 62, 9 L. ed. 51.

See 2 Cent. Dig. tit. "Alteration of Instruments," § 230 *et seq.*

31. Pipes *v.* Hardesty, 9 La. Ann. 152, 61 Am. Dec. 202. See also Scott *v.* Walker, Dudley (Ga.) 243; Ellison *v.* Mobile, etc., R. Co., 36 Miss. 572 (wherein it is held, however, that in order to raise the presumption it is not sufficient that it is probable an alteration was made, but it must be made manifest to the inspection of the jury, because if it were to be determined upon a mere probability it would be to found one presumption upon another, and to presume fraud upon a mere probability); Wilson *v.* Henderson, 9 Sm. & M. (Miss.) 375, 48 Am. Dec. 716; Commercial, etc., Bank *v.* Lum, 7 How. (Miss.) 414; Tillou *v.* Clinton, etc., Mut. Ins. Co., 7 Barb. (N. Y.) 564.

32. *Arkansas.*— Gist *v.* Gans, 30 Ark. 285.

Connecticut.—Hayden *v.* Goodnow, 39 Conn. 164, holding that the burden of proof to explain an alteration did not necessarily rest upon the party producing the instrument, but that each case depended upon its own circumstances; that the triers must be satisfied that the alteration was fairly made.

Delaware.— Welch *v.* Coulborn, 3 Houst. (Del.) 647 [*followed* in Hollis *v.* Vandergrift, 5 Houst. (Del.) 521].

Florida.— Harris *v.* Jacksonville Bank, 22 Fla. 501, 1 So. 140, 1 Am. St. Rep. 201. The rule adopted is that, in the absence of evidence to the contrary, an alteration will be presumed to have been made contemporaneously with the execution of the instrument. But it is held that nothing in this rule operates against the proposition that evidence necessary to destroy this *prima facie* presumption may appear on the face of the instrument itself, and thus require the party offering the instrument to explain its appearance in the first instance. Orlando *v.* Gooding, 34 Fla. 244, 15 So. 770.

Iowa.— Harlan *v.* Berry, 4 Greene (Iowa) 212. A demurrer to the evidence by defendant cannot withdraw the question of fact from the jury and permit the court to decide it as a presumption of law. Jones *v.* Ireland, 4 Iowa 63.

Kansas.—J. I. Case Threshing Mach. Co. *v.* Peterson, 51 Kan. 713, 33 Pac. 470, holding that, while it may not be proper as an abstract proposition of law to instruct the jury that the burden is upon plaintiff to satisfactorily explain the alteration, such instruction would not be erroneous where plaintiff has the general burden of proving such an instrument as he sets out in his pleading, as an alteration of an instrument may be so obvious and suspicious as to bring discredit upon it and to require the party offering it to explain the apparent changes, notwithstanding that, in the absence of such suspicious circumstances, no presumption could be indulged against its genuineness. See also State *v.* Roberts, 37 Kan. 437, 15 Pac. 593; Parsons First Nat. Bank *v.* Franklin, 20 Kan. 264.

Maine.— Martin *v.* Tuttle, 80 Me. 310, 14 Atl. 207; Dodge *v.* Haskell, 69 Me. 429; Belfast Nat. Bank *v.* Harriman, 68 Me. 522; Crabtree *v.* Clark, 20 Me. 337 (holding it to be a question for the jury when no explanation is offered and that an instruction that the note would be void if the alteration was not accounted for was erroneous); Gooch *v.* Bryant, 13 Me. 386.

New York.— Acker *v.* Ledyard, 8 Barb.

the court determining in the first instance whether the explanation is sufficient,[33] or determining only that explanatory evidence is necessary before admitting the instrument, leaving the whole question to the jury as soon as such explanatory evidence is offered.[34] In other cases, the instrument is admitted in the first

(N. Y.) 514; Maybee *v.* Sniffen, 2 E. D. Smith (N. Y.) 1.

Vermont.— Beaman *v.* Russell, 20 Vt. 205, 49 Am. Dec. 775.

West Virginia.— Connor *v.* Fleshman, 4 W. Va. 693.

33. Ward *v.* Cheney, 117 Ala. 238, 22 So. 996. But in Hart *v.* Sharpton, 124 Ala. 638, 27 So. 450, it is held that if the instrument is introduced without explanatory evidence the introduction of such evidence thereafter will cure any error in the original admission. So in Nickum *v.* Gaston, 28 Oreg. 322, 42 Pac. 130, under the statute requiring an apparent change to be explained before the instrument is admitted in evidence, a showing that the alleged change was made before execution of the instrument is sufficient to cure any objection to the admission of the instrument without explanatory evidence. In Wisconsin it is held that, when an alteration appears on the face of a note, the question must be raised and the alteration explained when the instrument is offered, and before it is received in evidence. Austin *v.* Austin, 45 Wis. 523 [*citing* Low *v.* Merrill, 1 Pinn. (Wis.) 340; Schwalm *v.* McIntyre, 17 Wis. 232]; Page *v.* Danaher, 43 Wis. 221.

34. *Illinois.*— In the absence of explanatory evidence of suspicious appearance by the party producing an instrument suspicion will become the conviction of fact in the mind of the court or jury that such alteration or appearance of alteration was subsequent to the execution and delivery; but the question is one of fact for the jury and not of law for the court. Catlin Coal Co. *v.* Lloyd, 180 Ill. 398, 54 N. E. 214, 72 Am. St. Rep. 216; Milliken *v.* Marlin, 66 Ill. 13; Reed *v.* Kemp, 16 Ill. 445. The court should instruct the jury that no presumption is raised as to when or by whom the apparent change was made, but that these are questions for them to determine. DeLong *v.* Soucie, 45 Ill. App. 234. On the other hand, it seems that the question of the admissibility of the instrument in evidence in the first instance, in the absence of explanatory evidence as to suspicious appearance, is for the court. Merritt *v.* Boyden, (Ill. 1901) 60 N. E. 907; Russell *v.* Peyton, 4 Ill. App. 473. And in Montag *v.* Linn, 23 Ill. 551, it was held that material interlineations in a deed were to be presumed to have been made after execution, unless explained by the party taking the benefit of the deed; but in this case the question was for the consideration of the jury, and the instruction was that the deed which had been read in evidence was to be considered by them as worthless unless they believed from the appearance of the instrument that the interlineations were made at the time of the execution, or before.

Louisiana.— Dawson *v.* Dawson, 7 Rob. (La.) 36, holding that where the court cannot say whether such erasures, apparent on the face of a note, are such as should authorize its exclusion until explained, the note will be permitted to go to the jury.

Massachusetts.— Ives *v.* Farmers' Bank, 2 Allen (Mass.) 236; Ely *v.* Ely, 6 Gray (Mass.) 439; Wilde *v.* Armsby, 6 Cush. (Mass.) 314. See also Newman *v.* Wallace, 121 Mass. 323.

Michigan.— Pearson *v.* Harding, 95 Mich. 360, 54 N. W. 904; Wilson *v.* Hotchkiss, 81 Mich. 172, 45 N. W. 838; Brand *v.* Johnrowe, 60 Mich. 210, 26 N. W. 883; Willett *v.* Shepard, 34 Mich. 106; Sirrine *v.* Briggs, 31 Mich. 443; Munroe *v.* Eastman, 31 Mich. 283; Sheldon *v.* Hawes, 15 Mich. 519.

Missouri.—Stillwell *v.* Patton, 108 Mo. 352, 18 S. W. 1075; Holton *v.* Kemp, 81 Mo. 661; Smith *v.* Ferry, 69 Mo. 142; Paramore *v.* Lindsey, 63 Mo. 63; McCormick *v.* Fitzmorris, 39 Mo. 24; Lubbering *v.* Kohlbrecher, 22 Mo. 596; Matthews *v.* Coalter, 9 Mo. 705. But see Patterson *v.* Fagan, 38 Mo. 70. The rule that in the absence of suspicious circumstances it will be presumed that the change was made before execution does not mean that when the interlineation or alteration is of a suspicious character the presumption stated is entirely removed or that one to the contrary obtains, but that if the alteration or interlineation is of a suspicious character the chancellor or jury will be authorized to decide against the presumption on the face of the paper, without additional proof. Noah *v.* German Ins. Co., 69 Mo. App. 332; Grimes *v.* Whitesides, 65 Mo. App. 1.

New Hampshire.— Cole *v.* Hills, 44 N. H. 227, holding that, after the instrument is admitted, if there is an entire absence of evidence then the presumption arises that the alteration was made after the execution of the instrument. See also Burnham *v.* Ayer, 35 N. H. 351; Hills *v.* Barnes, 11 N. H. 395.

New York.— The court cannot decide, upon a mere inspection of the instrument, that it is void and cannot be introduced in evidence. Pringle *v.* Chambers, 1 Abb. Pr. (N. Y.) 58. It can only decide, upon an inspection of the instrument, that the party producing it shall be required to explain changes, and as soon as evidence is offered the question at once becomes one for the jury. Tillou *v.* Clinton, etc., Mut. Ins. Co., 7 Barb. (N. Y.) 564; Smith *v.* McGowan, 3 Barb. (N. Y.) 404; Jackson *v.* Osborn, 2 Wend. (N. Y.) 555, 20 Am. Dec. 649. See also Pease *v.* Barnett, 27 Hun (N. Y.) 378 (holding that after explanatory evidence is given the question must be left to the jury, and the court cannot direct a verdict); Artisans' Bank *v.* Backus, 31 How. Pr. (N. Y.) 242.

Pennsylvania.— Presumption of innocence on the face of a deed if the alteration is not

instance, but the party producing it is required to offer explanatory evidence before the jury, who are to pass upon the whole question, under proper instructions from the court.[35]

(2) Different Uses of the Term "Suspicious Appearance." It would

of a suspicious character, but if it is of a suspicious character the law presumes nothing, but leaves the whole question to the jury. Jordan *v.* Stewart, 23 Pa. St. 244. To the same effect see Heffelfinger *v.* Shutz, 16 Serg. & R. (Pa.) 44; Stevens *v.* Martin, 18 Pa. St. 101 (wherein it was said to be proper to presume that the interlineation in a patent was made before the patent was issued); Nesbitt *v.* Turner, 155 Pa. St. 429, 26 Atl. 750. But it is also held that where the party offers a deed which contains an apparent alteration beneficial to him the instrument should not be admitted in evidence without explanation. Burgwin *v.* Bishop, 91 Pa. St. 336; Robinson *v.* Myers, 67 Pa. St. 9. So in the case of a bond which the obligee makes a part of his case. Barrington *v.* Washington Bank, 14 Serg. & R. (Pa.) 405. The jury determine, under proper instructions, whether the explanation is sufficient. Burgwin *v.* Bishop, 91 Pa. St. 336. But see Robinson *v.* Myers, 67 Pa. St. 9; Gettysburg Nat. Bank *v.* Gage, 4 Pa. Super. Ct. 505, which hold that the question of the sufficiency of such testimony is for the court, the former case holding that, if the instrument is admitted and the explanatory evidence is not sufficient, the opposite party is entitled to an instruction that the jury must reject the instrument. See also Smith *v.* Weld, 2 Pa. St. 54, holding that the court may either exclude the instrument in the first instance or pronounce upon its effect after it is submitted to the jury. It is further held that while it may be true that if it is evident upon an inspection of the paper that it has been altered in a material part it should be withheld from the jury in the absence of explanatory testimony, yet, if the fact is disputed and the question is in doubt, the supposed fraudulent action and intent must be left to the jury. Miller *v.* Stark, 148 Pa. St. 164, 23 Atl. 1058; Hudson *v.* Reel, 5 Pa. St. 279. A note bearing an apparent alteration should not be admitted except in connection with evidence tending to explain it, and then it should be referred to the jury to say whether the alteration, if any, was made before or after the delivery of the note. Hill *v.* Cooley, 46 Pa. St. 259; Heffner *v.* Wenrich, 32 Pa. St. 423; Winters *v.* Mowrer, 1 Pa. Super. Ct. 47. So a book of entries, manifestly altered, was held not to be admissible to go to the jury unless the party offering it also offered explanatory evidence of the alteration. Churchman *v.* Smith, 6 Whart. (Pa.) 146. If the apparent interlineation is not of a suspicious character the question will be submitted to the jury. Zimmerman *v.* Camp, 155 Pa. St. 152, 25 Atl. 1086; Winters *v.* Mowrer, 1 Pa. Super. Ct. 47.

South Carolina.— Ordinarily the question is determined by the court in the first instance upon the preliminary objection to the admission of the instrument in evidence, but it is again open to the jury, and is always so when the validity of the instrument is directly involved in the issue, and the party offering the instrument is not bound to offer other evidence in explanation than that furnished by the instrument itself. Wicker *v.* Pope, 12 Rich. (S. C.) 387, 75 Am. Dec. 732.

35. *Delaware.*— In Warren *v.* Layton, 3 Harr. (Del.) 404, the note in suit, which was much mutilated, was admitted and the court charged that plaintiff was under the burden of explaining the alteration, else he could not recover.

Tennessee.—Organ *v.* Allison, 9 Baxt. (Tenn.) 459; Farnsworth *v.* Sharp, 4 Sneed (Tenn.) 54, announcing the rule that an apparent change, in the absence of suspicious circumstances, will be presumed to have been made at the time of signing; but if the change is suspicious no presumption is indulged, but the whole question is left to be decided by the jury, the burden being on the party offering the instrument.

Texas.— Rodriguez *v.* Haynes, 76 Tex. 225, 13 S. W. 296, holding that the burden of explaining a suspicious change appearing in the face of an instrument is on the party producing it, but the jury are to determine by whom, when, and the intent with which the change was made. See also Park *v.* Glover, 23 Tex. 469; Miller *v.* Alexander, 13 Tex. 497, 65 Am. Dec. 73.

Vermont.— Upon the usual proof of execution, the instrument must be submitted to the jury, and, upon the question whether explanation of apparent change should be first given to the court or at once to the jury, the rule would seem to be that as no testimony is to go to the jury but upon oath, some evidence must be given of the execution of the instrument, and in this aspect only the court determines upon the sufficiency of such proof. Beaman *v.* Russell, 20 Vt. 205, 49 Am. Dec. 775.

West Virginia.— In Connor *v.* Fleshman, 4 W. Va. 693, it was held that, on a plea of *non est factum* to avoid an instrument on the ground of an alteration, the question whether the instrument had been mutilated is for the jury, and the paper should be submitted to the jury without first requiring plaintiff to explain its appearance.

Canada.— Wherever a doubt exists whether an alteration has taken place nothing is to be presumed, but it is for the jury to decide, and for this purpose they may inspect the writing; the extrinsic evidence as to the time and circumstances under which a change was made is also for the jury. Domville *v.* Davies, 13 Nova Scotia 159.

But see *supra*, IX, A, 3, b, (II), (C), (D).

For inspection of instrument by jury see *infra*, IX, C, 5.

also seem that the authorities sometimes use the term "suspicious appearance" in different senses. On the one hand, the mere fact of an apparent change would seem to be contemplated by the expression, as is also to be gathered from some of the authorities which lay down a general rule requiring interlineations or erasures to be explained by the party producing the instrument.[36] On the other hand, the mere appearance of a change is not always of itself sufficient, but other intrinsic evidence must appear in order to raise a suspicion.[37]

B. Admissibility and Competency — 1. Parol Evidence in General. Parol evidence is admissible to impeach an instrument for an alteration (the rule which excludes such evidence when offered to vary a written contract having no application),[38] or to prove that blanks have been filled contrary to directions.[39] And so, also, parol evidence is admissible to explain an alteration or show that the change was made under such circumstances as not to vitiate the instrument.[40]

36. Thus, in 1 Greenleaf Ev. § 564, upon stating the rule that a party producing an instrument has the burden of explaining an apparent alteration, it is said that "every alteration on the face of a written instrument detracts from its credit, and renders it suspicious; and this suspicion the party claiming under it is ordinarily held bound to remove." See Pipes *v.* Hardesty, 9 La. Ann. 152, 61 Am. Dec. 202; Park *v.* Glover, 23 Tex. 469; Miller *v.* Alexander, 13 Tex. 497, 65 Am. Dec. 73.

37. *California.*— Sedgwick *v.* Sedgwick, 56 Cal. 213, holding that under the statute requiring a party producing a writing as genuine, and which has been altered or appears to have been altered after its execution, etc., to account for the apparent alteration, a note which on its face appears to have been changed in the date thereof from 1871 to 1870 — for example, the figure "1" seemed at first to have been written and then changed to "0," the instrument does not indicate that the change was made after execution.

Massachusetts.— In Wilde *v.* Armsby, 6 Cush. (Mass.) 314, referring to the statement from 1 Greenleaf Ev. § 564, in note 36, *supra*, the court said that it was not prepared to decide that a material alteration, manifest on the face of an instrument, is in all cases such a suspicious circumstance as to throw the burden on the party claiming under the instrument, because the effect of such a rule would be that, if no evidence were given by the party claiming under the instrument, the issue must always be found against him.

Missouri.—Paramore *v.* Lindsey, 63 Mo. 63.

Pennsylvania.— Zimmerman *v.* Camp, 155 Pa. St. 152, 25 Atl. 1086.

Tennessee.—Organ *v.* Allison, 9 Baxt. (Tenn.) 459.

Texas.— Rodriguez *v.* Haynes, 76 Tex. 225, 13 S. W. 296.

Vermont.— Where the interlineation consists of words which are entirely immaterial no explanation as to the time when it was made is necessary. Langdon *v.* Paul, 20 Vt. 217.

Wisconsin.— Maldaner *v.* Smith, 103 Wis. 30, 78 N. W. 140; Page *v.* Danaher, 43 Wis. 221.

United States.— Cox *v.* Palmer, 1 McCrary (U. S.) 431, 3 Fed. 16.

See *infra*, IX, C, 6.

38. *Illinois.*— Johnson *v.* Pollock, 58 Ill. 181; Schwarz *v.* Herrenkind, 26 Ill. 208.

Iowa.— Coit *v.* Churchill, 61 Iowa 296, 16 N. W. 147.

Louisiana.— Perry *v.* Burton, 31 La. Ann. 262.

Maine.— Goodwin *v.* Norton, 92 Me. 532, 43 Atl. 111; Buck *v.* Appleton, 14 Me. 284.

Mississippi.— Everman *v.* Robb, 52 Miss. 653, 24 Am. Rep. 682.

Nebraska.— Courcamp *v.* Weber, 39 Nebr. 533, 58 N. W. 187.

Oregon.— Wren *v.* Fargo, 2 Oreg. 19.

Pennsylvania.—Grambs *v.* Lynch, 4 Pennyp. (Pa.) 243, 20 Wkly. Notes Cas. (Pa.) 376.

See 2 Cent. Dig. tit. "Alteration of Instruments," § 248 *et seq.*

39. Richards *v.* Day, 137 N. Y. 183, 33 N. E. 146, 50 N. Y. St. 389, 33 Am. St. Rep. 704, 23 L. R. A. 601.

40. *Georgia.*— Williams *v.* Waters, 36 Ga. 454; Crawford *v.* Brady, 35 Ga. 184.

Iowa.— Barlow *v.* Buckingham, 68 Iowa 169, 26 N. W. 58.

Louisiana.—Bernstien *v.* Ricks, 20 La. Ann. 409.

Maryland.— Edelin *v.* Sanders, 8 Md. 118; Burckmyer *v.* Whiteford, 6 Gill (Md.) 1.

Massachusetts.— Austin *v.* Boyd, 24 Pick. (Mass.) 64.

New Jersey.—Rape *v.* Westcott, 18 N. J. L. 244.

South Carolina.—Mouchet *v.* Cason, 1 Brev. (S. C.) 307.

Wisconsin.—Low *v.* Merrill, 1 Pinn. (Wis.) 340. So, in an action to annul certificates issued to defendant of tax-sales of plaintiff's property for a certain year, the defendant denied that the taxes had been paid, and upon this issue plaintiff offered in evidence a receipt in which there was a column of figures purporting to be the taxes assessed upon the property for the improvements for a particular year, and which figures had been erased, and it was held that the testimony of the officer who gave the receipt was admissible to show that the figures erased represented an official tax and were erased by him because the taxes had not been paid. Stringham *v.* Oshkosh, 22 Wis. 326.

United States.— Speake *v.* U. S., 9 Cranch (U. S.) 28, 3 L. ed. 645.

2. Any Testimony Bearing upon Transaction Involved. Upon the issue as to an alteration the door is thrown open to evidence bearing in any way upon the nature of the transaction or conducing to prove the fact;[41] but evidence of facts which can in no manner form the basis for a conclusion upon such an issue is inadmissible.[42] Even an immaterial alteration may be competent evidence to go to the jury to aid in an investigation of the main fact.[43] The inherent nature of the matter set up as an alteration may furnish such evidence of the probability or improbability of the fact as to conclusively support the finding thereof.[44]

3. Testimony of Witnesses as to Condition of Instrument — a. In General. The testimony of witnesses who have seen the instrument is admissible to show its condition at a particular time with reference to interlineations or erasures,[45] and the alleged or apparent change may in like manner be explained by such witnesses.[46]

41. Connally *v.* Spragins, 66 Ala. 258 (wherein plaintiff was permitted to testify that it was his custom to write mortgages for customers, leaving the date blank, and afterward to fill the blanks when the intended mortgagor came in to execute the instrument); Abel *v.* Fitch, 20 Conn. 90 (testimony of arbitrators as to recollection of what was submitted to them, for the purpose of showing that the paper signed by the parties submitting their differences had been altered); Smith *v.* Jagoe, 172 Mass. 538, 52 N. E. 1088 (holding that on the issue whether a chattel mortgage was executed in blank, to be filled by the mortgagee, and whether he exceeded the authority thus impliedly given, the situation of the parties and all that was said when the authority was given are competent evidence, and though the mortgagor cannot testify as to his "expectation" so as to affect the construction of the language of the mortgage, such evidence is material upon the question whether a fraud had been practised upon him by the mortgagee in filling the blanks, and whether he had estopped himself to set up the improper filling of the blanks); Winters *v.* Mowrer, 163 Pa. St. 239, 29 Atl. 916.

Leaving of blank space.— Notwithstanding the mere leaving of a blank space in a completed instrument may not be considered such negligence on the part of the maker as to render him liable to an innocent purchaser, yet, upon the issue whether or not the instrument had been altered by raising the amount, evidence showing that such a blank space was left as was sufficient to permit the amount to be raised without leaving traces of the alteration is admissible upon the probability of the genuineness of the instrument. Pearson *v.* Hardin, 95 Mich. 360, 54 N. W. 904.

42. Agawam Bank *v.* Sears, 4 Gray (Mass.) 95, holding that embarrassed circumstances of a debtor could furnish no presumption that he would make a fraudulent alteration, and therefore evidence of his pecuniary embarrassment is inadmissible. But in Winters *v.* Mowrer, 163 Pa. St. 239, 29 Atl. 916, it was held that testimony that plaintiff, at about the time of the alleged writing, was borrowing a large sum from a third party was admissible, the defense being alleged fraud in the alteration of the amount of the note, the court holding that such evidence bore on the probable truthfulness of the loan alleged on the one side and denied on the other.

43. Moye *v.* Herndon, 30 Miss. 110.

44. Matlock *v.* Wheeler, 29 Oreg. 64, 40 Pac. 5, 43 Pac. 867, wherein plaintiff testified that after the execution of the note in suit he indorsed a payment thereon and erased the word "maturity" upon defendant's suggestion that by mistake the note had been given for too large a sum, which testimony was contradicted by defendant. It was held that evidence that the amount of the note, after deducting the indorsed payment, included interest from the date of the note to maturity, calculated in advance, was admissible.

Evidence excluded.— In an action on a policy of insurance a recovery was resisted on the ground that an alteration had been made extending the life of the policy. It was held that the exclusion of evidence of the minimum rate existing in the company at the time was harmless where the policy itself recited a payment of a consideration different from that which would have been payable at such rate for the time that the policy should run as alleged by the company and from that due at such rate for the term stated on the face of the policy. Insurance Co. of North America *v.* Brim, 111 Ind. 281, 12 N. E. 315.

45. Hunter *v.* Parsons, 22 Mich. 96 (holding that where some of the alleged alterations were printed words, the testimony of the printer is admissible to show that the word was originally printed as it appeared when offered in evidence); Ansley *v.* Peterson, 30 Wis. 653, holding that the alteration may be shown by witnesses who saw the instrument prior to the alleged alteration, but who were not present when it was made.

Subscribing witness.— The fact of an erasure may be proved by other than subscribing witnesses to the deed. Such matter is not supposed to be within the peculiar office of such witnesses. Penny *v.* Corwithe, 18 Johns. (N. Y.) 499.

46. Bernstien *v.* Ricks, 20 La. Ann. 409; Batchelder *v.* Blake, 70 Vt. 197, 40 Atl. 34. See also Fisher *v.* Hoffman, 2 Wkly. Notes Cas. (Pa.) 18, holding that, where one of the figures of the date of an instrument was written over a printed form, the testimony of a witness who saw plaintiff offer a note of similar amount, in the month and year which

b. Testimony as to Appearance of Instrument. Where an issue is raised as to an alteration, inquiry as to whether the body of the note and signature are written with the same ink and hand, as to the color of the ink with which the different parts of the instrument are written, etc., is proper.[47] Expert testimony is competent in this connection,[48] though it also has been held that a witness, without qualifying as an expert, may testify that he can see the marks of an erasure.[49]

4. Other Instruments — a. In General. Upon the issue of an alteration of a particular instrument, evidence of the alteration of other instruments, or in relation to the manner of the execution of other instruments than that in controversy, is inadmissible;[50] but the character of a note in renewal of which the one in controversy was executed may be pertinent, and evidence thereof admissible.[51] And evidence that a note which the payee had drawn in proposed renewal of the note in suit is admissible, on behalf of defendant, to show that the words complained of as alterations in the note in suit were in the proposed renewal note, where the payee testified that he drew the note in suit in his usual manner of drawing such instruments.[52]

b. Collateral Writings. Other documents than those alleged to have been altered, but which are connected with some part of the same general transaction, are admissible in evidence to throw light upon the issue of an alteration in the instrument involved.[53]

the note in suit bears date, directly corroborates the instrument.

Affidavit by subscribing witnesses.— The *ex parte* affidavit of a subscribing witness to a deed, indorsed on the deed after the deed had been recorded, to the effect that an interlineation which did not appear in the record was made by himself before the execution of the deed, is inadmissible. The facts are competent, but the medium of proof is incompetent. Jordan *v.* Stewart, 23 Pa. St. 244. And certainly verbal and written declarations of such a witness, if admissible, are not sufficient to rebut the presumption arising from his signature. Reformed Dutch Church *v.* Ten Eyck, 25 N. J. L. 40.

47. Dubois *v.* Baker, 30 N. Y. 355; National State Bank *v.* Rising, 4 Hun (N. Y.) 793.

48. Nelson *v.* Johnson, 18 Ind. 329 (holding that where persons testify as to their opinions, but the record does not show whether as experts or not, and no objection was made to the evidence or motion to withdraw it, there was no error on the record); Vinton *v.* Peck, 14 Mich. 287 (holding that witnesses may be allowed to compare the writing in question with an appeal bond in the same case admitted to have been signed by defendant, or with other writings legitimately introduced under the issues, in order to judge of the genuineness of the writing to be proved); Moye *v.* Herndon, 30 Miss. 110 (saying, however, that such evidence has but little weight and should be received with caution); Fisher *v.* Hoffman, 2 Wkly. Notes Cas. (Pa.) 18.

See Evidence.

49. Yates *v.* Waugh, 46 N. C. 483, wherein it is said that it is not improper to prove by witnesses that which the jury may arrive at without such aid.

50. *Alabama.*— Winter *v.* Pool, 100 Ala. 503, 14 So. 411.

District of Columbia.— Cotharin *v.* Davis, 2 Mackey (D. C.) 230.

Michigan.— Pearson *v.* Hardin, 95 Mich. 360, 54 N. W. 904.

Missouri.— Paramore *v.* Lindsey, 63 Mo. 63; Iron Mountain Bank *v.* Murdock, 62 Mo. 70. But see Haynes *v.* Christian, 30 Mo. App. 198.

England.— Thompson *v.* Mosely, 5 C. & P. 501, 24 E. C. L. 676.

51. Plattsburgh First Nat. Bank *v.* Heaton, 6 Thomps. & C. (N. Y.) 37, holding that in an action on a renewal note, wherein defendant claimed that the date had been altered, evidence that the date of the original note was such that the date of its maturity would correspond with the date of the note in suit is admissible, and in such a case a question to a witness as to whether he had ever seen, prior to a date after that of the note, any note of the maker in blank did not so plainly refer to notes other than that in suit as to require it to be excluded on a general objection.

Alteration of renewal note.—So it has been held that, where such an alteration appears upon the face of a note as to render it suspicious, it may be shown as a circumstance corroborating its appearance that the note for which the one in suit was given in renewal had been altered also. Rankin *v.* Blackwell, 2 Johns. Cas. (N. Y.) 198.

52. Hellriegel *v.* Corson, 24 N. Y. App. Div. 452, 48 N. Y. Suppl. 419.

53. Carlisle *v.* People's Bank, 122 Ala. 446, 26 So. 115 (holding that, on an issue as to the alteration of a chattel mortgage by inserting other notes than the one which defendant claims the mortgage was executed to secure, a bond for title, executed on the same day with the mortgage, and signed by the parties, which contains recitals in reference to the mortgage securing the notes, is admissible); Cook *v.* Moulton, 59 Ill. App. 428

c. Duplicate. A duplicate of a contract involved is admissible to show an alteration.[54]

5. Declarations and Conduct of Parties. Upon the issue of an alteration, declarations, conversations, and conduct of the parties bearing upon the subject are admissible in evidence;[55] but on the issue of an alteration set up by a defendant, statements made by another who signed before defendant, upon delivery of the instrument in defendant's absence, are inadmissible against the defendant;[56]

(wherein it was held competent to refer to the conditions of a proposed deed, in explanation of erasures and alterations in a note secured by such deed, to show that such alterations were made before the note was executed); Perry *v.* Burton, 31 La. Ann. 262 (a letter written on the same piece of paper with a receipt admissible to explain alteration in receipt); Stein *v.* Brunswick-Balke-Collender Co., 69 Miss. 277, 13 So. 731 (holding that, in determining whether notes sued on were altered after their execution, the contract for the purchase of the goods for which the notes were given is competent and relevant evidence).

54. Young *v.* Cohen, 42 S. C. 328, 20 S. E. 62. But, though an alteration appeared on the face of the instrument, it was held that the court would not nonsuit the party where defendant had a counterpart which she refused to show. Curry *v.* May, 4 Harr. (Del.) 173.

Proved copy.— Where a plea of *non est factum* seeks to avoid a written instrument on the ground of alteration, a copy of the paper as proved to have been originally made may go to the jury to enable them to determine whether or not the original had been altered. Connor *v.* Fleshman, 4 W. Va. 693.

55. Browning *v.* Gosnell, 91 Iowa 448, 59 N. W. 340 (which involved the alteration of a note, after it was executed by the maker, by procuring additional signers, and a question to the first maker on cross-examination, if, after all the names had been signed to the note, he did not promise to pay it, was held to be proper, because, while as to the additional signers it was immaterial, it was evidence against the first maker, and the objection being a general one the evidence should be admitted); Booth *v.* Powers, 56 N. Y. 22 (evidence of willingness on the part of a maker to ratify an alleged alteration and to admit the note to be a valid obligation); Curtice *v.* West, 50 Hun (N. Y.) 47, 2 N. Y. Suppl. 507, 18 N. Y. St. 511 (admissions of conversations between plaintiff and defendant which took place before the execution of the instrument); Winters *v.* Mowrer, 163 Pa. St. 239, 29 Atl. 916 (declarations of plaintiff, before the family of defendant, that nothing was due plaintiff, admissible on the issue of an alleged fraudulent alteration of the amount of a note); North *v.* Henneberry, 44 Wis. 306 (on the question whether the grantor assented to an alteration of the deed, evidence admissible that he testified in a judicial proceeding after full knowledge of the facts that the grantee was the owner of the land).

Letter having no connection with note in suit.— On the issue whether one of a series of notes had been altered, as claimed by defendant, plaintiff notified defendant to produce all the notes of the series which had been paid; two of such notes were not produced because they were lost, but two others were produced, and one of these contained the clause which defendant insisted had been inserted in the note in suit as an alteration, and the other did not contain such clause, and plaintiff contended that the latter had been altered by erasure and proved that it had been surrendered to defendant by the cashier of a bank in exchange for one of the notes produced which contained the disputed clause. A letter written by plaintiff to the cashier, directing him to see that the clause should be inserted in the note from which he claimed it had been erased, was held to be inadmissible because the issue was susceptible of direct proof, and the letter was before the writing of the note and had no connection with the note in suit, and made no reference to it. Capen *v.* Crowell, 63 Me. 455.

Disputed clause interlined before signing.— In Jenkinson *v.* Monroe, 61 Mich. 454, 28 N. W. 663, a written agreement in duplicate was interlined, before signing, by one of the parties and after execution by the other party, and, upon the disputed point whether the clause so interlined was a part of the written contract as executed by the parties, parol evidence of the subsequent conduct and conversation of the parties is admissible as tending to show a final settlement and interpretation by the parties of an open and disputed question not settled in the written contract as originally executed by one of the parties.

Issues tried under original contract.— Where the issues are tried under the contract as originally executed, though an alteration of the contract was admitted, evidence of conversations as to who made the alteration is irrelevant. Jones *v.* Julian, 12 Ind. 274.

56. Hollis *v.* Vandergrift, 5 Houst. (Del.) 521.

Representations of payee's agent to show innocence.— But where the payee of a note altered it by inserting interest, acting upon the false representation of his agent, who had procured the note in payment of goods sold by him, upon the question of the right of the principal to recover on the original consideration evidence of a conversation between one of plaintiffs and the agent who negotiated the settlement, in which conversation plaintiff was informed that defendant had authorized the alteration, is admissible to show the good faith and innocence on the part of the

and a defendant testifying that when an instrument was executed it did not contain a particular provision cannot, for the purpose of showing how the fact was impressed upon his mind, testify as to a conversation between himself and another defendant in the absence of plaintiff.[57] So assent cannot be shown by the testimony of an attorney, when such testimony relates to communications received by him as attorney.[58] And an agent's declarations cannot be received by themselves as evidence of his agency.[59]

6. Memoranda Made by Party. Upon the defense of an unauthorized alteration, a memorandum as to dates, amount, and time of payment, made by the payee at the time of the indorsement, is not admissible unless the witness is unable to testify, from a failure to recollect the facts, without referring to the memorandum.[60]

7. As to Transactions with Decedents. Under statutory inhibitions against parties to suits testifying as to personal transactions with decedents in their lifetime, on the issue as to an alteration it is not competent for a party to testify as to the condition of an instrument at the time of its execution, when the other party is dead;[61] but, on the other hand, questions which do not call for answers as to personal transactions with deceased during his life are competent.[62] Where

principal in making the alteration, as such information came to plaintiff through the proper channel, and the evidence was the direct and accurate way of showing it. Krause *v.* Meyer, 32 Iowa 566.

57. Dickson *v.* Bamberger, 107 Ala. 293, 18 So. 290.

58. Bowers *v.* Briggs, 20 Ind. 139, holding that testimony by an attorney, that the party offered to confess judgment on the note in suit if witness thought it could be done with safety, was inadmissible.

59. Jordan *v.* Stewart, 23 Pa. St. 244.

60. National Ulster County Bank *v.* Madden, 114 N. Y. 280, 21 N. E. 408, 23 N. Y. St. 220, 11 Am. St. Rep. 633.

61. Gist *v.* Gans, 30 Ark. 285 (holding that under *non est factum* by an administrator, setting up an alteration in a note, the plaintiff could not testify that the note was executed by the decedent in the shape in which it was produced at the trial, though the court leaned to the opinion that plaintiff might testify that the note had not been altered by him or with his consent after its execution, the latter not relating to a transaction with deceased during his life); Mitchell *v.* Woodward, 2 Marv. (Del.) 311, 43 Atl. 165 (in action by administrator, question to defendant, whether the paper produced had the same date as when executed, excluded); Benton County Sav. Bank *v.* Strand, 106 Iowa 606, 76 N. W. 1001 (inadmissibility of testimony that certain words were not on the instrument at a certain time); Williams *v.* Barrett, 52 Iowa 637, 3 N. W. 690 (even where the witness has no interest in the particular point upon which the testimony is pertinent); Church *v.* Howard, 17 Hun (N. Y.) 5, 8 (which was an action by the administrator of the payee of a note against the maker and surety. The former, making no defense, was allowed to testify for the surety as to a personal transaction between the maker and decedent in his lifetime. It was held that under a former statute such evidence would have been inadmissible, but that it was admissible under the code provision then prevailing, which precluded a party from testifying "in his own behalf or interest, or in behalf of the party succeeding to his title or interest," and that testimony by the surety that he never paid or authorized the payment of any interest on the note was inadmissible if it had been objected to because it was the denial of the existence of a fact material to the issue, and to which the deceased might have spoken, if living).

After death of member of partnership.— Harris *v.* Jacksonville Bank, 22 Fla. 501, 1 So. 140, 1 Am. St. Rep. 201, holding that where the negotiations between an individual and a member of a firm lead to the acceptance of a bill of exchange by the former, drawn by the firm, which the firm afterward negotiated with a bank, in a suit by the acceptor against the bank to compel the surrender of a draft given by the acceptor in exchange for the bill of exchange, upon the ground that the acceptance had been materially altered after he had signed and delivered it, the acceptor cannot testify that the words complained of were added after he had accepted, because the member of the partnership with whom the acceptor had the transaction was dead, and while he had acted on behalf of the partnership, yet the transaction was between him and the acceptor, in the sense of the statute.

Matter on face of paper not testimony of deceased.— Under a statutory provision against such testimony, except as to a transaction as to which the testimony of the deceased person shall be given in evidence, a recital in the face of a check that it was given for certain purposes is not the testimony of the deceased, and a question to the party: "Examine the face of the check . . . and state what, if any, words in writing, are now on the check that were not there when the check was delivered to you and when you indorsed it," should be excluded. *In re* Brown, 92 Iowa 379, 388, 60 N. W. 659.

62. Thus questions as to when and with what ink defendant signed the note, and

the burden to explain apparent changes on the face of negotiable paper is upon the holder it is unimportant that both parties to the original transaction are dead, though an explanation is thereby rendered more difficult.[63]

C. Weight and Sufficiency — 1. In General.[64] As elsewhere shown, the fact of an alteration is for the determination of the jury,[65] and it may be stated generally that where an alteration is pleaded the issue is to be determined on a mere preponderance of the evidence,[66] and this is all that is required of plaintiff under his burden of proving the execution of an instrument when such execution is denied.[67] But the testimony should be stronger than to raise a mere suspicion in order to entitle one to discharge himself from liability, especially when the instrument itself is fair on its face.[68] And it is held that, where the evidence is evenly balanced as to when the change was made, the presumption will then be indulged that it was made before the instrument was executed.[69] Where plaintiff seeks to annul an instrument on the ground of an alteration, it is held that he must make out his case by clear and convincing testimony,[70] especially when the change would amount to a crime,[71] though, on the other hand, where plaintiff seeks relief from an alteration and the rule requiring the party producing the instrument to explain apparent changes is not applied, it is nevertheless held that suspicious alterations appearing may furnish *prima facie* evidence on the part of plaintiff.[72] A clear

whether he struck out the words complained of as having been stricken out, are held to be competent. Page *v.* Danaher, 43 Wis. 221. See also Gist *v.* Gans, 30 Ark. 285, in last preceding note.

63. Nagle's Estate, 134 Pa. St. 31, 19 Atl. 434, 19 Am. St. Rep. 669.

64. See 2 Cent. Dig. tit. "Alteration of Instruments," § 259 *et seq.*

65. See *infra*, X.

66. Glover *v.* Gentry, 104 Ala. 222, 16 So. 38; Coit *v.* Churchill, 61 Iowa 296, 16 N. W. 147; Lewis *v.* Garretson, 56 Iowa 278, 9 N. W. 214.

67. Longwell *v.* Day, 1 Mich. N. P. 286. See also Farmers' L. & T. Bank *v.* Siefke, 144 N. Y. 354, 39 N. E. 358, 63 N. Y. St. 662.

68. Oakey *v.* Hennen, 18 La. 435. And certainly such doubtful testimony as will scarcely raise a suspicion of the genuineness of the instrument, as where the witness testified that the signature might be his, did not deny the genuineness of the note, but said that he had a doubt about it, is properly excluded. Austin *v.* Austin, 45 Wis. 523. But where the testimony on behalf of plaintiff simply shows that the whole note was written in the same handwriting and signed in the presence of the party who wrote it, but that the inserted words were not written at the time the balance of the note was written, without any explanation as to why all the words were not written at the same time, or as to when they were written, it is not sufficient to overcome proof of a material alteration. Lamar *v.* Brown, 56 Ala. 157, wherein the witness was one of the payees, and it was said that the plea of defendant was calculated to reflect upon his integrity and would necessarily stimulate the zeal of the witness to furnish every corroborating circumstance in support of his version of the transaction.

An impossible date in a bill of sale may raise a presumption of ante or post-dating, but not of alteration after delivery. Davis *v.* Loftin, 6 Tex. 489.

69. Cox *v.* Palmer, 1 McCrary (U. S.) 431, 3 Fed. 16. In *in re* Hughes, 3 N. Y. Suppl. 201, 18 N. Y. St. 395, where the witnesses failed to testify positively, so that the question referred to the referee could not be fairly settled either way, it was held that the alteration of a voucher should not be presumed to have been made after it was filed. So, where the evidence is conflicting and evenly balanced, it is not sufficient to overcome the presumption in favor of a mortgage where the opposite party claims property was inserted after execution. Des Moines Nat. Bank *v.* Harding, 86 Iowa 153, 53 N. W. 99; Harding *v.* Des Moines Nat. Bank, 81 Iowa 499, 46 N. W. 1071; Potter *v.* Kennelly, 81 Iowa 96, 46 N. W. 856.

70. Riley *v.* Riley, 9 N. D. 580, 84 N. W. 347. See Smith *v.* Parker, (Tenn. Ch. 1896) 49 S. W. 285.

In an action to remove a cloud from title on the ground that a deed to the property in suit was a forgery, the grantee in a voluntary deed from plaintiff to other land having, after the execution of the deed, inserted therein the description of the land in suit, plaintiff testified positively that the land in suit was not included in the deed when delivered. The original deed was not produced. There was evidence of admissions of guilt by the grantee when charged with the forgery. Plaintiff, after the delivery of the deed, continued to receive the rents from the property, and the grantee, whenever he collected the same, receipted therefor as agent of plaintiff. The evidence was held sufficient to support a decree for plaintiff. Smith *v.* Smith, 132 Mo. 681, 34 S. W. 471.

71. Rosenberg *v.* Jett, 72 Fed. 90, holding that on an issue of an alteration in a notary's certificate the denial by the parties on the one side, supported by the testimony of the notary, must be overcome by convincing testimony.

72. See *supra*, IX, A, 3, b, (II).

In Putnam *v.* Clark, 33 N. J. Eq. 338, on

probability may arise from the internal evidence of the circumstances sufficiently strong to establish or explain an alleged alteration.[73]

2. By Whom Made. Where the only evidence as to an alleged alteration is that of the maker that the words were in the note when he executed it, and the payee testifies that he did not insert the words, it is held that there is no evidence of an alteration to charge the payee.[74]

3. Authority or Consent. The evidence of consent should be positive and should not be left to mere uncertain inferences.[75] Testimony by a party to an instrument that the change was made in the presence of the other party and with his consent, corroborated by another in whose presence the change was made, is sufficient to show consent where the opposite party admits he was present, though he denies his consent.[76]

4. Materiality. It has been held that an allegation that a written instrument has been mutilated by tearing a condition from it must be proved by showing the substance of the condition.[77] On the other hand, the refusal of a party complaining of an alteration to produce the instrument in his possession, on

the trial below (29 N. J. Eq. 412) it was held that where complainant relied on the fact that it appeared by the record of the assignment that beneath the signature of a subscribing witness (the commissioner before whom the acknowledgment was taken) there was a note that certain words were written over the erasure before execution, and the commissioner testified that he never so noted a writing over an erasure, but that his unvarying practice was to make such notation above his own signature, but he did not remember witnessing or taking the acknowledgment of this assignment, the production of the assignment might have shown that the note was in the commissioner's handwriting, and that, in the absence of the note, there could be no presumption that the alteration, if any, was made after execution of the assignment.

73. Burton *v.* Pressly, Cheves Eq. (S. C.) 1. On the foreclosure of a mortgage to secure three notes the defendant produced a receipt purporting to have been given for the payment of three hundred and seventy dollars, which plaintiff claimed had been altered from seventy dollars to three hundred and seventy dollars. The note upon which the payment was claimed to have been made bore an indorsement, dated as of the same date as the receipt for seventy dollars. It further appeared that the final balance, including interest paid on the note, was what it would have been if the payment had been only seventy dollars at the time the payment in dispute was made, and that the note was not in fact taken up, although if the payment of three hundred and seventy dollars had been made the note would have been paid in full. It was held that this evidence was sufficient to justify a finding that the receipt had been altered. Wilson *v.* Fulliam, 50 Iowa 123.

74. Ferguson *v.* White, (Miss. 1895) 18 So. 124, holding that under such evidence if there was such an alteration it was by a stranger. To the same effect see Drum *v.* Drum, 133 Mass. 566, holding that a recovery may be had for the original amount, although plaintiff cannot prove the circumstances of the alteration. See also Cairo, etc., R. Co. *v.* Parrott, 92 Ill. 194. Where a party defends on the ground that since the execution and delivery of the instrument it has been altered, testimony by plaintiff that he received the note on the day of its date in the same condition in which it was when offered in evidence is sufficient to rebut any *prima facie* presumption which might arise from the appearance of the note. Stough *v.* Ogden, 49 Nebr. 291, 68 N. W. 516; Miller *v.* Stark, 148 Pa. St. 164, 23 Atl. 1058. To the same effect see Fanning *v.* Vrooman, 12 N. Y. St. 393; Evans *v.* Williamson, 79 N. C. 86. And the requirement of the statute in Idaho providing that one offering a note which shows upon its face that it has been altered must prove that the alteration was made before the note came into his hands, is complied with when the party presenting the instrument shows that there has been no alteration therein since it came to his hands. Mulkey *v.* Long, (Ida. 1897) 47 Pac. 949.

75. Pew *v.* Laughlin, 3 Fed. 39, holding that the assent of the captain or owners to the alteration by the charterer's agent in the charter-party was not proved by the shipbrokers' testimony that under the circumstances they must have obtained consent, though they had no recollection of doing so. See also Nelson *v.* Dutton, 51 Mich. 416, 16 N. W. 791. But in King *v.* Bush, 36 Ill. 142, evidence that a note, in which an alteration of the amount had been made, was presented to the maker for payment after its maturity, and that he admitted its correctness, was held sufficient to show that the alteration was made before its execution, or, if afterward, with the maker's consent. And in Price *v.* Cockran, 1 Bibb (Ky.) 570, evidence that the obligee said: "You may do as you please!" was held sufficient to sustain a judgment, based on assent of the obligee, to the tearing off of a memorandum from the foot of a note.

76. Holand *v.* Griffith, 13 Nebr. 472, 14 N. W. 387.

77. Hall *v.* Forqueran, 2 Litt. (Ky.) 329.

the trial, is held to strengthen the presumption of the immateriality of the change.[78]

5. Inspection of Instrument. The question being referred to the jury, they may decide from all the evidence in the case as well as from an inspection of the instrument itself,[79] the weight of the testimony being matter within their province.[80] But whether or not they may decide this question from a mere inspection of the instrument the authorities are not in accord. On the one hand, it seems to be considered that a mere inspection may furnish sufficient evidence to the jury,[81] governed to some extent at least by the consideration of the presump-

78. Knapp *v.* Maltby, 13 Wend. (N. Y.) 587. So in Johnson *v.* Heagan, 23 Me. 329, it was held that where it appears that a writing on a note, varying its terms, had been taken off by the indorser, it will be presumed to have been a material and valid part of the contract unless the holder clearly shows that it was immaterial.

79. *Illinois.*— Milliken *v.* Marlin, 66 Ill. 13; De Long *v.* Soucie, 45 Ill. App. 234.

Maine.—Dodge *v.* Haskell, 69 Me. 429; Belfast Bank *v.* Harriman, 68 Me. 522.

Michigan.— Pearson *v.* Hardin, 95 Mich. 360, 54 N. W. 904; Wilson *v.* Hotchkiss, 81 Mich. 172, 45 N. W. 838; Jourden *v.* Boyce, 33 Mich. 302; Comstock *v.* Smith, 26 Mich. 306.

West Virginia.— Connor *v.* Fleshman, 4 W. Va. 693.

Canada.— Domville *v.* Davies, 13 Nova Scotia 159.

80. Martin *v.* Tuttle, 80 Me. 310, 14 Atl. 207, wherein there was an obvious alteration on the face of the note in suit and defendant testified that it had not been made when he signed the note, and the holder testified that it had been made when he received the note, and upon a verdict for plaintiff it was held, over the contention that the verdict was against the weight of the evidence, that, while the verdict was against the weight of defendant's testimony, how much weight such testimony was entitled to was a question for the jury. So in Lowden *v.* Schoharie County Nat. Bank, 38 Kan. 533, 16 Pac. 748, it was held that where, in an action on a note by an innocent holder, the note offered in evidence was regular on its face, and the maker testified to an alteration, such evidence would not be conclusive as a matter of law, although there was no other evidence than the note itself to impeach or contradict the witness, as his manner and the improbability of his testimony might justify the jury in wholly rejecting his testimony. But in Dorsey *v.* Conrad, 49 Nebr. 443, 68 N. W. 645, where the presumption is indulged that an apparent interlineation or erasure was made before the execution of the instrument, it was held that where the only evidence introduced on the subject outside of the instrument itself was that of a so-called expert, who testified that the alteration or erasure was in a different handwriting from that in the deed, and was made in a different ink from that in which the deed was written several years preceding the trial, but after the execution of the instrument, it could not be said on appeal that the trial court was wrong in concluding that the erasure was made before the delivery of the deed.

81. *Alabama.*— Davis *v.* Carlisle, 6 Ala. 707, from which it appears that while the court may not assume, in the absence of all other evidence, that interlineations or erasures were not made by a stranger, the jury may determine the issue from the whole case, though there is no other evidence presented than the note itself.

Connecticut.— See Hayden *v.* Goodnow, 39 Conn. 164; Bailey *v.* Taylor, 11 Conn. 531, 29 Am. Dec. 321.

Illinois.— See Montag *v.* Linn, 23 Ill. 551.

Maine.— Dodge *v.* Haskell, 69 Me. 429 (under the principle that an apparent alteration raises no presumption, but that the whole question is for the jury, with the general burden of explaining his case upon plaintiff, the paper itself, unaided by other evidence may or may not satisfy the jury); Belfast Nat. Bank *v.* Harriman, 68 Me. 522; Crabtree *v.* Clark, 20 Me. 337.

Massachusetts.— Where the court permits the introduction of an instrument in evidence because there is not enough on the face of it to raise a suspicion, and leaves the question of alteration for the jury, but with the burden on the party introducing the instrument to explain its appearance, it is held that to what extent such explanatory evidence must go will depend upon the peculiar circumstances of the case, and that the alterations themselves may be of such a character that the party may safely rely upon the paper itself; that the question is to be determined, however, from the evidence, either on the face of the instrument or extraneous, and that there is no presumption to be indulged. Ely *v.* Ely, 6 Gray (Mass.) 439. See also Davis *v.* Jenney, 1 Metc. (Mass.) 221.

Missouri.— Noah *v.* German Ins. Co., 69 Mo. App. 332; Grimes *v.* Whitesides, 65 Mo. App. 1.

South Carolina.— The instrument itself may furnish sufficient evidence on behalf of the party offering it, and upon whom rests the burden of explaining apparent interlineations or changes. Kennedy *v.* Moore, 17 S. C. 464; Wicker *v.* Pope, 12 Rich. (S. C.) 387, 75 Am. Dec. 732.

Vermont.— Beaman *v.* Russell, 20 Vt. 205, 49 Am. Dec. 775, where the jury determine after ordinary proof of execution, and the burden would seem not necessarily to be upon either party to explain.

England.— Taylor *v.* Mosely, 6 C. & P. 273,

tion attending an apparent change; while, on the other hand, other cases, sometimes influenced by considerations of a like nature, take the opposite view.[82] But the testimony of a witness who has the means of knowledge is of greater weight than that of a number of witnesses who speak merely from an inspection of the paper.[83]

6. Particular Circumstances as Raising Suspicion.[84] Illustrations of apparent changes which have been deemed sufficient to raise such suspicion as to require an explanation will be found in the following: as if the paper be cut and a mutilated figure is left;[85] if it appear to be contrary to the probable meaning of the instrument as it stood before the insertion of the interlined words;[86] if the erasure or interlineation is obviously beneficial to the party producing and claiming under it;[87] if the ink in which the interlineation or addition is written differs from that of the body of the instrument, and such addition is in a different handwriting from that of the body of the instrument,[88] or the words written on an erasure

25 E. C. L. 429; Bishop *v.* Chambre, M. & M. 116, 3 C. & P. 55, 14 E. C. L. 448.

82. *Georgia.*— Thrasher *v.* Anderson, 45 Ga. 538, 544, holding that, as the *prima facie* presumption concerning an apparent change in the face of an instrument is that it was made before execution, the jury are not at liberty to treat such presumption as of no weight, at their pleasure, but there must be something to rebut the presumption, either upon the face of the paper or *aliunde* to show that the alteration was made subsequent to the execution of the instrument. The court went on to say that the paper had undoubtedly been altered, and perhaps in important particulars, but added: "Who can say, from the evidence, that it was done after it was signed? . . . Every mark upon it, showing change, may just as well have been made, with the free consent of the maker, at the time of the signature as afterward." But it is also held that the decision of a jury is not conclusive where the instrument itself bears evidence of the fairness of a change complained of, as where the matter is not interlined, but is written in the middle of the instrument with the same ink as the body of the instrument, and with the same penmanship, so far as the record shows, and in addition to which a contemporaneous writing to the same effect, and on the back of the same paper, shows that the matter complained of was not interlined in the paper after it was executed. Akridge *v.* Watertown Steam Engine Co., 77 Ga. 50.

Iowa.— Horton *v.* Horton, 71 Iowa 448, 32 N. W. 452. Where the cause is submitted to the court without a jury the instrument itself cannot show that an alteration was made after the instrument was signed, or that it was made without the consent of the party, and, in the absence of any extraneous evidence, the court cannot declare the note invalid. Harlan *v.* Berry, 4 Greene (Iowa) 212.

Massachusetts.—See also Simpson *v.* Davis, 119 Mass. 269, 20 Am. Rep. 324.

Michigan.— Where there is no positive testimony that an alleged alteration was not made by defendant, a finding, upon a mere inspection of the instrument and a comparison of documents by the court, that such alteration was made by defendant himself could not be justified. Sheldon *v.* Hawes, 15 Mich. 519.

Nebraska.— See also Dorsey *v.* Conrad, 49 Nebr. 443, 68 N. W. 645.

New Hampshire.— Cole *v.* Hills, 44 N. H. 227.

New York.— Rankin *v.* Blackwell, 2 Johns. Cas. (N. Y.) 198.

Wisconsin.— Page *v.* Danaher, 43 Wis. 221.

England.— Knight *v.* Clements, 8 A. & E. 215, 35 E. C. L. 559; Clifford *v.* Parker, 2 M. & G. 909, 40 E. C. L. 917.

Where there is no allegation or evidence upon such a point counsel cannot call upon the jury to inspect the instrument, for the purpose of determining whether or not interlineations exist, after the case has been closed and is being presented to the jury. Shelton *v.* Reynolds, 111 N. C. 525, 16 S. E. 272.

After default judgment the jury are not required to disregard a note because of an unexplained alteration or erasure. Runnion *v.* Crane, 4 Blackf. (Ind.) 466.

83. Malin *v.* Malin, 1 Wend. (N. Y.) 625.

84. For inspection of instrument by appellate court see Appeal and Error, X, A, 7, a, (III), (E).

85. Bishop *v.* Chambre, M. & M. 116, 3 C. & P. 55, 14 E. C. L. 448.

86. Cox *v.* Palmer, 1 McCrary (U. S.) 431, 3 Fed. 16.

87. *Alabama.*— Hart *v.* Sharpton, 124 Ala. 638, 27 So. 450.

Illinois.— McAllister *v.* Avery, 17 Ill. App. 568.

Michigan.— Wilson *v.* Hotchkiss, 81 Mich. 172, 45 N. W. 838.

Pennsylvania.— Burgwin *v.* Bishop, 91 Pa. St. 336; Robinson *v.* Myers, 67 Pa. St. 9.

Virginia.— Hodgnett *v.* Pace, 84 Va. 873, 6 S. E. 217.

88. *Alabama.*— Fontaine *v.* Gunter, 31 Ala. 258. See also Burgess *v.* Blake, (Ala. 1900) 28 So. 963.

District of Columbia.— Peugh *v.* Mitchell, 3 App. Cas. (D. C.) 321.

Illinois.— See Chase *v.* Palmer, 29 Ill. 306.

Massachusetts.— Wilde *v.* Armsby, 6 Cush. (Mass.) 314.

are cramped to fit the space.[89] But where an interlineation or erasure is in the same handwriting, and written with the same ink, as the balance of the deed, the presumption, in the absence of any other proof, is that it occurred prior to the execution and delivery, or at least no inference arises to require explanation,[90] especially if it makes clear what was the evident intention of the parties;[91] and, where the change is apparently against the interest of the party claiming under the instrument, the law does not so far presume that it was improperly made as to throw upon him the burden of accounting for it.[92] If the apparent change be of a character to indicate that its purpose was to accommodate a printed form to

Missouri.— Powell *v.* Banks, 146 Mo. 620, 48 S. W. 664; Kelly *v.* Thuey, 143 Mo. 422, 45 S. W. 300.

Pennsylvania.— Robinson *v.* Myers, 67 Pa. St. 9; Hill *v.* Cooley, 46 Pa. St. 259; Simpson *v.* Stackhouse, 9 Pa. St. 186, 49 Am. Dec. 554; Mechling *v.* Hartzell, 4 Pennyp. (Pa.) 500.

United States.— Cox *v.* Palmer, 1 McCrary (U. S.) 431, 3 Fed. 16.

England.— Bishop *v.* Chambre, M. & M. 116, 3 C. & P. 55, 14 E. C. L. 448.

Contra.— There is no principle of the common law which requires a deed to be written throughout with the same colored ink. Smith *v.* McGowan, 3 Barb. (N. Y.) 404.

In Ault *v.* Fleming, 7 Iowa 143 [*following* Jones *v.* Ireland, 4 Iowa 63], it is held that matter written in a different ink from the balance of the instrument furnishes no presumption of a wrongful alteration; that the cases lay more emphasis upon the fact of an interlineation, and especially of an erasure, and that it would seem to require at least one of these circumstances to call for a rule which would make a presumption of guilt in a criminal case. See also Wilson *v.* Harris, 35 Iowa 507. So where the alteration was not in the handwriting of the party producing the instrument, nor of the only other person likely to have access to it, and the only other evidence from which it might be inferred that alteration was made by the party producing the instrument was that the paper was in her custody, the presumption is indulged that the alteration was made by a stranger. Croft *v.* White, 36 Miss. 455. *Compare* Coulson *v.* Walton, 9 Pet. (U. S.) 62, 9 L. ed. 51. And, where there is no presumption and the whole question is one of fact for the jury, it cannot be a question of law to decide whether a note is in two inks or one, or in two handwritings or one, or why it was so written. Dodge *v.* Haskell, 69 Me. 429. But when the jury may decide from a mere inspection of the instrument, they may attend to the circumstance that other parts of the instrument are not in the handwriting of defendant, while the balance of the instrument is in his handwriting. Taylor *v.* Mosely, 6 C. & P. 272, 25 E. C. L. 429.

89. Nagle's Estate, 134 Pa. St. 31, 19 Atl. 434, 19 Am. St. Rep. 669. See also Taylor *v.* Mosely, 6 C. & P. 273, 25 E. C. L. 429.

90. *District of Columbia.*— Peugh *v.* Mitchell, 3 App. Cas. (D. C.) 321.

Florida.—And when the matter complained of is not an erasure or interlineation, but consists of words indicating a place of payment, written with the same ink and in the same hand as the body of the instrument, no alteration or suspicion appears on the face of the instrument. Harris *v.* Jacksonville Bank, 22 Fla. 501, 1 So. 140, 1 Am. St. Rep. 201.

Georgia.— Vickery *v.* Benson, 26 Ga. 582.

Massachusetts.— But, on the other hand, such circumstances have been considered as not sufficient to require explanation before admitting the instrument in evidence, though the burden was cast on the party producing it to explain the interlineations. Ely *v.* Ely, 6 Gray (Mass.) 439.

New Jersey.— White *v.* Williams, 3 N. J. Eq. 376.

New York.— People *v.* Minck, 21 N. Y. 539.

Pennsylvania.— Zimmerman *v.* Camp, 155 Pa. St. 152, 25 Atl. 1086; Robinson *v.* Myers, 67 Pa. St. 9.

Wisconsin.— Maldaner *v.* Smith, 102 Wis. 30, 78 N. W. 140.

United States.— Cox *v.* Palmer, 1 McCrary (U. S.) 431, 3 Fed. 16.

91. Cox *v.* Palmer, 1 McCrary (U. S.) 431, 3 Fed. 16. See also Boston Block Co. *v.* Buffington, 39 Minn. 385, 40 N. W. 366.

Change in handwriting of grantor.— If the change appears to be in the handwriting of the grantor the presumption is that it was made before, or concurrently with, the acknowledgment of the instrument, and if there is any evidence tending to repel this presumption the question of fact must be determined by the jury. Webb *v.* Mullins, 78 Ala. 111; Sharpe *v.* Orme, 61 Ala. 263, such change curing defect in description of land.

92. *Connecticut.*— Bailey *v.* Taylor, 11 Conn. 531, 29 Am. Dec. 321.

Mississippi.— Wilson *v.* Henderson, 9 Sm. & M. (Miss.) 375, 48 Am. Dec. 716, wherein it is said that even assuming that the law presumes an alteration appearing on the face of a note to have been made after delivery, such presumption must be very much weakened, if not destroyed, when the alteration operates prejudicially to the holder.

New Jersey.— Den *v.* Farlee, 21 N. J. L. 279.

North Carolina.— Pullen *v.* Shaw, 14 N. C. 213.

Pennsylvania.— Zimmerman *v.* Camp, 155 Pa. St. 152, 25 Atl. 1086.

the wants of a particular occasion it will not be sufficient to engender that suspicion which requires a preliminary explanation.[93]

X. QUESTIONS OF LAW AND FACT.

The materiality of a particular change in an instrument is a question of law, to be decided by the court, and it is error to leave it to be found by the jury, but (aside from the phase of the subject noted in connection with the presumptions and burden of proof attending apparent alterations)[94] whether, under the evidence adduced, an instrument has been altered raises an issue of fact to be determined as such by the jury.[95] For example, it is reversible error to instruct the jury to

93. *Alabama.*—Tyree *v.* Rives, 57 Ala. 173.
California.— Corcoran *v.* Doll, 32 Cal. 82.
District of Columbia.— Portsmouth Sav. Bank *v.* Wilson, 5 App. Cas. (D. C.) 8.
Louisiana.— State *v.* Boisseau, 1 Rob. (La.) 388.
New Hampshire.— The filling of a blank in a deed which appears to have been originally left in the description of land conveyed, and to have been subsequently filled, will be presumed, in the absence of other proof, to have been made before the execution of the deed when otherwise the deed would have been imperfect. Dow *v.* Jewell, 18 N. H. 340, 45 Am. Dec. 371.
Pennsylvania.— Where the insertion of a crowded line, containing an exception of certain land from the conveyance in a deed, is in a different handwriting from the body of the deed, but in the same handwriting as the covenant of warranty, which had been left open until the execution and delivery of the deed, this was held *prima facie* sufficient to repel any presumption of subsequent alteration. Heffelfinger *v.* Shutz, 16 Serg. & R. (Pa.) 44.
Wisconsin.— Williams *v.* Starr, 5 Wis. 534.

94. See *supra*, IX, A, 3, b, (II), (H).

95. *Alabama.*— Payne *v.* Long, 121 Ala. 385, 25 So. 780; Capehart *v.* Granite Mills, 97 Ala. 353, 12 So. 44; Mackay *v.* Dodge, 5 Ala. 388.
Arkansas.— Overton *v.* Matthews, 35 Ark. 146, 37 Am. Rep. 9.
California.— Sill *v.* Reese, 47 Cal. 294.
Colorado.—Miller *v.* Williams, (Colo. 1899) 59 Pac. 740; Huston *v.* Plato, 3 Colo. 402; Schmidt *v.* Stecker, 3 Colo. 273.
Georgia.—Winkles *v.* Guenther, 98 Ga. 472, 25 S. E. 527. But in Reinhardt *v.* Miller, 22 Ga. 402, 68 Am. Dec. 506, it was held that, where an instrument was offered in evidence to prove a fact in a case, whether or not it had been altered in a material part should be referred to the jury.
Illinois.— Milliken *v.* Marlin, 66 Ill. 13; Schwarz *v.* Herrenkind, 26 Ill. 208.
Indiana.— Cochran *v.* Nebeker, 48 Ind. 459. But *compare* State *v.* Bodly, 7 Blackf. (Ind.) 355, where it is broadly stated that, where the issue raised by the pleadings was whether an instrument had been altered so as to destroy its identity, it should be submitted to the jury.
Iowa.—Benton County Sav. Bank *v.* Strand, 106 Iowa 606, 76 N. W. 1001; Ault *v.* Fleming, 7 Iowa 143.
Maine.— Martin *v.* Tuttle, 80 Me. 310, 14 Atl. 207; Belfast Nat. Bank *v.* Harriman, 68 Me. 522.
Mississippi.—Hill *v.* Calvin, 4 How. (Miss.) 231; Love *v.* Shoape, Walk. (Miss.) 508. From Moye *v.* Herndon, 30 Miss. 110, it might be inferred that the court considered the question of materiality one that was proper to be submitted to the jury, but it is apprehended that the decision did not intend to go to this extent, being confined to another phase of the instruction involved.
Missouri.— State *v.* Chick, 146 Mo. 645, 48 S. W. 829; State *v.* Dean, 40 Mo. 464; Fowles *v.* Bebee, 59 Mo. App. 401.
Nebraska.— Fisherdick *v.* Hutton, 44 Nebr. 122, 62 N. W. 488; Palmer *v.* Largent, 5 Nebr. 223, 25 Am. Rep. 479.
New Hampshire.— Burnham *v.* Ayer, 35 N. H. 351; Bowers *v.* Jewell, 2 N. H. 543.
New Jersey.—Jones *v.* Crowley, 57 N. J. L. 222, 30 Atl. 871; Richman *v.* Richman, 10 N. J. L. 114.
Oklahoma.— Richardson *v.* Fellmer, 9 Okla. 513, 60 Pac. 270.
Pennsylvania.— Farmers Mut. F. Ins. Co. *v.* Bair, 82 Pa. St. 33; Foster *v.* McGraw, 64 Pa. St. 464; Stephens *v.* Graham, 7 Serg. & R. (Pa.) 505, 10 Am. Dec. 485.
South Carolina.—Kinard *v.* Glenn, 29 S. C. 590, 8 S. E. 203; Commissioners of Poor *v.* Hanion, 1 Nott & M. (S. C.) 554.
Texas.— Randall *v.* Smith, 2 Tex. Unrep. Cas. 397.
Vermont.— Bliss *v.* McIntyre, 18 Vt. 466, 46 Am. Dec. 165; Davis *v.* Fuller, 12 Vt. 178, 36 Am. Dec. 334.
Virginia.— Keen *v.* Monroe, 75 Va. 424; Newell *v.* Mayberry, 3 Leigh (Va.) 250, 23 Am. Dec. 261.
West Virginia.— Connor *v.* Fleshman, 4 W. Va. 693.
United States.— Wood *v.* Steele, 6 Wall. (U. S.) 80, 18 L. ed. 725; Steele *v.* Spencer, 1 Pet. (U. S.) 552, 7 L. ed. 259.
England.— Vance *v.* Lowther, 1 Ex. D. 176; Suffell *v.* Bank of England, 7. Q. B. D. 270.
See 2 Cent. Dig. tit. "Alteration of Instruments," § 264 *et seq.*
By court when trial without jury.— See Huston *v.* Plato, 3 Colo. 402; Lowman *v.* Aubery, 72 Ill. 619; Richmond Mfg. Co. *v.* Davis, 7 Blackf. (Ind.) 412; Cass County Bank *v.* Morrison, 17 Nebr. 341, 22 N. W. 782, 52 Am. Rep. 417; White *v.* Williams, 3 N. J. Eq. 376.

find whether a particular change is material, or to find against the validity of an instrument, if they find that it has been materially altered.[96] But, on the other hand, it is a question of fact, to be determined by the jury, whether a particular change was made before or after execution,[97] by whom the change was made,[98] whether the change was made with or without the consent of the parties,[99] and the intent with which it was made.[100] While these issues of fact remain undisposed of it is error to render judgment on the pleadings,[101] and the finding upon them is ordinarily conclusive, as any other finding of fact, and will not be disturbed on the mere weight of the evidence.[102] If

96. *Alabama.*— Payne *v.* Long, 121 Ala. 385, 25 So. 780.
Mississippi.— Hill *v.* Calvin, 4 How. (Miss.) 231.
Pennsylvania.— Stephens *v.* Graham, 7 Serg. & R. (Pa.) 505, 10 Am. Dec. 485.
Texas.— Randall *v.* Smith, 2 Tex. Unrep. Cas. 397.
Virginia.— Keen *v.* Monroe, 75 Va. 424.

97. *Colorado.*—Chapman *v.* Sargent, 6 Colo. App. 438, 40 Pac. 849.
Georgia.—Winkles *v.* Guenther, 98 Ga. 472, 25 S. E. 527.
Iowa.— Berryman *v.* Manker, 56 Iowa 150, 9 N. W. 103.
Louisiana.— Pipes *v.* Hardesty, 9 La. Ann. 152, 61 Am. Dec. 202.
Massachusetts.— Norwood *v.* Fairservice, Quincy (Mass.) 189.
Mississippi.— Wilson *v.* Henderson, 9 Sm. & M. (Miss.) 375, 48 Am. Dec. 716.
Missouri.— Beach *v.* Heck, 54 Mo. App. 599.
Nebraska.— Lamb *v.* Briggs, 22 Nebr. 138, 34 N. W. 217.
New York.— Mosher *v.* Davis, 41 N. Y. App. Div. 622, 58 N. Y. Suppl. 529; Acker *v.* Ledyard, 8 Barb. (N. Y.) 514; Tuthill *v.* Hussey, 7 N. Y. Suppl. 547, 27 N. Y. St. 362.
Upon an agreed case which does not state that the alteration was made after the execution of the bond, the court cannot assume that such was the fact in pronouncing the conclusion of law upon the fact. Ramsey *v.* McCue, 21 Gratt. (Va.) 349.

98. *Illinois.*— Milliken *v.* Marlin, 66 Ill. 13; De Long *v.* Soucie, 45 Ill. App. 234.
Minnesota.— Wilson *v.* Hayes, 40 Minn. 531, 42 N. W. 467, 12 Am. St. Rep. 754, 4 L. R. A. 196.
New York.— Artisans' Bank *v.* Backus, 31 How. Pr. (N. Y.) 242.
Pennsylvania.— Martin *v.* Kline, 157 Pa. St. 473, 27 Atl. 753, 33 Wkly. Notes Cas. (Pa.) 323.
Virginia.— Ramsey *v.* McCue, 21 Gratt. (Va.) 349.
England.— Whitfield *v.* Collingwood, 1 C. & K. 325, 47 E. C. L. 325.

99. *Connecticut.*— Bailey *v.* Taylor, 11 Conn. 531, 29 Am. Dec. 321.
Illinois.— De Long *v.* Soucie, 45 Ill. App. 234.
Indiana.— Cornell *v.* Nebeker, 48 Ind. 463; Cochran *v.* Nebeker, 48 Ind. 459; Richmond Mfg. Co. *v.* Davis, 7 Blackf. (Ind.) 412.
Maine.— Belfast Nat. Bank *v.* Harriman, 68 Me. 522; Chadwick *v.* Eastman, 53 Me. 12.
Mississippi.— Wilson *v.* Henderson, 9 Sm. & M. (Miss.) 375, 48 Am. Dec. 716.
Missouri.— Briggs *v.* Glenn, 7 Mo. 572.
Pennsylvania.— Wilson *v.* Jamieson, 7 Pa. St. 126.
South Carolina.— Jacobs *v.* Gilreath, 45 S. C. 46, 22 S. E. 757.
Virginia.— Keen *v.* Monroe, 75 Va. 424.
Wisconsin.— North *v.* Henneberry, 44 Wis. 306.
England.— Whitfield *v.* Collingwood, 1 C. & K. 325, 47 E. C. L. 325.
Whether particular facts constitute ratification is held to be a question for the court. Dickson *v.* Bamberger, 107 Ala. 293, 18 So. 290.

100. *Colorado.*— Huston *v.* Plato, 3 Colo. 402.
Georgia.— Winkles *v.* Guenther, 98 Ga. 472, 25 S. E. 527; Printup *v.* Mitchell, 17 Ga. 558, 63 Am. Dec. 258. But in Pritchard *v.* Smith, 77 Ga. 463, it was held that where there was no controversy as to the alteration, the materiality of the alteration, as well as the intent with which it was done, becomes a question of law, to be decided by the court.
Illinois.— Wallace *v.* Wallace, 8 Ill. App. 69.
Maine.— Belfast Nat. Bank *v.* Harriman, 68 Me. 522.
Minnesota.— Wilson *v.* Hayes, 40 Minn. 531, 52 N. W. 467, 12 Am. St. Rep. 754, 4 L. R. A. 196.
New Hampshire.— Cole *v.* Hills, 44 N. H. 227.
New York.— Where a note was corrected by the maker, and without the assent of the indorser, by inserting omitted matter in that part indicating the amount of it, the question as to the amount intended to be inserted by the parties is for the jury. Boyd *v.* Brotherson, 10 Wend. (N. Y.) 93.
England.— Whether a note was originally dated by mistake is a question of fact for the jury. Brutt *v.* Picard, R. & M. 37, 21 E. C. L. 698.

101. Black *v.* De Camp, 75 Iowa 105, 39 N. W. 215.

102. *Arkansas.*— Andrews *v.* Calloway, 50 Ark. 358, 7 S. W. 449, holding that where a jury and subsequently a chancellor found that an interlineation in a note was not made by the custodian thereof, who was *prima facie* responsible for such change, the appellate court would not disturb the judgment.
Colorado.—Miller *v.* Williams, (Colo. 1899) 59 Pac. 740.
Massachusetts.— Where the form and appearance of a note are not material except as

the change is immaterial the issue of fact should not be submitted to the jury at all.[103]

ALTERATIONS OF RECORDS. See RECORDS.

ALTERFOITS. At another time; formerly.[1]

ALTERNAT. A usage among diplomats, by which the rank and places of different powers, who have the same rights and pretentions to precedence, are changed from time to time, either in a regular order or one determined by lot.[2]

ALTERNATIM. Interchangeably.[3]

ALTERNATIVA PETITIO NON EST AUDIENDA. A maxim meaning "An alternative petition is not to be heard."[4]

ALTERNATIVE. A privilege of choosing one of two things or courses; either of two objects offered to one's choice.[5] (Alternative: Judgment, see EQUITY; JUDGMENTS; REPLEVIN. Pleading, see PLEADING. Writ, see MANDAMUS; PROHIBITION.)

ALTHOUGH. A word implying a doubt; a concession of something not positively determined,[6] and equivalent to the words "even if."[7]

ALTO ET BASSO. Literally, "high and low." An absolute submission of all differences.[8]

ALTRE. Another; other.[9]

ALTUM MARE. The high sea.[10]

ALWAYS. In all cases.[11]

A. M. An abbreviation of the words *ante meridiem*, signifying "forenoon."[12]

AMALGAMATION. In England, the merger of two incorporated societies or companies; consolidation.[13] (See, generally, CORPORATIONS.)

AMALPHITAN CODE. A collection of sea laws, compiled about the end of the eleventh century by the people of Amalphi, consisting of the laws on maritime subjects which were or had been in force in countries bordering on the Mediterranean, and which for a long time was received as authority in those countries.[14]

bearing upon the questions of fact of the negotiation and knowledge of plaintiff, both of these questions are concluded by the decision of the court below in plaintiff's favor. Whitmore *v.* Nickerson, 125 Mass. 496, 28 Am. Rep. 257.

Missouri.— Holton *v.* Kemp, 81 Mo. 661.

Nebraska.— Holland *v.* Griffith, 13 Nebr. 472, 14 N. W. 387.

New York.— Tuthill *v.* Hussey, 7 N. Y. Suppl. 547, 27 N. Y. St. 362.

North Carolina.— Howell *v.* Cloman, 117 N. C. 77, 23 S. E. 95; Evans *v.* Williamson, 79 N. C. 86.

Pennsylvania.— Hudson *v.* Reel, 5 Pa. St. 279.

103. Palmer *v.* Largent, 5 Nebr. 223, 25 Am. Rep. 479.

1. Burrill L. Dict. [*citing* Y. B. 8 Edw. III, 20.]

2. Wharton L. Lex.

In the preparation of treaties the principle of the *alternat* is resorted to and the representative of each state signs, first, the copy intended for his own government, the order of the remaining signatures being determined by lot or alphabetically. Davis Int. L. 234.

3. Adams Gloss.

4. Wharton L. Lex.

5. Abbott L. Dict.

Alternative obligations are those which allow the obligor to choose which of two things he will do, the performance of either of which will satisfy the instrument in question. Black L. Dict.

6. Hogan *v.* State, 36 Wis. 226, 244.

7. Burnstein *v.* Cass Ave., etc., R. Co., 56 Mo. App. 45, 54.

8. Wharton L. Lex.

9. Burrill L. Dict. [*citing* Y. B. 9 Edw. III, 53].

10. Adams Gloss.

Used in the expression, "And yet *altum mare* is out of the jurisdiction of the common law," in Coke Litt. 260*b*.

11. Gyger's Estate, 65 Pa. St. 311, 313.

Not equivalent to "forever."— "While the statute declares that the judgment shall be a lien on the real estate of the debtor, and that this lien may 'always' be enforced in a court of equity, it was certainly never intended that the lien should exist independent of the judgment, nor that the word 'always' should be taken as equivalent to 'forever.'" Werdenbaugh *v.* Reid, 20 W. Va. 588, 596.

12. Hedderich *v.* State, 101 Ind. 564, 51 Am. Rep. 768.

13. Abbott L. Dict.

14. Wharton L. Lex.

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I. DEFINITIONS.

A. Ambassadors. An ambassador is a public minister of the highest rank, sent abroad by a sovereign state or prince, with a legal commission and authority to transact business on behalf of his country with the government to which he is sent.[1]

1. Bouvier L. Dict.
For further definitions see Abbott L. Dict.; 5 Jacob Inst. 153; Century Dict.
The division of ambassadors into grades is a question of diplomatic etiquette and precedence, and does not deal with their essential powers and privileges. Four classes were established by the great powers at the Congress of Vienna (1815) and the Congress of Aix la Chapelle (1818): (1) Ambassadors, papal legates, or nuncios. (2) Envoys, ministers, and other agents accredited to sovereigns. (3) Ministers resident, accredited to sovereigns. (4) *Chargés d'affaires*, accredited to the department of foreign relations. 1 Kent Comm. 39; Wheaton Int. L. (3d Eng. ed.) 317; Glenn Int. L. 106.
Before the enactment of 27 U. S. Stat. at L. c. 230. U. S. Rev. Stat. Suppl. (1899), p. 94, c. 230, the United States had no repre-

B. Consuls. A consul is a commercial agent appointed by a government to reside in a foreign country, and permitted by the government of the latter country so to do, to watch over the commercial rights and privileges of the nation deputing him, and to protect the interests of its subjects.[2]

II. APPOINTMENT.[3]

A. By Whom Made — 1. In General. The president is authorized to nominate, and, by and with the advice and consent of the senate, to appoint ambassadors, other public ministers, and consuls.[4]

2. Vice-Consuls — a. In General. Congress has power to vest in the president the authority to appoint vice-consuls.[5]

sentative of as high diplomatic rank as ambassador, but by that act the president was authorized to designate as ambassadors the representatives of the United States to those countries which were represented in the United States by ambassadors.

Ambassadors have been further styled "extraordinary" when their missions are special or their stay near the court to which they are accredited is indeterminate, as distinguished from ordinary ambassadors, whose missions are permanent. Bouvier L. Dict. [*citing* Vattel L. Nat. bk. I, c. 6, § 71].

2. Hall Int. L. 330; Abbott L. Dict.; Bouvier L. Dict.

A consul is distinguished from a minister or other diplomatic agent. Seidel *v.* Peschkaw, 27 N. J. L. 427; State *v.* De la Foret, 2 Nott & M. (S. C.) 217; The Anne, 3 Wheat. (U. S.) 435, 4 L. ed. 428, in which case it is said: "A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes." See *infra*, IX, A.

Classification of consuls.— The consular service of the United States consists of consuls-general, vice-consuls-general, deputy consuls-general, consuls, vice-consuls, deputy consuls, commercial agents, vice-commercial agents, consular agents, consular clerks, interpreters, marshals, and clerks at consulates. U. S. Cons. Reg. (1896), art. 1, § 1.

Principal consular officers.— Consuls-general, consuls and commercial agents are principal consular officers, as distinguished from subordinates or substitutes. U. S. Rev. Stat. (1878), § 1674; U. S. Cons. Reg. (1896), art. 1, § 1. It seems that a consul and a commercial agent are invested with the same powers and duties, and that the office of each is substantially the same, the name being determined by the relative importance of the post. Schunior *v.* Russell, 83 Tex. 83, 18 S. W. 484. Commercial agents in the consular service of the United States are to be distinguished, however, from certain officers described in international law by the same title, who are not usually regarded by other powers as entitled to the full rank and privileges of a consular officer. U. S. Cons. Reg. (1896), art. 1, § 16.

Subordinate consular officers.— Consular agents are consular officers subordinate to their principals, exercising the powers and performing the duties within the limits of their agencies, but at different places from those at which their principals are located, and they act only as representatives of the principal. U. S. Rev. Stat. (1878), § 1674; U. S. Cons. Reg. (1896), art. 1, § 20. See also Gould *v.* Staples, 9 Fed. 159.

Vice-consuls or vice-commercial agents, when in charge, are acting consuls or commercial agents for the time being, and are principal consular officers. U. S. Rev. Stat. (1878), § 1674; *In re* Herres, 33 Fed. 165.

The term "consul" is ordinarily used in a specific sense, to denote a particular grade in the consular service; but it is also sometimes used in a general sense, to embrace all consular officers. Dainese *v.* U. S., 15 Ct. Cl. 64.

3. See 2 Cent. Dig. tit. "Ambassadors and Consuls," § 1 *et seq.*

4. U. S. Const. art. 2, § 2.

No limitation can be placed by the legislative department upon the exercise of this power. Foote *v.* U. S., 23 Ct. Cl. 443; Byers *v.* U. S., 22 Ct. Cl. 59; 7 Op. Atty.-Gen. (U. S.) 186. See also U. S. *v.* Maurice, 2 Brock. (U. S.) 96, 26 Fed. Cas. No. 15,747.

To authorize the appointment of a consul it is not necessary that there should have been statutory provision for establishing the office. Mahoney *v.* U. S., 10 Wall. (U. S.) 62, 19 L. ed. 864 [*affirming* 3 Ct. Cl. 152]. So it has been held that the president had power to appoint a consul for any place for which a salary for a consul was appropriated by congress, even though such place had previously been a consular agency merely. Sampson *v.* U. S., 30 Ct. Cl. 365.

A retiring minister cannot instal a consul in the legation and authorize him to perform diplomatic functions. Otterbourg *v.* U. S., 5 Ct. Cl. 430.

5. U. S. *v.* Eaton, 169 U. S. 331, 18 S. Ct. 374, 42 L. ed. 767.

Thus U. S. Rev. Stat. (1878), §§ 1073, 1695, giving the president authority to fix the compensation of a vice-consul, to be paid out of the allowance made by law for the principal officer whose place he fills, has been held to vest power in the president to appoint a vice-consul. U. S. *v.* Eaton, 169 U. S. 331, 18 S. Ct. 374, 42 L. ed. 767.

Before the consular service act of 1856 [11 U. S. Stat. at L. p. 52], a vice-consul could not be appointed legally without the advice and consent of the senate, and one whose appointment was not so made could not be regarded as having been the lawful incumbent, though recognized as such by the department of state. Dainese *v.* U. S., 15 Ct. Cl. 64.

b. In Cases of Emergency. Where an emergency arises necessitating the appointment of some one to perform temporarily the duties of the consulate, the diplomatic representative may make such appointment, with the consent of the foreign government, but where there are consuls-general, to whom the nominations of subordinate officers are required to be submitted for approval, the authority to make such appointments is lodged in them.[6]

B. Of Foreigners — 1. As Diplomatic Agents. A citizen of the country of reception is not generally acceptable as the permanent diplomatic representative of a foreign power.[7]

2. As Consuls. Consular office may be given to a citizen of the country in which the office is to be exercised.[8]

III. Qualification.[9]

A. Bond of Consular Appointee. Every consul-general, consul, and commercial agent, before he receives his commission or enters upon the duties of his office, is required to give a bond to the government in a penal sum which is in no case to be less than the compensation allowed such officer.[10] This bond goes into effect at the time when the secretary of state approves it.[11]

B. Oath of Diplomatic Appointee. The taking of the oath required of a diplomatic appointee by statute is a condition precedent to complete investiture in the office.[12]

IV. Commencement of Mission or Office.

A. Issuance and Recognition of Letters of Credence. The mission of the ambassador begins, with reference to the government to which he is accredited, upon the production and recognition of his letters of credence.[13]

6. U. S. Cons. Reg. (1896), art. 7, § 107. In U. S. *v.* Eaton, 169 U. S. 331, 18 S. Ct. 374, 42 L. ed. 767, it was held that under a similar provision [U. S. Cons. Reg. (1888), art. 6, § 87] a minister resident who was also consul-general was authorized, when his health prevented him from discharging the duties of his office, to appoint a vice-consul-general, his inability to perform such duties not depriving him of the power to make such appointment in his capacity as minister.

7. Matter of Baiz, 135 U. S. 403, 10 S. Ct. 854, 34 L. ed. 222; Wharton Dig. Int. L. § 88*a*; 2 Phillimore Int. L. 179.

8. Börs *v.* Preston, 111 U. S. 252, 4 S. Ct. 407, 28 L. ed. 419; Gittings *v.* Crawford, Taney (U. S.) 1, 10 Fed. Cas. No. 5,465. See 8 Op. Atty.-Gen. (U. S.) 169; Hall Int. L. 332.

9. See 2 Cent. Dig. tit. "Ambassadors and Consuls," § 1 *et seq.*

10. U. S. Rev. Stat. (1878), § 1697; Williams *v.* U. S., 23 Ct. Cl. 46; Dainese *v.* U. S., 15 Ct. Cl. 64; 19 Op. Atty.-Gen. (U. S.) 219; 18 Op. Atty.-Gen. (U. S.) 157. In 2 Gould & T. Notes on U. S. Rev. Stat. p. 157, § 1723, it is stated that ambassadors must qualify by taking oath and giving bond [*citing* Williams *v.* U. S., 23 Ct. Cl. 46]. In this case, however, the claimant was appointed both minister resident and consul-general, the statute [U. S. Rev. Stat. (1878), § 1697], as seen above, expressly requiring bond for the latter office, and the decision being, in the main, based on that provision.

Consular agents are not required to give bond. Sampson *v.* U. S., 30 Ct. Cl. 365.

The surety on the bond may be a corporation. 20 Op. Atty.-Gen. (U. S.) 17; 19 Op. Atty.-Gen. (U. S.) 175.

11. 14 Op. Atty.-Gen. (U. S.) 7.

Bondsmen of a consul are liable for money which he gets as overpayments of salary and fails to return to the government. U. S. *v.* Bee, 54 Fed. 112, 7 U. S. App. 459, 4 C. C. A. 219; U. S. *v.* Mitchell, 26 Fed. 607. And the neglect of officers of the government to claim or sue for the excess of salary does not discharge the sureties from liability therefor, even though the neglect has been of sufficiently long duration to be a defense against any but the government. U. S. *v.* Bee, 54 Fed. 112, 7 U. S. App. 459, 4 C. C. A. 219.

In an action on the bond of a consul, the condition of which bond requires him to give up all fees which shall come into his hands, he is not liable for money paid, under the direction of the state department, to a clerk appointed by the president, although the statute does not provide for clerk-hire. U. S. *v.* Owen, 47 Fed. 797. But an agreement by the consul for the services of an interpreter and body-servant at the consulate is the contract of the consul, not of the government. Azogue *v.* U. S., 26 Ct. Cl. 430.

12. Williams *v.* U. S., 23 Ct. Cl. 46.

Oath must be taken before an officer authorized by the laws of the United States to administer oaths. Otterbourg *r.* U. S., 5 Ct. Cl. 430.

Consular agents are not required to take the oath of office. Sampson *v.* U. S., 30 Ct. Cl. 365.

13. **Letters of credence contain** the general

B. Issuance of Exequatur. A consul is recognized, by the government to which he is sent, through the issue of an *exequatur*.[14] The *exequatur* is usually in the form of a letter patent, signed by the sovereign and countersigned by the minister of foreign affairs.[15]

C. Refusal to Receive Ambassador. As a general rule it is not permissible for a state to refuse to receive an ambassador; but, where there are special reasons, it may always decline to receive an agent who is *persona non grata*.[16]

D. Recognition of Diplomatic Tenure. The reception and recognition, by the government, of a person as a foreign minister is conclusive, and the courts cannot question the legality of his credentials.[17]

V. Termination of Mission or Office.

The mission of a diplomatic officer is terminated by his death; by his recall; by his dismissal by the government to which he is accredited; by his departure on his own account upon a cause of complaint stated; by war; by the interruption of amicable relations between the two governments; by the expiration of his letter of credence, if it be given for a specific time; by the fulfilment of the specific object for which he may have been accredited; by change of form of government, through revolution; and, in the case of monarchical countries, by the death of the accrediting sovereign.[18] If a foreign consul is guilty of illegal or improper conduct, his *exequatur* may be revoked and he may be punished, or sent out of the country, at the option of the offended government.[19]

VI. Compensation.[20]

A. In General. The power to provide for the compensation of ambassadors and consuls is, by the constitution of the United States, vested in the legislative branch of the government.[21]

purport of the mission, the name and class of the agent, and request that faith be given representations made by him in behalf of his government. According to modern custom, the "full power" to negotiate is embodied in a separate instrument. Hall Int. L. 314; 2 Phillimore Int. L. 256; Glenn Int. L. 108.

14. This is a confirmation of his commission which enables him to perform the duties of his office, and guarantees such rights as he possesses in virtue of it. In the United States it is not usual to grant an *exequatur* to a consular officer of lower grade than vice-consul. Hall Int. L. 332; Glenn Int. L. 117; Wharton Dig. Int. L. § 118.

15. Hall Int. L. 332.

16. 2 Phillimore Int. L. 176; Hall Int. L. 312; Glenn Int. L. 106.

17. D'Azambuja *v.* Pereira, 1 Miles (Pa.) 366; U. S. *v.* Ortega, 4 Wash. (U. S.) 531, 27 Fed. Cas. No. 15,971; U. S. *v.* Benner, Baldw. (U. S.) 234, 24 Fed. Cas. No. 14,568.

The best evidence to prove the diplomatic character of a person, accredited as minister to the United States, is a certificate of the secretary of state. U. S. *v.* Liddle, 2 Wash. (U. S.) 205, 26 Fed. Cas. No. 15,598; U. S. *v.* Benner, Baldw. (U. S.) 234, 24 Fed. Cas. No. 14,568; Matter of Baiz, 135 U. S. 403, 10 S. Ct. 854, 34 L. ed. 222, 231, in which case the court said: "While we have not cared to dispose of this case upon the mere absence of technical evidence, we do not assume to sit in judgment upon the decision of the executive in reference to the public character of a person claiming to be a foreign minister; and therefore have the right to accept the certificate of the State Department that a party is or is not a privileged person, and cannot properly be asked to proceed upon argumentative or collateral proof."

Parol evidence is admissible to show the period during which a person was considered a minister by the government to which he is accredited. U. S. *v.* Liddle, 2 Wash. (U. S.) 205, 26 Fed. Cas. No. 15,598.

18. Hall Int. L. 317; Calvo Int. L. § 1363; Glenn Int. L. 109. As to the effect of a change of authority in the accrediting government on the status of its diplomatic agents see Wharton Dig. Int. L. § 87; D'Azambuja *v.* Pereira, 1 Miles (Pa.) 366; 7 Op. Atty.-Gen. (U. S.) 582; 2 Op. Atty.-Gen. (U. S.) 290.

Change of possession of country.— Where the province to which a consul is assigned changes from the possession of a non-Christian power to the possession of a Christian power, the statute so assigning him, and fixing his duties and compensation, becomes of no effect. Mahoney *v.* U. S., 10 Wall. (U. S.) 62, 19 L. ed. 864.

19. Hall *v.* Coppell, 7 Wall. (U. S.) 542, 19 L. ed. 244; 2 Op. Atty.-Gen. (U. S.) 725.

20. See 2 Cent. Dig. tit. "Ambassadors and Consuls." § 3 *et seq.*

21. 7 Op. Atty.-Gen. (U. S.) 186; Foote *v.* U. S., 23 Ct. Cl. 443; Byers *v.* U. S., 22 Ct. Cl. 59.

B. Of Ambassadors. Neither the president nor the secretary of state can restrict the compensation of a diplomatic officer, by the terms of his appointment, to less than the salary established by law for the office.[22] The salary must be paid in money of the United States, or its actual market equivalent.[23]

C. Of Consuls.[24] The transfer of the consulate, by congress, to a class having a lower salary attached is a change of the previously existing law, and the incumbent is entitled thereafter to the lower salary only.[25] Where the statute imposes upon the consul judicial duties, he cannot claim additional compensation therefor,[26] and he cannot receive the pay provided by law for a *chargé d'affaires*, even though he performs the duties of such office, unless he was expressly authorized by the president to exercise diplomatic functions.[27]

D. Of Vice-Consuls. Vice-consular officers, acting during the absence of their superiors or during a vacancy in the office, are compensated from the salary of the office.[28] To entitle a vice-consul to compensation his appointment

No diplomatic or consular officer shall be entitled to compensation for his services, except from the time when he reaches his post and enters upon his official duties to the time when he ceases to hold such office, and for such time as is actually and necessarily occupied in receiving his instructions, not to exceed thirty days, and in making the direct transit between the place of residence, when appointed, and his post of duty, at the commencement and termination of the period of his official service, for which he shall in all cases be allowed and paid, except as otherwise provided by statute. U. S. Rev. Stat. (1878), § 1740; U. S. *v.* Bee, 54 Fed. 112, 7 U. S. App. 459, 4 C. C. A. 219. The pay allowed for the time occupied in returning home from his post only applies to those cases where the journey is actually performed by the officer. 9 Op. Atty.-Gen. (U. S.) 261. Nor is it granted where the officer resigns on account of malfeasance in office, or is recalled therefor. U. S. Rev. Stat. (1878), § 1740; 9 Op. Atty.-Gen. (U. S.) 89.

22. Foote *v.* U. S., 23 Ct. Cl. 443.

The salary fixed by law at the time of the representative's appointment is the amount he is entitled to receive, although previous legislation may have provided for a larger salary. Wallace *v.* U. S., 133 U. S. 180, 10 S. Ct. 251, 33 L. ed. 571; Francis *v.* U. S., 22 Ct. Cl. 403. But a statute fixing, without limitation as to time, the annual salary of a diplomatic representative should not be deemed abrogated or suspended by subsequent acts appropriating a less amount for such salary for specific years, and containing no words repealing, expressly or by implication, the statute. U. S. *v.* Langston, 118 U. S. 389, 6 S. Ct. 1185, 30 L. ed. 164. See also Foote *v.* U. S., 23 Ct. Cl. 443, 444, in which case it was held that an envoy extraordinary to Corea is entitled to receive the salary which had been previously established by statute for diplomatic officers of that grade, even though, before he was appointed, an appropriation of a smaller amount was made to enable the president "to extend diplomatic relations with the governments of Eastern Asia."

23. Clay *v.* U. S., 8 Ct. Cl. 209.

24. Bond required by law is a condition precedent to the consul's right to receive salary. Williams *v.* U. S., 23 Ct. Cl. 46; Dainese *v.* U. S., 15 Ct. Cl. 64. See also *supra*, III, A.

The incumbent of a consulate created by congress under a treaty is entitled to his salary, without regard to any diplomatic question as to the construction or validity of the treaty. Dainese *v.* U. S., 15 Ct. Cl. 64.

Salary appropriated for a consul in a non-Christian country ceases when the country becomes a possession of a Christian power, no further appropriation being made for the salary. Mahoney *v.* U. S., 10 Wall. (U. S.) 62, 19 L. ed. 864.

Suit to recover consular salary may be brought by the claimant in the court of claims. Dainese *v.* U. S., 15 Ct. Cl. 64.

25. Mathews *v.* U. S., 123 U. S. 182, 8 S. Ct. 80, 31 L. ed. 127 [*affirming* 22 Ct. Cl. 330]; Byers *v.* U. S., 22 Ct. Cl. 59; Sawyer *v.* U. S., 22 Ct. Cl. 326, in which case it was held that where congress, after omitting to make an appropriation for a consular post for a number of years, during which period no consul was appointed, appropriates therefor a smaller salary than the position had previously carried, an appointment made thereafter to such post will be deemed to be at the reduced salary.

26. Dainese *v.* U. S., 15 Ct. Cl. 64.

27. Otterbourg *v.* U. S., 5 Ct. Cl. 430.

Before the passage of 11 U. S. Stat. at L. p. 139, it was held that a party, acting and treated by his government as their *chargé d'affaires* in a foreign country, during the absence of the minister, may recover the value of his services, although he received no specific appointment from the government; and the opinion of the secretary of state as to the value of such services is to be received as that of an expert. Savage *v.* U. S., 1 Ct. Cl. 170.

28. Boyd *v.* U. S., 31 Ct. Cl. 158; 12 Op. Atty.-Gen. (U. S.) 410; 7 Op. Atty.-Gen. (U. S.) 714; 2 Op. Atty.-Gen. (U. S.) 521. So it has been held that where a vice-consul performs the duties of minister resident and consul-general, which are filled by one person, in the absence of the incumbent, he is entitled to be paid at the rate of compensation allowed the two offices, where the salary is not apportioned between them. U. S. *v.*

must have been legally made, and he must have given the bond required by law.[29]

VII. PRIVILEGES AND IMMUNITIES.[30]

A. Of Ambassadors—1. General Statement of Rule. Diplomatic agents are absolutely exempt from allegiance to the state to which they are accredited; they are not subject to its laws, and their persons are inviolable.[31] These privileges and immunities of an ambassador do not expire with the cessation of his

Eaton, 169 U. S. 331, 18 S. Ct. 374, 42 L. ed. 767.

Double payment of salary.— Where a vice-consul in charge of a consulate has drawn salary for a period for which the consul whom he replaced has already been paid, the government may, in a suit on his bond, recover the amount so paid him. U. S. *v.* Mitchell, 26 Fed. 607.

29. Dainese *v.* U. S., 15 Ct. Cl. 64. But *compare* U. S. *v.* Eaton, 169 U. S. 331, 18 S. Ct. 374, 42 L. ed. 767; Boyd *v.* U. S., 31 Ct. Cl. 158, to the effect that compensation of a vice-consular officer, acting during the consul's absence, begins with such absence, and not upon the approval of his bond.

30. See 2 Cent. Dig. tit. "Ambassadors and Consuls," § 6 *et seq.*

31. Hall Int. L. c. 4; 1 Kent Comm. 38 *et seq.*; Holbrook *v.* Henderson, 4 Sandf. (N. Y.) 619; Magdalena Steam Nav. Co. *v.* Martin, 2 E. & E. 94, 105 E. C. L. 94, 28 L. J. Q. B. 310, 5 Jur. N. S. 1260, 7 Wkly. Rep. 598; The Charkieh, L. R. 4 A. & E. 59. See also Grotius, bk. II, c. 18; Wicquefort, bk. I, § 27; Vattel L. Nat. bk. IV, c. 7.

"Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or, by a political fiction, suppose him to be extraterritorial, and, therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of extraterritoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it. This consent is not expressed. It is true that in some countries, and in this among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess. The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and therefore, a consent to receive him implies a consent that he shall possess those privileges which his principal intended he should retain — privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform." Marshall, C. J., in The Schooner Exchange *v.* McFaddon, 7 Cranch (U. S.) 116, 138, 3 L. ed. 287, 294.

Statutory enactments.— These immunities have been declared by statute both in England and in the United States. 7 Anne, c. 12; U. S. Rev. Stat. (1878), §§ 4062–4065. The statutes confer no other privileges than, and are merely declaratory of, those secured by the law of nations, and were intended to provide a punishment for their infringement. Holbrook *v.* Henderson, 4 Sandf. (N. Y.) 619; Matter of Baiz, 135 U. S. 403, 10 S. Ct. 854, 34 L. ed. 222; The Schooner Exchange *v.* McFaddon, 7 Cranch (U. S.) 116, 3 L. ed. 287; Magdalena Steam Nav. Co. *v.* Martin, 2 E. & E. 94, 105 E. C. L. 94, 28 L. J. Q. B. 310, 5 Jur. N. S. 1260, 7 Wkly. Rep. 598; Heathfield *v.* Chilton, 4 Burr. 2015; Triquet *v.* Bath, 3 Burr. 1478; Novello *v.* Toogood, 1 B. & C. 554, 8 E. C. L. 234.

Ambassador of unrecognized government.— An ambassador whose government is not recognized by the government to which he is accredited is not extended the privileges of an ambassador. U. S. *v.* Skinner, Brunn. Col. Cas. (U. S.) 446, 27 Fed. Cas. No. 16,309.

Ambassador passing through intermediate state.— An ambassador from one sovereign state to another, while traveling through the territories of a state to which he is not accredited, in the execution of the duties of his mission, is privileged from arrest on civil process. Wilson *v.* Blanco, 56 N. Y. Super. Ct. 582, 4 N. Y. Suppl. 714, 23 N. Y. St. 629; Holbrook *v.* Henderson, 4 Sandf. (N. Y.) 619, wherein it was held that, in the United States, a foreign ambassador is not required to have a passport nor to have otherwise obtained express permission to secure him safe-conduct, unless in time of war. Sir Robert Phillimore thus sums up the right of an ambassador passing through a third country: "1. That, in time of peace, the ambassador is of right inviolable in his transit through a third country; but cannot claim the privileges of extraterritoriality as a matter of tacit compact, though they would probably be accorded to him by the courts of all nations. 2. That, in time of war, he cannot be secure from imprisonment without a previously obtained permission to pass through the territory: but that his life can in no case be taken, unless, indeed, he actually exercises hostilities in the

functions, but he retains them until he returns to his principal;[32] and while a foreign minister cannot, by an act of his own, waive the privileges and immunities which are attached to his office,[33] a prior assault by him deprives him of his privilege, and will excuse a battery committed on him in self-defense, but will not justify an arrest on process.[34] An ambassador does not forfeit his privileges by engaging in trade.[35]

2. CIVIL LIABILITY. Local jurisdiction cannot be exercised in such manner as to interfere in the remotest degree with the ambassador's freedom of diplomatic action, or with the property belonging to him as representative of his sovereign, except that he is subject to such administrative and police regulations as are necessary for the health or the safety of the community.[36]

country through which he passes." 2 Phillimore Int. L. 217.

32. Dupont *v.* Pichon, 4 Dall. (Pa.) 321; D'Azambuja *v.* Pereira, 1 Miles (Pa.) 366; Vattel L. Nat. bk. IV, c. 9, § 125. *Compare* Marshall *v.* Critico, 9 East 447, 14 Rev. Rep., preface viii note.

This rule is true even though he has announced the termination of his government and received his passports and his successor has been recognized. D'Azambuja *v.* Pereira, 1 Miles (Pa.) 366, in which case it was held that a suit, by a newly-appointed *chargé d'affaires*, to recover the archives and documents from his predecessor, commenced by service on defendant while he was returning to his native country, did not *ipso facto* deprive defendant of the privileges attached to him as a returning diplomatic agent, and that it was not evidence that his sovereign had deprived him of his privileges.

33. Valarino *v.* Thompson, 7 N. Y. 576; U. S. *v.* Benner, Baldw. (U. S.) 234, 24 Fed. Cas. No. 14,568; Barbuit's Case, Cas. t. Talb. 281.

Effect of voluntary appearance.— When a minister enters an appearance in an action against him and allows the action to proceed till issue joined, and gets a rule for a special jury, he will be deemed to have attorned to the jurisdiction of the court by his voluntary appearance; and a stay of proceedings, on the ground of his exemption, will not be granted where neither his person nor his goods have been interfered with. Taylor *v.* Best, 14 C. B. 487, 78 E. C. L. 487, 2 C. L. R. 1717, 23 L. J. C. P. 89, 18 Jur. 402, 2 Wkly. Rep. 259.

The privilege of the servants is the privilege of the ambassador, and not of the servant, and may therefore be waived by the ambassador. Fisher *v.* Begrez, 2 C. & M. 240, 3 Tyrw. 184, 2 Dowl. P. C. 279, 4 Tyrw. 35, 2 L. J. Exch. 13; Taylor *v.* Best, 14 C. B. 487, 78 E. C. L. 487, 2 C. L. R. 1717, 23 L. J. C. P. 89, 18 Jur. 402, 2 Wkly. Rep. 259. See also *infra*, VII, A, 5, b.

34. U. S. *v.* Ortega, 4 Wash. (U. S.) 531, 27 Fed. Cas. No. 15,971; U. S. *v.* Liddle, 2 Wash. (U. S.) 205, 26 Fed. Cas. No. 15,598; U. S. *v.* Benner, Baldw. (U. S.) 234, 24 Fed. Cas. No. 14,568.

35. Taylor *v.* Best, 14 C. B. 487, 78 E. C. L. 487, 2 C. L. R. 1717, 23 L. J. C. P. 89, 18 Jur. 402, 2 Wkly. Rep. 259; Magdalena Steam Nav. Co. *v.* Martin, 2 E. & E. 94, 105 E. C. L. 94, 28 L. J. Q. B. 310, 5 Jur. N. S. 1260, 7 Wkly. Rep. 598. In this last case the decision was that a public minister of a foreign state, accredited to, and received by, the English sovereign, having no real property in England, and having done nothing to disentitle him to the general privileges of a foreign minister, cannot, while he retains this character, be sued, against his will, in England, although the action may arise out of commercial transactions in that country, and although neither his person nor his goods are touched by the suit.

But the application of this rule does not prevent the property embarked by him and accruing to him in his capacity of a tradesman from being subject to seizure, at the instance of creditors, where this can be accomplished without personal service on him, without infringing his dignity as an ambassador and without interference with the proper discharge of his duties. 2 Phillimore Int. L. 222 [*citing* Taylor *v.* Best, 23 L. J. C. P. 89; The Swift, 1 Dods. 320; The Charkieh, L. R. 4 A. & E. 59]; Hall Int. L. 180. Vattel, with whom Wheaton [Int. L. (3d Eng. ed.) 317] seems to agree, admits that property employed in commerce by an ambassador is subject to the local jurisdiction, but to the extent only, it would appear, of the merchandise, cash, debts due to him, and other assets, if any, representing the capital which he actually uses in the business. Vattel L. Nat. bk. IV, c. 8, § 114.

36. Hall Int. L. 180; Glenn Int. L. 70; State *v.* De la Foret, 2 Nott & M. (S. C.) 217; The Schooner Exchange *v.* McFaddon, 7 Cranch (U. S.) 116, 3 L. ed. 287; The Charkieh, L. R. 4 A. & E. 59; Gladstone *v.* Musurus Bey, 1 H. & M. 495, 32 L. J. Ch. 155, 9 Jur. N. S. 71, 7 L. T. Rep. N. S. 477, 11 Wkly. Rep. 180.

The decision in Magdalena Steam Nav. Co. *v.* Martin, 2 E. & E. 94, 113, 105 E. C. L. 94, 113, 28 L. J. Q. B. 310, 5 Jur. N. S. 1260, 7 Wkly. Rep. 598, that a foreign ambassador is exempt from the civil jurisdiction of the courts of the country to which he is accredited, was given with express reference to the contention of counsel that "the action could be prosecuted to that stage, with a view to ascertain the amount of the debt, and to enable the plaintiffs to have execution on the judgment when the defendant may cease to be a public minister."

Injunction against ambassador.— Although the English courts cannot make an order

3. Criminal Liability. Diplomatic agents are not subject to the criminal jurisdiction of the state to which they are credited, nor can they, as a rule, be arrested;[37] and they are exempt, in the United States, from the criminal jurisdiction of the state courts as well as the federal courts.[38]

4. Exemption from Taxation. The person and personalty of an ambassador, and the property belonging to him as a representative of his sovereign, are not subject to taxation; otherwise, no exemption from taxes or duties are accorded him as a matter of right; by courtesy, however, the free entry of goods intended for his private use is generally allowed.[39] A different rule obtains where he has acquired a domicile[40] in the country.[41]

5. Who Protected by — a. Family and Official Household. The privileges and immunities of an ambassador extend to his family,[42] and to the members of his official household.[43]

against an ambassador who does not submit himself to their jurisdiction, yet the court of chancery will grant an *interim* injunction restraining a third party from handing over to him a fund which is in dispute, notwithstanding his title to the fund may be absolute at law. Gladstone *v.* Musurus Bey, 9 Jur. N. S. 71, 7 L. T. Rep. N. S. 477, 1 Hem. & M. 495.

Costs.— A foreign ambassador will not be compelled to give security for costs. De Monteblano *v.* Christin, 5 M. & S. 503, 17 Rev. Rep. 418. See also, generally, Costs.

Statute of limitations.— An action cannot be commenced in England against an ambassador; and, therefore, the statute of limitations does not commence to run in his favor while he is accredited to England, or during such time after his recall as is reasonably occupied by him in winding up the affairs of his embassy and leaving the country. Musurus Bey *v.* Gadban, 63 L. J. Q. B. 621, [1894] 2 Q. B. 352, 71 L. T. Rep. N. S. 51, 42 Wkly. Rep. 545.

37. 2 Phillimore Int. L. 202; Vattel L. Nat. bk. IV, c. 7, §§ 94, 95; Glenn Int. L. p. 68; Wharton Comm. § 167; Woolsey Int. L. 135; Pitt-Cobbett Cas. Int. L. 68.

If the crime affect individuals only, his recall may be demanded, and he may be expelled if his recall be refused. 7 Op. Atty.-Gen. (U. S.) 367; Hall Int. L. 178.

If the crime affect the public safety of the country, its government may, for urgent cause, either seize and hold his person till the danger be passed, or expel him from the country by force. 7 Op. Atty.-Gen. (U. S.) 367; 2 Phillimore Int. L. 204; 1 Kent Comm. 38; Hall Int. L. 178.

38. *Ex p.* Cabrera, 1 Wash. (U. S.) 232, 4 Fed. Cas. No. 2,278.

39. 2 Phillimore Int. L. 239; Hall Int. L. 191; Parkinson *v.* Potter, 55 L. J. Q. B. 153, 16 Q. B. D. 152, 53 L. T. Rep. N. S. 818, 50 J. P. 470.

Exemption from parochial rates.— So it has been held that a British subject, accredited as a member of a foreign embassy, is, in the absence of express stipulation to the contrary by the receiving government, exempt from local jurisdiction, and his furniture cannot be seized for non-payment of parochial rates. Macartney *v.* Garbutt, 24 Q. B. D. 368, 62 L. T. Rep. N. S. 368, 38 Wkly. Rep. 559, 54 J. P. 437.

40. **An ambassador may acquire a domicile** by an expression of intention to that effect, and the purchase of real estate. Heath *v.* Samson, 14 Beav. 441.

41. Atty.-Gen. *v.* Kent, 1 H. & C. 12, 31 L. J. Exch. 391, 6 L. T. Rep. N. S. 864, 10 Wkly. Rep. 722, in which case an ambassador's estate was held liable for a legacy duty.

42. Glenn Int. L. 71; Hall Int. L. 184; 2 Phillimore Int. L. 226; Vattel L. Nat. bk. IV, c. 9, § 121; Lockwood *v.* Coysgarne, 3 Burr. 1676.

So the children of an ambassador are held to be subjects of the prince whom he represents, although born under the actual protection, and in the dominion, of a foreign prince. Inglis *v.* Sailor's Snug Harbor, 3 Pet. (U. S.) 99, 7 L. ed. 617. See also, generally, Aliens.

43. Respublica *v.* De Longchamps, 1 Dall. (Pa.) 111.

Among the members of the official household are included civil and military attachés (U. S. *v.* Benner, 1 Baldw. (U. S.) 234, 24 Fed. Cas. No. 14,568; Parkinson *v.* Potter, 55 L. J. Q. B. 153. In *In re* Anfrye, 3 Wkly. Notes Cas. (Pa.) 188, it was held that a military attaché of a foreign legation is privileged from arrest on a capias, in an action of malicious prosecution, although he is also, at the time, serving his government in another capacity), secretary and councilor of legation having charge of the executive affairs of the legation, and acting in the absence of the ambassador as *chargé d'affaires* (Taylor *v.* Best, 14 C. B. 487, 78 E. C. L. 487, 2 C. L. R. 1717, 23 L. J. C. P. 89, 18 Jur. 402, 2 Wkly. Rep. 259), secretary of the legation (Respublica *v.* De Longchamps, 1 Dall. (Pa.) 111; *Ex p.* Cabrera, 1 Wash. (U. S.) 232, 4 Fed. Cas. No. 2,278), and the secretary of the minister, even though his name be not registered at the office of the secretary of state (Hopkins *v.* De Robeck, 3 T. R. 79, 1 Rev. Rep. 650). But the wife of the secretary is not so included. English *v.* Caballero, 3 D. & R. 25, 16 E. C. L. 130.

Natives of country.— If a government receive one of its own subjects as a member of a foreign embassy, without providing that he shall not be exempt from its local jurisdiction, he is exempt therefrom (Macartney *v.* Garbutt, 24 Q. B. D. 368, 62 L. T. Rep. N. S. 656, 38 Wkly. Rep. 559, 54 J. P. 437); but

b. Servants[44] — (I) *In General.* The servants of an ambassador are protected by his immunities and privileges.[45] This does not, however, of necessity cover the goods of the servant; but it rests with him to show that they are protected.[46]

(II) *Actual Service Required.* One who is merely a nominal servant of an ambassador is not protected from arrest.[47] But actual residence in the house of the ambassador is not necessary to constitute *bona fide* service.[48]

(III) *Engaging in Trade.* Domestic servants cannot retain their exemption when they engage in business.[49]

6. House. The house of an ambassador is, by universal consent, inviolable,[50] and an attack upon the house of a foreign minister, even though made without intention to offer violence to his person, is an infringement of his inviolability.[51] His house is also inaccessible to the ordinary officers of justice.[52]

a citizen of a country who, while recognized by his government as an agent of a foreign government in the absence of the minister, is not recognized in any diplomatic character is not entitled to the immunities of a diplomatic agent, although he transacted diplomatic business with the government (Matter of Baiz, 135 U. S. 403, 10 S. Ct. 854, 34 L. ed. 222; Hollander *v.* Baiz, 41 Fed. 732). It is otherwise, however, if his appointment is merely an honorary one which has not been recognized by his government, and was obtained for a fraudulent purpose. *Ex p.* Cloete, 65 L. T. Rep. N. S. 102, 55 J. P. 758, 8 Morrell 195; Delvalle *v.* Plomer, 3 Campb. 47, 13 Rev. Rep. 746; Lockwood *v.* Coysgarne, 3 Burr. 1676. In Darling *v.* Atkins, 3 Wils. C. P. 33, the English courts denied protection to the English secretary of a foreign ambassador, because it appeared that he was a purser in the English navy, the court holding that the two offices were incompatible. But in Triquet *v.* Bath, 3 Burr. 1478, 1 W. Bl. 471, such protection was not refused, though the person seeking it had formerly been a trader, and the case arose under very suspicious circumstances.

44. Official list of the ambassador's domestic servants shall be communicated to the proper officer (generally the secretary or minister of foreign affairs) of the government to which he is accredited. This is customary, and in some countries it is required by law. 1 Russell Crimes (Greaves' ed.) 754; Wheaton Int. L. (3d Eng. ed.) § 226; U. S. Rev. Stat. (1878), § 4065.

45. Fisher *v.* Begrez, 1 Dowl. P. C. 588, 1 C. & M. 117, 3 Tyrw. 184, 2 L. J. Exch. 13; Lockwood *v.* Coysgarne, 3 Burr. 1676.

Natives of the country where the embassy is located, employed by the ambassador as his servants, are protected by his privilege. Lockwood *v.* Coysgarne, 3 Burr. 1676.

46. Fisher *v.* Begrez, 1 Dowl. P. C. 588, 1 C. & M. 117, 3 Tyrw. 184, 2 L. J. Exch. 13, 4 Tyrw. 35, 2 Dowl. P. C. 279.

Security for costs.— It has been held that the servant of an ambassador will be required to give security for costs. Goodwin *v.* Archer, 2 P. Wms. 452, 1 Eq. Cas. Abr. 350, pl. 4; Anonymous, Mosely, 175. *Contra*, Davies *v.* Solomon, Tidd Pr. (9th ed.) 535, note (s).

47. Heathfield *v.* Chilton, 4 Burr. 2015; Seaccmb *v.* Bownley, 1 Wils. C. P. 20; Poitier *v.* Croza, 1 W. Bl. 48; Fontainier *v.* Heyl, 3 Burr. 1731; Delvalle *v.* Plomer, 3 Campb. 47; Crosse *v.* Talbot, 8 Mod. 288; Fisher *v.* Begrez, 1 C. & M. 117, 1 Dowl. P. C. 588, 2 C. & M. 240, 3 Tyrw. 184, 2 Dowl. P. C. 279, 4 Tyrw. 35, 2 L. J. Exch. 13.

48. Wigmore *v.* Alvarez, Fitzg. 200; Novello *v.* Toogood, 2 D. & R. 833, 1 B. & C. 554, 8 E. C. L. 234, 1 L. J. K. B. 181, 25 Rev. Rep. 507. In an earlier case it was held that the ambassador's privilege does not include an interpreter who does not live in the house. Carolino's Case, 1 Wils. C. P. 78. The ambassador's immunity has also been denied to a chaplain who did no duty in the house. Seacomb *v.* Bownley, 1 Wils. C. P. 20.

Chorister.— The protection of the ambassador does not extend to a citizen, of the country to which the ambassador is accredited, who merely acts as chorister. Novello *v.* Toogood, 2 D. & R. 833, 1 B. & C. 554, 8 E. C. L. 234, 1 L. J. K. B. 181, 25 Rev. Rep. 507. But it seems that a chorister whose employment is *bona fide* is privileged. Fisher *v.* Begrez, 1 C. & M. 117, 1 Dowl. P. C. 588, 2 C. & M. 240, 3 Tyrw. 184, 2 Dowl. P. C. 279, 4 Tyrw. 35, 2 L. J. Exch. 13.

49. Taylor *v.* Best, 14 C. B. 487, 78 E. C. L. 487, 2 C. L. R. 1717, 23 L. J. C. P. 89, 18 Jur. 402, 2 Wkly. Rep. 259. See 7 Anne, c. 12.

50. Respublica *v.* De Longchamps, 1 Dall. (Pa.) 111; U. S. *v.* Hand, 2 Wash. (U. S.) 435, 26 Fed. Cas. No. 15,297; 2 Phillimore Int. L. 241; Hall Int. L. 186.

Right of asylum.— Engrafted upon the immunity allowed the ambassador's house was the right of asylum — the right to afford a refuge to offenders against the law of the state to which the ambassador is accredited. Hall Int. L. 189; Glenn Int. L. 73.

51. U. S. *v.* Hand, 2 Wash. (U. S.) 435, 26 Fed. Cas. No. 15,297.

52. 2 Phillimore Int. L. 241; Vattel L. Nat. bk. IV, c. 9, § 117: U. S. *v.* Jeffers, 4 Cranch C. C. (U. S.) 704, 26 Fed. Cas. No. 15,471, in which case it was held that the entrance by an officer of justice into the house of an ambassador, and the seizure there of a runaway slave, is a violation of the ambassador's privilege.

Mechanic's lien.— A foreign ambassador is not exempt from the application of the mechanic's-lien law as to any building which is

7. Punishing Violation of. An assault committed on a public minister is punishable with the penalty prescribed for that offense, even though the person who committed it was ignorant of the official position of the minister.[53] The punishment of one violating an ambassador's privilege will be ascertained and administered by the courts of the country in which the offense was committed.[54]

B. Of Consuls — 1. In General. A consul is generally exempt from personal taxes; from liability to have soldiers quartered in his house; from arrest for political reasons; from jury duty and from militia duty;[55] is allowed to place the arms of his nation over his door, and to do what is necessary to carry out his official duties, short of having immunity from the local jurisdiction.[56] A consul is not entitled, by virtue of his office merely, to the immunities of a foreign minister, but is subject, civilly and criminally, like other residents, to the tribunals of the country in which he resides;[57] but he will not be held personally liable on a

not used for purposes connected with his official character; and where such exemption is claimed it must appear by proof that he is entitled to it. Byrne *v.* Herran, 1 Daly (N. Y.) 344.

Scienter.—To constitute an offense against a foreign minister by an attack on his house, the offender must have known that the house attacked was the minister's domicile. U. S. *v.* Hand, 2 Wash. (U. S.) 435, 26 Fed. Cas. No. 15,297.

53. U. S. *v.* Liddle, 2 Wash. (U. S.) 205, 26 Fed. Cas. No. 15,598. See also U. S. *v.* Benner, Baldw. (U. S.) 234, 24 Fed. Cas. No. 14,568.

Indictment for serving process on minister.—By U. S. Rev. Stat. (1878), § 4064, the penalty of imprisonment is provided for executing process on a foreign minister. An indictment under this statute need not allege that the offense was committed by an officer, nor that the minister had been authorized and received as such by the president; nor is knowledge, on the defendant's part, of the official character of the minister requisite to support the indictment. U. S. *v.* Benner, Baldw. (U. S.) 234, 24 Fed. Cas. No. 14,568.

54. Respublica *v.* De Longchamps, 1 Dall. (Pa.) 111.

An indictment for violating the law of nations by offering violence to the person of a foreign minister is not a case "affecting ambassadors, other public ministers and consuls," within the scope of U. S. Const. art. 3, § 2. U. S. *v.* Ortega, 11 Wheat. (U. S.) 467, 6 L. ed. 521.

55. Hall Int. L. 335; Glenn Int. L. 118. See also 2 Phillimore Int. L. 275.

Lord Ellenborough said, in Viveash *v.* Becker, 3 M. & S. 284, 297, that "a consul is entitled to privileges to a certain extent, such as for safe-conduct; and if that be violated the sovereign has a right to complain of such violation."

56. A consul, in exercising judicial functions, is entitled to the same privileges and exemptions from liability for such acts as other judicial officers are accorded. Haggard *v.* Pelicier, [1892] App. Cas. 61, 61 L. J. P. C. N. S. 19, 65 L. T. Rep. N. S. 769.

A vice-consul of a foreign nation, who possesses an unrevoked *exequatur*, must still be recognized by the courts as the accredited representative of his country, entitled to all the privileges appertaining to his office, in spite of the fact that the government which sent him has been overthrown, and an apparently successful revolutionary government established in its place. U. S. *v.* Trumbull, 48 Fed. 94.

Exceptional privileges are accorded to consuls in the Mohammedan states, China, and generally in those countries which are not within the pale of international law; in these countries consuls have, in a large measure, the character of diplomatic representatives. Mahoney *v.* U. S., 10 Wall. (U. S.) 62, 19 L. ed. 864; 7 Op. Atty.-Gen. (U. S.) 346; 2 Phillimore Int. L. 339; Hall Int. L. 337; U. S. Cons. Reg. (1896), to which reference is made for the specific provisions of the various treaties affecting consuls.

57. *Massachusetts.*—Hall *v.* Young, 3 Pick. (Mass.) 80, 15 Am. Dec. 180.

New Jersey.— Sartori *v.* Hamilton, 13 N. J. L. 107.

Pennsylvania.— Com. *v.* Kosloff, 5 Serg. & R. (Pa.) 545; Kidderlin *v.* Meyer, 2 Miles (Pa.) 242; Durand *v.* Halbach, 1 Miles (Pa.) 46.

South Carolina.— State *v.* De la Foret, 1 Nott & M. (S. C.) 217.

United States.— Hall *v.* Coppell, 7 Wall. (U. S.) 542, 19 L. ed. 244; Davis *v.* Packard, 7 Pet. (U. S.) 276, 8 L. ed. 684; The Anne, 3 Wheat. (U. S.) 435, 4 L. ed. 428; U. S. *v.* Ravara, 2 Dall. (U. S.) 297, 1 L. ed. 388; St. Luke's Hospital *v.* Barclay, 3 Blatchf. (U. S.) 259, 21 Fed. Cas. No. 12,241; Lorway *v.* Lousada, 1 Lowell (U. S.) 77, 15 Fed. Cas. No. 8,517; Gittings *v.* Crawford, Taney (U. S.) 1, 10 Fed. Cas. No. 5,465.

England.— Viveash *v.* Becker, 3 M. & S. 284, 15 Rev. Rep. 488; Clarke *v.* Critico, 1 Taunt. 106; Barbuit's Case, Cas. t. Talb. 281; Heathfield *v.* Chilton, 4 Burr. 2015.

Canada.— Leonard *v.* Premio-Real, 11 Quebec L. R. 128.

See also 2 Phillimore Int. L. c. 2; Hall Int. L. 334; Wharton Dig. Int. L. § 120; Glenn Int. L. 118; 2 Cent. Dig. tit. "Ambassadors and Consuls," § 23 *et seq.* *Contra*, Vattel L. Nat. bk. II, c. 2, § 34.

Civil liability.— Thus it has been held that the consul of a foreign government is liable to arrest in an action for debt for money received in a fiduciary capacity (McKay *v.* Garcia, 6 Ben. (U. S.) 556, 16 Fed. Cas. No.

contract entered into by him on behalf of his government.[58] While in the United States, consuls of foreign governments cannot be sued in the state courts, but only in the federal courts.[59] This does not, however, prohibit the commitment of a consular offender, by a magistrate, merely for the purpose of transmitting him to the proper state, for trial in the appropriate tribunal.[60]

2. Engaging in Trade. A consul who is engaged in mercantile pursuits cannot receive any additional protection, for his occupation as a merchant, by reason of his office.[61] The consul of a neutral state who resides and is engaged in business in an enemy's country is to be regarded as an enemy,[62] and his property on the high seas is subject to capture and condemnation as prize of war.[63]

3. Exemption from Attendance as Witness. A consul who, by express treaty, is not amenable to the process of the courts cannot be forced, by compulsory process, to attend as a witness.[64]

8,844); that he may be summoned as garnishee in foreign attachment (Kidderlin *v.* Meyer, 2 Miles (Pa.) 242); that he may be sued in a federal district court, by one of his countrymen, to recover the amount of official fees illegally exacted (Lorway *v.* Lousada, 1 Lowell (U. S.) 77, 15 Fed. Cas. No. 8,517), or on a contract executed by him jointly with another person (Valerino *v.* Thompson, 28 Fed. Cas. No. 16,813*a*).

Criminal liability.— It has also been held that a foreign consul may be indicted and tried for sending anonymous letters, with the intent of extorting money (U. S. *v.* Ravara, 2 Dall. (U. S.) 297, 27 Fed. Cas. No. 16,122; and *compare* Matter of Hitz, 111 U. S. 766, 4 S. Ct. 698, 28 L. ed. 592, wherein it was held that a person indicted for an offense will not be held exempt because, at the time the indictment was found, he was consul-general of a foreign government, where it appears that his resignation had been demanded prior thereto, even though it had not been given until after the finding of the indictment); for assault and battery (State *v.* De la Foret, 2 Nott & M. (S. C.) 217; and for a rape (Com. *v.* Kosloff, 5 Serg. & R. (Pa.) 545).

58. Jones *v.* Le Tombe, 3 Dall. (U. S.) 384, 1 L. ed. 647.

59. Wilcox *v.* Luco, 118 Cal. 639, 45 Pac. 676, 50 Pac. 758, 62 Am. St. Rep. 305, 45 L. R. A. 579; Miller *v.* Van Loben Sels, 66 Cal. 341, 5 Pac. 512; Sartori *v.* Hamilton, 13 N. J. L. 107; Valarino *v.* Thompson, 7 N. Y. 576; Griffin *v.* Dominguez, 2 Duer (N. Y.) 656; Sippile *v.* Albites, 5 Abb. Pr. N. S. (N. Y.) 76; and, generally, Courts. But *compare* De Give *v.* Grand Rapids Furniture Co., 94 Ga. 605, 21 S. E. 582 (wherein it was decided that a civil action to recover an alleged debt, due upon an account, may be brought against a foreign consul in a state court); Reclamation Dist. No. 551 *v.* Van Loben Sels, 117 Cal. 164, 49 Pac. 131 (wherein it was held that a consul of a foreign nation cannot, in a state court, plead his consular privilege in bar of a proceeding brought by a reclamation district to determine the validity of an assessment levied for purposes of reclamation).

A consul cannot be attached for contempt where he fails to obey an order of a state court for his appearance and examination as judgment debtor. Griffin *v.* Dominguez, 2 Duer (N. Y.) 656. See also Matter of Aycinena, 1 Sandf. (N. Y.) 690.

60. *In re* Iasigi, 79 Fed. 751.

This immunity of a foreign consul from suit in a state court is not personal, but is the immunity of the country or government which he represents, and he cannot waive it by omitting to plead or suggest it until after judgment (Miller *v.* Van Loben Sels, 66 Cal. 341, 5 Pac. 512; Valarino *v.* Thompson, 7 N. Y. 576; Matter of Tracy, 46 N. Y. Super. Ct. 48; Durand *v.* Halbach, 1 Miles (Pa.) 46; Davis *v.* Packard, 7 Pet. (U. S.) 276, 8 L. ed. 684. [But see Hall *v.* Young, 3 Pick. (Mass.) 80, 15 Am. Dec. 180, wherein it was held that, in an action in a state court against a foreign consul, where it does not appear by plaintiff's own showing, nor upon a plea to the jurisdiction, that defendant was a consul, but judgment is rendered on a default, he cannot, on scire facias against the bail, take advantage of the want of jurisdiction in the original action]); and the fact that he is joined with others not entitled to be exempted does not do away with his privilege to be exempt from suit (Valarino *v.* Thompson, 7 N. Y. 576; Durand *v.* Halbach, 1 Miles (Pa.) 46).

61. Arnold *v.* United Ins. Co., 1 Johns. Cas. (N. Y.) 363; Hall *v.* Coppell, 7 Wall. (U. S.) 542, 19 L. ed. 244; The Falcon, 6 C. Rob. 197; The Josephine, 4 C. Rob. 25, 26; The Indian Chief, 3 C. Rob. 27.

62. Sorensen *v.* Reg., 11 Moore P. C. 141.

63. Arnold *v.* United Ins. Co., 1 Johns. Cas. (N. Y.) 363; The Pioneer, Blatchf. Prize Cas. 666, 19 Fed. Cas. No. 11,175; The President, 5 C. Rob. 277.

64. Baiz *v.* Malo, 27 Misc. (N. Y.) 685, 58 N. Y. Suppl. 806; *In re* Dillon, 7 Sawy. (U. S.) 561, 7 Fed. Cas. No. 3,914.

See also U. S. *v.* Trumbull, 48 Fed. 94, holding that, in a prosecution against private individuals for violating the neutrality laws of the United States by fitting out a warlike vessel to aid a rebellion against a foreign power, the vice-consul of that power cannot be compelled, by legal process, to attend as a witness in behalf of the United States when it appears that the insurgent party has been successful, and that the government established by it has been recognized by the United States.

4. Inviolability of Archives. The archives and papers in the consulate are deemed inviolable.[65]

VIII. Power of Ambassador to Sue on Behalf of Government.

A foreign ambassador, when authorized by his government to prosecute an action in its behalf, may take any legal proceedings which he deems necessary;[66] and the declaration of an ambassador, whose official character is established, is conclusive proof of his authority to prosecute the suit.[67]

IX. Powers and Duties of Consuls.[68]

A. In General. A consul is a public agent who is, ordinarily, clothed with authority for only commercial purposes,[69] and he cannot exercise diplomatic functions, even though placed in charge of the legation by the minister,[70] unless his nation is not otherwise represented;[71] nor can he, merely by virtue of his office, and without the special authority of his government, interpose a claim for the assertion of violated rights of his sovereign.[72]

B. Administration of Estates. A consular officer is, by the law of nations and by statute, the provisional conservator of the property within his district belonging to his countrymen deceased therein. He has no right, as a consular officer, apart from the provisions of treaty, local law, or usage, to administer on the estate, or in that character to aid any other person in so administering it, without judicial authorization. His duties are restricted to guarding and collecting the effects, and to transmitting them to the country of the deceased, or to aiding others in so doing.[73]

65. Hall Int. L. 335.

Where a subpœna duces tecum is prayed for, directed to the consul of a country whose official papers are, by convention between his country and the United States, protected from examination or seizure, it is the duty of the court to require the party praying for it to show that the document desired is not an official paper coming within such protection. *In re* Dillon, 7 Sawy. (U. S.) 561, 7 Fed. Cas. No. 3,914.

66. Republic *v.* De Arangoiz, 5 Duer (N. Y.) 634. See also Peel *v.* Elliott, 7 Abb. Pr. (N. Y.) 433.

To a bill, filed by the charge d'affaires of a foreign government, in his own name, to restrain judgment creditors from proceeding against certain furniture upon which a sum of money had been advanced by his government, secured by an unregistered bill of sale, a demurrer on the ground that the minister could not sue in his own name was allowed. Penedo *v.* Johnson, 29 L. T. Rep. N. S. 452, 22 Wkly. Rep. 103.

67. Republic *v.* De Arangoiz, 5 Duer (N. Y.) 634.

68. See 2 Cent. Dig. tit. "Ambassadors and Consuls," § 13 *et seq.*

For power to take acknowledgments see Acknowledgments.

69. Seidel *v.* Peschkaw, 27 N. J. L. 427; The Anne, 3 Wheat. (U. S.) 435, 4 L. ed. 428.

70. Otterbourg *v.* U. S., 5 Ct. Cl. 430.

71. Gernon *v.* Cochran, Bee Adm. 209, 10 Fed. Cas. No. 5,368.

72. The Anne, 3 Wheat. (U. S.) 435, 4 L. ed. 428. *Compare* The Vrow Anna Catharina, 5 C. Rob. 161, in which case a claim that the territory of his sovereign had been violated was interposed by a consul, and entertained by the court.

For a specific enumeration of the powers and duties of consuls see U. S. Cons. Reg. (1896), which are issued from time to time for the guidance of United States consuls, and the instructions issued for the guidance of the British consular service.

The functions of consuls to other than Christian countries are of a different nature from those of other consuls. They are clothed with diplomatic and even with judicial powers, and are restricted to the duties of their offices, being prohibited from entering into trade, and are paid a stated salary. Ross *v.* McIntyre, 140 U. S. 453, 11 S. Ct. 897, 35 L. ed. 581; Mahoney *v.* U. S., 10 Wall. (U. S.) 62, 19 L. ed. 864; Dainese's Case, 15 Ct. Cl. 64; 7 Op. Atty.-Gen. (U. S.) 346, 348; Halleck Int. L. c. 10, §§ 21, 22.

73. 7 Op. Atty.-Gen. U. S. 274; U. S. Cons. Reg. (1896), § 409; Aspinwall *v.* Queen's Proctor, 2 Curt. Ecc. 241, in which it was held that letters of administration should not be granted to the American consul upon the effects of an American citizen who died while traveling in England. *Compare* also Thompson's Succession, 9 La. Ann. 96, wherein it was said that a consul cannot take from an administrator the succession of a citizen of his country which has already been opened in a state in which the deceased left property, although he was not domiciled there.

Property affected.— The consul's authority in respect to the estate relates only to the property and debts in the foreign country where the decedent died (7 Op. Atty.-Gen. (U. S.) 274), and extends, under the statutes, to personal property alone (7 Op. Atty.-

C. Celebration of Marriages. Consuls of the United States have no authority as such to solemnize marriages in countries comprehended within the pale of international law.[74] It seems, however, that, in non-Christian countries, a valid marriage may be performed by a consul,[75] and a valid marriage may be performed in a city by a United States consul between an American citizen and a foreigner not domiciled there.[76]

D. Contracts against Public Policy. A contract, entered into by the consul-general of a foreign government, which is contrary to public policy will not be enforced by the courts, even though it may be valid in the officer's country.[77]

E. In Regard to Seamen[78] — **1. In General.** The official acts of a foreign consul, respecting the crew of a vessel of his country, will not be called in question by the courts.[79]

2. Discharge of Seamen. The discharge of a seaman in a foreign port must be made before the consul.[80] He cannot, however, authorize the improper discharge of a seaman,[81] and, when the application is made by the master, it is the duty of the consular officer to inquire carefully into the facts and circumstances, and to satisfy himself, before granting the application, that sufficient reasons exist for a discharge.[82] The consul may discharge a seaman in a foreign port if the latter refuses to do his duty,[83] and has the power, when a seaman applies to him for

Gen. (U. S.) 270). Distributive shares, to which persons residing in his country are entitled, from the estate of a person dying in the country where his consulate is located, are not property which the consul is entitled to receive. Matter of Tartaglio, 12 Misc. (N. Y.) 245, 33 N. Y. Suppl. 1121, 67 N. Y. St. 825. Article 8 of the consular convention of Dec. 11, 1871, between Germany and the United States, authorizing German consuls to act as legal representatives of the German emperor's subjects, does not constitute such consuls administrators of deceased persons, or authorize a consul to recover wages due a deceased seaman who was in life a German subject, unless the consul represents heirs who are entitled to the money and who are German subjects. The Gen. McPherson, 100 Fed. 860.

Settlement of claims against the estate.— A consul, administering the estate of a citizen dying in a foreign country, is not authorized to pay a claim for damages for a wrongful act committed by the deceased, where such claim has not been reduced to damages. Sturgis *v.* Slacum, 18 Pick. (Mass.) 36.

Where the establishment of the right to administer an estate depends on facts which occurred in France, the person claiming the administration having been born and having resided there, the French consul, on the strength of the treaty between the United States and France giving consuls the right to apply to the authorities for the purpose of protecting the interests of their countrymen, and by reason of international comity, ought to be heard, as the national agent of the parties interested. Ferrie *v.* Public Administrator, 3 Bradf. Surr. (N. Y.) 249.

74. 7 Op. Atty.-Gen. (U. S.) 18.

By U. S. Rev. Stat. (1878), § 4082, it is provided that marriages contracted in the presence of any consular officer of the United States in a foreign country, between persons who would be authorized to marry if residing in the District of Columbia, shall be valid.

75. 7 Op. Atty.-Gen. (U. S.) 18.

76. Loring *v.* Thorndike, 5 Allen (Mass.) 257, wherein it was held that the civil act of the free city of Frankfort-on-the-Main, requiring marriages to be solemnized in a particular form, did not apply to foreigners temporarily residing there.

77. Oscanyan *v.* Winchester Repeating Arms Co., 103 U. S. 261, 26 L. ed. 539 (in which case it appeared that plaintiff, the consul-general of Turkey, contracted with defendant to use his influence with a purchasing agent of his government to aid defendant in obtaining a favorable report on its goods from such agent, whereby it could obtain a contract for the sale of such goods to the government, the consideration being a percentage on all sales made to the government); Hall *v.* Coppell, 7 Wall. (U. S.) 542, 19 L. ed. 244 (wherein it was held that a contract, made by a consul of a neutral power with a citizen of a belligerent state, that he will protect from capture by the belligerent merchandise which the citizen has in the enemy's lines, is void, as against public policy).

78. See, generally, Seamen.

79. Patch *v.* Marshall, 1 Curt. (U. S.) 452, 18 Fed. Cas. No. 10,793; Bernhard *v.* Creene, 3 Sawy. (U. S.) 230, 3 Fed. Cas. No. 1,349.

80. Hathaway *v.* Jones, 2 Sprague (U. S.) 56, 11 Fed. Cas. No. 6,212.

81. Hutchinson *v.* Coombs, 1 Ware (U. S.) 58, 12 Fed. Cas. No. 6,955.

82. The Sachem, 59 Fed. 790.

The propriety of the consul's act, in discharging a seaman at the master's instance, is to be determined upon the facts before him, not by the case which may be afterward shown upon a trial (Tingle *v.* Tucker, Abb. Adm. 519, 23 Fed. Cas. No. 14,057); and must, to avail the master anything, have been secured without deceit or malpractice on his part (Tingle *v.* Tucker, Abb. Adm. 519, 23 Fed. Cas. No. 14,057).

83. Jordan *v.* Williams, 1 Curt. (U. S.) 69, 13 Fed. Cas. No. 7,528.

a discharge on the ground of cruel treatment, to inquire into the facts, and, if there has been cruel or unusual treatment, to discharge the seaman, allowing him three months' extra pay.[84] Where a consul, in discharging a seaman, abuses his power he is personally liable for all damages occasioned thereby.[85]

3. IMPRISONMENT. A consul has no authority to order an American seaman to be imprisoned in a foreign port,[86] and the fact that the master acted upon the advice of a consul in causing a seaman to be imprisoned is no justification if the imprisonment was illegal.[87]

4. SENDING HOME FOR TRIAL. A consul has no authority to take seamen from one vessel for criminal conduct, and send them home in another vessel for trial;[88] and he cannot require the master of a vessel to transport to the United States seamen or others charged with crime.[89]

5. TRANSPORTATION OF DESTITUTE SEAMEN. A consul may require an American vessel to receive and transport a destitute seaman, even though the latter is a deserter from another American vessel.[90]

6. WAGES. Under the rules of the English court of admiralty, that court will not exercise its jurisdiction of a suit for wages, by a seaman on a foreign vessel, without having first notified the consul of the country to which the vessel belongs; and, if the latter protest against the prosecution of the suit, the court will then determine whether it shall proceed or not.[91] The doctrine of the American courts is, it seems, more stringent in regard to requiring the assent of the minister or consul of a foreign country, in suits by seamen of such country;[92]

84. Coffin *v.* Weld, 2 Lowell (U. S.) 81, 5 Fed. Cas. No. 2,953.

Consent of seaman discharged.— The discharge of a seaman in a foreign port could, under the acts of congress of Feb. 28, 1803, and July 20, 1840, be ordered by the consul only upon the consent of the seaman, given or proved before him; and the grounds upon which the consul proceeded in ordering a discharge had to appear in his certificate. The Atlantic, Abb. Adm. 451, 2 Fed. Cas. No. 620.

85. Tingle *v.* Tucker, Abb. Adm. 519, 23 Fed. Cas. No. 14,057. See U. S. Rev. Stat. (1878), § 1735.

86. The William Harris, 1 Ware (U. S.) 373, 29 Fed. Cas. No. 17,695.

As condemning the imprisonment of seamen in a foreign port at the instance of the master see Buddington *v.* Smith, 13 Conn. 334, 33 Am. Dec. 407; Johnson *v.* The Coriolanus, Crabbe (U. S.) 239, 13 Fed. Cas. No. 7,380; Magee *v.* The Moss, Gilp. (U. S.) 219, 16 Fed. Cas. No. 8,944; Shorey *v.* Rennell, 1 Sprague (U. S.) 407, 22 Fed. Cas. No. 12,806.

87. Wilson *v.* The Mary, Gilp. (U. S.) 31, 30 Fed. Cas. No. 17,823; The William Harris, 1 Ware (U. S.) 373, 29 Fed. Cas. No. 17,695; Jay *v.* Almy, 1 Woodb. & M. (U. S.) 262, 13 Fed. Cas. No. 7,236.

The conduct of the master of a foreign vessel in procuring, by false allegations, the official intervention of his consul, by which an American seaman is imprisoned, will be investigated by the courts of the United States. Patch *v.* Marshall, 1 Curt. (U. S.) 452, 18 Fed. Cas. No. 10,793.

88. U. S. *v.* Lunt, 26 Fed. Cas. No. 15,642, 18 Law Rep. 683.

89. 7 Op. Atty.-Gen. (U. S.) 722; U. S. Cons. Reg. (1896), art. 16, § 276.

90. Matthews *v.* Offley, 3 Sumn. (U. S.) 115, 16 Fed. Cas. No. 2,290; 7 Op. Atty.-Gen. (U. S.) 722; U. S. Rev. Stat. (1878), § 4577.

Consul is the proper judge as to what vessel should receive and transport a destitute seaman to the United States. Matthews *v.* Offley, 3 Sumn. (U. S.) 115, 16 Fed. Cas. No. 9,290.

Neither the consul nor the vice-consul is a proper party plaintiff in an action to recover the penalty provided by act of congress of Feb. 28, 1803, c. 62, § 5, for the refusal of a master to receive destitute sailors and transport them to the United States. Matthews *v.* Offley, 3 Sumn. (U. S.) 115, 16 Fed. Cas. No. 9,290.

Where a minor has concealed himself on board a whaling vessel, without the knowledge of his parents or of the master, it is the latter's duty to leave him with the consul at the first port at which he touches, and the consul must provide for such minor and send him to the United States. Luscom *v.* Osgood, 1 Sprague (U. S.) 82, 15 Fed. Cas. No. 8,608.

91. The Golubchick, 1 W. Rob. 143; La Blache *v.* Rangel, L. R. 2 P. C. 38; The Herzogin Marie, Lush. 292; The Leon XIII, 8 P. D. 121, 52 L. J. Adm. 58; The Agincourt, 2 P. D. 239.

The consul's protest does not, however, deprive the court of its jurisdiction; but the exercise of that jurisdiction is discretionary. The Golubchick, 1 W. Rob. 143; La Blache *v.* Rangel, L. R. 2 P. C. 38; The Octavie, 33 L. J. P. 115; The Herzogin Marie, Lush. 292; The Milford, Swabey 362; The Franz *et* Elize, 5 L. T. Rep. N. S. 290.

92. Saunders *v.* The Victoria, 21 Fed. Cas. No. 12,377; Lynch *v.* Crowder, 15 Fed. Cas. No. 8,637, 12 Law Rep. 355; The Infanta, Abb. Adm. 263, 13 Fed. Cas. No. 7,030; Gon-

but where the voyage is ended, or the seamen have been dismissed or treated with great cruelty, the court will entertain jurisdiction even against the consul's protest.[93]

F. Licensing Enemy Vessels. A consul has not authority, by virtue of his office, to grant a license or permit which could have the legal effect of exempting the vessel of an enemy from capture or confiscation.[94]

G. Protection of Property Rights — 1. In General. A consul who has been duly recognized is a competent party to assert or defend the rights of property of the individuals of his nation in any court having jurisdiction of causes affected by the application of international law.[95]

2. Receiving Restitution. Although he may claim for unknown subjects of his nation, yet restitution cannot be decreed without specific proof of the individual proprietary interest;[96] nor can he receive actual restitution without a special procuration from the parties interested.[97]

X. Consular Courts.

A. In General.[98] As a general rule, principles of international law afford no warrant for the exercise of judicial powers by consuls; and their rights and duties in that capacity, both as to authority and extent, are dependent upon treaties.[99] Such powers are usually conferred upon consuls of Christian nations

zales *v.* Minor, 2 Wall. Jr. C. C. (U. S.) 348, 10 Fed. Cas. No. 5,530. The Becherdass Ambaidass, 1 Lowell (U. S.) 569, 3 Fed. Cas. No. 1,203, in which case it was held that a libel brought in the United States against a vessel for wages, by British sailors shipped for a voyage ending in a home port, will not be entertained, against the protest of the British consul, in the absence of special circumstances, such as a clear deviation from the voyage described in the articles, cruelty, or the breaking up of the voyage, although the court may doubt the validity of the articles.

In Patch *v.* Marshall, 1 Curt. (U. S.) 452, 18 Fed. Cas. No. 10,793, the court refused to decline jurisdiction of an appeal, in a case of personal damage brought by an American seaman serving on a British vessel, where the voyage was terminated in the United States and the master's domicile was also there, although the British consul filed a protest, claiming that the vessel and her commander were British, and that "an investigation of some of the alleged causes of damage must call in question official acts and conduct of a British functionary in regard to British subjects." See also Bernhard *v.* Creene, 3 Sawy. (U. S.) 230, 3 Fed. Cas. No. 1,349.

93. The Steamship Belgenland *v.* Jensen, 114 U. S. 355, 5 S. Ct. 860, 29 L. ed. 152; Orr *v.* The Achsah, 18 Fed. Cas. No. 10,586; The Becherdass Ambaidass, 1 Lowell (U. S.) 569, 3 Fed. Cas. No. 1,203.

94. The Benito Estenger, 176 U. S. 568, 20 S. Ct. 489, 44 L. ed. 592; Rogers *v.* The Amado, Newb. Adm. 400, 20 Fed. Cas. No. 12,005; The Hope, 1 Dods. 226. See also Hall *v.* Coppell, 7 Wall. (U. S.) 542, 19 L. ed. 244.

95. The Bello Corrunes, 6 Wheat. (U. S.) 152, 5 L. ed. 229; The Anne, 3 Wheat. (U. S.) 435, 4 L. ed. 428; The Elizabeth, Blatchf. Prize Cas. 250, 8 Fed. Cas. No. 4,350; The London Packet, 1 Mason (U. S.) 14, 15 Fed. Cas. No. 8,474; Robson *v.* The Huntress, 2 Wall. Jr. C. C. (U. S.) 59, 20 Fed. Cas. No. 11,971. See also Rowe *v.* The Brig ———, 1 Mason (U. S.) 372, 20 Fed. Cas. No. 12,093. See also The Conserva, 38 Fed. 431, wherein it is said that a consul, especially where he is the only representative of his government present, has the right to intervene and claim a vessel belonging to it against which a libel has been filed to secure her forfeiture.

Extent of rule.—A consular representative in court has no privilege or immunity, in respect to questions of irregular practice on the part of the libellants, in the prize commissioner's office or otherwise, in managing a defense to the action, which could not be exercised by the owners of the property seized. The Elizabeth, Blatchf. Prize Cas. 250, 8 Fed. Cas. No. 4,350.

Fraudulent sale of vessel.— A consul in a foreign port, under whose authority a vessel is sold, cannot acquire an interest in it; and, in case he does so, the sale is conclusively presumed to be fraudulent. Riley *v.* The Obell Mitchell, 20 Fed. Cas. No. 11,839.

96. The Antelope, 10 Wheat. (U. S.) 66, 6 L. ed. 268.

97. The Bello Corrunes, 6 Wheat. (U. S.) 152, 5 L. ed. 229. But *compare* The Adolph, 1 Curt. (U. S.) 87, 1 Fed. Cas. No. 86, wherein it was held that a consul may, where citizens of his country, who are absent and have no other legal representative in the country, are interested, petition the court to order the marshal to pay into the registry proceeds of a sale of property libeled for salvage.

98. See 2 Cent. Dig. tit. "Ambassadors and Consuls," § 16 *et seq.*

For a discussion of the organization and jurisdiction of our consular courts in China see 34 Am. L. Rev. 826.

99. Ross *v.* McIntyre, 140 U. S. 453, 11 S. Ct. 897, 35 L. ed. 581 [*affirming* 44 Fed. 185]; Dainese *v.* Hale, 91 U. S. 13, 23 L. ed. 190; The Nereide, 9 Cranch (U. S.) 388, 3

in non-Christian countries for the decisions of controversies between their fellow-citizens or subjects residing or commorant there, and for the punishment of crimes committed by them.[1]

B. Jurisdiction — 1. In General. Consuls cannot exercise admiralty jurisdiction except by force of treaty.[2] By provision of many of the treaties, the consuls have sole jurisdiction of controversies arising between seamen and masters of vessels of their country respecting wages;[3] others provide that the consuls shall have exclusive jurisdiction of any difference between seamen and masters.[4]

2. Persons. Where the defendant is a citizen of another country,[5] it has been held, both in this country and in England, that the consular court can exercise

L. ed. 769; *In re* Wildenhus, 28 Fed. 924; U. S. *v.* Craig, 28 Fed. 795; *In re* Aubrey, 26 Fed. 848; The William Harris, 1 Ware (U. S.) 373, 29 Fed. Cas. No. 17,695; 2 Op. Atty.-Gen. (U. S.) 378; Wheaton Int. L. (3d Eng. ed.) 175; Wharton Dig. Int. L. § 124.

Where treaty stipulations exist with regard to the right of foreign consul to adjudge controversies, they should be faithfully observed (The Steamship Belgenland *v.* Jensen, 114 U. S. 355, 5 S. Ct. 860, 29 L. ed. 152); and, where this jurisdiction is in terms only such as is allowed by the laws of the country or its usage in its intercourse with other nations, those laws or usages must be proved in order to show the precise extent of such jurisdiction (Dainese *v.* Hale, 91 U. S. 13, 23 L. ed. 190).

1. Forbes *v.* Scannell, 13 Cal. 243; Dainese *v.* Hale, 1 MacArthur (D. C.) 86; Ross *v.* McIntyre, 140 U. S. 453, 11 S. Ct. 897, 35 L. ed. 581 [*affirming* 44 Fed. 185]; Dainese *v.* Hale, 91 U. S. 13, 23 L. ed. 190.

The importance of consular courts in other than Christian countries has been continually recognized, though their powers are more carefully defined now than formerly. Ross *v.* McIntyre, 140 U. S. 453, 11 S. Ct. 897, 35 L. ed. 581; 2 Phillimore Int. L. 337 *et seq.*

The usage that Franks, while in Turkey, shall be under the jurisdiction of their respective ministers or consuls is a part of the international law of Europe; and it is, therefore, a part of the public law of the United States, derived from the common law (of which international law is a part), and not dependent upon treaty, that American consuls in Mohammedan countries exercise judicial powers. As used in the further article of the treaty of 1830 with Turkey, which provides for the exercise of judicial powers by consuls, and is silent as to vice-consuls, the word "consul" should be understood as embracing all consular officers. Dainese *v.* U. S., 15 Ct. Cl. 64.

2. Glass *v.* The Sloop Betsey, 3 Dall. (U. S.) 6, 1 L. ed. 485. See also Admiralty, IV, C, 1, a, (III), (B).

The British consular court at Constantinople possesses a jurisdiction *in rem* in cases of collision between British and foreign ships. Passayanni *v.* Russian Steam Nav., etc., Co., 2 Moore P. C. N. S. 161.

3. Tellefsen *v.* Fee, 168 Mass. 188, 46 N. E. 562, 60 Am. St. Rep. 379, 45 L. R. A. 481; Norberg *v.* Hillgreu, 5 N. Y. Leg. Obs. 177; The Burchard, 42 Fed. 608; The Salomoni, 29 Fed. 534; The Elwine Kreplin, 9 Blatchf. (U. S.) 438, 8 Fed. Cas. No. 4,426 [*reversing* 4 Ben. (U. S.) 413, 8 Fed. Cas. No. 4,427].

4. Meyer *v.* Basson, 10 Phila. (Pa.) 414, 32 Leg. Int. (Pa.) 107; The Welhaven, 55 Fed. 80; The Marie, 49 Fed. 286.

So the consul of Norway and Sweden has exclusive jurisdiction of any difference arising between a member of the crew of a Norwegian vessel and the master of such vessel, though such person is an American citizen and shipped at an American port. The Marie, 49 Fed. 286.

Consular jurisdiction of the French consuls between Frenchmen, under the convention of 1778, did not extend generally to all matters of differences, but was confined to the description of cases therein enumerated. Villeneuve *v.* Barrion, 2 Dall. (Pa.) 235 note.

The provision in a treaty between the United States and the court of Sweden that the subjects of the latter should enjoy the same privileges in the ports of the United States that had been or might be granted to "the most favored nation" by the United States, did not confer on a Swedish consul exclusive jurisdiction of a controversy arising between the master of a Swedish vessel and one of his seamen, even though there was in force at the time a treaty between France and the United States whereby, under special convention, a like jurisdiction was conferred on the French consuls. Weiberg *v.* The St. Oloff, 2 Pet. Adm. 428, 29 Fed. Cas. No. 17,357. *Compare* The Amalia, 3 Fed. 652, construing the thirteenth article of the treaty between Sweden and the United States [8 U. S. Stat. at L. pp. 346, 362] and holding that the district court of the United States was not debarred from exercising its authority in a case in the terms of such treaty where there was no consul or other officer of Sweden within the territorial jurisdiction of the court.

5. 11 Op. Atty.-Gen. (U. S.) 474; Passayanni *v.* Russian Steam Nav., etc., Co., 2 Moore P. C. N. S. 161, 9 Jur. N. S. 1160; Pitts *v.* La Fontaine, 5 App. Cas. 564, holding that the fact that a native of Turkey marries a British subject does not give a consular court jurisdiction over her real property so that it can compel a sale by a decree *in personam*. Thus a French subject, who never assented to the republic, but, leaving the French West Indies, had settled in the United States, was not a French citizen for the purpose of consular jurisdiction. Caignet *v.* Pettit, 2 Dall. (Pa.)

no jurisdiction, either civil or criminal. A foreigner may, however, voluntarily submit to the jurisdiction of such a court.[6]

C. Procedure — 1. IN GENERAL. The ministers of the United States are authorized to prescribe the methods of procedure in the consular courts.[7] These latter are courts of limited jurisdiction, and all the jurisdictional facts must be alleged in the libel or petition; otherwise, it will not be sufficient.[8]

2. APPEALS FROM CONSULAR COURTS IN CHINA AND JAPAN. Appeals from the consular courts of the United States in China and Japan are regulated by statute.[9] On an appeal in such cases to the circuit court, a citation is necessary unless the appeal is allowed in open court;[10] and the record consists of the transcript of the libel, bill, answer, depositions, and all other proceedings in the case.[11] A sum of money deposited in the registry of the consular court in lieu of a bond is sufficient security, on an appeal to the circuit court, where the deposit was taken without objection.[12]

D. Judgments and Their Effect. The judgments of the consular courts

234, 1 Yeates (Pa.) 546. So, also, it has been held that, where a railway company is a complete and existing corporation in a foreign country, a consular court cannot issue a sequestration against members resident in its jurisdiction for failure to comply with an order by it to register the company as one of limited liability under the English acts. Bulkeley *v.* Schutz, 8 Moore P. C. N. S. 170, L. R. 3 P. C. 764.

In a suit for the dissolution of a partnership and an accounting, an English consular court in Turkey has power to order the receiver to sell at auction land owned by the partnership, although the partners had not taken advantage of the protocol authorizing British subjects to hold land in Turkey, and still held it in the name of a subject of the sultan. Abbott *v.* Abbott, L. R. 6 P. C. 220.

A subject of a foreign government who enlists as one of the crew of an American ship becomes, temporarily, a subject of the United States, so as to give the consular tribunal of the United States in a foreign country jurisdiction to try offenses committed by him on board the ship. *In re* Ross, 44 Fed. 185 [*affirmed* 140 U. S. 453, 11 S. Ct. 897, 35 L. ed. 581].

6. Passayanni *v.* Russian Steam Nav., etc., Co., 2 Moore P. C. N. S. 161.

7. U. S. Rev. Stat. (1878), § 4117.

Distinct causes of action cannot be joined in an action in a consular court. Peninsular, etc., Steam Nav. Co. *v.* Tsune Kijama, 64 L. J. P. C. 146, 73 L. T. Rep. N. S. 37.

Trial by jury.— The guaranties of the constitution against accusation of capital or infamous crimes except by indictment by a grand jury, and for a trial by a jury when thus accused, do not apply to cases of which a consular court has jurisdiction, but the trial must be conducted in accordance with the provisions of the treaty by which authority is given for the establishment of the tribunal. Ross *v.* McIntyre, 140 U. S. 453, 11 S. Ct. 897, 35 L. ed. 581. See also Carew *v.* Japan Crown Prosecutor, 66 L. J. P. C. 95. In this case it was held that a British subject, on trial before a consular court for murder, was not entitled to demand trial by a jury of twelve. See also, generally, JURY.

8. The Spark *v.* Lee Choi Chum, 1 Sawy. (U. S.) 713, 22 Fed. Cas. No. 13,206. *Compare In re* Aubrey, 26 Fed. 848, wherein it is said that when a British consul, in a matter of discipline, is dealing with British subjects on board of a British ship, courts of the United States are not called upon to look for his jurisdiction further than the instructions issued by the British foreign office.

9. U. S. Rev. Stat. (1878), § 4092 *et seq.*, providing for an appeal to the United States minister when the amount involved is not less than five hundred dollars nor more than two thousand five hundred dollars; and an appeal to the circuit court for the district of California when the amount involved exceeds two thousand five hundred dollars.

The appellate jurisdiction of the circuit court in cases exceeding two thousand five hundred dollars is not limited by the statutory provision that, when the damages demanded in a consular court exceed five hundred dollars, the consul must summon not less than two nor more than three other citizens of the United States to sit with him, and, if either of such associates differ in opinion from him, either party may appeal to the ministers of the United States, but it is merely to prescribe the conditions and limitations under which the consular jurisdiction shall be exercised. The Ping-On *v.* Blethen, 7 Sawy. (U. S.) 482, 11 Fed. 607.

10. Tazaymon *v.* Twombley, 5 Sawy. (U. S.) 79, 23 Fed. Cas. No. 13,810; The Spark *v.* Lee Choi Chum, 1 Sawy. (U. S.) 713, 22 Fed. Cas. No. 13,206.

11. Tazaymon *v.* Twombley, 5 Sawy. (U. S.) 79, 23 Fed. Cas. No. 13,810.

The record must show an allowance of the appeal (Tazaymon *v.* Twombley, 5 Sawy. (U. S.) 79, 23 Fed. Cas. No. 13,810; The Spark *v.* Lee Choi Chum, 1 Sawy. (U. S.) 713, 22 Fed. Cas. No. 13,206), and should be a single document, certified at the end as being a full and correct copy of the proceedings in the case, and authenticated by the official signature and seal of the consul (Tazaymon *v.* Twombley, 5 Sawy. (U. S.) 79, 23 Fed. Cas. No. 13,810).

12. The Ping-On *v.* Blethen, 7 Sawy. (U. S.) 482, 11 Fed. 607.

are not conclusive upon all other courts of their country,[13] and consular courts have no power to impose a judgment banishing American convicts to the United States or other countries, or to send them there to serve out their terms of imprisonment.[14]

XI. Consular Fees.

A. In General.[15] The president[16] is authorized to prescribe, from time to time, the rates or tariffs of fees to be charged for official services, and to designate what shall be regarded as official services, besides such as are expressly declared by law, in the business of the several consulates and commercial agencies, and to adapt the same, by such differences as may be necessary or proper, to each consulate or commercial agency; and the officers must collect and account for, as their official services, only such fees as are prescribed for respective consulates and agencies.[17] The construction by the state department of the regulations issued to consuls by the secretary of state, defining what acts are to be deemed official and what non-official, is controlling, in case of doubt, and should conclude the accounting officers of the treasury department.[18]

13. Forbes *v.* Scannell, 13 Cal. 243.

Decrees in rem of a foreign consul having jurisdiction cannot be revised by the court of another nation; but the nature and jurisdiction of such court may be examined (Cheriot *v.* Foussat, 3 Binn. (Pa.) 220. [See also Messina *v.* Petrococchino, 26 L. T. Rep. N. S. 561; Dent *v.* Smith, 20 L. T. Rep. N. S. 868]); and one relying on its judgment as a bar must prove that it had jurisdiction by treaty, usage, or voluntary submission (The Griefswald, Swabey 430).

Plea of judgment recovered, in an action brought in an English consular court, and payment to plaintiff is a bar to an action brought in England for the same cause. Barber *v.* Lambe, 8 C. B. N. S. 95, 98 E. C. L. 95, 29 L. J. C. P. 234.

Proceedings in a British consular court in Egypt do not debar plaintiff in England from recovering from the captain of a ship, plaintiff in the consular court, an amount paid to him in excess of what he was entitled to demand. Tamvaco *v.* Simpson, 13 L. T. Rep. N. S. 160.

14. Wharton Dig. Int. L. § 125; 19 Op. Atty.-Gen. (U. S.) 377; 14 Op. Atty.-Gen. (U. S.) 522. See also *In re* Aubrey, 26 Fed. 848, where it was held that the courts of the United States would not assist a foreign consul in sending a prisoner back to his country to be tried.

15. See 2 Cent. Dig. tit. "Ambassadors and Consuls," § 21 *et seq.*

16. The only limitations on the president's power in this regard are the express limitation that he cannot declare a fee, which the law makes official, to be unofficial, and the implied limitation which prevents him from prescribing a fee for services which the law declares shall be gratuitous. Stahel *v.* U. S., 26 Ct. Cl. 193.

17. U. S. *v.* Mosby, 133 U. S. 273, 10 S. Ct. 327, 33 L. ed. 625; U. S. *v.* Badeau, 33 Fed. 572, 31 Fed. 697; Stahel *v.* U. S., 26 Ct. Cl. 193; U. S. Rev. Stat. (1878), §§ 1745, 1747; U. S. Cons. Reg. (1896), § 518.

Thus, in Hathaway *v.* Jones, 2 Sprague (U. S.) 56, 11 Fed. Cas. No. 6,212, it was held that a consul in a foreign port, before whom a seaman is discharged, is not entitled to a commission on money paid in settlement of such charges. See also U. S. Rev. Stat. (1878), § 1719.

Embezzlement by consular agent.— A consul cannot be held liable for fees embezzled by a consular agent, within the limits of his consulate, where he had been instructed that such agency had been created an independent consulate. Sampson *v.* U. S., 30 Ct. Cl. 365.

The inhibition on consular officers, as to the collection of fees, is only against the collection, for their official services, of other than the prescribed fees. U. S. *v.* Mosby, 133 U. S. 273, 10 S. Ct. 327, 33 L. ed. 625.

18. U. S. *v.* Badeau, 31 Fed. 697.

Fees received by a consul while acting independent of the authority of the government are not official, and may be retained by him without rendering any account of them. U. S. *v.* Badeau, 33 Fed. 572, 31 Fed. 697.

Interest may be recovered, where a consul has retained fees to which he is not entitled, on the amount so retained from the time when he actually received a demand therefor from the government. Marston *v.* U. S., 71 Fed. 496, 34 U. S. App. 461, 18 C. C. A. 216.

Interest on public moneys, deposited by the consul in bank, cannot be retained by the consul. U. S. *v.* Mosby, 133 U. S. 273, 10 S. Ct. 327, 33 L. ed. 625.

The fact that there is no legal right to collect a fee which is listed as official does not entitle the consul to retain it. Stahel *v.* U. S., 26 Ct. Cl. 193.

For particular consular fees which have been judicially determined to be official, and *vice versa*, see U. S. *v.* Eaton, 169 U. S. 331, 18 S. Ct. 374, 42 L. ed. 767 [*overruling* Boyd *v.* U. S., 31 Ct. Cl. 158]; U. S. *v.* Mosby, 133 U. S. 273, 10 S. Ct. 327, 33 L. ed. 625; U. S. *v.* Badeau, 33 Fed. 572, 31 Fed. 697; Wilson *v.* U. S., 32 Ct. Cl. 64; Stahel *v.* U. S., 26 Ct. Cl. 193; Goldsborough *v.* U. S., 25 Ct. Cl. 73; De Lama *v.* Haldimand, R. & M. 45, 1 C. & P. 183, 12 E. C. L. 114, wherein it was held that a foreign consul resident in England, and receiving a salary as such an officer from his

B. Recovery of Fees Paid to Government by Mistake. Before final settlement of his consular accounts with his government — but not afterward [19] — it seems, a consul may recover back money belonging to himself which he has paid over to the government by mistake.[20] And a consul who desires to recover fees turned over to his government through mistake must show definitely the amount.[21]

AMBIDEXTER. One who can use the left hand as well as the right.[1]

AMBIGUA RESPONSIO CONTRA PROFERENTEM EST ACCIPIENDA. A maxim meaning "An ambiguous answer is to be taken against him who offers it." [2]

AMBIGUIS CASIBUS SEMPER PRÆSUMITUR PRO REGE. A maxim meaning "In doubtful cases the presumption is always in favor of the king." [3]

AMBIGUITAS VERBORUM LATENS VERIFICATIONE SUPPLETUR; NAM QUOD EX FACTO ORITUR AMBIGUUM VERIFICATIONE FACTI TOLLITUR. A maxim meaning "Latent ambiguity may be supplied by evidence; for an ambiguity which arises by proof of an extrinsic fact may, in the same manner, be removed." [4]

AMBIGUITAS VERBORUM PATENS NULLA VERIFICATIONE EXCLUDITUR. A maxim meaning "A patent ambiguity cannot be cleared up by extrinsic evidence." [5]

AMBIGUITY. The quality or state of being ambiguous; doubtfulness or uncertainty, particularly of signification.[6] (Ambiguity: Evidence to Explain, see EVIDENCE. In Pleadings, see PLEADING. In Statutes, see STATUTES. In Wills, see WILLS.)

own government, cannot maintain an action for any trouble or labor to which he may have been put in transacting business for merchants here, in which he acted in conformity to the express instructions of his government. But when he acts as between one individual and another, though he acts as consul, he may receive fees.

When not a question of fact.—Where there is no conflict in the evidence as to the character of the acts for which the fees were received, the question as to whether they were official or not is not one of fact for the jury. U. S. *v.* Badeau, 31 Fed. 697.

Pro-rating fees.—A consular officer, who is entitled to retain fees collected by him or by a consular agent under his supervision during any year, up to a fixed limit, and who retires from office during the course of a fiscal year, is not entitled to retain all the fees then collected up to such limit, but only such part of the total annual allowance as is proportioned to the part of the fiscal year during which he has held office. Marston *v.* U. S., 71 Fed. 496, 34 U. S. App. 461, 18 C. C. A. 216. See also, as bearing on this question, Collin's Appeal, 5 Lawr. Compt. Dec. 100; U. S. *v.* Wendell, 2 Cliff. (U. S.) 340, 28 Fed. Cas. No. 16,666.

19. U. S. *v.* Wilson, 168 U. S. 273, 18 S. Ct. 85, 42 L. ed. 464, wherein it was held that where a consul charges himself with fees received by him as consul for which he is not obliged to account, and pays them to the government with each settlement, and retires, and makes his final settlement on the same basis, he cannot, in an action commenced after his retirement, recover back such payments, but they will be deemed voluntary.

20. U. S. *v.* Owen, 47 Fed. 797; U. S. *v.* Badeau, 33 Fed. 572. In U. S. *v.* Owen, 47 Fed. 797, it was held that where a consul pays over to the government money belonging to himself, under the impression that it was fees belonging to the government, he is entitled, at any time before final settlement, to be credited therewith.

Mistake of law and fact.—Where a consul, sued for balance of alleged consular fees claimed by the government, proved that he had always retained a sum in excess of the amount claimed, although this had, in early accounts, been credited to the treasury department, and it appeared that the moneys were not official fees, but legally belonged to the consul, it was held that this did not show a voluntary payment to the government of the fees in question so as to preclude defendant from resisting a recovery of the amount erroneously returned in his former accounts; and that the ruling of the state department, and the tabular list of fees promulgated by the president, apparently including the fees in question, until a revision and different ruling by the state department, made the case one of accounting under a mistake of mixed law and fact, and were not conclusive upon the defendant. U. S. *v.* Badeau, 33 Fed. 572.

21. Goldsborough *v.* U. S., 25 Ct. Cl. 73.

1. Burrill L. Dict.

Applied, in ancient times, first to an attorney who took pay from both sides, and, subsequently, to a juror who did the same. Cowell L. Dict. [*cited* in Bouvier L. Dict.].

2. Burrill L. Dict.

3. Morgan Leg. Max.

4. Broom Leg. Max.

5. Black L. Dict. [*citing* Lofft 249].

6. Kraner *v.* Halsey, 82 Cal. 209, 212, 22 Pac. 1137 [*citing* Webster Dict.].

Other definitions have been given as follows: "Duplicity, indistinctness, or uncertainty of meaning of an expression used in a

AMBIGUOUS. Doubtful or uncertain, particularly in respect to signification; equivocal; indeterminate; indefinite; unsettled; indistinct.[7]

AMBIGUUM PACTUM CONTRA VENDITOREM INTERPRETANDUM EST. A maxim meaning "An ambiguous agreement is to be interpreted against the seller."[8]

AMBIGUUM PLACITUM INTERPRETARI DEBIT CONTRA PROFERENTEM. A maxim meaning "An ambiguous pleading ought to be construed against the party offering it."[9]

AMBIT. A boundary line; an exterior or inclosing line or limit.[10]

AMBULATORIA EST VOLUNTAS DEFUNCTI USQUE AD VITÆ SUPREMUM EXITUM. A maxim meaning "The will of a deceased person is ambulatory until the last moment of life."[11]

AMBULATORY. That which may be altered or moved; changeable.[12]

AMBUSH. The act of attacking an enemy unexpectedly from a concealed station; a concealed station, where troops or enemies lie in wait to attack by surprise; an ambuscade; troops placed in a concealed place, for attacking by surprise; and as a verb "to lie in wait; to surprise; to place in ambush."[13]

A ME. A term denoting direct tenure of the superior lord.[14]

AMENABLE. Responsible; subject to answer;[15] obedient.[16]

AMEND. A word derived from the French word *amender* and signifying "to make better; to change from bad for the better."[17]

AMENDMENT. The correction of an error in any process, pleading, or proceeding at law or in equity, either of course, by consent of parties, or upon motion to the court in which the proceeding is pending.[18] (Amendment: As

written contract." Nindle *v.* State Bank, 13 Nebr. 245, 246, 13 N. W. 275 [*citing* Bouvier L. Dict.].

"The effect of words that have either no definite sense, or else a double one." Ellmaker *v.* Ellmaker, 4 Watts (Pa.) 89, 90.

Ambiguities are of two kinds, patent and latent. A patent ambiguity,— *ambiguitas patens* — is one which appears on the face of the instrument, that ambiguity which occurs when the expression of an instrument is so defective that a court of law which is obliged to put a construction upon it, placing itself in the situation of the parties, cannot ascertain therefrom the parties' intention. A latent ambiguity,— *ambiguitas latens* — is one which arises from some collateral circumstance, or extrinsic matter, in cases where the instrument is itself sufficiently certain and intelligible.

Alabama.— Chambers *v.* Ringstaff, 69 Ala. 140, 144.

Arkansas.— Dorr *v.* School Dist. No. 26, 40 Ark. 237, 241.

California.— Mesick *v.* Sunderland, 6 Cal. 297, 312.

Georgia.—Walker *v.* Wells, 25 Ga. 141, 142, 71 Am. Dec. 164.

Indiana.— Craven *v.* Butterfield, 80 Ind. 503, 510; Grimes *v.* Harmon, 35 Ind. 198, 208, 9 Am. Rep. 690.

Iowa.— Palmer *v.* Albee, 50 Iowa 429, 431 [*citing* Bouvier L. Dict.].

Kentucky.— Breckenridge *v.* Dugcan, 2 A. K. Marsh. (Ky.) 50, 12 Am. Dec. 359.

Maryland.— Stokeley *v.* Gordon, 8 Md. 496, 505.

Massachusetts.— Herring *v.* Boston Iron Co., 1 Gray (Mass.) 134, 138.

Mississippi.—Brown *v.* Guice, 46 Miss. 299, 301.

Ohio.— Webster *v.* Paul, 10 Ohio St. 531, 534 [*citing* Smith *v.* Jeffryes, 15 M. & W. 561].

United States.—Peisch *v.* Dickson, 1 Mason (U. S.) 9, 19 Fed. Cas. No. 10,911.

Distinguished from "indistinctness," "obscurity," and "uncertainty."— Ambiguity or duplicity are predicable only of language as to which it is needful to make a choice of meanings; while indistinctness, obscurity, and uncertainty include these, and also cases of language devoid of sense, or which does not present any meaning with clearness or precision. Abbott L. Dict.

7. Kraner *v.* Halsey, 82 Cal. 209, 213, 22 Pac. 1137 [*citing* Webster Dict.].

8. Morgan Leg. Max.

9. Broom Leg. Max. 601.

10. Burrill L. Dict.

Used in the sentence "An entry . . . gives a constructive possession . . . although there may be no fence or inclosure round the ambit of the tract," per Story, J., in Ellicott *v.* Pearl, 10 Pet. (U. S.) 412, 442, 9 L. ed. 475.

11. Burrill L. Dict.

12. Abbott L. Dict.

13. Dale County *v.* Gunter, 46 Ala. 118, 142 [*citing* Webster Dict.].

14. Bouvier L. Dict.

15. Jacob L. Dict.

16. Miller *v.* Com., 1 Duv. (Ky.) 15, 18.

17. Diamond *v.* Williamsburgh Ins. Co., 4 Daly (N. Y.) 494, 500 [*quoted* in State *v.* White, 16 R. I. 591, 18 Atl. 179, 1038].

18. Burrill L. Dict.

Other definitions have been given as follows: "The correction of errors committed

Ground of Continuance, see CONTINUANCES. As to Parties, see PARTIES. Changing Cause of Action or Defense, see EQUITY; PLEADING. Changing Form of Action, see PLEADING. Conforming Pleading to Proof, see PLEADING. Discretion of Court as to, see APPEAL AND ERROR; CRIMINAL LAW; PLEADING. In Particular Proceedings, see ADMIRALTY; ATTACHMENT; APPEAL AND ERROR; BANKRUPTCY; BASTARDS; CERTIORARI; CHATTEL MORTGAGES; CRIMINAL LAW; DRAINS; EMINENT DOMAIN; EQUITY; EXECUTIONS; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; INDICTMENTS AND INFORMATIONS; INFANTS; INSOLVENCY; INTERPLEADER; JUSTICES OF THE PEACE; LANDLORD AND TENANT; LIENS; MANDAMUS; MECHANICS' LIENS; MORTGAGES; MOTIONS; MUNICIPAL CORPORATIONS; NEW TRIAL; PARTITION; PROHIBITION; QUO WARRANTO; RAILROADS; REMOVAL OF CAUSES; SCIRE FACIAS; TAXATION; WILLS. Of Particular Acts, Instruments, or Proceedings, see ADMIRALTY; APPEAL AND ERROR; APPEARANCES; ARBITRATION AND AWARD; ARREST; ASSOCIATIONS; ATTACHMENT; BAIL; BANKRUPTCY; CERTIORARI; CONSTITUTIONAL LAW; CORPORATIONS; COSTS; CRIMINAL LAW; CUSTOMS DUTIES; DISCOVERY; ELECTIONS; EMINENT DOMAIN; ENTRY, WRIT OF; EQUITY; EXECUTIONS; EXECUTORS AND ADMINISTRATORS; GARNISHMENT; HABEAS CORPUS; INDICTMENTS AND INFORMATIONS; INJUNCTIONS; INSOLVENCY; INSURANCE; JUDGMENTS; JUSTICES OF THE PEACE; LIS PENDENS; MANDAMUS; MECHANICS' LIENS; MOTIONS; MUNICIPAL CORPORATIONS; PARTNERSHIP; PATENTS; PLEADING; PROCESS; PROHIBITION; QUO WARRANTO; RECEIVERS; RECOGNIZANCES; REFERENCES; REMOVAL OF CAUSES; REPLEVIN; REVIEW; SEQUESTRATION; STATUTES; SUBMISSION OF CONTROVERSY; TAXATION; TOWNS; TRIAL.

AMENDS. Compensation or satisfaction for an injury or loss.[19]

AMENSURATIO. In old English law, ADMEASUREMENT,[20] *q. v.*

AMENTIA. Idiocy.[21]

AMERCEMENT. See SHERIFFS AND CONSTABLES.

AMERCIAMENTUM. In old English law, AMERCEMENT,[22] *q. v.*

AMERICAN. An adjective descriptive, in the general mind, of the descendants of Europeans born in America, and applied especially to the inhabitants of the United States.[23]

AMERICAN CLAUSE. A proviso in a policy of insurance that, in case of any subsequent insurance, the insurer shall nevertheless be answerable for the full extent of the sum subscribed by him, without right to claim contribution from subsequent insurers.[24]

AMI or **AMY.** A friend.[25]

AMICABLE. Friendly.[26] (Amicable: Action, see SUBMISSION OF CONTROVERSY. Compounders, see ARBITRATION AND AWARD.)

in the progress of a cause." *In re* Sims, 9 Fed. 440, 441.

"The correction of some error or mistake in a pleading already before the court." Woodruff *v.* Dickie, 5 Rob. (N. Y.) 619, 622, 31 How. Pr. (N. Y.) 164 [*quoted* in Givens *v.* Wheeler, 6 Colo. 149, 151].

"The espying out of some error in the proceedings, and the correcting of it before judgment and after, if the error be not in the giving of the judgment." Diamond *v.* Williamsburgh Ins. Co., 4 Daly (N. Y.) 494, 500.

19. Burrill L. Dict.

20. Burrill L. Dict. [*citing* Bracton fol. 314*a*].

21. Taylor Med. Jurispr. 707.

22. Burrill L. Dict.

23. Beardsley *v.* Bridgeport, 53 Conn. 489, 493, 3 Atl. 557, 55 Am. Rep. 152.

24. American Ins. Co. *v.* Griswold, 14 Wend. (N. Y.) 399 [Tracy, Senator, dissenting].

25. Burrill L. Dict.

26. Abbott L. Dict.

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CROSS-REFERENCES

As to Assignment of Counsel by Court, see Attorney and Client.
Private Counsel in Criminal Prosecutions, see Criminal Law.

I. Definition.

An *amicus curiæ* is one who, voluntarily or on invitation of the court, instructs the court on a matter of law concerning which the latter is doubtful or mistaken, or informs him of facts, a knowledge of which is necessary to a proper disposition of the case.[1]

II. Nature of Right to Appear.

An *amicus curiæ* is heard only by the leave[2] and for the assistance of the court, and upon a case already before it.[3]

1. Amicus curiæ — friend of court — is a term applied to a bystander who, without having any interest in the cause, of his own knowledge makes a suggestion, on a point of law or of fact, for the information of the presiding judge. Abbott L. Dict.

An *amicus curiæ* is one who, for the assistance of the court, gives information on some matter of law in regard to which the court is doubtful or mistaken, such as a case not reported, or which the judge has not seen, or does not at the moment recollect. Bouvier L. Dict. [*citing* 2 Coke Inst. 178; 2 Viner Abr. 475]; Birmingham Loan, etc., Co. *v.* Anniston First Nat. Bank, 100 Ala. 249, 13 So. 945, 46 Am. St. Rep. 45.

An *amicus curiæ* is a counsel who intervenes, in a friendly manner, to remind the court of some matter of law which has escaped its notice, and in regard to which it appears to be in danger of going wrong. Taft *v.* Northern Transp. Co., 56 N. H. 414.

2. *Alabama.*— Birmingham Loan, etc., Co. *v.* Anniston First Nat. Bank, 100 Ala. 249, 13 So. 945, 46 Am. St. Rep. 45.

California.—Tomkin *v.* Harris, 90 Cal. 201, 27 Pac. 202.

Illinois.— Charleston *v.* Cadle, 167 Ill. 647, 49 N. E. 192; Matter of Guernsey, 21 Ill. 443.

Indiana.— Irwin *v.* Armuth, 129 Ind. 340, 28 N. E. 702; Little *v.* Thompson, 24 Ind. 146.

Massachusetts.— Martin *v.* Tapley, 119 Mass. 116; Nauer *v.* Thomas, 95 Mass. 572.

Michigan.— People *v.* Gibbs, 70 Mich. 425, 38 N. W. 257.

New York.— E. B. *v.* E. C. B., 8 Abb. Pr. (N. Y.) 44.

Texas.—State *v.* Jefferson Iron Co., 60 Tex. 312.

United States.— *In re* Columbia Real-Estate Co., 101 Fed. 965.

See 2 Cent. Dig. tit. "Amicus Curiæ," § 1.

3. Birmingham Loan, etc., Co. *v.* Anniston First Nat. Bank, 100 Ala. 249, 13 So. 945, 46 Am. St. Rep. 45; Martin *v.* Tapley, 119 Mass. 116.

Effect as appearance.— The appearance of the regular attorney of a corporation as *amicus curiæ*, to object to the sufficiency of the service of a writ on one who, as agent for such corporation, the corporation denies, is not an appearance of such corporation. International, etc., R. Co. *v.* Moore, (Tex. Civ. App. 1895) 32 S. W. 379.

III. When Amicus Curiæ May Appear.

A. In General. One may, as *amicus curiæ*, suggest the action of the court in any matter in which the court may proceed of its own motion;[4] but not on matters which should be presented by exception or plea.[5] And the rights or powers of a counsel appearing as *amicus curiæ* are not enlarged because the court assumed to appoint him in that capacity to represent it on the appeal of a cause which had come before it.[6]

B. For Dismissal of Suit. An attorney, as an *amicus curiæ*, may move to dismiss an action on the ground that it is collusive or fictitious,[7] or that the court has no jurisdiction,[8] or that the prosecution of it is unconscionably delayed.[9]

4. Adams Gloss. [*citing* Y. B. 4 Hen. VI, 16; Theloall Dig. lib. XIII, c. 14; Protector *v.* Geering, Hardres 85; 11 Mod. 137]; 2 Viner Abr. 475, 476 [*citing* Rex *v.* Vaux, Cumb. 13; Dove *v.* Martin, Cumb. 170; Protector *v.* Geering, Hardres 85; Theloall Dig. 200] and the following cases:

Alabama.—State *v.* Middleton, 5 Port. (Ala.) 484 (objections to grand juror); Boyington *v.* State, 2 Port. (Ala.) 100.

Indiana.— Croxton *v.* Renner, 103 Ind. 223, 2 N. E. 601; Jeffersonville R. Co. *v.* Swayne, 26 Ind. 477.

Iowa.— Childs *v.* Risk, Morris (Iowa) 439.

Kansas.— Mallory *v.* Burlington, etc., R. Co., 53 Kan. 557, 36 Pac. 1059.

Louisiana.—Life Assoc. of America *v.* Hall, 33 La. Ann. 49. See also Lesassier *v.* Board of Liquidation, 30 La. Ann. 611.

Texas.— Jones *v.* Jefferson, 66 Tex. 576, 1 S. W. 903; State *v.* Jefferson Iron Co., 60 Tex. 312 [*citing* 2 Coke Inst. 178, 2 Viner Abr. 475]; Andrews *v.* Beck, 23 Tex. 455.

United States.— U. S. *v.* Gale, 109 U. S. 65, 68, 3 S. Ct. 1, 27 L. ed. 857 (objections to grand juror).

England.— Rex *v.* Buckridge, 2 Show. 297, holding, however, that the accused must be present.

In certiorari proceedings in the supreme court formal intervention is not allowable, but counsel representing other interests may be permitted to appear as *amicus curiæ*. State *v.* Rost, 49 La. Ann. 1451, 22 So. 421.

Judges unlearned in the law, who do not feel themselves capable of ruling on questions of law that may arise, cannot call to the bench a member of the bar to assist them as *amicus curiæ*. Com. *v.* Collom, 1 Pa. Super. Ct. 542. But see Bocock *v.* Cochran, 32 Hun (N. Y.) 521, where it was held that a justice of the peace may request a neighboring justice, who was an attorney, to sit by him and take minutes and aid him with advice.

Judicial notice.— An *amicus curiæ* may instruct, inform, or move the court on any matter of which the court takes judicial cognizance. Bouvier L. Dict. [*citing* 8 Coke 15].

One who was a member of the legislature at the time of the passage of a certain statute may inform the court as to the intention of the legislature in passing the act. Viner Abr. 476 [*citing* Horton *v.* Ruesby, Comb. 33.]

Proof of will.— *In re* Barr, 30 Cinc. L. Bul. 386, was an application to admit to probate an authenticated copy of a foreign will, and, to throw light on the question of the execution of the will, the court permitted persons to appear as *amici curiæ*, and to introduce evidence.

A receiver, appointed by the final judgment in a cause and who has no interest in the matter except that of retaining his office, may file a brief as *amicus curiæ*. People *v.* Union Bldg., etc., Assoc., 127 Cal. 400, 59 Pac. 692.

5. Moseby *v.* Burrow, 52 Tex. 396.

6. Matter of Pina, 112 Cal. 14, 44 Pac. 332.

7. *Alabama.*— Birmingham Loan, etc., Co. *v.* Anniston First Nat. Bank, 100 Ala. 249, 13 So. 945, 46 Am. St. Rep. 45.

Illinois.— Matter of Guernsey, 21 Ill. 443.

Nevada.— Haley *v.* Eureka County Bank, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815.

New York.— Judson *v.* Flushing Jockey Club, 14 Misc. (N. Y.) 562, 36 N. Y. Suppl. 128, 71 N. Y. St. 76; E. B. *v.* E. C. B., 8 Abb. Pr. (N. Y.) 44.

Tennessee.— Ward *v.* Alsup, 100 Tenn. 619, 46 S. W. 573; State *v.* Wilson, 2 Lea (Tenn.) 204.

Vermont.— Stearns *v.* Stearns, 10 Vt. 540. See 2 Cent. Dig. tit. "Amicus Curiæ," § 4.

Defects in complaint.— A motion to dismiss a suit, on account of alleged defects in the complaint, cannot be made by an *amicus curiæ*. Piggott *v.* Kirkpatrick, 31 Ind. 261.

8. Williams *v.* Blunt, 2 Mass. 207; Jones *v.* Jefferson, 66 Tex. 576, 1 S. W. 903; *In re* Columbia Real-Estate Co., 101 Fed. 965; Brown *v.* Walker, 2 Show. 596. See also State *v.* Jefferson Iron Co., 60 Tex. 312; Olsen *v.* California Ins. Co., 11 Tex. Civ. App. 371, 32 S. W. 446.

Letters of administration issued without authority.— Whenever a court has issued letters of administration not authorized by, or in contravention of, an express provision of the statute, it may, upon the suggestion of an *amicus curiæ*, revoke, annul, or set aside such letters. Croxton *v.* Renner, 103 Ind. 223, 2 N. E. 601; Jeffersonville R. Co. *v.* Swayne, 26 Ind. 477; Mallory *v.* Burlington, etc., R. Co., 53 Kan. 557, 36 Pac. 1059; Gasque *v.* Moody, 12 Sm. & M. (Miss.) 153; 2 Cent. Dig. tit. "Amicus Curiæ," § 3.

9. Tomkin *v.* Harris, 90 Cal. 201, 27 Pac. 202.

C. On Behalf of Infant. An *amicus curiæ* may make application for, and in behalf of, an infant.[10]

D. On Behalf of Public Interests. In summary proceedings, where formal intervention will not be allowed, one may be heard as *amicus curiæ* on interests public in their character.[11]

E. On Death of Party. Counsel for a deceased party may be heard as an *amicus curiæ*, before the full court, if the exceptions sought to be established were taken in his client's lifetime,[12] though not allowed or entered until after the client's death;[13] or if the ruling below was in his favor, and questions of law were reserved on the motion of the other party.[14]

IV. When Amicus Curiæ May Not Appear.

The office of a friend of the court is restricted to making suggestions as to questions apparent upon the record, or matters of practice presenting themselves for determination in course of proceedings in open court.[15] An *amicus curiæ* can neither take upon himself the management of the cause as counsel;[16] nor file a demurrer;[17] nor take exceptions to the rulings of the court;[18] nor bring the case from one court to another, by appeal or writ of error;[19] nor suggest a diminution of the record;[20] nor file a petition for a rehearing.[21]

10. Matter of Guernsey, 21 Ill. 443 (where a stranger suggested to the court impropriety in the sale of a ward's estate); E. B. *v.* E. C. B., 8 Abb. Pr. (N. Y.) 44; *In re* Green, 3 Brewst. (Pa.) 427; Beard *v.* Travers, 1 Ves. 313 (a petition relating to the appointment of a guardian).

11. State *v.* Rost, 49 La. Ann. 1451, 22 So. 421 (where the state board of agriculture and the commissioner of agriculture made application to be allowed to intervene); *Ex p.* Yeager, 11 Gratt. (Va.) 655 (where an attorney was allowed to argue against the issuance of a tavern-keeper's license in proceedings by mandamus). See also Mumma's Estate, 2 Pa. Dist. 592, wherein it was held that, where it appeared to the court that, in accounts presented for compensation, illegal fees were allowed to the court officers, a committee of members of the bar should be appointed as *amici curiæ* to file exceptions to the account in order that the question of the validity of the charges might be brought up for adjudication. And see Green *v.* Biddle, 8 Wheat. (U. S.) 1, 5 L. ed. 547.

12. Martin *v.* Tapley, 119 Mass. 116; Bridges *v.* Smyth, 8 Bing. 29, 21 E. C. L. 431; Miles *v.* Williams, 9 Q. B. 47, 58 E. C. L. 47.

As to right of *amicus curiæ* to appeal see *infra*, IV.

13. Tapley *v.* Martin, 116 Mass. 275; Kelley *v.* Riley, 106 Mass. 339, 8 Am. Rep. 336.

14. Currier *v.* Lowell, 16 Pick. (Mass.) 170; Isley's Case, 1 Leon. 187.

15. Jones *v.* Jefferson, 66 Tex. 576, 1 S. W. 903.

16. *Alabama.*—Birmingham Loan, etc., Co. *v.* Anniston First Nat. Bank, 100 Ala. 249, 13 So. 945, 46 Am. St. Rep. 45.

California.— Matter of Pina, 112 Cal. 14, 44 Pac. 332.

Indiana.— Parker *v.* State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567; Knight *v.* Low, 15 Ind. 374.

Massachusetts.— Martin *v.* Tapley, 119 Mass. 116.

New Hampshire.—Taft *v.* Northern Transp. Co., 56 N. H. 414.

Pennsylvania.— Com. *v.* Collom, 1 Pa. Super. Ct. 542.

England.—Isley's Case, 1 Leon. 187; Viner Abr. tit. Amicus Curiæ.

17. *Ex p.* Henderson, 84 Ala. 36, 4 So. 284.

18. *Alabama.*—Birmingham Loan, etc., Co. *v.* Anniston First Nat. Bank, 100 Ala. 249, 13 So. 945, 46 Am. St. Rep. 45.

Indiana.— Parker *v.* State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567; Irwin *v.* Armuth, 129 Ind. 340, 28 N. E. 702; Conrad *v.* Johnson, 20 Ind. 421; Morehouse *v.* Potter, 15 Ind. 477; Knight *v.* Low, 15 Ind. 374; Darlington *v.* Warner, 14 Ind. 449; New Albany, etc., R. Co. *v.* Combs, 13 Ind. 490; Buchanan *v.* Beard, 13 Ind. 471; Hust *v.* Conn, 12 Ind. 257; Campbell *v.* Swasey, 12 Ind. 70.

Massachusetts.— Martin *v.* Tapley, 119 Mass. 116.

Texas.— See Andrews *v.* Beck, 23 Tex. 455.

England.— Isley's Case, 1 Leon. 187; Viner Abr. tit. Amicus Curiæ.

See 2 Cent. Dig. tit. "Amicus Curiæ," § 5.

19. *Alabama.*—Birmingham Loan, etc., Co. *v.* Anniston First Nat. Bank, 100 Ala. 249, 13 So. 945, 46 Am. St. Rep. 45.

Massachusetts.— Martin *v.* Tapley, 119 Mass. 116.

Mississippi.— Miller *v.* Keith, 26 Miss. 166.

New York.— E. B. *v.* E. C. B., 8 Abb. Pr. (N. Y.) 44.

Virginia.— Dunlop *v.* Com., 2 Call (Va.) 284; Sayre *v.* Grymes, 1 Hen. & M. (Va.) 404.

England.—Isley's Case, 1 Leon. 187; Viner Abr. tit. Amicus Curiæ.

See 2 Cent. Dig. tit. "Amicus Curiæ," § 5.

20. Matter of Pina, 112 Cal. 14, 44 Pac. 332.

21. People *v.* Union Bldg., etc., Assoc., 127 Cal. 400, 59 Pac. 692; Charleston *v.* Cadle,

V. PROCEDURE.

A. In General. An *amicus curiæ* may interfere by statement in open court,[22] or by motion in writing,[23] or by affidavit.[24] In support of his contention, the court consenting to hear him, he may be permitted to introduce evidence;[25] or the court itself may call witnesses before it and examine them as to the truth of the matters thus brought to its attention.[26]

B. Notice. In case of a motion or suggestion by an *amicus curiæ* the parties immediately interested, if not present, should be informed.[27]

VI. COMPENSATION.

An *amicus curiæ*, to whom a question has been referred by the court for examination and report, may be allowed a reasonable compensation therefor, to be taxed as costs.[28]

AMITTERE CURIAM. In old English law, to lose the court; to be deprived of the privilege of attending the court.[1]

AMITTERE LEGEM TERRÆ or **AMITTERE LIBERAM LEGEM.** To lose the liberty of swearing in any court.[2]

AMNESTY. An act of oblivion or forgetfulness;[3] a general pardon of the offenses of subjects against the government, or the proclamation of such pardon.[4] (See, generally, PARDONS.)

167 Ill. 647, 49 N. E. 192; Parker *v.* State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567; Apple *v.* Atkinson, 34 Ind. 518; Life Assoc. of America *v.* Hall, 33 La. Ann. 49. But see Breaux *v.* Negrotto, 43 La. Ann. 426, 9 So. 502; Lesassier *v.* Board of Liquidation, 30 La. Ann. 611.

22. Olsen *v.* California Ins. Co., 11 Tex. Civ. App. 371, 32 S. W. 446.

At request of court.— The court may, of its own motion, request information of some attorney of the court.

Indiana.— Parker *v.* State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567; Campbell *v.* Swasey, 12 Ind. 70.

Missouri.— *In re* St. Louis Institute of Christian Science, 27 Mo. App. 633.

Nevada.— Haley *v.* Eureka County Bank, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815.

Pennsylvania.— Mumma's Estate, 2 Pa. Dist. 592.

United States.—*Ex p.* Randolph, 2 Brock. (U. S.) 447, 20 Fed. Cas. No. 11,558.

23. Haley *v.* Eureka County Bank, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815.

24. Matter of Guernsey, 21 Ill. 443.

25. Irwin *v.* Armuth, 129 Ind. 340, 28 N. E. 702; Haley *v.* Eureka County Bank, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815; Bass *v.* Fontleroy, 11 Tex. 698. See also The David Pratt, 1 Ware (U. S.) 509, 7 Fed. Cas. No. 3,597.

26. Olsen *v.* California Ins. Co., 11 Tex. Civ. App. 371, 32 S. W. 446. See also Jones *v.* Jefferson, 66 Tex. 576, 1 S. W. 903.

27. Tomkin *v.* Harris, 90 Cal. 201, 27 Pac. 202; Matter of Guernsey, 21 Ill. 443.

Dismissal of suit as fictitious.— No notice need be given of a motion by an *amicus curiæ* to dismiss an action as fictitious. Haley *v.* Eureka County Bank, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815.

28. *In re* St. Louis Institute of Christian Science, 27 Mo. App. 633; 2 Cent. Dig. tit. "Amicus Curiæ," § 2.

1. Burrill L. Dict.

2. Jacob L. Dict.

3. *Ex p.* Law, 35 Ga. 285, 296; Davies *v.* McKeeby, 5 Nev. 369, 373 [*citing* Webster Dict.].

Not a common-law term.— "The word 'amnesty' does not belong to the common law, and has no technical meaning in it, and can be used in it only in the meaning of its synonym in our language, and that is 'oblivion.' For the derivative and literal meaning of amnesty is 'removed from memory;' and in the English law 'oblivion' is the synonym of 'pardon,' and is so used in it." Knote *v.* U. S., 10 Ct. Cl. 397, 407 [*affirmed* in 95 U. S. 149, 24 L. ed. 442].

Properly belongs to international law.— "The word 'amnesty' properly belongs to international law, and is applied to treaties of peace following a state of war, and signifies there the burial in oblivion of the particular cause of the strife, so that that shall not be again a cause for war between the parties; and this signification of 'amnesty' is fully and poetically expressed in the Indian custom of burying the hatchet. And so amnesty is applied to rebellions which by their magnitude are brought within the rules of international law, and in which multitudes of men are the subjects of the clemency of the government. But in these cases and in all cases it means only oblivion, and never expresses or implies a grant." Knote *v.* U. S., 10 Ct. Cl. 397, 407 [*affirmed* in 95 U. S. 149, 24 L. ed. 442].

4. Davies *v.* McKeeby, 5 Nev. 369, 373 [*citing* Webster Dict.].

Distinguished from "pardon."— "'Pardon' and 'amnesty' are not precisely the same.

AMONG. Intermingled with ;[5] and sometimes used in the sense of "between."[6]

AMORTISE. To alien or convey lands in mortmain.[7]

AMORTISEMENT or AMORTIZATION. An alienation of lands or tenements in mortmain.[8]

AMOTION. Ouster; the removal of a corporate officer from office.[10] (See CORPORATIONS; MUNICIPAL CORPORATIONS.)

AMOUNT IN CONTROVERSY. See APPEAL AND ERROR; COSTS; COURTS; JUSTICES OF THE PEACE; REMOVAL OF CAUSES.

AMOUR. Grace; favor.[11]

AMOVE. To remove from a post or station.[12]

AMOVEAS MANUS. Literally, "that you remove your hands." In old English practice, the judgment against the crown on a *monstrans de droit* that the possession of lands claimed be restored to the demandant.[13]

AMPARO. An instrument known to the Mexican law which is issued to a claimant of land as a protection to him until a survey can be ordered and the title of possession issued by an authorized commissioner.[14]

AMPLIARE. In old English law, to enlarge or extend.[15]

AMPLIATION. A referring of judgment till the cause is further examined.[16]

AMPUTATION OF RIGHT HAND. An ancient punishment for a blow given in a superior court, or for assaulting a judge sitting in court.[17]

AMUSEMENTS. See THEATERS AND SHOWS.

AMY. See AMI.

AN. See A.

ANÆSTHETIC. That which produces insensibility to pain.[18]

ANALOGY. Identity or similarity of proportion.[19]

ANARCHY. The absence of government; a state of society where there is no law or supreme power.[20]

ANATHEMA. A punishment, in ecclesiastical law, separating a person from the body of the church and forbidding him all intercourse with the faithful.[21]

ANATOMY ACT. The English statute[22] by which the practice of dissecting human corpses is regulated.[23]

ANCESTOR. See DESCENT AND DISTRIBUTION.

ANCESTRAL. Relating to, or derived from, ancestors.[24]

ANCHORAGE. A duty or toll taken of ships for the use of the haven where they cast anchor, and sometimes exacted though there be no anchor.[25]

ANCHOR WATCH. A small watch kept constantly on deck while in port or riding at single anchor.[26]

A pardon is granted to one who is certainly guilty, sometimes before, but usually after, conviction. And the court takes no notice of it, unless pleaded, or in some way claimed by the person pardoned; and it is usually granted by the crown or by the executive. But amnesty is to those who may be guilty, and is usually granted by Parliament, or the Legislature; and to whole classes, before trial. Amnesty is the abolition or oblivion of the offense; pardon is its forgiveness." State *v.* Blalock, 61 N. C. 242, 247.

5. Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 194, 6 L. ed. 23, 69.

6. Senger *v.* Senger, 81 Va. 687, 698. And see, generally, BETWEEN.

7. Burrill L. Dict.

8. Jacob L. Dict.

9. 3 Bl. Comm. 198.

10. Abbott L. Dict.

Distinguished from "disfranchisement."— "'Amotion' relates alone to officers and 'disfranchisement' to members of the corporation." Richards *v.* Clarksburg, 30 W. Va. 491, 497, 4 S. E. 774.

11. Kelham Dict.

12. Wharton L. Lex.

13. Burrill L. Dict.

14. Trimble *v.* Smithers, 1 Tex. 790.

15. Burrill L. Dict.

16. Jacob L. Dict.

17. Wharton L. Lex.

18. State *v.* Baldwin, 36 Kan. 1, 20, 12 Pac. 318 [*citing* Webster Dict.].

19. Wharton L. Lex.

20. Spies *v.* People, 122 Ill. 1, 253, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

21. Bouvier L. Dict.

22. 2 & 3 Wm. IV, c. 75.

23. Wharton L. Lex.

24. Burrill L. Dict.

25. Foreman *v.* Free Fishers, L. R. 4 H. L. 266, 284; Free Fishers *v.* Gann, 13 C. B. N. S. 853, 859, 106 E. C. L. 853.

26. The Lady Franklin, 2 Lowell (U. S.) 220, 14 Fed. Cas. No. 7,984 [*citing* Dana Dict.

ANCIENT. Old; that existed in former times.[27] (Ancient: Documents, see DEEDS; EVIDENCE; LOST INSTRUMENTS. Houses, see EASEMENTS. Lights, see ADJOINING LANDOWNERS; EASEMENTS; INJUNCTIONS.)

ANCIENTS. Gentlemen of the Inns of Court.[28]

ANCILLARY. Auxiliary; that which aids or promotes a proceeding regarded as the principal.[29] (Ancillary: Administration, see EXECUTORS AND ADMINISTRATORS. Guardianship, see GUARDIAN AND WARD. Judgment, see EQUITY; JUDGMENTS. Jurisdictions, see COURTS; EQUITY. Receivership, see RECEIVERS.)

AND. A particle which expresses the relation of addition,[30] but which is frequently construed as meaning "or,"[31] although it should never be so read unless the context favors the conversion,[32] and sometimes in the sense of "as well as."[33] The word is frequently abbreviated "&."[34]

Sea Terms, 129; Totten Naval Text Book & Dict. 443].

One man always on deck, without any duty assigned to him, answers the requisites of an anchor watch. The Rival, 1 Sprague (U. S.) 128, 20 Fed. Cas. No. 11,867.

27. Bagley *v.* Castile, 42 Ark. 77, 87 [*citing* Webster Dict.].

"'Ancient' is a correlative term, and has for its correlate, as standing in the opposition, the term 'modern.'" Garner *v.* State, 5 Yerg. (Tenn.) 159, 178.

Ancient demesne.— A species of copyhold tenure, existing in certain manors, which, though now perhaps granted out to private subjects, were actually in the hands of the crown in the time of Edward the Confessor, or William the Conqueror, and so appear to have been by Domesday Book, in which they were entered. Burrill L. Dict.

Ancient readings.— Essays on the early English statutes. Coke Litt. 280.

Ancient rent.—"That shall be deemed the ancient rent, which was the rent at the time the power was reserved, or when the last lease before was made, if the estate was not then under lease." Doe *v.* Lock, 2 A. & E. 705, 736, 29 E. C. L. 325 [*citing* Orby *v.* Mohun, 2 Vern. 531, 542].

Ancient writings.— Documents upward of thirty years old. Wharton L. Lex.

28. Jacob L. Dict.

29. Abbott L. Dict.

30. Lane *v.* Kolb, 92 Ala. 636, 665, 9 So. 873; Hyatt *v.* Allen, 54 Cal. 353, 367 [*citing* Webster Dict.]; O'Brien *v.* Carson, 42 Iowa 553; State Board of Assessors *v.* Central R. Co., 48 N. J. L. 146, 352, 4 Atl. 578.

31. *Alabama.*— Porter *v.* State, 58 Ala. 66, 68; Hilliard *v.* Binford, 10 Ala. 977, 996.

California.— People *v.* Pool, 27 Cal. 572, 581.

Illinois.— Chicago, etc., R. Co. *v.* Bartlett, 120 Ill. 603, 11 N. E. 867; Streeter *v.* People, 69 Ill. 595.

Indiana.— Smith *v.* Madison, 7 Ind. 86, 90.

Iowa.—Williams *v.* Poor, 65 Iowa 410, 415, 21 N. W. 753; Eisfeld *v.* Kenworth, 50 Iowa 389; State *v.* Smith, 46 Iowa 670; State *v.* Brandt, 41 Iowa 593; State *v.* Myers, 10 Iowa 448.

Maine.— Collins Granite Co. *v.* Devereux, 72 Me. 422; Sargent *v.* Simpson, 8 Me. 148; Sayward *v.* Sayward, 7 Me. 210, 22 Am. Dec. 191.

Maryland.—Janney *v.* Sprigg, 7 Gill (Md.) 197, 48 Am. Dec. 557.

Massachusetts.— Litchfield *v.* Cudworth, 15 Pick. (Mass.) 23, 27.

Missouri.— Maguire *v.* Moore, 108 Mo. 267, 18 S. W. 897; Missouri Loan Bank *v.* How, 56 Mo. 53, 58.

New Hampshire.— Bay State Iron Co. *v.* Goodall, 39 N. H. 223, 234, 75 Am. Dec. 219.

New Jersey.— Shimer *v.* Shimer, 50 N. J. Eq. 300, 24 Atl. 385.

New York.— Room *v.* Phillips, 24 N. Y. 463, 470; O'Hara *v.* Dever, 2 Keyes (N. Y.) 558; Jackson *v.* Topping, 1 Wend. (N. Y.) 388, 19 Am. Dec. 515.

North Carolina.—Hughes *v.* Smith, 64 N. C. 493.

Pennsylvania.— Simpson *v.* Morris, 3 Yeates (Pa.) 104, 117; Englefried *v.* Woelpart, 1 Yeates (Pa.) 41.

South Carolina.— Bowen *v.* Southern R. Co., 58 S. C. 222, 36 S. E. 590; Duncan *v.* Harper, 4 S. C. 76; Seabrook *v.* Mikell, Cheves Eq. (S. C.) 80.

Texas.— Robinson *v.* Brinson, 20 Tex. 438.

Virginia.— East *v.* Garrett, 84 Va. 523, 9 S. E. 1112.

West Virginia.— Jelly *v.* Dils, 27 W. Va. 267, 274; State *v.* Cain, 9 W. Va. 559, 569.

Wisconsin.— Hall *v.* Fond du Lac, 42 Wis. 274, 281.

United States.— U. S. *v.* Fisk, 3 Wall. (U. S.) 445, 18 L. ed. 243; Brown *v.* Grand Rapids Parlor Furniture Co., 58 Fed. 286, 16 U. S. App. 221, 7 C. C. A. 225, 22 L. R. A. 817.

England.— Townsend *v.* Read, 10 C. B. N. S. 308, 100 E. C. L. 308; Prebble *v.* Boghurst, 1 Swanst. 309, 330; Bell *v.* Phyn, 7 Ves. Jr. 453, 458; Maberly *v.* Strode, 3 Ves. Jr. 450; Jackson *v.* Jackson, 1 Ves. 217.

Canada.—Boag *v.* Lewis, 1 U. C. Q. B. 357.

32. Armstrong *v.* Moran, 1 Bradf. Surr. (N. Y.) 314.

33. Porter *v.* Moores, 4 Heisk. (Tenn.) 16, 19.

34. Pickens *v.* State, 58 Ala. 364; Hunt *v.* Smith, 9 Kan. 137, 153; Com. *v.* Clark, 4 Cush. (Mass.) 596; Malton *v.* State, 29 Tex. App. 527, 16 S. W. 423; Brown *v.* State, 16 Tex. App. 245, 247, in which last case the court said: "It will be noticed that the pleader used between the names of the defendants the sign or abbreviation '&,' instead of the conjunction 'and.' In the Appendix to his unabridged dictionary, under the title

ANDROLEPSY. The taking by one nation of the citizens of another, in order to compel the latter to do justice to the former.[35]

ANEW. Over again.[36]

ANGER. A violent passion of the mind excited by a real or supposed injury, or by an injury offered to a relative or friend.[37]

ANGLICE. In English.[38]

ANGOSTURA. A bark, valuable as a febrifuge and tonic, the produce of *Galipea* or *Cusparia febrifuga.*[39]

ANGUISH. Extreme pain, either of body or mind; agony; distress; pang; torment.[40] (Anguish As Element of Damages, see DAMAGES.)

'Miscellaneous,' Mr. Webster makes the sign or abbreviation '&' mean the same as the word 'and,' and Mr. Richardson in his dictionary gives many illustrations from the old English authors under the word 'and,' showing that the sign '&' was used synonymously with 'and' as an abbreviation for the word 'and.' This style of abbreviation has come down to us sanctioned by age and good use for perhaps centuries, and is used even at this day in written instruments, in daily transactions, with such frequency that it may be said to be a part of our language when it is written."

"&c" for "and so forth."—"It is also objected that the abbreviation '&c' is Latin, but we do not so consider it. We were early taught that its meaning is 'and so forth,' and though borrowed from the Latin, like many of the best words of the language, it has been naturalized in English for ages. Lord Coke has, in many places in his Commentary on Littleton, discussed what was intended by the '&c' of his author, but it is no where suggested that the abbreviation is not English. It is every where introduced and explained in English reading books, grammars and dictionaries as an English abbreviation." Berry *v.* Osborn, 28 N. H. 279, 288.

35. Wharton L. Lex.

36. Neil *v.* Case, 25 Kan. 510, 514, 37 Am. Rep. 259.

37. Eanes *v.* State, 10 Tex. App. 421, 447 [*citing* Webster Dict.].

38. Burrill L. Dict.

39. Siegert *v.* Abbott, 72 Hun (N. Y.) 243, 246, 25 N. Y. Suppl. 590, 55 N. Y. St. 698 [*citing* Murray's New English Dict.].

The name is derived from Angustura or Angostura, a town on the Orinoco, now called Ciudad Bolivar. Siegert *v.* Abbott, 72 Hun (N. Y.) 243, 246, 25 N. Y. Suppl. 590, 55 N. Y. St. 698.

40. Cook *v.* Missouri Pac. R. Co., 19 Mo. App. 329, 334 [*citing* Webster Dict.].

ANIMALS

EDITED BY SAMUEL C. BENNETT
Dean of Boston University School of Law

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For General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW.

I. DEFINITION.

As used in the law the term "animals" includes any animate being, which is not human, endowed with the power of voluntary motion.[1]

II. PROPERTY IN ANIMALS.[2]

A. In General — 1. Domestic Animals — a. Generally. In animals *domitæ naturæ* — tame animals — a man may have as absolute a property as in any inanimate things.[3]

1. Bouvier L. Dict.
"The common law divides animals having the power of locomotion, exclusive of man, into three classes, namely: such as are *domitæ naturæ* — tame animals; such as are *feræ naturæ* — wild animals; and such as, whether wild or tame, are of so base a nature as not to be the subject of larceny. This latter class is composed out of the two former." State *v.* Sumner, 2 Ind. 377; 2 Bl. Comm. 390 *et seq.*; 4 Bl. Comm. 236.

2. **Property in estrays,** see *infra*, IX.
Evidence of ownership, brands and marks as, see *infra*, IV.

3. State *v.* Sumner, 2 Ind. 377; Blair *v.* Forehand, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94; Eddy *v.* Davis, 35 Vt. 247; Case of Swans, 7 Coke 18*a*; 2 Bl. Comm. 390.

b. Dogs. Dogs are animals *domitæ naturæ*,[4] and the law, both in England and the United States, recognizes property in and to them.[5] Such property has been held, however, not to stand on the same ground as property in other animals, but is said to be base, inferior, and entitled to less regard and protection.[6]

The reason assigned for the rule is "because these continue perpetually in his occupation, and will not stray from his house or person, unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property." 2 Bl. Comm. 390 [*quoted* in State *v.* Sumner, 2 Ind. 377, 378].

Horses, cattle, and sheep are examples of this class of animals mentioned in the books. Blair *v.* Forehand, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94; 2 Bl. Comm. 390.

Poultry, including peacocks (Com. *v.* Beaman, 8 Gray (Mass.) 497; Y. B. Hen. VIII, 2) and turkeys (State *v.* Turner, 66 N. C. 618), are embraced in this class (2 Bl. Comm. 390). But see Rex *v.* Manu, 4 Hawaii 409, 23 Alb. L. J. 444, wherein it was held that turkeys, whose remote ancestors had been imported, running wild on one's land, but not in his custody, control, or possession, were not the subjects of larceny, although the court said: "We consider that these turkeys are not, properly speaking, animals *ferœ naturæ*, though partaking of their habits."

4. White *v.* Brantley, 37 Ala. 430; State *v.* McDuffie, 34 N. H. 523, 69 Am. Dec. 516; Dodson *v.* Mock, 20 N. C. 146, 32 Am. Dec. 677; Hurley *v.* State, 30 Tex. App. 333, 17 S. W. 455, 28 Am. St. Rep. 916. See also 2 Bl. Comm. 391, where animals *domitæ naturæ* are said to be such as "we generally see tame, and are therefore seldom, if ever, found wandering at large;" and State *v.* Harriman, 75 Me. 562, 563, 46 Am. Rep. 423, where the court, though holding *contra*, said: "It is true that dogs have extensively become domesticated, so that is usual and perhaps not an improper use of language to call them 'domestic animals,' but as they still retain in a great measure their natural propensities, they may more properly be called domestic animals with vicious habits. They still keep their wild characteristics which ally them to the class of animals *ferœ naturæ*."

5. *Alabama.*— White *v.* Brantley, 37 Ala. 430; Parker *v.* Mise, 27 Ala. 480, 62 Am. Dec. 776.

Connecticut.— Wilton *v.* Weston, 48 Conn. 325; Woolf *v.* Chalker, 31 Conn. 121, 81 Am. Dec. 175.

District of Columbia.— Washington *v.* Meigs, 1 MacArthur (D. C.) 53, 29 Am. Rep. 578.

Georgia.— Graham *v.* Smith, 100 Ga. 434, 28 S. E. 225, 62 Am. St. Rep. 323, 40 L. R. A. 503; Jemison *v.* Southwestern R. Co., 75 Ga. 444, 58 Am. Rep. 476.

Illinois.— Brent *v.* Kimball, 60 Ill. 211, 14 Am. Rep. 35.

Indiana.— Kinsman *v.* State, 77 Ind. 132; State *v.* Sumner, 2 Ind. 377.

Iowa.— Anson *v.* Dwight, 18 Iowa 241.

Kansas.— Harrington *v.* Miles, 11 Kan. 480, 15 Am. Rep. 355.

Maine.— Chapman *v.* Decrow, 93 Me. 378, 45 Atl. 295, 74 Am. St. Rep. 357.

Massachusetts.— Uhlein *v.* Cromack, 109 Mass. 273; Cummings *v.* Perham, 1 Metc. (Mass.) 555.

Michigan.— Ten Hopen *v.* Walker, 96 Mich. 236, 55 N. W. 657; Heisrodt *v.* Hackett, 34 Mich. 283, 22 Am. Rep. 529.

Mississippi.— Jones *v.* Illinois Cent. R. Co., 75 Miss. 970, 23 So. 358.

Nebraska.— Nehr *v.* State, 35 Nebr. 638, 53 N. W. 589, 17 L. R. A. 771.

New Hampshire.— State *v.* McDuffie, 34 N. H. 523, 69 Am. Dec. 516.

New York.— Fox *v.* Mohawk, etc., River Humane Soc., 20 Misc. (N. Y.) 461, 46 N. Y. Suppl. 232; People *v.* Tighe, 9 Misc. (N. Y.) 607, 30 N. Y. Suppl. 368; People *v.* McMaster, 10 Abb. Pr. N. S. (N. Y.) 132.

North Carolina.— State *v.* Latham, 35 N. C. 33; Dodson *v.* Mock, 20 N. C. 146, 32 Am. Dec. 677.

Ohio.— Fagin *v.* Cincinnati Humane Soc., 5 Ohio S. & C. P. Dec. 596.

Pennsylvania.— Furness *v.* Union R. Co., 8 Kulp (Pa.) 103, 4 Pa. Dist. 784, 1 Lack. Leg. N. (Pa.) 332.

South Carolina.—Salley *v.* Manchester, etc., R. Co., 54 S. C. 481, 32 S. E. 526, 71 Am. St. Rep. 810.

Tennessee.—State *v.* Brown, 9 Baxt. (Tenn.) 53, 40 Am. Rep. 81; Wheatley *v.* Harris, 4 Sneed (Tenn.) 468, 70 Am. Dec. 258.

Texas.—Heiligmann *v.* Rose, 81 Tex. 222, 16 S. W. 931, 26 Am. St. Rep. 804, 13 L. R. A. 272.

Utah.— Jenkins *v.* Ballantyne, 8 Utah 245, 30 Pac. 760, 16 L. R. A. 689.

England.— Reg. *v.* Slade, 16 Cox C. C. 496, 57 L. J. M. C. 120, 59 L. T. Rep. 640, 37 Wkly. Rep. 141; Ireland *v.* Higgins, Cro. Eliz. 125; Athill *v.* Corbet, Cro. Jac. 463; Wright *v.* Ramscot, 1 Saund. 84, 1 Sid. 336, 1 Lev. 216, 2 Keb. 333; Binstead *v.* Buck, 2 W. Bl. 1117; Y. B. 12 Hen. VIII, 3; Bacon Abr. tit. Trover (D); Comyns Dig. tit. Biens (F).

See 2 Cent. Dig. tit. "Animals," § 2.

Mastiffs, hounds, spaniels, and tumblers are, it seems, the only dogs in which the common law recognizes property. Wright *v.* Ramscot, 1 Saund. 84, 1 Sid. 336, 1 Lev. 216, 2 Keb. 330; Ireland *v.* Higgins, Cro. Eliz. 125.

Deprivation of property without process of law.— A dog is property in the United States within the meaning of the fifth amendment to the constitution, which forbids any person being deprived of his property without due process of law. Jenkins *v.* Ballantyne, 8 Utah 245, 30 Pac. 760, 16 L. R. A. 689.

6. *Connecticut.*— Wilton *v.* Weston, 48 Conn. 325; Woolf *v.* Chalker, 31 Conn. 121, 81 Am. Dec. 175.

Georgia.— Jemison *v.* Southwestern R. Co., 75 Ga. 444, 58 Am. Rep. 476.

Accordingly, at common law and in some states, a dog has been held or said not to be the subject of larceny,[7] not to be "property" within general provisions for taxation,[8] not to be inventoried and appraised as an asset of a decedent's estate,[9] and case will not lie for its intentional, though negligent, destruction.[10]

2. WILD ANIMALS — a. In General. The ownership of wild animals, so far as they are capable of ownership, is in the state — not as proprietor, but in its sovereign capacity, as the representative of, and for the benefit of, all its people in common.[11] Such animals become the subject of private ownership only so far as the people may elect to make them so.[12]

Maryland.— Hagerstown *v.* Witmer, 86 Md. 293, 37 Atl. 965, 39 L. R. A. 649.

Massachusetts.— Blair *v.* Forehand, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94.

New Hampshire.— State *v.* McDuffie, 34 N. H. 523, 69 Am. Dec. 516.

Texas.— State *v.* Marshall, 13 Tex. 55.

United States.— Sentell *v.* New Orleans, etc., R. Co., 166 U. S. 698, 17 S. Ct. 693, 41 L. ed. 1169.

England.— 4 Bl. Comm. 236.

Three reasons may be assigned for this: (1) They do not serve for food and hence were held to have no intrinsic value. Woolf *v.* Chalker, 31 Conn. 121, 81 Am. Dec. 175; State *v.* McDuffie, 34 N. H. 523, 69 Am. Dec. 516; 4 Bl. Comm. 236. (2) Because the dog, in common with the class of wild animals to which he originally belonged, is subject to the most distressing and incurable disease known, which he is inclined to communicate, and frequently, if not destroyed, does communicate, by his bite, to animals and mankind. Woolf *v.* Chalker, 31 Conn. 121, 81 Am. Dec. 175. (3) Because he is chiefly propagated for purposes which require that he should retain in some degree the natural ferocity and inclination to mischief which characterize him, and, thus kept, trained, and used, he is liable to become mischievous, and to injure the property of others; noisy, and a private nuisance; ferocious, and accustomed to bite persons, therefore dangerous to the community and a public nuisance. Woolf *v.* Chalker, 31 Conn. 121, 81 Am. Dec. 175; Blair *v.* Forehand, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94.

7. *Alabama.*— Ward *v.* State, 48 Ala. 161, 17 Am. Rep. 31.

Indiana.— State *v.* Doe, 79 Ind. 9, 41 Am. Rep. 599.

Maine.— State *v.* Harriman, 75 Me. 562, 46 Am. Rep. 423.

North Carolina.— State *v.* Holder, 81 N. C. 527, 31 Am. Rep. 517.

Ohio.— State *v.* Lymus, 26 Ohio St. 400, 20 Am. Rep. 772 [*distinguished* in State *v.* Yates, 19 Cinc. L. Bul. (Ohio) 150, 10 Ohio Dec. (Reprint) 182, 37 Alb. L. J. 232, 10 Crim. L. Mag. 439, the statute relating to larceny having since had added to it the words, "any thing of value"].

Pennsylvania.— Findlay *v.* Bear, 8 Serg. & R. (Pa.) 571; Com. *v.* Huggins, 4 Pa. Co. Ct. 671.

England.— Case of Swans, 7 Coke 18*a*; Reg. *v.* Robinson, Bell C. C. 34, 8 Cox C. C. 115; 4 Bl. Comm. 236; Burns Justice, tit. Dogs; 1 Hale P. C. 511.

Contra, see the following:

Georgia.— Jemison *v.* Southwestern R. Co., 75 Ga. 444, 58 Am. Rep. 476 (by express statutory provision).

Kansas.— Harrington *v.* Miles, 11 Kan. 480, 15 Am. Rep. 355.

New York.— Mullaly *v.* People, 86 N. Y. 365; People *v.* McMaster, 10 Abb. Pr. N. S. (N. Y.) 132; People *v.* Campbell, 4 Park. Crim. (N. Y.) 386; People *v.* Maloney, 1 Park. Crim. (N. Y.) 593.

Tennessee.—State *v.* Brown, 9 Baxt. (Tenn.) 53, 40 Am. Rep. 81.

Texas.— Hurley *v.* State, 30 Tex. App. 333, 17 S. W. 455, 28 Am. St. Rep. 916.

See 2 Cent. Dig. tit. "Animals," § 2.

8. Jemison *v.* Southwestern R. Co., 75 Ga. 444, 58 Am. Rep. 476; State *v.* Harriman, 75 Me. 562, 46 Am. Rep. 423; Hendrie *v.* Kalthoff, 48 Mich. 306, 12 N. W. 191; *Ex p.* Cooper, 3 Tex. App. 489, 30 Am. Rep. 152.

9. Jemison *v.* Southwestern R. Co., 75 Ga. 444, 58 Am. Rep. 476; State *v.* Harriman, 75 Me. 562, 46 Am. Rep. 423.

10. Jemison *v.* Southwestern R. Co., 75 Ga. 444, 58 Am. Rep. 476. But see Ranson *v.* Kitner, 31 Ill. App. 241 (wherein it was held that an action would lie for the value of a dog mistakenly killed for a wolf), and Wright *v.* Clark, 50 Vt. 130, 28 Am. Rep. 496 (wherein it was held that trespass would lie for accidentally killing a dog in shooting at a fox).

11. *Ex p.* Maier, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129; State *v.* Repp, 104 Iowa 305, 73 N. W. 829, 40 L. R. A. 687; State *v.* Rodman, 58 Minn. 393, 59 N. W. 1098; Geer *v.* Connecticut, 161 U. S. 519, 16 S. Ct. 600, 40 L. ed. 793 [*affirming* State *v.* Geer, 61 Conn. 144, 22 Atl. 1012, 13 L. R. A. 804].

The Roman law considered animals *ferœ naturœ* as belonging in common to all the citizens of the state. Geer *v.* Connecticut, 161 U. S. 519, 16 S. Ct. 600, 40 L. ed. 793.

That in international law no such thing exists as a national right of property in a herd or body of wild animals, as a whole, apart from the ordinary right of property in each individual animal inhering in its custodian during the time that his possession of it lasts, is supported by Behring Sea Arbitrators' Decision, 32 Am. L. Reg. 901.

12. *Ex p.* Maier, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129.

Substantially in accord with English law. —"We understand that the law in this country with regard to property in animals *ferœ*

b. Title — How Acquired by Individuals — (I) *By Confining, Reclaiming, or Taming* — (A) *In General.* One may acquire property in wild animals *per industriam*, by reclaiming and making them tame by art, industry, and education, or by so confining them within his own immediate power that they cannot escape and use their natural liberty;[13] but no title can be acquired by one who at the time the reduction to possession is effected is a trespasser.[14]

(B) *Law of the Chase.* The natural right to pursue and take any wild animal exists in every individual except so far as restrained by express provision of law,[15] and one who has once seized such an animal becomes the owner thereof.[16] While

naturæ is substantially in accord with that of England, excepting, of course, all game laws and statutory regulations, which are now very numerous upon this subject." Rexroth *v.* Coon, 15 R. I. 35, 37, 23 Atl. 37, 2 Am. St. Rep. 863.

13. Manning *v.* Mitcherson, 69 Ga. 447, 47 Am. Rep. 764; Fleet *v.* Hegeman, 14 Wend. (N. Y.) 42; Case of Swans, 7 Coke 18*a*; 2 Bl. Comm. 391.

The mere finding and marking of a bee-tree is insufficient to give the finder a title to the bees unless they are actually hived. Merrils *v.* Goodwin, 1 Root (Conn.) 209; Fisher *v.* Steward, Smith (N. H.) 60; Gillet *v.* Mason, 7 Johns. (N. Y.) 16.

Among the animals in which property can be acquired by this means are bees (State *v.* Murphy, 8 Blackf. (Ind.) 498; Goff *v.* Kilts, 15 Wend. (N. Y.) 550; Gillet *v.* Mason, 7 Johns. (N. Y.) 16; Idol *v.* Jones, 13 N. C. 162; Rexroth *v.* Coon, 15 R. I. 35, 23 Atl. 37, 2 Am. St. Rep. 863; Harvey *v.* Com., 23 Gratt. (Va.) 941; 2 Bl. Comm. 392. See also Cock *v.* Weatherby, 5 Sm. & M. (Miss.) 333, 337, an action of slander for charging plaintiff with stealing a bee-tree, where it was held that "the term bee-tree relates to the wild, and not to the reclaimed, insect — the insect *feræ naturæ*, and not yet reduced to property," which was not subject of larceny; and Tibbs *v.* Smith, T. Raym. 33, where, after verdict for plaintiff in an action for slander for charging plaintiff with having stolen bees, it was held that it will be intended that they were such bees of which felony may be committed), buffalo (Ulery *v.* Jones, 81 Ill. 403; State *v.* Crenshaw, 22 Mo. 457), canary-birds (Manning *v.* Mitcherson, 69 Ga. 447, 47 Am. Rep. 764), cats (Whittingham *v.* Ideson, 8 U. C. L. J. 14. But see, *contra*, a case in one of the lower courts of Maryland referred to in 40 Centr. L. J. 41), deer (Fleet *v.* Hegeman, 14 Wend. (N. Y.) 42; Ford *v.* Tynte, 2 Johns. & H. 150, 31 L. J. Ch. 177; Davies *v.* Powell, Willes 46; 2 Bl. Comm. 392), doves and pigeons (Com. *v.* Chace, 9 Pick. (Mass.) 15, 19 Am. Dec. 348; Rex *v.* Brooks, 4 C. & P. 131, 19 E. C. L. 441; Reg. *v.* Cheafor, 5 Cox C. C. 367, 2 Den. C. C. 361, 15 Jur. 1067, 21 L. J. M. C. 43, 8 Eng. L. & Eq. 598; Rex *v.* Howell, 2 Den. C. C. 363 note; 2 Bl. Comm. 392), foxes (Pierson *v.* Post, 3 Cai. (N. Y.) 175, 2 Am. Dec. 264), hares and rabbits (Fleet *v.* Hegeman, 14 Wend. (N. Y.) 42; 2 Bl. Comm. 392), hawks (2 Bl. Comm. 392), mocking-birds (Haywood *v.* State, 41 Ark. 479), monkeys (Grymes *v.* Shack, Cro. Jac. 262; Comyns Dig. tit. Biens (F)), muskcats (Grymes *v.* Shack, Cro. Jac. 262), otters (State *v.* House, 65 N. C. 315, 6 Am. Rep. 744), parrots (Grymes *v.* Shack, Cro. Jac. 262; Comyns Dig. tit. Biens (F). But see Swan *v.* Saunders, 44 L. T. Rep. N. S. 424, wherein it was held that a parrot was not a domestic animal within the statute relating to cruelty to animals, but where Grove, J., said: "I do not say that a parrot might not become a domesticated animal when thoroughly tamed and accustomed to the society of human beings, but these were young and unacclimatized birds, freshly imported into England"), pheasants (2 Bl. Comm. 392), sea-lions (Mullett *v.* Bradley, 24 Misc. (N. Y.) 695, 53 N. Y. Suppl. 781), swans (Case of Swans, 7 Coke 18*a*), whales (Bartlett *v.* Budd, 1 Lowell (U. S.) 223, 2 Fed. Cas. No. 1,075), wild geese (Amory *v.* Flyn, 10 Johns. (N. Y.) 102, 6 Am. Dec. 316).

See 2 Cent. Dig. tit. "Animals," § 3.

14. State *v.* Repp, 104 Iowa 305, 73 N. W. 829, 40 L. R. A. 687; Rexroth *v.* Coon, 15 R. I. 35, 23 Atl. 37, 2 Am. St. Rep. 863; Blades *v.* Higgs, 11 H. L. Cas. 621, 11 Jur. N. S. 701, 34 L. J. C. P. 286, 12 L. T. Rep. N. S. 615.

15. 2 Bl. Comm. 403.

16. 2 Bl. Comm. 403. See also Churchward *v.* Studdy, 14 East 249, where plaintiff's dog having hunted and caught on defendant's land a hare started on the land of another, the property was held to be thereby vested in plaintiff, who might maintain trespass against defendant for afterward taking away the hare; and so it would be though the hare, being quite spent, had been caught up by a laborer of defendant for the benefit of the hunters.

Where a whale has been killed and is anchored, with marks of appropriation, it is the property of the captors; and even where it is proved to be the usage that when a whale is found adrift on the ocean the finding ship may appropriate it to her own use, if those who killed it do not appear and claim it before it is cut in, a finding ship cannot appropriate such whale where it is still anchored, although it has dragged from its first anchorage. Taber *v.* Jenny, 1 Sprague (U. S.) 315, 23 Fed. Cas. No. 13,720. In Massachusetts Bay finback whales are killed by firing bomb-lances, suitably marked, which cause the whales to sink to the bottom, whence they rise in the course of from one to three days and float again. By the custom of those engaged in this species of fishery the whale is the property of the person who killed it. Ghen *v.* Rich, 8 Fed. 159.

pursuit alone gives no right of property in animals *feræ naturæ*,[17] the possession necessary to acquire such right does not mean actual bodily seizure, but wounding or ensnaring an animal so as to prevent its escape is sufficient,[18] provided the hunter does not abandon the chase.[19]

(II) *By Reason of Animal's Inability to Use Liberty.* One may also acquire property in wild animals *ratione impotentiæ* — by reason of their own inability to make use of their natural liberty and forsake him.[20]

(III) *By Privilege.* One may also have property in wild animals *propter privilegium* — that is, he may have the privilege of hunting, taking, and killing them, to the exclusion of other persons.[21]

(IV) *Ratione Soli.* Property *ratione soli* is the right which every owner of land had at common law to kill and take all such animals *feræ naturæ* as were from time to time found on his land.[22]

17. Pierson *v.* Post, 3 Cai. (N. Y.) 175, 2 Am. Dec. 264, holding that an action will not lie against a man for killing and taking an animal of this kind pursued by, and in view of, the person who first found, started, pursued, and was on the point of taking it.

18. Pierson *v.* Post, 3 Cai. (N. Y.) 175, 2 Am. Dec. 264.

What constitutes possession in the whale fisheries is determined by the customs of the various localities in which this calling is followed. Thus, in the Greenland and Davies Strait fisheries the whale is deemed the property of the boat which struck it so long as the whale remains attached to the boat though the harpoon does not remain in the fish (Hogarth *v.* Jackson, 2 C. & P. 595, 12 E. C. L. 753; Aberdeen Arctic Co. *v.* Sutter, 4 Macq. 355; Addison *v.* Roe, 3 Paton Sc. App. 334; Littledaile *v.* Scarth, 1 Taunt. 243 note); in the Okhotsk Sea a whale is the property of the boat which struck it, provided the harpoon, with the line, remain in the whale, even though the whale does not remain fast to the boat (Swift *v.* Gifford, 2 Lowell (U. S.) 110, 23 Fed. Cas. No. 13,696); and in the Galapagos Islands he who strikes the whale with a loose harpoon is entitled to receive half the produce from him who kills it (Fennings *v.* Grenville, 1 Taunt. 241).

19. Buster *v.* Newkirk, 20 Johns. (N. Y.) 75; Charlebois *v.* Raymond, 12 L. C. Jur. 55.

Even though a hunter's dog continues the chase he acquires no property in the animal if, after wounding it and continuing the pursuit until evening, he abandons it. Buster *v.* Newkirk, 20 Johns. (N. Y.) 75.

20. Case of Swans, 7 Coke 18*a*; 2 Bl. Comm. 394.

Among the animals in which property exists *ratione impotentiæ* are conies (2 Bl. Comm. 394), doves (Com. *v.* Chace, 9 Pick. (Mass.) 15, 19 Am. Dec. 348), hawks (Case of Swans, 7 Coke 18*a*; 2 Bl. Comm. 394), herons (2 Bl. Comm. 394), pheasants hatched by a hen (Reg. *v.* Cory, 10 Cox C. C. 23; Reg. *v.* Garnham, 2 F. & F. 347; Reg. *v.* Head, 1 F. & F. 350; Reg. *v.* Shickle, L. R. 1 C. C. 158), and shovelers (Case of Swans, 7 Coke 18*a*).

21. Case of Swans, 7 Coke 18*a*; Blades *v.* Higgs, 11 H. L. Cas. 621, 11 Jur. N. S. 701, 34 L. J. C. P. 286, 12 L. T. Rep. N. S. 615; 2 Bl. Comm. 394.

None can have a swan-mark unless it be by the grant of the king, or of his officers authorized thereto, or by prescription; and if he hath a lawful swan-mark, and hath swans swimming in open and common rivers, lawfully marked therewith, they belong to him *ratione privilegii*. Case of Swans, 7 Coke 18*a*.

22. Blades *v.* Higgs, 11 H. L. Cas. 621, 11 Jur. N. S. 701, 34 L. J. C. P. 286, 12 L. T. Rep. N. S. 615; Sutton *v.* Moody, 1 Ld. Raym. 250; Long Point Co. *v.* Anderson, 19 Ont. 487.

Bees.— While one may acquire a property in bees by reclaiming them (see *supra*, II, A, 2, b, (I)), it has been said that, until so reclaimed, the only property in them is *ratione soli*. State *v.* Repp, 104 Iowa 305, 73 N. W. 829, 40 L. R. A. 687; Goff *v.* Kilts, 15 Wend. (N. Y.) 550; Ferguson *v.* Miller, 1 Cow. (N. Y.) 243, 13 Am. Dec. 519; Idol *v.* Jones, 13 N. C. 162; Rexroth *v.* Coon, 15 R. I. 35, 23 Atl. 37, 2 Am. St. Rep. 863. See also Adams *v.* Burton, 43 Vt. 36, where plaintiff informed Burton that a swarm of bees was in a tree on Burton's land, and that he intended to cut down the tree and get the honey; Burton made no objection and asserted no claim to the bees or the honey; it was held that this was a waiver of any right Burton had in the matter as the owner of the tree, and was sufficient to warrant the plaintiff in cutting the tree without making himself a trespasser thereby, and that his possession while in the act of cutting the tree gave him superior right over a third party to whom Burton subsequently gave consent to cut the tree and take the honey, but without revoking any authority he had given plaintiff.

See 2 Cent. Dig. tit. "Animals," § 4.

A custom of rooks to resort to and build their nests in one's trees gives the owner no such right of property in such rooks as will enable him to maintain an action against those who prevent them from so resorting. No ownership is acquired *propter usum et consuetudinem*. Hannam *v.* Mockett, 2 B. & C. 934, 9 E. C. L. 401, 4 D. & R. 518 [*distinguishing* Keeble *v.* Hickeringill, 11 East 574 note]. But see Kellogg *v.* King, 114 Cal. 378, 388, 46 Pac. 166, 55 Am. St. Rep. 74, holding that, under Cal. Civ. Code, § 656, which declares that "animals wild by nature are the subject of ownership while living only when on the land of the person claiming them," one has a

c. Nature of Property. Where one has property *ratione soli* or *ratione privilegii* game taken by virtue of such right becomes his absolute property;[23] but, generally, in animals *feræ naturæ* none can have an absolute property,[24] for, if his property be *per industriam*, it is defeasible by the animals resuming their ancient wildness and going at large;[25] if *ratione impotentiæ*, by their attaining strength and departing from his land;[26] if *propter privilegium*, by their ceasing to remain within his liberty;[27] and if *ratione soli*, by their quitting or being hunted off his land.[28] In such reclaimed animals as were kept for pleasure, curiosity, or whim, the property was deemed of so base a character that they were not the subjects of larceny.[29]

B. In Increase. In accordance with the maxim, "*partus sequitur ventrem*" — the offspring follows the dam — the general rule of law is that the offspring of all tame and domestic animals belongs to the owner of the dam or mother,[30]

right in wild birds within his game preserve which entitles him to protect them from trespassers.

23. Blades *v.* Higgs, 11 H. L. Cas. 621, 11 Jur. N. S. 701, 34 L. J. C. P. 286, 12 L. T. Rep. N. S. 615 [*cited* with approval in Long Point Co. *v.* Anderson, 19 Ont. 487].

24. State *v.* Sumner, 2 Ind. 377; 2 Bl. Comm. 391; Comyns Dig. tit. Biens (F).

25. Mullett *v.* Bradley, 24 Misc. (N. Y.) 695, 53 N. Y. Suppl. 781; Fleet *v.* Hegeman, 14 Wend. (N. Y.) 42; Case of Swans, 7 Coke 18*a*; 2 Bl. Comm. 392; Comyns Dig. tit. Biens (F).

What constitutes going at large.— An animal cannot be said to be going at large where it has *animum revertendi*, for, if the intention to return exists, in contemplation of law the possession continues. Brinckerhoff *v.* Starkins, 11 Barb. (N. Y.) 248; Fleet *v.* Hegeman, 14 Wend. (N. Y.) 42; Case of Swans, 7 Coke 18*a*. But the *animus revertendi* only conferred the right of property in wild animals at the common law when it was induced by artificial means, such as taming them or offering them food. Behring Sea Arbitrators' Decision, 32 Am. L. Reg. 901.

Where a sea-lion escaped from captivity near the city of New York, and was caught in a fish-pound in the Atlantic Ocean, on the Jersey coast, seventy miles from the point of escape, some two weeks later, it was held that the owner had lost his property in the animal, as it had regained its natural freedom and had shown no intention of returning to its place of captivity; and the contention that the animal could not return to its natural liberty until it had reached its native place on the coast of California, or at least, a place not found on the Atlantic coast, where the physical conditions are opposed to its existence, was held untenable. Mullett *v.* Bradley, 24 Misc. (N. Y.) 695, 53 N. Y. Suppl. 781. See, however, Manning *v.* Mitcherson, 69 Ga. 447, 450, 47 Am. Rep. 764, where the court said: "To say, if one has a canary-bird, mocking-bird, parrot, or any other bird so kept, and it should accidentally escape from its cage to the street, or to a neighboring house, that the first person who caught it would be its owner is wholly at variance with our views of right and justice. To hold that the traveling organist with his attendant monkey, if it should slip its collar and go at will out of his immediate possession and control, and be captured by another person, that he would be the true owner and the organist lose all claim to it, is hardly to be expected; or that the wild animals of a menagerie, should they escape from their owner's immediate possession, would belong to the first person who should subject them to his dominion;" and Goff *v.* Kilts, 15 Wend. (N. Y.) 550, where it is said that if a swarm of bees fly from the hive the owner's qualified property continues so long as he can keep them in sight and has the power to pursue them.

26. 2 Bl. Comm. 394.

27. Sutton *v.* Moody, 1 Ld. Raym. 250; 2 Bl. Comm. 394.

28. Sutton *v.* Moody, 1 Ld. Raym. 250.

29. 2 Bl. Comm. 393.

Coons (Warren *v.* State, 1 Greene (Iowa) 106), sables (Norton *v.* Ladd, 5 N. H. 203, 20 Am. Dec. 573), and ferrets (Rex *v.* Searing, R. & R. 260) are examples of animals held not to be subjects of larceny. See also *supra*, II, A, 1, b; and generally, LARCENY.

30. *Alabama.*—Meyer *v.* Cook, 85 Ala. 417, 5 So. 147; Elmore *v.* Fitzpatrick, 56 Ala. 400.

Illinois.— Hazelbaker *v.* Goodfellow, 64 Ill. 238.

Iowa.— Rogers *v.* Highland, 69 Iowa 504, 29 N. W. 429, 58 Am. Rep. 230.

Kansas.— Morse *v.* Patterson, 1 Kan. App. 577, 42 Pac. 255.

Kentucky.— Kelley *v.* Grundy, 20 Ky. L. Rep. 1081, 45 S. W. 100.

Maine.— Hanson *v.* Millett, 55 Me. 184.

Michigan.— Kellogg *v.* Lovely, 46 Mich. 131, 8 N. W. 699, 41 Am. Rep. 151.

Missouri.— Stewart *v.* Ball, 33 Mo. 154; Edmonston *v.* Wilson, 49 Mo. App. 491; White *v.* Storms, 21 Mo. App. 288.

New York.—Hasbrouck *v.* Bouton, 41 How. Pr. (N. Y.) 208.

North Carolina.—Tyson *v.* Simpson, 3 N. C. 321.

Texas.— Morris *v.* Coburn, 71 Tex. 406, 9 S. W. 345.

Vermont.— Leavitt *v.* Jones, 54 Vt. 423, 41 Am. Rep. 849.

United States.— Arkansas Valley Land, etc., Co. *v.* Mann, 130 U. S. 69, 9 S. Ct. 458, 32 L. ed. 854.

and such ownership continues until divested by some contract, express or implied.[31] An exception to this rule exists in the case of young cygnets, which belong equally to the owners both of the cock and the hen,[32] and when the dam is hired for a limited period, when the increase belongs to the usufructuary.[33]

III. BAILMENT OF ANIMALS.[34]

A. Hire and Use— 1. CONSTRUCTION OF CONTRACT[35] — a. In General. Where, by the terms of the contract, the bailee, in return for the use of the animals, is to feed and keep them,[36] or to deliver the increase thereof,[37] the contract is one of hire, and not a mere naked bailment. The terms of the contract of hire will govern as to amount of compensation,[38] the duration of the bailment,[39] and the number[40] and condition[41] of the animals to be returned. Such a contract is not

The reason of the rule is not only because the male is frequently unknown, but also because the dam, during the time of her pregnancy, is almost useless to the proprietor, and must be maintained with great expense and care; wherefore, as her owner is the loser by her pregnancy, he ought to be the gainer by her brood. 2 Bl. Comm. 390.

31. Hazelbaker *v.* Goodfellow, 64 Ill. 238; Morse *v.* Patterson, 1 Kan. App. 577, 42 Pac. 255.

32. Case of Swans, 7 Coke 18*a*; 2 Bl. Comm. 390.

"And the law thereof is founded on a reason in nature; for the cock swan is an emblem or representation of an affectionate and true husband to his wife, above all other fowls; for the cock swan holdeth to one female only, and for this cause nature has conferred on him a gift beyond all others; that is, to die so joyfully that he sings sweetly when he dies; upon which the poet sayeth:

'Dulcia defecta modulator carmina lingua,
Cantator, cygnus, funeris ipse sui,' etc.

And therefore this case of the swan doth differ from the case of kine, or other brute beasts." Case of Swans, 7 Coke 18*a*.

33. *Missouri.*— Stewart *v.* Ball, 33 Mo. 154; White *v.* Storms, 21 Mo. App. 288.

New York.— Putnam *v.* Wyley, 8 Johns. (N. Y.) 432, 5 Am. Dec. 346.

Pennsylvania.— Allen *v.* Allen, 2 Penr. & W. (Pa.) 166.

Tennessee.— McCarty *v.* Blevins, 5 Yerg. (Tenn.) 195, 26 Am. Dec. 262.

England.— Wood *v.* Ash, Owen 139.

34. For matter relating to bailments, generally, see BAILMENTS.

Breeding, hire and use for, see *infra*, V.

35. For forms of contracts for the hire of animals see Learned-Letcher Lumber Co. *v.* Fowler, 109 Ala. 169, 19 So. 396; Stewart *v.* Davis, 31 Ark. 518, 25 Am. Rep. 576; Bellows *v.* Denison, 9 N. H. 293.

36. Chamberlin *v.* Cobb, 32 Iowa 161.

37. Putnam *v.* Wyley, 8 Johns. (N. Y.) 432, 5 Am. Dec. 346.

38. Under a contract to pay one dollar a day for the use of oxen, and to feed and take care of them till returned, the bailee is bound to pay the pecuniary compensation only for the days the oxen were actually used, but must feed and care for them so long as he keeps them under the contract. Learned-Letcher Lumber Co. *v.* Fowler, 109 Ala. 169, 19 So. 396.

An agreement to pay a certain price per head for all sheep not returned by reason of "accident," and a certain other price for those disposed of "in any other manner," binds the bailee to pay for those not returned; and the fact that the sheep were attached and sold by a creditor of one of the bailees, and that plaintiffs replevied them but afterward dismissed the suit, will constitute no defense to a suit for the value thereof. Armijo *v.* Abeytia, 5 N. M. 533, 25 Pac. 777.

Under a contract to pay the value of a mare if not returned in good condition the acceptance of the mare does not necessarily constitute a rescission of the contract, or a waiver of the right to recover her value. Austin *v.* Miller, 74 N. C. 274.

39. In the absence of expressed time the bailment is subject to the will of either bailor or bailee, and neither can insist, against the election of the other, that it shall continue. Learned-Letcher Lumber Co. *v.* Fowler, 109 Ala. 169, 19 So. 396.

Compliance with condition excused.—Where a horse is let on a contract providing that, on a day's notice, he should be returned in the same condition as when received, compliance with the condition is excused by death of the horse without fault of the bailee. American Preservers' Co. *v.* Drescher, 4 Misc. (N. Y.) 482, 24 N. Y. Suppl. 361.

40. Thus where plaintiff let to another a certain number of sheep, of a given weight, to be kept well and returned in one year, all to be of good age and the same weight of sheep, and the bailee was also to deliver a certain weight of washed wool, as good as should be averaged from the flock, it was held that the same sheep were to be returned, with a sufficient number of other sheep, of equal quality with those delivered, to make up losses, if any occurred (Bellows *v.* Denison, 9 N. H. 293); and where A delivered six sheep to B on an agreement that, at the end of a year, B would deliver to A an equal number of sheep of equal value, it was held that the property in the sheep was changed, and that B was bound to deliver to A six sheep of equal value at the expiration of the year, although part of the sheep had been taken under an attachment against A (Wilson *v.* Finney, 13 Johns. (N. Y.) 358).

41. Diseased sheep.— Where the contract called for the return of sheep "in good marketable condition," and the sheep delivered to the bailee were diseased, the true construc-

rendered void, as against public policy, because the owner, by his representation that the animals were not diseased, induced the bailee to drive them along the public highway to a distant range.[42]

b. Implied Warranty of Fitness. Every contract of letting impliedly warrants that the animals are reasonably fit and suitable for the work which they are hired to perform, if the same be known to the bailor.[43]

2. Duties and Liabilities of Bailor — a. To Bailee — (I) *To Notify of Vicious Propensities.* One letting a horse to another to be used for hire, is bound to inform the hirer of the vicious propensities of the animal, if any; otherwise he will be liable for any damages which may happen to the hirer in consequence of a vicious act of the horse.[44]

(II) *To Care for Sick Animal.* Since the bailor can charge the delinquent party only for such damages as by reasonable endeavors and expense he could not prevent, the bailor is required, in case a horse let to hire be made sick by the misconduct or neglect of the hirer, to use all reasonable exertions to cure him and prevent his death.[45]

b. To Third Person.[46] One who loans or hires a horse to another, to be used exclusively for the purposes of the latter, is in no wise responsible for the negligent manner in which the horse may be used.[47]

3. Duties and Liabilities of Bailee — a. To Bailor — (I) *In General.* Where an animal is loaned without compensation the bailee is bound to exercise extraordinary diligence, such as the most prudent would use toward his own property;[48] but where the animal is hired the bailee is bound, in the absence of special contract providing what degree of care shall be exercised,[49] only to the exercise of ordinary diligence in the use and care of the property,[50] and he is not liable to the

tion of the contract was held to call for the redelivery of sheep as "good and marketable" as could reasonably be expected, the animals being diseased. Peck *v.* Brewer, 48 Ill. 54.

Pregnant sheep.— Where, by the terms of the contract, the bailee was to return the sheep "in the same condition as when let," and the sheep returned were pregnant and began dropping lambs during the winter, in consequence of which a number died, it was held that there was no breach of the contract when it was proved, and not contradicted, that the sheep, when the bailee took them of plaintiff, were in the same condition in regard to their pregnancy as those he returned, and began to drop their lambs in January, continuing to drop them in February and March. Williams *v.* Frazier, 41 How. Pr. (N. Y.) 428.

42. Labbe *v.* Corbett, 69 Tex. 503, 6 S. W. 808.

43. Bass *v.* Cantor, 123 Ind. 444, 24 N. E. 147; Leach *v.* French, 69 Me. 389, 31 Am. Rep. 296; Harrington *v.* Snyder, 3 Barb. (N. Y.) 380.

44. Campbell *v.* Page, 67 Barb. (N. Y.) 113, holding that the giving of notice is a question of fact, to be disposed of by the jury.

Where the bailee was warned of a horse's habit of kicking failure to furnish a kicking-strap cannot be said as matter of law to be actionable negligence. Ohlweiler *v.* Lohmann, 82 Wis. 198, 52 N. W. 172.

45. Graves *v.* Moses, 13 Minn. 335, holding that since such expense, and the trouble and attention which he is obliged to bestow for this purpose, are occasioned by the hirer's fault, and by the natural and proximate damages resulting from it, the bailor is entitled to recover therefor.

46. Liability for care of sick horse see *infra*, III, A, 3, b.

47. Bard *v.* Yohn, 26 Pa. St. 482.

48. Howard *v.* Babcock, 21 Ill. 259; Robertson *v.* Brown, 1 U. C. Q. B. 345.

49. Where there is a special contract providing what degree of care the bailee shall exercise over the property, the latter is required to use such care as the contract provides; otherwise, independent of any contract, the law imposes certain duties upon the bailee with reference to the care to be exercised by him over the property bailed. Line *v.* Mills, 12 Ind. App. 100, 39 N. E. 870.

50. *Georgia.*—Thompson *v.* Harlow, 31 Ga. 348.

Illinois.— Howard *v.* Babcock, 21 Ill. 259.

Indiana.— Bass *v.* Cantor, 123 Ind. 444, 24 N. E. 147.

Kansas.— Moore *v.* Cass, 10 Kan. 288.

Massachusetts.—Eastman *v.* Sanborn, 3 Allen (Mass.) 594, 81 Am. Dec. 677; Mooers *v.* Larry, 15 Gray (Mass.) 451; Edwards *v.* Carr, 13 Gray (Mass.) 234.

Michigan.— Wolscheid *v.* Thome, 76 Mich. 265, 43 N. W. 12; Hofer *v.* Hodge, 52 Mich. 372, 18 N. W. 112, 50 Am. Rep. 256; Ruggles *v.* Fay, 31 Mich. 141.

Missouri.— Buis *v.* Cook, 60 Mo. 391; Johnson *v.* Ruth, 34 Mo. App. 659.

New York.— Harrington *v.* Snyder, 3 Barb. (N. Y.) 380.

United States.— Laub *v.* Lansdale, 1 Hayw. & H. (U. S.) 45, 14 Fed. Cas. No. 8,118.

bailor for any injuries which are not caused or contributed to by his abuse or negligence.[51]

(II) *When Animal in Charge of Bailor's Servant.* If one hire an animal to go a journey, and the owner sends his own driver, the hirer incurs no responsibility for any injury happening to the animal unless such injury have occurred from some act or interference of his — that is, unless he assumes control.[52]

(III) *For Departure from Terms of Bailment.* The owner of a horse, which he has let to go a specified journey within a given time, cannot recover for the loss of the horse, where it was driven only in the time, by the way, and by the driver agreed upon, if its death results from the effort to accomplish only that which such owner contracted for it to perform.[53] But when the animal is let for a certain time, and the bailee continues to use him after the expiration thereof,[54] or, having hired him to drive to a certain place by a certain route

England.— Cooper *v.* Barton, 3 Campb. 5 note.

Canada.— Robertson *v.* Brown, 1 U. C. Q. B. 345.

See 2 Cent. Dig. tit. "Animals," § 71.

That bailor expected bailee would be careless or unskilful, or had reason to expect that he would be, does not affect the latter's liability to use reasonable care and skill unless his incapacity was manifest. Mooers *v.* Larry, 15 Gray (Mass.) 451.

Attempting to ford a stream usually crossed by a small bridge, which has been carried away by an excessive high water, displays such a want of care and prudence as amounts to negligence. United Telephone Co. *v.* Cleveland, 44 Kan. 167, 24 Pac. 49.

Excessively loading an animal, if injury accrue, will be an abuse of the animal for which the bailee will be liable in case, although such acts do not amount to a conversion. McNeill *v.* Brooks, 1 Yerg. (Tenn.) 73.

Immoderate driving, if wilfully and intentionally done, may amount to a conversion (Wentworth *v.* McDuffie, 48 N. H. 402) for which even an infant will be liable (Campbell *v.* Stokes, 2 Wend. (N. Y.) 137, 19 Am. Dec. 561).

Improperly feeding and watering a horse, whereby he has been made sick, and returning him in this condition to the owner, will render the bailee liable for his full value if the owner, by the use of reasonable care and the employment of a suitable veterinary surgeon, who treated him according to his best judgment, was unable to cure him, although such treatment was in fact improper and contributed to the horse's death. Eastman *v.* Sanborn, 3 Allen (Mass.) 594, 81 Am. Dec. 677.

When a horse becomes sick it is the duty of the bailee to abstain from using it, and if he continue to he is liable for all the injury occasioned thereby.

Georgia.— Hawkins *v.* Haynes, 71 Ga. 40; Thompson *v.* Harlow, 31 Ga. 348.

Indiana.— Bass *v.* Cantor, 123 Ind. 444, 24 N. E. 147.

Maine.— Leach *v.* French, 69 Me. 389, 31 Am. Rep. 296.

Massachusetts.— Edwards *v.* Carr, 13 Gray (Mass.) 234.

Missouri.—Marshall *v.* Bingle, 36 Mo. App. 122.

England.— Bray *v.* Mayne, Gow. 1, 5 E. C. L. 845.

If, upon a hired horse being taken ill, the bailee calls in a farrier he is not responsible for any mistakes which the latter may commit in the treatment of the horse; but if, instead of that, he prescribes for the horse himself, and, from unskilfulness, gives him a medicine which causes his death, though acting *bona fide,* he is liable to the owner of the horse as for gross negligence. Deane *v.* Keate, 3 Campb. 4.

51. *Georgia.*—Thompson *v.* Harlow, 31 Ga. 348.

Indiana.— Bass *v.* Cantor, 123 Ind. 444, 24 N. E. 147; Conwell *v.* Smith, 8 Ind. 530.

Massachusetts.— Perham *v.* Coney, 117 Mass. 102; Eastman *v.* Sanborn, 3 Allen (Mass.) 594, 81 Am. Dec. 677.

Missouri.—Buis *v.* Cook, 60 Mo. 391; Johnson *v.* Ruth, 34 Mo. App. 659.

New York.— Millon *v.* Salisbury, 13 Johns. (N. Y.) 211; Harrington *v.* Snyder, 3 Barb. (N. Y.) 380.

South Carolina.— Carrier *v.* Dorrance, 19 S. C. 30.

Leaving unguarded ice-holes, failure to notify the driver of the location thereof, or failure to have at hand ropes or appliances to get the horses out of the water, will not render an ice company liable for the loss of horses hired for the purpose of cutting ice and lost by falling through such ice-holes where the precautions, had they been taken, would not have prevented the loss. Stacy *v.* Knickerbocker Ice Co., 84 Wis. 614, 54 N. W. 1091.

52. Hughes *v.* Boyer, 9 Watts (Pa.) 556.

Effect of interference by bailee see *infra,* III, A, 3, a, (III).

Driver agreed upon.— One who hires horses and intrusts them to the care and attention of a driver agreed upon by the owner is liable for the negligence of such driver only, and not for that of an innkeeper, or his hostler, to whom such driver, without negligence, has intrusted them. Ruggles *v.* Fay, 31 Mich. 141.

53. Ruggles *v.* Fay, 31 Mich. 141.

54. Stewart *v.* Davis, 31 Ark. 518, 25 Am. Rep. 576.

drives him to a different place,[55] or by a different route,[56] or beyond the place contemplated in the hiring,[57] such departure from the terms of the bailment, unless compelled by circumstances which the bailee cannot control,[58] or ratified by the bailor,[59] amounts to a conversion of the horse for which the bailee is liable in trover,[60] even though he be an infant,[61] or the contract of hiring be void because made on Sunday.[62] So, too, the bailee is liable if, having hired an animal to be used in a certain place and for a certain purpose, it is injured while in use, by his consent, in a different place or for a different purpose,[63] even though it is being handled by servants of the bailor.[64]

(IV) *ACTIONS*[65]—(A) *Parties*—(1) PLAINTIFF. One who hires an animal to another may maintain an action for damages caused by the negligence of the bailee, although such person has only a special property in, and right to the present possession of, the chattel.[66]

(2) DEFENDANT. An action may be maintained directly against a third per-

55. Homer *v.* Thwing, 3 Pick. (Mass.) 492; Malaney *v.* Taft, 60 Vt. 571, 15 Atl. 326, 6 Am. St. Rep. 135.

56. Brown *v.* Baker, 15 Wkly. Notes Cas. (Pa.) 60; Towne *v.* Wiley, 23 Vt. 355, 56 Am. Dec. 85.

57. *Connecticut.*—Frost *v.* Plumb, 40 Conn. 111, 16 Am. Rep. 18.

Georgia.—Farkas *v.* Powell, 86 Ga. 800, 13 S. E. 200, 12 L. R. A. 397; Malone *v.* Robinson, 77 Ga. 719.

Louisiana.—Murphy *v.* Kaufman, 20 La. Ann. 559; Guillot *v.* Armitage, 7 Mart. (La.) 710.

Maine.—Morton *v.* Gloster, 46 Me. 520.

Massachusetts.—Perham *v.* Coney, 117 Mass. 102; Hall *v.* Corcoran, 107 Mass. 251, 9 Am. Rep. 30; Lucas *v.* Trumbull, 15 Gray (Mass.) 306; Rotch *v.* Hawes, 12 Pick. (Mass.) 136, 22 Am. Dec. 414; Homer *v.* Thwing, 3 Pick. (Mass.) 492; Wheelock *v.* Wheelwright, 5 Mass. 104.

Michigan.—Fisher *v.* Kyle, 27 Mich. 454.

New Hampshire.—Woodman *v.* Hubbard, 25 N. H. 67, 57 Am. Dec. 310.

New York.—Fish *v.* Ferris, 5 Duer (N. Y.) 49; Disbrow *v.* Tenbroeck, 4 E. D. Smith (N. Y.) 397.

Vermont.—Moore *v.* Hill, 62 Vt. 424, 19 Atl. 997; Ray *v.* Tubbs, 50 Vt. 688, 28 Am. Rep. 519.

See 2 Cent. Dig. tit. "Animals," § 74.

58. Farkas *v.* Powell, 86 Ga. 800, 13 S. E. 200, 12 L. R. A. 397.

Where the wrong road is taken by mistake and, upon discovery thereof, the bailee takes what he considers the best way back to the place of hiring, which is by a circuit through another town, he is not liable for the conversion of the horse. Spooner *v.* Manchester, 133 Mass. 270, 43 Am. Rep. 514.

59. Charging for the full distance, where the owner acts knowingly, is a ratification of the act of the bailee so that trover will not lie. Rotch *v.* Hawes, 12 Pick. (Mass.) 136, 22 Am. Dec. 414; Moore *v.* Hill, 62 Vt. 424, 19 Atl. 997. See also Disbrow *v.* Tenbroeck, 4 E. D. Smith (N. Y.) 397.

60. Departure must cause or contribute to injury.—But see Farkas *v.* Powell, 86 Ga. 800, 13 S. E. 200, 12 L. R. A. 397 (to the effect that, though the bailee is guilty of a technical conversion by riding the horse beyond the point to which it is hired to go, if the extra distance do not cause or contribute to the injury, and he return the horse within the limits of his original contract, he will not be held liable for an injury to the horse occurring, without his fault, after such return), and Cullen *v.* Lord, 39 Iowa 302 (holding that a disregard of instructions as to the manner of use of the animal loaned will only render liable a bailee for hire when the loss was occasioned thereby, though, in the case of a *commodatum*, it renders the bailee liable absolutely).

61. Malone *v.* Robinson, 77 Ga. 719; Homer *v.* Thwing, 3 Pick. (Mass.) 492; Fish *v.* Ferris, 5 Duer (N. Y.) 49; Ray *v.* Tubbs, 50 Vt. 688, 28 Am. Rep. 519; Towne *v.* Wiley, 23 Vt. 355, 56 Am. Dec. 85. And see, generally, INFANTS.

62. Stewart *v.* Davis, 31 Ark. 518, 25 Am. Rep. 576; Frost *v.* Plumb, 40 Conn. 111, 16 Am. Rep. 18; Morton *v.* Gloster, 46 Me. 520; Hall *v.* Corcoran, 107 Mass. 251, 9 Am. Rep. 30 [*overruling* Gregg *v.* Wyman, 4 Cush. (Mass.) 322 (*followed* in Fay *v.* Foster, 1 Allen (Mass.) 408)]; Woodman *v.* Hubbard, 25 N. H. 67, 57 Am. Dec. 310. *Contra*, Whelden *v.* Chappel, 8 R. I. 230. And see, generally, SUNDAY.

63. Buchanan *v.* Smith, 10 Hun (N. Y.) 474.

Substitution of drivers.—If the hirer of mules substitutes someone else as driver instead of him who is placed in personal charge by the owner, he is guilty of conversion, and liable for damages resulting from injuries received, whether negligently or not; and whether he directed the substitution or simply permitted it is immaterial. Kellar *v.* Garth, 45 Mo. App. 332.

64. Fox *v.* Young, 22 Mo. App. 386; De Voin *v.* Michigan Lumber Co., 64 Wis. 616, 25 N. W. 552, 54 Am. Rep. 649.

65. For forms of declarations against a bailee for injuries to an animal bailed see Spooner *v.* Manchester, 133 Mass. 270, 43 Am. Rep. 514; Banfield *v.* Whipple, 10 Allen (Mass.) 27, 87 Am. Dec. 618; Edwards *v.* Carr, 13 Gray (Mass.) 234.

66. Harrison *v.* Marshall, 4 E. D. Smith (N. Y.) 271.

son who borrows the animal of the bailee and injures it,[67] or against the bailee and borrower jointly where the two together cause the injury;[68] but no action can be maintained against one who accompanies the bailee as his guest.[69]

(B) *Form of Action.* An action upon the contract of bailment may be maintained against the bailee for any neglect or breach of duty by which the bailor is damaged;[70] but, for a departure from the terms of the bailment amounting to a conversion, trover is the proper remedy,[71] unless such acts have been ratified by the bailor, in which case, for injuries by ill-usage, case is the proper remedy.[72]

(C) *Evidence* — (1) BURDEN OF PROOF. According to some decisions the burden of proving negligence is on the bailor,[73] while other cases hold that, after proof of loss, the burden is on the bailee to show diligence.[74]

(2) ADMISSIBILITY. In an action for conversion evidence is admissible to show what locality was commonly meant by the term used,[75] as is also evidence as to what defendant said, after the accident, about making good the damage done the team.[76] But declarations of the bailee to his own family at his own house, of his intention to hire the horse for a given purpose, are not admissible,[77] nor are remarks made by the bailee to a person whom he had sought to employ as a farrier.[78] The fact that, immediately after an injury resulting from immoderate driving, the bailee made an assignment of all his property is admissible,[79] and where the horse is returned after the conversion and received back by the bailor, such return may be given in evidence in mitigation of damages.[80]

(D) *Questions of Law and Fact.* What is due care is a question to be decided by the court.[81] Whether the bailee has exercised such care is a question for the jury,[82] as are also the questions whether the departure from the terms of the bailment contributed to the injury,[83] what were the terms of the contract of bailment, if oral,[84] and whether the reception back of the property and the presentation of a bill for its use constitutes a waiver of the tort.[85]

b. To Third Person for Care of Sick Animal. One who hires a horse is not liable to a third person for the expense of caring for it if, without his fault, it becomes sick on his hands, but the owner is liable therefor, if, with his knowledge, the animal is cared for at the request of the hirer.[86]

67. O'Riley *v.* Waters, 19 Kan. 439.

68. Banfield *v.* Whipple, 10 Allen (Mass.) 27, 87 Am. Dec. 618.

69. Graves *v.* Moses, 13 Minn. 335; Hubbard *v.* Hunt, 41 Vt. 376.

70. West *v.* Blackshear, 20 Fla. 457.

71. Homer *v.* Thwing, 3 Pick. (Mass.) 492; Wheelock *v.* Wheelwright, 5 Mass. 104.

72. Rotch *v.* Hawes, 22 Pick. (Mass.) 136, 22 Am. Dec. 414.

Antiquity of case.— An action on the case, for driving a horse beyond the place to which he was hired to go, was apparently known to the common law a long time before the declaration in trover was invented. Spooner *v.* Manchester, 133 Mass. 270, 43 Am. Rep. 514 [*citing* Y. B. 21 Edw. IV, 75, pl. 9].

73. *Maine.*— Leach *v.* French, 69 Me. 389, 31 Am. Rep. 296.

New York.— Harrington *v.* Snyder, 3 Barb. (N. Y.) 380.

South Carolina.— Carrier *v.* Dorrance, 19 S. C. 30.

Vermont.— Malaney *v.* Taft, 60 Vt. 571, 15 Atl. 326, 6 Am. St. Rep. 135.

England.— Cooper *v.* Barton, 3 Campb. 5 note.

74. Hawkins *v.* Haynes, 71 Ga. 40; Funkhouser *v.* Wagner, 62 Ill. 59; Arnot *v.* Branconier, 14 Mo. App. 431.

75. Thus, where defendant hired a horse and team to go to Willoughby Lake, the question was whether, under the contract, defendant had a right to drive beyond the Willoughby Lake House. The fact that persons familiar with the vicinity addressed letters to Willoughby Lake which were intended for the Willoughby Lake House was competent, but the fact that a particular stable-keeper had uniformly left people whom he carried to the lake at or near the Willoughby Lake House was not. Moore *v.* Hill, 62 Vt. 424, 19 Atl. 997.

76. Moore *v.* Hill, 62 Vt. 424, 19 Atl. 997.

77. Lucas *v.* Trumbull, 15 Gray (Mass.) 306.

78. Ruggles *v.* Fay, 31 Mich. 141.

79. Banfield *v.* Whipple, 10 Allen (Mass.) 27, 81 Am. Dec. 618.

80. Wheelock *v.* Wheelwright, 5 Mass. 104.

81. Rowland *v.* Jones, 73 N. C. 52.

82. West *v.* Blackshear, 20 Fla. 457; Rowland *v.* Jones, 73 N. C. 52; Ruggles *v.* Fay, 31 Mich. 141.

83. Farkas *v.* Powell, 86 Ga. 800, 13 S. E. 200, 12 L. R. A. 397.

84. Lucas *v.* Trumbull, 15 Gray (Mass.) 306.

85. Lucas *v.* Trumbull, 15 Gray (Mass.) 306.

86. Leach *v.* French, 69 Me. 389, 31 Am. Rep. 296.

B. Agistment — 1. Definition. Agistment is the taking and feeding of other men's cattle on one's own land, for a consideration, to be paid by the owner.[87]

2. Rights of Agistor — a. Against Owner — (I) *To Compensation.* Before the owner can lawfully obtain possession of his stock he must pay or tender to the agistor the amount due for their feed and care,[88] unless the latter has rendered a tender impracticable.[89] The amount of compensation is determined by the contract of the parties.[90] In an action to recover for the pasturing of cattle, some of which were not returned by the bailee, it is incumbent on plaintiff to prove that he used the degree of diligence required of him by his contract.[91] A petition[92] in an action to recover for pasturing which alleges that the cattle were kept on land having on it sufficient grass and water for them, and furnishing them ample range, is not demurrable because it does not allege the number of acres contained in the pasture.[93] In such an action the owner may claim as a set-off any damages sustained by him from the agistor's negligence.[94]

(II) *To Lien* — (A) *At Common Law* — (1) In General. While, by the law of Scotland, an agistor of animals has a lien on them for their keeping,[95] the common-law authorities are well-nigh uniform to the effect that he has not, except by special agreement with the owner.[96]

87. Williams *v.* Miller, 68 Cal. 290, 9 Pac. 166 [*citing* Webster Dict.]; Auld *v.* Travis, 5 Colo. App. 535, 39 Pac. 357.

An agistor is one who takes the cattle of another man on to his own ground, to be fed for a consideration, to be paid by the owner. Skinner *v.* Caughey, 64 Minn. 375, 67 N. W. 203; Bass *v.* Pierce, 16 Barb. (N. Y.) 595; Pearce *v.* Sheppard, 24 Ont. 167.

88. Gates *v.* Parrott, 31 Nebr. 581, 48 N. W. 387.

89. Staat *v.* Evans, 35 Ill. 455.

Conversion by agistor.—"Where cattle are delivered by their owner to another, to be kept and fattened till a certain time, when they are to be redelivered and payment made for feeding them, and the party to whom they are delivered sells them and converts them into money, in an action of assumpsit for their proceeds no tender of the sum due for feeding them is necessary." Statt *v.* Evans, 35 Ill. 455, 456.

The declaration made by a bailee to a stranger, that he will not give up to the owner the property in his possession, and which he detains by virtue of his lien, on full payment of such lien, does not dispense with the necessity of a tender of the charges by the owner before bringing suit. Brown *v.* Holmes, 21 Kan. 687.

90. Thus, where, by the contract sued upon, plaintiff bound himself to winter a certain number of cattle for defendant, and defendant obligated himself to pay a stipulated sum for every head delivered in the spring "in good, thrifty order and condition," plaintiff could not recover for the keeping of any cattle that died, or were not delivered in good, thrifty order and condition, although their death or ill condition might not have been caused by any want of care on his part. Stonam *v.* Waldo, 17 Mo. 489. So, too, where, by the terms of the contract, plaintiff undertook to pasture all the cattle certain land was capable of grazing — in no case less than three thousand head — at one dollar for each head of cattle so pastured, the condition that the land should be capable of grazing three thousand head of cattle was deemed an essential condition of the agreement, and, its capacity being less, it was held that the owner of the cattle was not liable to pay the full price agreed on for pasture. Williams *v.* Miller, 68 Cal. 290, 9 Pac. 166.

Question for jury.— Where the contract provides a mode for ascertaining the number of cattle for which pasture fees should be paid, although resort to that mode is prevented by the voluntary act of the owner of the cattle, the determination of the number is for the jury upon all the testimony, and it is error for the court to charge that the largest number proven to have been put in should be found. McAuley *v.* Harris, 71 Tex. 631, 9 S. W. 679.

91. Goodfellow *v.* Meegan, 32 Mo. 280; Waldo *v.* Beckwith, 1 N. M. 97.

92. **For form of petition** to recover compensation for agistment see Calland *v.* Nichols, 30 Nebr. 532, 46 N. W. 631.

For form of answer to petition to recover compensation setting up want of proper care of cattle see Calland *v.* Nichols, 30 Nebr. 532, 46 N. W. 631.

93. O'Neal *v.* Knippa, (Tex. 1892) 19 S. W. 1020.

94. McAuley *v.* Harris, 71 Tex. 631, 9 S. W. 679; Fields *v.* Haley, (Tex. Civ. App. 1899) 52 S. W. 115; Sargent *v.* Slack, 47 Vt. 674, 19 Am. Rep. 136.

Owner estopped to deny agistor's title to land.— In assumpsit by A against B, for depasturing and keeping on hay the cattle of B, at his request, on land in A's possession, B is estopped to show that the title of the land was not in A, but in B, at the time the services were performed, when he fails to set up any claim by way of set-off for plaintiff's use and occupation of the land. Eastman *v.* Tuttle, 1 Cow. (N. Y.) 248.

95. 2 Bell Comm. 110 [*cited* in Goodrich *v.* Willard, 7 Gray (Mass.) 183].

96. *Alabama.*— Hickman *v.* Thomas, 16 Ala. 666.

(2) Farriers and Trainers. The common law did recognize, however, a lien in favor of farriers for their reasonable charges in doctoring and curing animals submitted to their care,[97] and in favor of trainers of a horse for the labor, skill, and expense bestowed by them, whereby the value of the animal was enhanced.[98]

(b) *Under Contract.* As above stated,[99] a lien might be created at common

California.— Lewis *v.* Tyler, 23 Cal. 364.

Colorado.— Auld *v.* Travis, 5 Colo. App. 535, 39 Pac. 357.

Illinois.— Millikin *v.* Jones, 77 Ill. 372.

Indiana.— Hanch *v.* Ripley, 127 Ind. 151, 26 N. E. 70, 11 L. R. A. 61.

Maine.— Allen *v.* Ham, 63 Me. 532.

Massachusetts.— Goell *v.* Morse, 126 Mass. 480; Goodrich *v.* Willard, 7 Gray (Mass.) 183.

Minnesota.— Skinner *v.* Caughey, 64 Minn. 375, 67 N. W. 203.

Missouri.— McPherson First Nat. Bank *v.* Geo. R. Barse Live Stock Commission Co., 61 Mo. App. 143.

New York.— Bissell *v.* Pearce, 28 N. Y. 252; Bass *v.* Pierce, 16 Barb. (N. Y.) 595; Fox *v.* McGregor, 11 Barb. (N. Y.) 41; Grinnell *v.* Cook, 3 Hill (N. Y.) 485, 38 Am. Dec. 663.

North Carolina.— Manney *v.* Ingram, 78 N. C. 96.

Oregon.— Sharpe *v.* Johnson, (Oreg. 1901) 63 Pac. 485.

Vermont.— Willis *v.* Barrister, 36 Vt. 220; Cummings *v.* Harris, 3 Vt. 244, 23 Am. Dec. 206.

England.—Jackson *v.* Cummins, 5 M. & W. 341; Chapman *v.* Allen, Cro. Car. 271.

See 2 Cent. Dig. tit. "Animals," § 54.

A contrary view obtains, however, in Pennsylvania, where, in Steinman *v.* Wilkins, 7 Watts & S. (Pa.) 466, 467, 42 Am. Dec. 254, Gibson, C. J., said: "The doctrine of specific lien has been extended to almost every case in which the thing has been improved by the agency of the bailee. Yet, in the recent case of Jackson *v.* Cummins, 5 M. & W. 342, it was held to extend no further than to cases in which the bailee has directly conferred additional value by labor or skill, or indirectly by the instrumentality of an agent under his control; in supposed accordance with which it was ruled that the agistment of cattle gives no lien. But it is difficult to find an argument for the position that a man who fits an ox for the shambles, by fattening it with his provender, does not increase its intrinsic value by means exclusively within his control;" and *dicta* to the effect that an agistor has a common-law lien are to be found in Mathias *v.* Sellers, 86 Pa. St. 486, 491, 27 Am. Rep. 723; Magee *v.* Beirne, 39 Pa. St. 50, 60, and in the cases of Yearsley *v.* Gray, 140 Pa. St. 238, 21 Atl. 318; Hoover *v.* Epler, 52 Pa. St. 522, and Cadwalader *v.* Dilworth, 26 Wkly. Notes Cas. (Pa.) 32, a common-law lien for keep in favor of the agistor has been squarely recognized. The language of Gibson, C. J., in Steinman *v.* Wilkins, 7 Watts & S. (Pa.) 466, 42 Am. Dec. 254, has also been approved by Brewer, J., in Kelsey *v.* Layne, 28 Kan. 218, 224, 42 Am. Rep. 158.

Reason for absence of lien.— "An agistor of cattle is under no legal obligation to take the charge of or keep any cattle that may be brought to him for that purpose. He may receive or refuse them, without violating any duty or obligation imposed on him by the law; and he is at perfect liberty, therefore, when he receives stock to keep, to impose such terms and conditions as he may deem proper. And he may require an agreement that he shall have a lien upon the animals for his reasonable charges, or for the agreed price, if he shall deem it necessary for his security. That class of bailees, however, who are required by law to take the charge and custody of, and to keep animals for others, have no right to impose conditions upon those who employ them; and the law, therefore, very properly gives them a lien upon the property for their security." Lewis *v.* Tyler, 23 Cal. 364.

97. Allen *v.* Ham, 63 Me. 532; Danforth *v.* Pratt, 42 Me. 50; Lord *v.* Jones, 24 Me. 439, 41 Am. Dec. 391; Hoover *v.* Epler, 52 Pa. St. 522; Scarfe *v.* Morgan, 4 M. & W. 270; Brenan *v.* Currint, Say. 224. But see Nicolls *v.* Duncan, 11 U. C. Q. B. 332, 333, wherein it is said that "the right of lien in such a case as this seems to be subject yet to doubt."

See 2 Cent. Dig. tit. "Animals," § 59.

98. *Georgia.*—Jackson *v.* Holland, 31 Ga. 339.

Iowa.— Scott *v.* Mercer, 98 Iowa 258, 67 N. W. 108, 60 Am. St. Rep. 188. But *compare* Scott *v.* Mercer, (Iowa 1895) 63 N. W. 325, construing Iowa Laws (1880), c. 25, § 1.

Maine.— Allen *v.* Ham, 63 Me. 532.

Massachusetts.— Harris *v.* Woodruff, 124 Mass. 205, 26 Am. Rep. 658.

New Hampshire.— Towle *v.* Raymond, 58 N. H. 64.

New York.—Grinnell *v.* Cook, 3 Hill (N. Y.) 485, 38 Am. Dec. 663.

Pennsylvania.— Hartman *v.* Keown, 101 Pa. St. 338.

Tennessee.—Shields *v.* Dodge, 14 Lea (Tenn.) 356.

England.— Bevan *v.* Waters, 3 C. & P. 520, 14 E. C. L. 693; Scarfe *v.* Morgan, 4 M. & W. 270; Forth *v.* Simpson, 13 Q. B. 680, 66 E. C. L. 680.

See 2 Cent. Dig. tit. "Animals," § 61.

Racing illegal.— The fact that the animal was to be illegally used to run for bets and wagers will not make the contract for training illegal. Harris *v.* Woodruff, 124 Mass. 205, 26 Am. Rep. 658.

99. See *supra*, III, B, 2, a, (II), (A), (1).

law by agreement of the parties, but to create such a lien the contract must expressly provide therefor.[1]

(c) *Under Statute* — (1) In General. Nearly all the states have statutes recognizing the rights of agistors to a lien on horses and other animals for their keep.[2] The extent and character of such lien depend necessarily upon the construction given to the statute creating it.[3]

(2) Who Entitled to. The statutory lien exists, generally, only in favor of one who has actually "kept" the animal,[4] and whose business it is to feed cattle,[5] and does not attach in favor of a mere servant employed in the care of animals.[6] Since, too, to maintain a lien the cattle must be the property of another, a partner can acquire no lien by feeding animals belonging to the partnership.[7]

1. Cummings *v.* Harris, 3 Vt. 244, 23 Am. Dec. 206.

Where a contract provides that the contractor shall take certain cattle to his farm; that he shall feed and fatten them there until a certain date; that he shall be liable for all losses of such cattle from death, disease, escape, or theft, at a fixed price per head; that he waives any lien on said cattle as an agistor, or in any other character; that the contractee shall sell said cattle; and that the contractor shall receive, in full for his services, the price realized at the sale in excess of a fixed sum per head and expenses of sale, it does not give the contractor title to said cattle, nor right to sell them. Western Land, etc., Co. *v.* Plumb, 27 Fed. 598.

Privilege of sale to pay for keep.— An agreement that stock shall be liable for their keeping, with power to sell them to pay expenses, gives the bailee the right to sell only so much of it as is necessary to pay what might be due him for its keeping. A sale of more is a conversion, although such sale is not void, but voidable only, at the election of the party sought to be divested of the title. Whitlock *v.* Heard, 13 Ala. 776, 48 Am. Dec. 73.

Stipulation for pay "before moving."— Under a contract for wintering cattle, which expresses the sum the agistor is to receive therefor, and provides that the amount so stipulated shall be paid "before moving the cattle" from the premises, the agistor is entitled to retain possession of the cattle until payment to him of the sum stipulated for their keeping. McCoy *v.* Hock, 37 Iowa 436.

2. Hanch *v.* Ripley, 127 Ind. 151, 26 N. E. 70, 11 L. R. A. 61.

Such liens have been held to exist in the following cases: Johnson *v.* Perry, 53 Cal. 351; Fishell *v.* Morris, 57 Conn. 547, 18 Atl. 717, 6 L. R. A. 82; Kroll *v.* Ernst, 34 Nebr. 482, 51 N. W. 1032; Gates *v.* Parrott, 31 Nebr. 581, 48 N. W. 387; Smith *v.* Marden, 60 N. H. 509; Towle *v.* Raymond, 58 N. H. 64.

Statute not retroactive.— A person who had an animal in his possession, under a contract with its owner for its keeping, at the time of the passage of the Maine act of 1872, c. 27, but who had no lien at common law nor by the terms of his contract, can claim none under that act for food or shelter furnished prior to its passage; but has one for what is afterward supplied, provided the rights of third parties are not affected thereby. Allen *v.* Ham, 63 Me. 532.

3. Hanch *v.* Ripley, 127 Ind. 151, 26 N. E. 70, 11 L. R. A. 61.

"Liens are in derogation of the common law, and the court is not authorized to extend the law beyond the objects specifically provided for, or enforce a remedy provided by statute except in accordance with the terms thereof." Lord *v.* Collins, 76 Me. 443, 444.

4. **Merely paying** or contracting to pay some value for the keeping is not sufficient. Cox *v.* McGuire, 26 Ill. App. 315; Sharp *v.* Johnson, (Oreg. 1901) 63 Pac. 485.

5. Conklin *v.* Carver, 19 Ind. 226, holding that the statute was not intended to include an insolated case of feeding. But see Kelsey *v.* Layne, 28 Kan. 218, 42 Am. Rep. 158, wherein it was held that the statute covered the case of one who for several years has kept a number of cattle belonging to the same person, although he kept no cattle for others.

The owner of a farm is not entitled to a lien upon the stock of a farm-hand kept on said farm during his term of service for said owner, and pastured on the latter's land and fed with his grain, but which is otherwise cared for by such employee. Wright *v.* Waddell, 89 Iowa 350, 56 N. W. 650.

Presumption.— Where the evidence showed a contract whereby defendant undertook, for a price stated, to keep fifty head of cattle for plaintiff in a manner and for a time stated, and that defendant performed the agreement, it was held, in an action of replevin, that the jury was warranted in inferring that defendant was in the business of feeding live stock, and accordingly entitled, under Ind. Rev. Stat. (1881), § 5292, to a lien. Bunnell *v.* Davisson, 85 Ind. 557.

6. Skinner *v.* Caughey, 64 Minn. 375, 67 N. W. 203; Underwood *v.* Birdsell, 6 Mont. 142, 9 Pac. 922; Bailey *v.* Davis, 19 Oreg. 217, 23 Pac. 881; Hooker *v.* McAllister, 12 Wash. 46, 40 Pac. 617. And to the same effect in Pennsylvania under the common law, see Hoover *v.* Epler, 52 Pa. St. 522.

See 2 Cent. Dig. tit. "Animals," § 58.

7. Auld *v.* Travis, 5 Colo. App. 535, 39 Pac. 357. But see Corning *v.* Ashley, 51 Hun (N. Y.) 483, 4 N. Y. Suppl. 255 [*affirmed* in 121 N. Y. 700, 24 N. E. 1100], wherein it was held that the fact that plaintiff was one of several mortgagees to whom a chattel mortgage was given did not prevent him from acquiring a lien for the care of the

(3) How Created — (a) Necessity of Delivery. Under such statutes before a lien is created there must be a delivery of possession.[8]

(b) Necessity of Contract — aa. *In General.* It is further necessary that such delivery be under a contract for the keeping of the cattle for the purposes of the agistment, with an agreement to pay for the feed and care,[9] but an implied contract to pay for the keeping will be sufficient to sustain the lien.[10]

bb. *With Whom Made.* The contract must be made either with the owner or his agent.[11]

(c) Necessity of Notice. To create the lien the statute in some states requires that previous notice of the amount of the charges, and of the intention to detain the animals until the charges are paid, must be given to the owner.[12]

(4) Covers What Service. The statutes seem to contemplate a lien only for the amount which may be due for keeping;[13] but. in the absence of a provision

horse, especially since it appeared that, under the terms of the mortgage, plaintiff was not entitled to receive anything until other and prior claims had been first paid.

8. Auld *v.* Travis, 5 Colo. App. 535, 39 Pac. 357; H. Feltman Co. *v.* Chinn, 19 Ky. L. Rep. 1147, 43 S. W. 192; Underwood *v.* Birdsell, 6 Mont. 142, 9 Pac. 922.

9. *Colorado.*— Auld *v.* Travis, 5 Colo. App. 535, 39 Pac. 357.

Missouri.— Cunningham *v.* Hamill, 84 Mo. App. 389.

Montana.— Underwood *v.* Birdsell, 6 Mont. 142, 9 Pac. 922.

Nebraska.— Hale *v.* Wigton, 20 Nebr. 83, 29 N. W. 177.

New York.— Cook *v.* Shattuck, 21 N. Y. Suppl. 29.

For forms of contracts of agistment see O'Keefe *v.* Talbot, 84 Iowa 233, 50 N. W. 978; Meuly *v.* Corkill, 75 Tex. 599, 12 S. W. 1005; McAuley *v.* Harris, 71 Tex. 631, 9 S. W. 679.

A party wrongfully converting stock to his use is not entitled to an agistor's lien for feeding and caring for the same as against one who is entitled to the possession thereof. Howard *v.* Burns, 44 Kan. 543, 24 Pac. 981.

Terms "milk for meat."—Where cows were agisted on the terms, "milk for meat," that is, that the agistor should take their milk in exchange for their pasturage, the agistment was held to be within the statute. London, etc., Bank *v.* Belton, 15 Q. B. D. 457.

10. Thus, where, at the end of three months' pasturage, plaintiff tendered the amount due therefor and demanded his cattle, and defendant refused to accept the money or surrender the cattle, whereupon, on the same day, plaintiff brought replevin and took out his writ, but withheld service until the end of the fourth month, it was held that there arose an implied contract to pay for the keeping to the end of the fourth month which would sustain an agistor's lien. Powers *v.* Botts, 63 Mo. App. 285, 1 Mo. App. Rep. 780; Powers *v.* Botts, 58 Mo. App. 1. And where in an action to foreclose a chattel mortgage it was adjudged that plaintiff who seized the animals was not entitled thereto, and he thereupon notified the mortgagor that he held them subject to his order, but the latter failed to indicate that he would accept possession, such failure constitutes an implied promise to pay the reasonable value of their keep from the time of notice. Iowa, etc., Bank *v.* Price, 12 S. D. 184, 80 N. W. 195.

So, too, where defendant's horse strayed away and was taken up by plaintiff and turned into pasture to prevent damage on plaintiff's premises, and defendant learned the fact shortly thereafter, and sent plaintiff word that he owned the horse and not to advertise it as an estray, but that he would come and get him, and thereafter allowed such horse to remain in plaintiff's care for nearly two years after notice that plaintiff would claim payment for feed and care, plaintiff was entitled to replevy the horse after defendant had removed him without plaintiff's consent, since plaintiff was entitled to possession of the horse under his lien for feed and care. Campbell *v.* Headen, 89 Ill. App. 172.

11. Elliott *v.* Martin, 105 Mich. 506, 63 N. W. 525, 55 Am. St. Rep. 461; Sherwood *v.* Neal, 41 Mo. App. 416.

Mortgagee.— For this purpose a mortgagee of the horses, and not the mortgagor, is such owner. Howes *v.* Newcomb, 146 Mass. 76, 15 N. E. 123; Sargent *v.* Usher, 55 N. H. 287, 20 Am. Rep. 208. But an agistor acquires no lien under a contract made with the agent of a mortgagee under a void mortgage. Gates *v.* Parrott, 31 Nebr. 581, 48 N. W. 387. But see Corning *v.* Ashley, 51 Hun (N. Y.) 483, 4 N. Y. Suppl. 255 [*affirmed* in 121 N. Y. 700, 24 N. E. 1100], wherein it was held that a claim that, after default in the mortgage, the mortgagor was not "the owner" of the horse any longer was not well taken, as the word "owner," as used in the statute relating to agistors' liens, is used in contradistinction with an entire stranger, a person who has no right or authority over the chattel.

Sheriff.— A ranchman placed in possession of mortgaged cattle by the sheriff, to whom they were turned over for sale under the terms of the chattel mortgage, has a lien on the cattle. Vose *v.* Whitney, 7 Mont. 385, 16 Pac. 846.

12. Corning *v.* Ashley, 51 Hun (N. Y.) 483, 4 N. Y. Suppl. 255 [*affirmed* in 121 N. Y. 700, 24 N. E. 1100].

13. Powers *v.* Botts, 58 Mo. App. 1.

Breach of contract.— If there be a breach of the contract of agistment, as to the length

to the contrary in the statute or contract, there is nothing to limit the time covered.[14]

(5) Attaches to What. The lien attaches only to the animals agisted;[15] but where there is an entire contract for the keep of a number of animals the agistor has a lien on them all, not only for their proportionate part of the sum due for the keep of all, but for the entire amount due upon all the animals embraced in the contract.[16]

(6) Lien Is Assignable. The lien of an agistor of cattle is assignable, since the action would survive and pass to the personal representative.[17]

(7) Priorities. The lien of an agistor has priority over the lien of the assignee of past-due notes, secured by a mortgage on domestic animals, the possession of which remains in the mortgagor,[18] and likewise over a chattel mortgage executed while the animals were in possession of the agistor, of which fact the mortgagee had notice when he took the mortgage.[19] Ordinarily, the lien of a chattel mortgage duly recorded is held to be paramount to that of an agistor for subsequently pasturing the mortgaged stock, unless it is shown that the mortgagee consented, either expressly or impliedly, that such stock might be so pastured and subjected to such lien.[20] But there are decisions to the contrary.[21]

of time or in other particulars, such breach would give an action for damages as in other cases, but would not constitute the basis of a lien. Powers *v.* Botts, 58 Mo. App. 1.

Shoeing.— A trainer has no lien upon a mare for the expenses of shoeing her while in his possession, when no charge was made against him therefor. Barringer *v.* Burns, 108 N. C. 606, 13 S. E. 142.

Training.— Iowa Laws (1880), c. 25, § 1, which provides that the keepers of livery and feed-stables, herders, and feeders of stock for hire, shall have a lien for their charges and expenses as such, does not give a lien to one who is "a professional trainer of horses for speed" on horses which he has in his possession under contract to train. Scott *v.* Mercer, (Iowa 1895) 63 N. W. 325.

14. Allen *v.* Ham, 63 Me. 532.

15. Fein *v.* Wyoming L. & T. Co., 3 Wyo. 331, 22 Pac. 1150, holding that wagons, ox-yokes, and chains are not subject to the lien.

No lien exists, therefore, on the surplus arising from the proceeds of sale, after satisfaction of an execution issued upon a judgment on a petition to enforce an agistor's lien, for the keep of animals during the time intervening between the dates of the two petitions. Lord *v.* Collins, 76 Me. 443.

16. George R. Barse Live-Stock Commission Co. *v.* Adams, (Indian Terr. 1899) 48 S. W. 1023; Yearsley *v.* Gray, 140 Pa. St. 238, 21 Atl. 318.

17. McPherson First Nat. Bank *v.* Geo. R. Barse Live Stock Commission Co., 61 Mo. App. 143.

18. Blain *v.* Manning, 36 Ill. App. 214.

19. Tabor *v.* Salisbury, 3 Colo. App. 335, 33 Pac. 190.

20. *Indiana.*— Hanch *v.* Ripley, 127 Ind. 151, 26 N. E. 70, 11 L. R. A. 61; Woodard *v.* Myers, 15 Ind. App. 42, 43 N. E. 573.

New Hampshire.— Sargent *v.* Usher, 55 N. H. 287, 20 Am. Rep. 208.

New York.—Bissell *v.* Pearce, 28 N. Y. 252 [*distinguished* in Corning *v.* Ashley, 51 Hun (N. Y.) 483, 4 N. Y. Suppl. 255 (*affirmed* in 121 N. Y. 700, 24 N. E. 1100)].

South Dakota.—Wright *v.* Sherman, 3 S. D. 290, 52 N. W. 1093, 17 L. R. A. 792.

Vermont.— Ingalls *v.* Vance, 61 Vt. 582, 18 Atl. 452.

See 2 Cent. Dig. tit. "Animals," § 57.

Retention of possession by mortgagor.— While such consent may be shown by circumstances, the fact that the mortgagor retains possession of the mortgaged property is not of itself proof of such consent. Wright *v.* Sherman, 3 S. D. 290, 52 N. W. 1093, 17 L. R. A. 792.

Mere knowledge of bailment.— Such consent will not be implied from the mere knowledge of such mortgagee that, after the execution of his mortgage, the property had been placed in the hands of a third party to be kept. Ingalls *v.* Vance, 61 Vt. 582, 18 Atl. 452.

Failure to act after breach.—The failure of a mortgagee to assert his right to the possession of the animal on breach of the condition for the payment of the debt when due, in view of the fact that the feed and care of the animal by the bailee was necessary to the preservation of the life of the animal, may fairly be construed by the jury, under the circumstances, as a waiver of mortgagee's superior lien in favor of the agistor's lien. Woodard *v.* Myers, 15 Ind. App. 42, 43 N. E. 573.

Agistor entitled to balance.— Where live stock, which is encumbered by a chattel mortgage and also by an agistor's lien subsequent thereto, is taken from the possession of the agistor *in invitum* and sold upon the mortgage, any balance remaining in the hands of the officer after satisfaction of the mortgage belongs to the agistor up to the amount of his lien. Ingalls *v.* Green, 62 Vt. 436, 20 Atl. 196.

21. Case *v.* Allen, 21 Kan. 217, 30 Am. Rep. 425; Willard *v.* Whinfield, 2 Kan. App. 53, 43 Pac. 314; Corning *v.* Ashley, 51 Hun

(8) Waiver and Extinguishment. An agistor cannot be deprived of his lien upon live stock except by his voluntary relinquishment of the lien, or by such conduct as estops him from asserting it.[22] A voluntary parting[23] with possession of the animal is an abandonment of the lien,[24] which may be surrendered also by agreement; but as the lien must be regarded as something of value, such agreement, in order to be obligatory, must be based on a legal consideration.[25] Tender of the full amount due for the keep of cattle extinguishes the lien given by statute, but does not take away plaintiff's right to an ordinary money judgment for that amount, without costs, although plaintiff refuses the tender and sues to enforce a lien for a greater amount.[26]

(9) How Enforced. One lawfully claiming a lien for feeding live stock has the right of possession until the debt is paid, but he can do nothing else to enforce payment except in pursuance of the statute providing for the enforcement of such a lien.[27] Thus, when the statute gives the right to enforce by sale,[28] if the sale is made without complying with the provisions of the statute, the owner of the stock may resume possession thereof, or he may bring an action for the conversion of the same.[29] In an action to foreclose, the animals upon which a lien is claimed must be sufficiently described.[30] An allegation that petitioner "kept" the animal is substantially an allegation that food and shelter were furnished.[31]

(N. Y.) 483, 4 N. Y. Suppl. 255 [*distinguishing* Bissell *v.* Pearce, 28 N. Y. 252]; Alymore *v.* Kahn, 11 Ohio Cir. Ct. 392. But see Graham *v.* Winchell, 3 Ohio N. P. 106.

22. Weber *v.* Whetstone, 53 Nebr. 371, 73 N. W. 695, holding that a purchaser for value without actual notice of the lien takes subject thereto.

See 2 Cent. Dig. tit. "Animals," §§ 64, 65.

23. Where an agistor leaves the stock he is feeding and caring for to be herded temporarily by another person, and they are driven off during his temporary absence by the owner or one having a special ownership in them, the agistor will not be deemed to have lost his lien, if, within a reasonable time, he demands a return of the stock. Willard *v.* Whinfield, 2 Kan. App. 53, 43 Pac. 314. See also Weber *v.* Whetstone, 53 Nebr. 371, 73 N. W. 695.

24. *Connecticut.*— Fishell *v.* Morris, 57 Conn. 547, 18 Atl. 717, 6 L. R. A. 82.

Iowa.— Wright *v.* Waddell, 89 Iowa 350, 56 N. W. 650.

Maine.— Danforth *v.* Pratt, 42 Me. 50.

Missouri.— McPherson First Nat. Bank *v.* Geo. R. Barse Live Stock Commission Co., 61 Mo. App. 143; Powers *v.* Botts, 58 Mo. App. 1.

Nebraska.— Kroll *v.* Ernst, 34 Nebr. 482, 51 N. W. 1032.

Nevada.— Cardinal *v.* Edwards, 5 Nev. 36.

See 2 Cent. Dig. tit. "Animals," § 65.

Must assert right in unequivocal terms.— The claimant of such lien, if he means to abide by it, should assert it in unequivocal terms, and not leave it to conjecture whether he bases his detention of the property on account of his lien, or some other ground. He cannot be permitted to maintain a lien in the face of his own disclaimer. Workman *v.* Warder, 28 Mo. App. 1. But see Brown *v.* Holmes, 21 Kan. 687, to the effect that if a person who has a lien for the keeping and feeding of cattle claims to detain them in his possession on more than one ground, but expressly makes mention of his lien and charges as one of his reasons for such detention, such declaration will not be considered a waiver, or an abandonment of his lien.

Causing to be taken on execution.— Where an agistor or trainer causes property subject to his lien to be taken on execution at his own suit, and assents to the officer's taking possession thereof, he thereby surrenders his lien. Fein *v.* Wyoming L. & T. Co., 3 Wyo. 331, 22 Pac. 1150; Jacobs *v.* Latour, 5 Bing. 130, 15 E. C. L. 506.

A mere offer to buy the animal from one having no authority to sell will not be deemed a waiver. Lord *v.* Jones, 24 Me. 439, 41 Am. Dec. 391.

25. **The promise, not in writing, of a third** party, to pay the amount necessary to discharge the lien, is an undertaking to pay the debt of another, void by statute of frauds, and furnishes no consideration for such an agreement. Danforth *v.* Pratt, 42 Me. 50.

26. Berry *v.* Tilden, 70 Mo. 489.

27. Greenawalt *v.* Wilson, 52 Kan. 109, 34 Pac. 403.

Constitutionality of statute.— The Kentucky statute authorizing a warrant to be sued out, directing the proper officer to levy upon and seize the cattle for the amount due, and requiring the proceedings under the warrant to be in all respects the same as in cases of distress for rent, is not unconstitutional. Griffith *v.* Gross, (Ky. 1900) 55 S. W. 1077.

28. **Such right is given** by the New Hampshire statute. Towle *v.* Raymond, 58 N. H. 64.

29. Greenawalt *v.* Wilson, 52 Kan. 109, 34 Pac. 403.

30. An allegation that defendant owned a certain flock of sheep, giving their number, and that they are within a certain county, and have at all times prior to the filing of the complaint been within the state, is not a sufficient description. Hooker *v.* McAllister, 12 Wash. 46, 40 Pac. 617.

31. Allen *v.* Ham, 63 Me. 532.

Though no lien exists for shoeing the animal, nor for the payment of taxes assessed upon him, the insertion of a count claiming a lien for such items will not invalidate the petition.[32]

(10) How Pleaded. It is well established that the lien is admissible as a defense under a plea denying property in plaintiff.[33]

b. Against Third Persons. By the common law an agistor has such title in virtue of his possession as enables him to maintain trespass or trover for an injury to,[34] or conversion of,[35] the animals.

3. Liabilities of Agistor — a. To Owner — (1) *In General.* In the absence of a special contract[36] an agistor is not an insurer.[37] In caring for the animals in his charge he is required to exercise only reasonable care and diligence,[38] becom-

32. Allen *v.* Ham, 63 Me. 532.

33. Richards *v.* Symons, 8 Q. B. 90, 55 E. C. L. 90, 15 L. J. N. S. 35, 10 Jur. 6.

34. New York, etc., R. Co. *v.* Auer, 106 Ind. 219, 6 N. E. 330, 55 Am. Rep. 734 [*citing* Story Bailm. § 443]; Weymouth *v.* Gile, 72 Me. 446; Betts *v.* Mouser, Wright (Ohio) 744.

35. *Colorado.*— Auld *v.* Travis, 5 Colo. App. 535, 39 Pac. 357.

Indiana.— New York, etc., R. Co. *v.* Auer, 106 Ind. 219, 6 N. E. 330, 55 Am. Rep. 734 [*citing* Story Bailm. § 443].

New York.—Bass *v.* Pierce, 16 Barb. (N. Y.) 595.

Ohio.— Betts *v.* Mouser, Wright (Ohio) 744.

England.— Burton *v.* Hughes, 2 Bing. 173, 9 E. C. L. 533; Wilbraham *v.* Snow, 2 Saund. 47; Sutton *v.* Buck, 2 Taunt. 302.

See 2 Cent. Dig. tit. "Animals," § 41.

"If he has sued by authority and has recovered the value, the recovery is conclusive of the subject. If the agistor sue and recover the value, he elects to hold himself answerable to the owner. If the owner sanction the suit, he cannot afterward question the right." Betts *v.* Mouser, Wright (Ohio) 744, 745.

36. Cummings *v.* Mastin, 43 Mo. App. 558; Calland *v.* Nichols, 30 Nebr. 532, 46 N. W. 631.

If the contract provides specifically what shall be done in certain particulars, any implication of duty to exercise reasonable care in those particulars is excluded, and the stipulated things must be done. Bunnell *v.* Davisson, 85 Ind. 557; Ware Cattle Co. *v.* Anderson, 107 Iowa 231, 77 N. W. 1026.

Preservation of hides.— Where one of the parties to the contract was to preserve the hides of the cattle which died, as evidence of death, and the ears of any which had earmarks, and there was no provision in the contract as to when the hides of cattle which had died should be counted, it was held that the hides preserved should be counted at the time of death, with a view of making them available for use or sale. Teal *v.* Bilby, 123 U. S. 572, 8 S. Ct. 239, 31 L. ed. 263.

37. *Illinois.*— Halty *v.* Markel, 44 Ill. 225, 92 Am. Dec. 182.

Iowa.— O'Keefe *v.* Talbot, 84 Iowa 233, 50 N. W. 978.

Missouri.— McCarthy *v.* Wolfe, 40 Mo. 520; Winston *v.* Taylor, 28 Mo. 82, 75 Am. Dec. 112; Rey *v.* Toney, 24 Mo. 600, 69 Am. Dec. 444; Crawford *v.* Cushman, 82 Mo. App. 554; Cummings *v.* Mastin, 43 Mo. App. 558.

New York.— Gibbs *v.* Coykendall, 39 Hun (N. Y.) 140 [*affirmed* in 116 N. Y. 666, 22 N. E. 1135]; Bass *v.* Pierce, 16 Barb. (N. Y.) 595.

England.— Smith *v.* Cook, 1 Q. B. D. 79; Broadwater *v.* Blot, Holt 547, 3 E. C. L. 216.

See 2 Cent. Dig. tit. "Animals," §§ 43, 44.

38. *Illinois.*— Union Stock-Yard, etc., Co. *v.* Mallory, etc., Co., 157 Ill. 554, 41 N. E. 888, 48 Am. St. Rep. 341; Cloyd *v.* Steiger, 139 Ill. 41, 28 N. E. 987 [*affirming* 38 Ill. App. 107]; Mansfield *v.* Cole, 61 Ill. 191; Umlauf *v.* Bassett, 38 Ill. 96.

Kansas.— Ransom *v.* Getty, 37 Kan. 75, 14 Pac. 487.

Massachusetts.— Wood *v.* Remick, 143 Mass. 453, 9 N. E. 831.

Missouri.— Winston *v.* Taylor, 28 Mo. 82, 75 Am. Dec. 112.

Nebraska.— Calland *v.* Nichols, 30 Nebr. 532, 46 N. W. 631.

New Jersey.— Deyer *v.* Ashley, 6 N. J. L. J. 283.

New York.— Gibbs *v.* Coykendall, 39 Hun (N. Y.) 140 [*affirmed* in 116 N. Y. 666, 22 N. E. 1135].

Pennsylvania.— Murray *v.* Rhodes, 3 Lack. Jur. (Pa.) 123.

Texas.— Brush *v.* Clarendon Land, etc., Co., 2 Tex. Civ. App. 188, 21 S. W. 389.

Vermont.— Sargent *v.* Slack, 47 Vt. 674, 19 Am. Rep. 136; Phelps *v.* Paris, 39 Vt. 511; Eastman *v.* Patterson, 38 Vt. 146.

England.— Smith *v.* Cook, 1 Q. B. D. 79.

See 2 Cent. Dig. tit. "Animals," §§ 43, 44.

So, too, if A place a dog with B, and the dog be received by B, to be kept by him for reward to be paid to him by A, B is not responsible for the loss of the dog if he took reasonable care of it; but if the dog be lost, the onus lies on B to acquit himself by showing that he was not in fault with respect to the loss. Mackenzie *v.* Cox, 9 C. & P. 632, 38 E. C. L. 369.

"**The test is not** necessarily the care which the agistor may exercise as to his own animals, for they may be accustomed to a place of danger to which a strange horse would be unused, and he may choose to take risks as to his own property which would be unwarrantable as to that of another for which he is to be paid." Pearce *v.* Sheppard, 24 Ont. 167, 170.

ing liable for loss thereof or injury thereto only where there is a want of such care on his part.[39]

(II) *For Conversion.* The unauthorized use by an agistor of animals in his custody is a conversion;[40] but an offer to sell, in an attempt to enforce the lien by an irregular mode, will not be treated as such.[41]

Duty to fence.— A farmer who takes in cattle to pasture for hire must keep his ground under a good fence; and, if it be not so at the time he receives cattle, he ought immediately to repair it. Even though the owner of the cattle sees the fence is bad, the farmer is bound to put and keep it in good order, for the owner of the cattle has a right to expect this will be done, and need not make it a condition of the contract, for this condition is of the nature of the contract. Cecil *v.* Preuch, 4 Mart. N. S. (La.) 256, 16 Am. Dec. 171.

Duty as to male animals.—When the owner or keeper of a ram is bailee of the sheep of another, and the parties have made no express stipulations by contract as to the manner in which the sheep would be kept, or the care which the bailee should take of them, he should, upon principle, be required to keep them separate and apart from his ram during the period the statute requires him to restrain it from running at large off his own premises. Phelps *v.* Paris, 39 Vt. 511.

An unusual risk to which cattle are exposed in the agistor's grounds should be brought to the notice of customers. McLain *v.* Lloyd, 5 Phila. (Pa.) 195, 20 Leg. Int. (Pa.) 348.

39. *Illinois.*— Mansfield *v.* Cole, 61 Ill. 191.

Missouri.—McCarthy *v.* Wolfe, 40 Mo. 520; Winston *v.* Taylor, 28 Mo. 82, 75 Am. Dec. 112; Rey *v.* Toney, 24 Mo. 600, 69 Am. Dec. 444; Owens *v.* Geiger, 2 Mo. 39, 22 Am. Dec. 435; Cummings *v.* Mastin, 43 Mo. App. 558.

New York.— Gibbs *v.* Coykendall, 39 Hun (N. Y.) 140 [*affirmed* in 116 N. Y. 666, 22 N. E. 1135]; Bass *v.* Pierce, 16 Barb. (N. Y.) 595.

Pennsylvania.— Cook *v.* Haggarty, 36 Pa. St. 67.

Texas.— Brush *v.* Clarendon Land, etc., Co., 2 Tex. Civ. App. 188, 21 S. W. 389.

England.— Broadwater *v.* Blot, Holt 547, 3 E. C. L. 216.

See 2 Cent. Dig. tit. "Animals," §§ 43, 44.

Injury from contracting disease.— It is the duty of an agistor who takes animals for pasture to know their condition as to health; and if he has knowledge of the prevalence of a distemper among them of a contagious character, and fails to inform a customer of the fact, whose animal takes the distemper from contact with the diseased animals, and in consequence dies, the owner is entitled to recover its value in an action on the case, notwithstanding the contract for such pasturage is void because entered into on Sunday. Costello *v.* Ten Eyck, 86 Mich. 348, 49 N. W. 152, 24 Am. St. Rep. 128. But see Gibbs *v.* Coykendall, 39 Hun (N. Y.) 140 [*affirmed* in 116 N. Y. 666, 22 N. E. 1135], wherein plaintiff's cattle were sound and healthy when turned into the pasture, but soon after became sick and died of Texas fever, which disease they contracted from the dejections of Texan cattle which defendant had previously pastured upon the farm, of which fact plaintiff was ignorant. The jury found that defendant did not, at the time of receiving plaintiff's cattle, know that there was danger of native cattle contracting the disease by being pastured upon fields previously occupied by Texan cattle, and it was held that defendant was not liable for the damages sustained by plaintiff and that the liability of native cattle to contract such disease under such circumstances was not sufficiently well known among the farmers of New York to charge defendant with knowledge of that fact.

Injury from vicious animals.— Where an agistor has knowledge of the vicious character of an animal in his pasture, he will be liable for injuries which such animal may inflict on other animals taken for pasture. Schroeder *v.* Faires, 49 Mo. App. 470. The fact that defendant had no knowledge of the mischievous disposition of the particular animal is no ground for disturbing a verdict in favor of the bailor, as such knowledge is not essential to his liability, under his contract as an agistor, to take reasonable care of plaintiff's animal. Smith *v.* Cook, 1 Q. B. D. 79.

Poor pasturage.— The owner of a pasture who receives cattle therein for a stipulated time, at a sum agreed on, is not liable for loss resulting from poor pasturage or want of water when the owner of the cattle has reserved the right, as a part of the contract, to remove the cattle whenever they might be liable to loss from defective supply of either grass or water, and when the condition of the pasture at the time of the contract is known to both contracting parties. Meuly *v.* Corkill, 75 Tex. 599, 12 S. W. 1005. But an agreement not to overstock the pasture has been held to be a continuing covenant, and the fact that the owner of the stock inspected the pasture, and acquainted himself with its capacity before the contract, does not relieve the owner from his covenant against overstocking it. McAuley *v.* Harris, 71 Tex. 631, 9 S. W. 679.

40. Gooe *v.* Watson, 61 N. H. 136; Collins *v.* Bennett, 46 N. Y. 490. But see Johnson *v.* Weedman, 5 Ill. 495, to the effect that where a horse was delivered by plaintiff to defendant to be agisted, and defendant, without authority of plaintiff, rode the horse fifteen miles, and the horse died a few hours afterward, but not in consequence of the riding, plaintiff could not sustain an action for trover and conversion.

41. Shields *v.* Dodge, 14 Lea (Tenn.) 356.

(III) *For Acts of Servants.* An agistor is bound to employ careful, skilful, and trustworthy servants. He is liable for all injuries done by them, in the course of their employment, through negligence or carelessness;[42] but he is not liable for any malicious or wilful act committed by them without his knowledge or consent and outside the scope of their authority.[43]

(IV) *Action against Agistor* — (A) *Pleading.*[44] In an action against an agistor, it is necessary to allege only his business, a delivery to and acceptance of the animals by him, the tender of the amount due, and a demand and refusal to return the animals. It is not necessary to aver negligence.[45]

(B) *Evidence* — (1) Burden of Proof. If plaintiff contends that the cattle are injured by the negligence of the agistor, the burden of proof is upon plaintiff to show such negligence.[46]

(2) Admissibility. Evidence that the condition of the fence was good around other parts of the pasture than that where the animal was injured; that defendant was reported to be a prudent agistor of horses and was intrusted with many valuable horses to pasture; and that, in particular instances, she had refused to assume the risk, as tending to show a general custom by her not to assume risks, is inadmissible.[47]

(C) *Question of Fact.* Whether an agistor of cattle is negligent or acts in a wrongful manner is purely a question of fact, to be found by the jury or referee.[48]

b. To Third Persons. An agistor who has the care and custody of animals for the purpose of pasturing them is liable for damage done by them in the same manner and to the same extent as the owner.[49]

4. Liability of Owner. At the common law the owner as well as the agistor was liable for damage committed by the cattle agisted;[50] but in some states it is held that where the animals are in the hands of an agistor, and are suffered to

42. Halty *v.* Markel, 44 Ill. 225, 92 Am. Dec. 182; Rohrabacher *v.* Ware, 37 Iowa 85; Sinclair *v.* Pearson, 7 N. H. 219.

43. Halty *v.* Markel, 44 Ill. 225, 92 Am. Dec. 182.

44. For forms of declarations against agistor by owner see Costello *v.* Ten Eyck, 86 Mich. 348, 49 N. W. 152, 24 Am. St. Rep. 128; Cook *v.* Haggarty, 36 Pa. St. 67.

45. Cummings *v.* Mastin, 43 Mo. App. 558.

Right to interest.— Where cattle are delivered by the owner to another to be fattened and returned at a certain day, upon payment being made for feeding them, and the party to whom they are delivered sells them and converts them into money, in an action of assumpsit for the proceeds of the cattle the owner will be entitled to interest upon the value of the cattle from the time of the demand for the redelivery of the cattle, made after the time fixed for their redelivery, till the date of the trial of the cause. Staat *v.* Evans, 35 Ill. 455.

46. Wood *v.* Remick, 143 Mass. 453, 9 N. E. 831; McCarthy *v.* Wolfe, 40 Mo. 520; Rayl *v.* Kreilich, 74 Mo. App. 246; Casey *v.* Donovan, 65 Mo. App. 521; Calland *v.* Nichols, 30 Nebr. 532, 46 N. W. 631; Kemp *v.* Phillips, 55 Vt. 69.

But see Hudson *v.* Bradford, 91 Ill. App. 218; Crawford *v.* Cashman, 82 Mo. App. 554, to the effect that where it is shown that the agistor received the animals in good condition and failed so to return them a *prima facie* case of negligence is made out.

47. Lucia *v.* Meech, 68 Vt. 175, 34 Atl. 695.

Evidence as to use of animal.— The exclusion of evidence offered by plaintiff that defendant has used some of the stock without his consent, where use by a keeper of a "public ranch or stable" forfeits his lien on the animal so used, is not reversible error where a plaintiff does not offer to prove that defendant keeps a public ranch, and does not offer proof to reduce the defendant's lien but only to prove damages. Harper *v.* Lockhart, 9 Colo. App. 430, 48 Pac. 901.

48. Halty *v.* Markel, 44 Ill. 225, 92 Am. Dec. 182; Kemp *v.* Phillips, 55 Vt. 69.

49. *Connecticut.*— Barnum *v.* Vandusen, 16 Conn. 200.

Maine.— Weymouth *v.* Gile, 72 Me. 446.

Massachusetts.— Sheridan *v.* Bean, 8 Metc. (Mass.) 284, 41 Am. Dec. 507.

Missouri.— Reddick *v.* Newburn, 76 Mo. 423.

Nebraska.— Laflin *v.* Svoboda, 37 Nebr. 368, 55 N. W. 1049.

New Hampshire.— Kennett *v.* Durgin, 59 N. H. 560; Tewksbury *v.* Bucklin, 7 N. H. 518.

Oregon.— Bileu *v.* Paisley, 18 Oreg. 47, 21 Pac. 934, 4 L. R. A. 840.

Pennsylvania.— Rossell *v.* Cottom, 31 Pa. St. 525.

England.— Bacon Abr. tit. Trespass, G. 2; 1 Esp. N. P. Dig. 387, tit. Trespass; Viner Abr. tit. Trespass, B.

See 2 Cent. Dig. tit. "Animals," § 49.

50. Weymouth *v.* Gile, 72 Me. 446; Sheridan *v.* Bean, 8 Metc. (Mass.) 284, 41 Am. Dec. 507; Blaisdell *v.* Stone, 60 N. H. 507; Bacon Abr. tit. Trespass, G, 2; Viner Abr. tit. Trespass, B.

escape and do mischief, he, and not the owner, is the party responsible,[51] unless the owner purposely selected an irresponsible, incompetent, or untrustworthy bailee.[52]

IV. Brands and Marks.[53]

A. As Evidence of Ownership — 1. In General. In several of the states where stock-raising is a leading industry and cattle are allowed to run at large, the legislatures, in order to prevent controversies and to secure the evidence of ownership in a practical mode best adapted to the circumstances of the country, have passed laws[54] regulating the marking, branding, and counter-branding of stock. These laws are imperative in their character, and are required by the wants and necessities of the country.[55] By some of these statutes it is expressly provided that a lawfully-recorded brand shall be *prima facie* evidence of ownership,[56] and even in the absence of such provision it has been so held.[57] Such statutes do not

51. Ozburn *v.* Adams, 70 Ill. 291; Ward *v.* Brown, 64 Ill. 307, 16 Am. Rep. 561; Reddick *v.* Newburn, 76 Mo. 423; Atwater *v.* Lowe, 39 Hun (N. Y.) 150; Rossell *v.* Cottom, 31 Pa. St. 525.

52. Ward *v.* Brown, 64 Ill. 307, 16 Am. Rep. 561; Reddick *v.* Newburn, 76 Mo. 423.

53. Slaughtering unmarked cattle see *infra*, XV, A.

54. More than one brand.— Where it was objected that the court erred, in admitting copies of brands, because they showed different brands in each county, it was held that even where a statute provides that an individual shall have but one mark and brand for his cattle, yet, if he remove the cattle from the county in which his brand is recorded, and for any reason causes a different brand to be recorded in the county to which the cattle are removed, the new brand does not invalidate the old one, nor deprive the owner of any benefit accruing from its registration. McClure *v.* Sheek, 68 Tex. 426, 4 S. W. 552. But see Unsell *v.* State, 39 Tex. Crim. 330, 45 S. W. 1022, holding that the record of a second brand in the same county while the first remains unabandoned is not admissible to prove ownership, the statute providing for the use of only one brand by one person.

55. Walden *v.* Murdock, 23 Cal. 540, 83 Am. Dec. 135; Beyman *v.* Black, 47 Tex. 558.

56. Chesnut *v.* People, 21 Colo. 512, 42 Pac. 656; Murray *v.* Trinidad Nat. Bank, 5 Colo. App. 359, 38 Pac. 615; State *v.* Cardelli, 19 Nev. 319, 10 Pac. 433.

Ownership of person whose brand it may be. — Under N. M. Comp. Laws, § 57, a duly recorded brand is evidence, not of ownership in the person in whose name it is recorded, but in the owner of the brand, and on a trial for larceny of an animal it may be alleged and proved that a person other than he in whose name the brand was recorded was the owner of the brand, or of the animal, at the time of the larceny. Territory *v.* Chavez, (N. M. 1892) 30 Pac. 903. See also Brill *v.* Christy, (Ariz. 1901) 63 Pac. 757.

Presumption of ownership rebutted.—Where plaintiff in replevin introduced evidence that the cow replevied was given to her, and was kept on a farm, and was branded the same as the cattle that were kept on the farm, and the owner of the farm notified, and pasturage paid for the cow, the evidence was held to be sufficient to overcome any presumption of ownership, and to put defendant upon his proof. Debord *v.* Johnston, 11 Colo. App. 402, 53 Pac. 255.

57. De Garca *v.* Galvan, 55 Tex. 53; Schneider *v.* Fowler, 1 Tex. App. Civ. Cas. § 856. To the same effect see Smith *v.* State, 1 Tex. App. 133, where, on a trial for theft of a branded steer, the accused proved that before he took the animal he had recorded the brand as his own, and he asked the court to instruct the jury that "the record of marks and brands is *prima facie* evidence of ownership, and the oldest record is *prima facie* the best," which the court modified by interpolating the words, "in good faith," after the word "brands," and the modification was held to be proper.

But see Stewart *v.* Hunter, 16 Oreg. 62, 66, 16 Pac. 876, 8 Am. St. Rep. 267 (wherein the court, in speaking of a recorded brand, said: "Branding stock furnishes evidence of its ownership, though it does not constitute implied notice of the fact. It is a circumstance which will aid in ascertaining to whom it belongs, but is not constructive notice that it belongs to the party branding it"), and Alexander *v.* State, 24 Tex. App. 126, 127, 5 S. W. 840 (where the court said: "While a recorded brand is admissible in evidence to prove ownership, the statute does not make it *prima facie* proof of ownership, nor attach to it any peculiar weight, or even expressly declare it to be admissible evidence. It is like any other evidence of ownership, and, having been admitted in evidence, is for the consideration of the jury like any other evidence, and the court is not required to, and ordinarily should not, call particular attention to it in the charge").

A brand of itself is not conclusive evidence of the ownership of an animal any more than the fact of an animal being unbranded is conclusive of want of ownership. Davis *v.* Green, 2 Hawaii 367; Plummer *v.* Newdigate, 2 Duv. (Ky.) 1, 87 Am. Dec. 479; Peoples *v.* Devault, 11 Heisk. (Tenn.) 431.

contemplate, however, that a recorded brand or mark shall be the exclusive mode of proving ownership.[58]

2. Recording — a. Necessity for — (I) *When Offered to Prove Ownership* — (A) *Brand.* By some statutes it is provided that a brand shall not be any evidence of ownership unless the same has been recorded;[59] and, since an unrecorded brand is no evidence that the actual owner owns the animal, it is self-evident that it cannot be evidence that a special owner has the management and control thereof.[60]

(B) *Marks.* Although the Texas statute requires marks to be recorded, it does not provide, as in the case of brands, that they shall not be evidence of ownership unless so recorded, and hence an unrecorded mark is admissible in evidence in proof of ownership.[61]

(II) *When Offered to Prove Identity.* An unrecorded brand is admissible, in connection with other proof, to identify an animal,[62] even where the statute provides that no brand except such as is recorded shall be recognized as any evidence of ownership.[63] For this purpose the brand is admissible in evidence although recorded after the commission of the offense.[64]

b. Where Recorded. The statute requires only that the owner of a mark or brand shall record the same in the county comprising the intended range of his stock. Such a statute does not require the owner to record his mark and brand in every county into which his cattle may stray.[65] The owner may, however, record his mark and brand in as many counties as he thinks necessary.[66]

c. Requisites of Record — (I) *In General.* Where the record shows distinctly the brand and mark claimed, and by whom they are claimed, it attains all the purposes of the law.[67]

58. Irrespective of any brand, ownership and identification may be shown by the flesh-marks or other satisfactory evidence. Bazell *v.* State, 89 Ala. 14, 8 So. 22; Hutto *v.* State, 7 Tex. App. 44; Wolf *v.* State, 4 Tex. App. 332; Fisher *v.* State, 4 Tex. App. 181; Lockhart *v.* State, 3 Tex. App. 567; Jones *v.* State, 3 Tex. App. 498.

59. Murray *v.* Trinidad Nat. Bank, 5 Colo. App. 359, 38 Pac. 615; Allen *v.* State, 42 Tex. 517; Poag *v.* State, 40 Tex. 151; Herber *v.* State, 7 Tex. 69; Childers *v.* State, 37 Tex. Crim. 392, 35 S. W. 654; Gregory *v.* Nunn, (Tex. Civ. App. 1894) 25 S. W. 1083; Thompson *v.* State, 26 Tex. App. 466, 9 S. W. 760; Burke *v.* State, 25 Tex. App. 172, 7 S. W. 873; Thompson *v.* State, 25 Tex. App. 161, 7 S. W. 589; Crowell *v.* State, 24 Tex. App. 404, 6 S. W. 318; Morrow *v.* State, 22 Tex. App. 239, 2 S. W. 624; Wyers *v.* State, 21 Tex. App. 448, 2 S. W. 816; Hutto *v.* State, 7 Tex. App. 44; Fisher *v.* State, 4 Tex. App. 181.

See 2 Cent. Dig. tit. "Animals," §§ 9, 10.

That accused failed to claim authority from any one to kill the animal in question does not make an unrecorded brand evidence of ownership. McKenzie *v.* State, 32 Tex. Crim. 568, 25 S. W. 426, 40 Am. St. Rep. 795.

Whether another state has such a statute or not has been held immaterial where, on an indictment for bringing into the state an animal stolen in another state, an attempt was made to prove ownership by an unrecorded brand. McKenzie *v.* State, 32 Tex. Crim. 568, 25 S. W. 426, 40 Am. St. Rep. 795.

60. McKenzie *v.* State, 32 Tex. Crim. 568, 25 S. W. 426, 40 Am. St. Rep. 795.

61. Dixon *v.* State, 19 Tex. 134; Coffelt *v.* State, 19 Tex. App. 436; Love *v.* State, 15 Tex. App. 563; Dreyer *v.* State, 11 Tex. App. 631; Kelly *v.* State, 1 Tex. App. 628; Johnson *v.* State, 1 Tex. App. 333.

See 2 Cent. Dig. tit. "Animals," § 9.

62. Brooke *v.* People, 23 Colo. 375, 48 Pac. 502; State *v.* Cardelli, 19 Nev. 319, 10 Pac. 433.

63. Poage *v.* State, 43 Tex. 454; Childers *v.* State, 37 Tex. Crim. 392, 35 S. W. 654; Gregory *v.* Nunn, (Tex. Civ. App. 1894) 25 S. W. 1083; Lockwood *v.* State, 32 Tex. Crim. 137, 22 S. W. 413; Tittle *v.* State, 30 Tex. App. 597, 17 S. W. 1118; Horn *v.* State, 30 Tex. App. 541, 17 S. W. 1094; Coffelt *v.* State, 19 Tex. App. 436; Coombes *v.* State, 17 Tex. App. 258; Johnson *v.* State, 1 Tex. App. 333.

64. Chesnut *v.* People, 21 Colo. 512, 42 Pac. 656; Turner *v.* State, 39 Tex. Crim. 322, 45 S. W. 1020; Crowell *v.* State, 24 Tex. App. 404, 6 S. W. 318; Harvey *v.* State, 21 Tex. App. 178, 17 S. W. 158; Spinks *v.* State, 8 Tex. App. 125; Priesmuth *v.* State, 1 Tex. App. 480.

65. Thompson *v.* State, 26 Tex. App. 466, 9 S. W. 760; Walton *v.* State, (Tex. Crim. 1900) 55 S. W. 566; Atterberry *v.* State, 19 Tex. App. 401, the last two cases holding that a record of marks and brands in one county was evidence of ownership in every other county.

66. Atterberry *v.* State, 19 Tex. App. 401.

67. McClure *v.* Sheek, 68 Tex. 426, 4 S. W. 552.

(II) *Kind of Animal to Be Branded.* The law does not require the record to state whether the brand is to be used on horses, cattle, or other property.[68]

(III) *Part of Animal to Be Branded.* The record must designate the part of the animal upon which the brand is to be placed.[69] But it has been held that the statute controlling this subject cannot be construed to mean that the record shall designate the particular right or left side, shoulder, flank, or hip of the animal upon which it is to be placed.[70]

(IV) *Residence of Owner.* The statute requires the certificate to be filed in the county wherein the person filing the same resides, but does not require that the record shall show such residence.[71]

3. How Proved. The record itself,[72] or a certified copy thereof,[73] is admissible to prove ownership; but it is error to permit proof by parol that a brand has been recorded.[74]

B. Title to — How Passed. In the absence of statute recorded brands are subject to sale or transfer like other personal property, and such transfer may be shown by parol evidence;[75] but, in some states, by statute, a parol sale of a recorded mark or brand is ineffectual to pass title,[76] although such sale may be proved by parol.[77]

C. Unlawfully Branding or Marking, or Altering or Defacing Brands or Marks — 1. In General. Statutes have been enacted in several of the states to punish the act of changing or defacing marks or brands which are the ordinary indications of ownership in stock. Such statutes also prohibit the act of

68. Ledbetter *v.* State, 35 Tex. Crim. 195, 32 S. W. 903; McGrew *v.* State, 31 Tex. Crim. 336, 20 S. W. 740.

69. Hayes *v.* State, 30 Tex. App. 404, 17 S. W. 940; Thompson *v.* State, 25 Tex. App. 161, 7 S. W. 589; Harwell *v.* State, 22 Tex. App. 251, 2 S. W. 606; Priesmuth *v.* State, 1 Tex. App. 480.

70. Thompson *v.* State, 25 Tex. App. 161, 7 S. W. 589.

"Hip, thigh, and flank."— The record is sufficient if it shows that the brand is to be placed on the "hip, thigh, and flank." Thompson *v.* State, 25 Tex. App. 161, 7 S. W. 589.

"Left or right side."— Where the record designates that the brand shall be placed on the "left or right side" of the animal, it is sufficient. Hayes *v.* State, 30 Tex. App. 404, 17 S. W. 940.

"Left side and left thigh."—A record which shows that the brand was placed upon the "left side and left thigh" is in conformity with the statute. Ledbetter *v.* State, 35 Tex. Crim. 195, 32 S. W. 903.

"Ribs and hips."— Designating the place of branding as on the "ribs and hips" is sufficient. McGrew *v.* State, 31 Tex. Crim. 336, 20 S. W. 740.

71. Chesnut *v.* People, 21 Colo. 512, 42 Pac. 656, holding that the fact of residence may be shown *aliunde* the record, if it may not be presumed from the fact of filing the brand in the particular county.

72. Chesnut *v.* People, 21 Colo. 512, 42 Pac. 656.

Variance.— The recorded brand and the brand found upon the animal must correspond, or the discrepancy be satisfactorily explained by the evidence. Myers *v.* State, 24 Tex. App. 334, 6 S. W. 194. Hence, where the record describes the brand as to be put upon the "hip," while the evidence showed that it was on the ribs, the variance was held too great. Priesmuth *v.* State, 1 Tex. App. 480. But see Harwell *v.* State, 22 Tex. App. 251, 2 S. W. 606, where the record designated the place of branding as the "left hip" and the evidence showed the brand to be on the side of the animal, and it was held that the variance did not affect the admissibility of the record in evidence, but only its probative force, and that, unsupported by other evidence, the record would not be sufficient proof of ownership.

73. Wilson *v.* State, 3 Tex. App. 206.

For forms of certified records of brands see Dickson *v.* Territory, (Ariz. 1899) 56 Pac. 971; Chesnut *v.* People, 21 Colo. 512, 42 Pac. 656; Thompson *v.* State, 26 Tex. App. 466, 9 S. W. 760; Byrd *v.* State, 26 Tex. App. 374, 9 S. W. 759.

74. Elsner *v.* State, 22 Tex. App. 687, 3 S. W. 474.

Unless objected to when offered, however, no objection can be taken to the admission of parol evidence. Lockhart *v.* State, 3 Tex. App. 567.

75. Chesnut *v.* People, 21 Colo. 512, 42 Pac. 656.

76. Chesnut *v.* People, 21 Colo. 512, 42 Pac. 656; Rankin *v.* Bell, 85 Tex. 28, 19 S. W. 874.

77. Thus, where, on a trial for theft, the recorded mark and brand has been transferred by the owners on the record to other parties, it is not essential that a bill of sale should be introduced in evidence in order to admit the record evidence of transfer, but proof of the purchase of the brand and the animals in such brand can be made by parol. Ledbetter *v.* State, 35 Tex. Crim. 195, 32 S. W. 903.

putting false marks or brands thereon, with intent to injure the owner by either depriving him of the property or rendering his title thereto more difficult of proof.[78]

2. Elements of Offense — a. What Constitutes Alteration or Defacement. To constitute alteration it is only necessary that defendant should put on an additional brand, although the last may not interfere with or change the figure of the first.[79] To constitute defacement, however, the original brand must be obliterated.[80]

b. Intent. Under most statutes an intent to defraud is the gist of the offense.[81]

3. Requisites of Indictment — a. Following Language of Statute. The indictment should charge the offense in the language of the statute,[82] and an indictment in this form is sufficient.[83]

b. Particular Averments — (I) *As to Mark* — (A) *Description of Original Mark and Alteration.* The indictment need not set out or describe the original mark, nor the manner in which the alteration was made;[84] but where the particular mode of alteration is alleged it must be proved as averred.[85]

(B) *Ownership of Mark.* An indictment for altering or defacing a mark or brand need not allege whose mark or brand it was that has been altered or defaced.[86]

78. State *v.* Davis, 24 N. C. 153.

Marking a hog is an offense under the South Carolina act of 1789, which provides that if any person wilfully and knowingly marks, brands, or disfigures certain animals, he shall, for each animal for which he may be convicted of branding or disfiguring, be subject to penalty, etc. (State *v.* Nichols, 12 Rich. (S. C.) 672), although this was doubted in State *v.* Roberts, 1 Treadw. (S. C.) 116.

79. Atzroth *v.* State, 10 Fla. 207; Linney *v.* State, 6 Tex. 1, 55 Am. Dec. 756.

Means of alteration immaterial.— If the brand has been changed or altered from what it was to another and different brand, it matters not by what means the alteration was effected. Thus, it has been held that an alteration of the scar made by the branding-iron is not necessary, but that merely clipping some of the hair from the brand of the animal, whereby the brand was changed, is an alteration. Slaughter *v.* State, 7 Tex. App. 123.

80. Linney *v.* State, 6 Tex. 1, 55 Am. Dec. 756.

81. Territory *v.* Blevins, (Ariz. 1895) 41 Pac. 442; Morgan *v.* State, 13 Fla. 671; State *v.* Matthews, 20 Mo. 55; State *v.* Hall, 27 Tex. 333; Montgomery *v.* State, (Tex. App. 1890) 13 S. W. 1000; Foster *v.* State, (Tex. App. 1889) 12 S. W. 506; Cresap *v.* State, 28 Tex. App. 529, 13 S. W. 992; Fossett *v.* State, 11 Tex. App. 40.

82. Morgan *v.* State, 13 Fla. 671; State *v.* Davis, 24 N. C. 153.

"Wilfully and knowingly."— An indictment which did not charge defendant, in the words of the act of 1789, with having "wilfully and knowingly" marked, was insufficient. State *v.* Roberts, 3 Brev. (S. C.) 139.

83. State *v.* Stelly, 48 La. Ann. 1478, 21 So. 89.

For forms of indictments for altering or defacing marks or brands, or for unlawfully branding or marking animals, see:

Florida.— Atzroth *v.* State, 10 Fla. 207.

Missouri.— State *v.* Matthews, 20 Mo. 55.

North Carolina.— State *v.* O'Neal, 29 N. C. 251; State *v.* Davis, 24 N. C. 153.

Oregon.— State *v.* Lee, 17 Oreg. 488, 21 Pac. 455.

Texas.— State *v.* Haws, 41 Tex. 161; Davis *v.* State, 13 Tex. App. 215.

Utah.— People *v.* Swasey, 6 Utah 93, 21 Pac. 400.

84. State *v.* Stelly, 48 La. Ann. 1478, 21 So. 89; State *v.* O'Neal, 29 N. C. 251; State *v.* Lee, 17 Oreg. 488, 21 Pac. 455. *Contra*, Sewall *v.* State, Wright (Ohio) 483, wherein it was held that an indictment for altering and defacing the ear-marks of animals should set out the marks alleged to be altered or defaced, and describe the alteration, or the manner thereof, as near as may be.

See 2 Cent. Dig. tit. "Animals," § 14.

"Make" for "mark."— Where an indictment charged the accused with altering the "make" of a sheep, the court said that while, no doubt, the word "make" was intended to be written "mark," it was a different word, having a different signification, and could not be brought within the exception of *idem sonans*. State *v.* Davis, 24 N. C. 153.

85. Davis *v.* State, 13 Tex. App. 215.

See also House *v.* State, 15 Tex. App. 522, wherein the indictment charged the alteration of a brand on six head of cattle from "J L" to "B U D," and the proof was that the brand of "J L" was altered by defendant to "B U D" on some of them, and into "B U D" on others. It was held that, to make the charge good, it was sufficient to prove the change into "B U D" on any one of the six animals, and that proof relating to the other change was admissible as part of the *res gestæ*, the evidence showing that the brands were all put on at the same time and place, and that all constituted but one transaction.

86. Shiver *v.* State, (Fla. 1899) 27 So. 36; State *v.* Stelly, 48 La. Ann. 1478, 21 So. 89.

(II) *Description of Animal*—(A) *In General.* An indictment is sufficient which describes the animal by its specific designation in the statute.[87]

(B) *Value.* Where the punishment is determined by the value of the animal in question, value should be alleged,[88] but not otherwise.[89]

(III) *As to Ownership of Animal.* The indictment must allege that the animal was not defendant's own,[90] and should state the name of the owner, or allege that the name of the owner is unknown.[91]

(IV) *Negativing Consent of Owner.* The indictment should allege that the acts complained of were done without the consent of the owner.[92]

(V) *As to Intent.* Where a particular intent is required to constitute the offense under a specific statute, the indictment should allege such intent, using the language of the statute.[93]

(VI) *Negativing Authority of Law.* It is not necessary for the indictment to show that the act was done "without authority of law."[94]

87. State *v.* Haws, 41 Tex. 161.

"A colt" is a sufficient description of the animal, and it is unnecessary to further describe the colt as "an animal of the horse species." Pullen *v.* State, 11 Tex. App. 89.

"A hog" is a sufficient description, without giving the size, sex, color, age, etc. State *v.* Stelly, 48 La. Ann. 1478, 21 So. 89.

88. Thus, where the statute provides that the illegal marking or branding of certain enumerated animals shall be punished as in cases of theft of such animals, and the theft of certain of them is declared to be a felony, regardless of value, no value need be alleged; but where the theft of certain others of them is declared to be a felony or misdemeanor, according to value, the value must be alleged. Melton *v.* State, 20 Tex. App. 202.

Value not essential.— Tex. Laws (1893), p. 25, making the punishment for stealing a hog two to four years' imprisonment, and repealing Tex. Pen. Code (1879), art. 748, making the extent of the punishment for such stealing depend on the value of the animal, provides a punishment, without further legislation, for subsequent alterations of the marks of hogs; article 760 declaring that one altering the mark of a hog, without the consent of the owner, and with fraudulent intent, "shall be punished in the same manner as if he had committed a theft of such animal." Barfield *v.* State, (Tex. Crim. 1897) 43 S. W. 333.

89. Houston *v.* State, 66 Ark. 607, 53 S. W. 44.

90. Cresap *v.* State, 28 Tex. App. 529, 13 S. W. 992.

91. People *v.* Hall, 19 Cal. 425; State *v.* Haws, 41 Tex. 161; State *v.* Faucett, 15 Tex. 584.

Describing property as belonging to estate. — It is not sufficient to describe the property as belonging to an estate. People *v.* Hall, 19 Cal. 425.

One having actual care, control, and management of an animal is properly described as the owner. Alford *v.* State, 31 Tex. Crim. 299, 20 S. W. 553.

Estrays.— It is no objection that at the time the act was done the animal had strayed from its owner. State *v.* Davis, 24 N. C. 153; Alford *v.* State, 31 Tex. Crim. 299, 20 S. W. 553.

92. Cresap *v.* State, 28 Tex. App. 529, 13 S. W. 992; State *v.* Hall, 27 Tex. 333.

93. Morgan *v.* State, 13 Fla. 671.

"Intent to claim said steer."— An indictment under Fla. Rev. Stat. § 2474, for fraudulently altering the marks and brands of a steer, belonging to another, with intent to claim the same, which contains an allegation that the fraudulent alteration was effected by defendant "with intent to claim said steer," is sufficiently definite to apprise him of the specific intent charged, and to enable him to prepare his defense to that branch of the charge against him. Shiver *v.* State, (Fla. 1899) 27 So. 36.

Intent to convert to defendant's use.— Under Ariz. Pen. Code, § 969, an indictment which fails to allege that the act was done with intent to convert the animal to defendant's use is demurrable. Territory *v.* Blevins, (Ariz. 1895) 41 Pac. 442.

Intent to defraud.— Under the Texas statute the indictment should allege that the act was done "with intent to defraud." Cresap *v.* State, 28 Tex. App. 529, 13 S. W. 992; State *v.* Hall, 27 Tex. 333.

"Wilfully and feloniously marked."— The Florida statute prescribes a punishment for fraudulently marking an unmarked animal, with intent to claim the same, or to prevent identification by the owner; and an indictment charging that defendant "wilfully and feloniously marked an unmarked animal" is not sufficient, the particular intent being of the essence of the offense. Morgan *v.* State, 13 Fla. 671.

Where statute is silent respecting intent, an indictment, for altering or defacing a mark, without the use of the words, "with intent to steal," or other words of similar import, is sufficient. State *v.* Stelly, 48 La. Ann. 1478, 21 So. 89.

94. Murrah *v.* State, 51 Miss. 675, wherein it was said that, although the statute forbids the acts "without the consent of the owner, or without authority of law," yet the words, "without authority of law," do not constitute a negative necessary to be averred. Marking without authority of law might constitute a distinct cause of indictment, or, if

4. DEFENSES — a. Mistake as to Ownership. Where defendant had permission to mark certain animals, and did so in the belief that they belonged to the one granting permission, this is a good defense, and warrants an instruction for acquittal if believed by the jury.[95]

b. Former Conviction. Where two animals are branded at the same time by one not their owner, conviction for the crime of branding one of them is a bar to a prosecution for branding the other.[96]

5. EVIDENCE — a. Admissibility. On trial of an indictment for unlawfully branding or marking an animal, parol evidence is admissible to prove the prosecutor's mark.[97]

b. Weight and Sufficiency — (I) *IN GENERAL.* On a trial for altering a mark where the only evidence is that the animal was found with its mark changed from that of its owner to that of defendant, the evidence is insufficient and a conviction should be set aside.[98]

(II) *AS TO INTENT.* The criminal intent will be presumed upon proof of the branding, alteration, or defacement;[99] but defendant may rebut this presumption by showing that he acted in good faith and with innocent motives.[1]

(III) *AS TO OWNERSHIP.* The ownership of the animal must be proved as alleged.[2]

done with authority of law, it would be a matter of defense.

95. Goree *v.* State, (Tex. Crim. 1896) 34 S. W. 119.

An honest belief that animal was defendant's is a good defense, for it negatives the fraudulent intent which is the gist of the offense; and, where the jury has been instructed to this effect, it is no error to omit to instruct the jury to acquit if defendant claimed to own the animal as his property. Pace *v.* State, (Tex. Crim. 1893) 24 S. W. 297.

96. Adams *v.* State, 16 Tex. App. 162.

97. State *v.* King, 84 N. C. 737.

On a prosecution for altering marks on goats, it is not error to refuse to strike from the evidence testimony as to the marking of goats on a date previous to that fixed by an employee of the owner as the time when they were all in the herd; for such employee's testimony merely showed a discrepancy of dates, and did not preclude testimony that they were lost before that time. Diaz *v.* State, (Tex. Crim. 1899) 53 S. W. 632.

98. Dobson *v.* State, 67 Miss. 330, 7 So. 327.

99. Bradley *v.* People, 8 Colo. 599, 9 Pac. 783; State *v.* Davis, 24 N. C. 153. But see Fossett *v.* State, 11 Tex. App. 40, to the effect that an attempt to defraud must be established by evidence, either affirmative or negative, and that it cannot be inferred from the naked fact that the accused marked or branded an animal, not his own, without the owner's consent.

Sufficient evidence.— Where a cow was found in the possession of defendant with the brand altered from that of her owner to that of defendant, and the calf of said cow was found in the pen of defendant bearing his mark and brand, in the absence of satisfactory explanation on his part the jury properly found him guilty of having fraudulently altered the brand of said cow, with intent to claim the same, in violation of the Florida act of Feb. 12, 1832, § 12, and the supreme court will not hold it error in the circuit court to refuse to set aside a verdict founded on such testimony. Atzroth *v.* State, 10 Fla. 207.

1. Bradley *v.* People, 8 Colo. 599, 9 Pac. 783; State *v.* Davis, 24 N. C. 153.

The evidence fails to establish an intent to defraud where it shows that defendant, as soon as he discovered that he had branded an animal which did not belong to him, went to the owner, explained the circumstance, and bought and paid for the animal (Taylor *v.* State, 35 Tex. 496), or that defendant's purpose was to protect the owner of the animal in his property by preventing said animal from being appropriated by some person to whom he did not belong (Montgomery *v.* State, (Tex. App. 1890) 13 S. W. 1000). But where, on a trial for altering the brand of cattle, the court had charged that before the jury could convict they must believe beyond a reasonable doubt that defendant altered the brand with intent to defraud the owner, it was proper to refuse to charge for defendant that, if he believed that the animal had been stolen, and changed the brand with intent to prevent the thief from recovering it, he was not guilty. Childers *v.* State, 37 Tex. Crim. 392, 35 S. W. 654.

2. Mayes *v.* State, 33 Tex. 340; Foster *v.* State, (Tex. App. 1889) 12 S. W. 506; People *v.* Swasey, 6 Utah 93, 21 Pac. 400.

Joint ownership.— While, by Tex. Rev. Code Crim. Proc. art. 426, where property is owned in common, or jointly, by two or more persons, the ownership may be alleged to be in either or all of them, yet, previous to the adoption of this statute, where the indictment alleged that defendant defaced the brand on a certain animal with intent to defraud one Free Green, alleged to be the owner, and the proof showed that the animal belonged jointly to Free Green and T. J. Word, the variance was fatal. Calloway *v.* State, 7 Tex. App. 585.

(iv) *As to Want of Owner's Consent.* The mere extrajudicial statements and declarations of the owner, or of others, are not sufficient evidence of the want of the owner's consent to the alteration of the brand.[3]

(v) *As to Value.* Where the offense is a felony or a misdemeanor, according to the value of the animals in question, if the value alleged in the indictment is so small as to constitute the offense only a misdemeanor, no proof of value is necessary, but if the value alleged be so large as to make the offense charged in the indictment a felony, then the value must be proven.[4]

6. Verdict. Where, on the trial of two defendants for unlawfully marking certain animals, it appeared that one defendant marked one animal which he claimed, and the other defendant at another time marked others which he claimed, but no joint act or concurrence in the separate acts was proved, a verdict which fails to ascertain the number of animals marked is insufficient to support a conviction.[5]

7. Punishment. Where, by statute, punishment for fraudulently altering the mark and brand of cattle is made the same as for theft, and a theft of neat cattle is made a felony without regard to the value of the property stolen, a charge of the court allowing the jury to find any other punishment than that prescribed for such act is error.[6]

D. Driving Unmarked Cattle from County. Where the statute makes it an offense to drive herds of cattle from the county to market without a list of the marks and brands of such cattle recorded, the offense is not punishable in the county from which the cattle were driven [7]

E. Shipping from County Hides Branded after Skinning. Where the statute makes it an offense to ship out of the county hides which have been branded since they were skinned from the carcass, it is no defense that they originally came from a county other than the one in which the indictment was found, and, on a trial for this offense, a bill of sale of the hides, and an inspector's certificate that he had examined them, is irrelevant evidence which is properly excluded.[8]

V. Breeding of Animals.[9]

A. Standing Unlicensed Animal.[10] Where a statute prohibits the standing of a covering horse or jack, without license, it is immaterial whether the person guilty be the owner.[11] Standing a jack under a contract to have the mules at a stipulated price less than their value is a standing of the jack for profit within the meaning of such a statute.[12]

B. Contract for Service — 1. Consideration. There can be no recovery for the services of an unlicensed stallion where the statute imposes a penalty for standing an unlicensed animal.[13] It is not necessary for plaintiff in an action to

Insufficient evidence.— When, on a trial for illegally branding horses alleged to be the property of Hawkins, it appeared that the horses were estrays and had been in the neighborhood for about two years; that his neighbors had requested Hawkins to look after the horses and see that no one but the true owner branded them; that when branded by the defendant they were on the range with Hawkins' stock, but he had never taken actual possession, it was held that the evidence failed to show such possession and control by Hawkins as to sustain the allegation of his ownership. Hawkins *v.* State, (Tex. Crim. 1892) 20 S. W. 830.

3. West *v.* State, 32 Tex. 651.

4. Melton *v.* State, 20 Tex. App. 202.

Where it appears by overwhelming testimony that the value of the animals was more than twenty dollars, the amount necessary to render the offense a felony, it is not error for the court to refuse an instruction that the jury must believe that the animals were of the value of sixty-five dollars, as alleged in the indictment. Diaz *v.* State, (Tex. Crim. 1899) 53 S. W. 632.

5. State *v.* Nichols, 12 Rich. (S. C.) 672.

6. Buford *v.* State, 44 Tex. 525.

7. Senterfit *v.* State, 41 Tex. 186.

8. Williams *v.* State, 37 Tex. 405.

9. **Restraint of animals** used for breeding see *infra*, XIV.

10. **For form of indictment** for standing an unlicensed covering jack see Com. *v.* Brandon, 4 B. Mon. (Ky.) 2.

11. Com. *v.* Brandon, 4 B. Mon. (Ky.) 2.

12. Com. *v.* Harris, 8 B. Mon. (Ky.) 373.

13. Smith *v.* Robertson, 20 Ky. L. Rep. 1959, 50 S. W. 852, 45 L. R. A. 510. But see Briggs *v.* Hunton, 87 Me. 145, 32 Atl. 794, 47

recover for such services to allege that he has procured a license.[14] Although the statute provides for advertising terms of service, this will not prevent the parties from making other terms, the object of such statutes being merely to make the advertised terms conclusive between the parties in the absence of a special agreement to the contrary.[15]

2. No Implied Warranty of Freedom from Disease. There is no implied warranty, in a contract for the services of a stallion, that the animal is free from disease that may be transmitted to the offspring.[16]

3. Lien — a. In General. At common law it would seem that a person who receives a mare for the purpose of being covered by his horse has a lien upon her for the use of his horse so long as he retains possession of the mare,[17] and a lien on the offspring may be created by agreement[18] or statute.[19] By the New York

Am. St. Rep. 318, holding that the price of service of a male animal may be recovered if the animal has not been advertised or held out for public use, although the animal has not been registered as required by statute.

Insufficient registration.— A certificate by the owner of a stallion, under Me. Rev. Stat. c. 38, § 61, giving the name of the horse as "Oliver," will not support an action for services of the same horse under the name of "Dictator Chief." Nelson *v.* Beck, 89 Me. 264, 36 Atl. 374.

14. Crumbaugh *v.* Williams, 19 Ky. L. Rep. 582, 41 S. W. 268.

15. Sturgeon *v.* Merritt, 49 Mo. App. 160.

Admissibility of terms as evidence.— On an issue as to whether a foal was insured, as a part of a special contract for the services of a stallion, the advertised terms of the conditions of service were not admissible in favor of the owner of the stallion. White *v.* Williams, 20 Ky. L. Rep. 1600, 49 S. W. 808.

Election of terms.— Where, by the contract, plaintiff was to receive five dollars for each colt begotten by the ass bailed, or pay to defendant twenty dollars per month for his services, at his election, and the bailment was terminated by mutual consent of the parties before the expiration of the season, it was held that, plaintiff having failed to elect, according to the terms of the contract, the defendant might do so, and his counter-claim for services would lie. Conwell *v.* Smith, 8 Ind. 530.

"With the privilege of breeding back again next season, should the mare not prove with foal. The money (price of the season) due at the time of the service, or before the mare is removed." Under the foregoing stipulations in the published terms upon which a stallion was to make a season, the customer had the right to reput his mare the next season, provided she did not prove in foal in the first one, and provided the horse and mare both lived till the next season. The owner of a mare not proving with foal is liable for the price of the season, although he is deprived of the privilege of breeding back the next season by the death of the horse. Price *v.* Pepper, 13 Bush (Ky.) 42. See also Pinkham *v.* Libbey, 93 Me. 575, 45 Atl. 823, 49 L. R. A. 693.

In an action to recover for the service of a stallion, though it appeared plaintiff understood merely that defendant was to come back the next year with his mare in case she should prove not to be with colt, yet, as his language justified defendant in understanding that he was not to pay in that event, a finding by the court for defendant will not be disturbed as against the evidence, the conditions not being fulfilled. Seacord *v.* Gale, 65 Ill. App. 637.

16. Briggs *v.* Hunton, 87 Me. 145, 32 Atl. 794, 47 Am. St. Rep. 318.

17. Jackson *v.* Holland, 31 Ga. 339; Grinnell *v.* Cook, 3 Hill (N. Y.) 485, 38 Am. Dec. 663; Scarfe *v.* Morgan, 4 M. & W. 270.

18. Thus plaintiff's mare having been served by defendant's stallion, and plaintiff having executed a written agreement to pay defendant twenty dollars in twelve months if mare proved with foal, "colt holden for payment," the agreement was construed to be a mortgage of the colt. Sawyer *v.* Gerrish, 70 Me. 254, 35 Am. Rep. 323.

19. Gile *v.* Atkins, 93 Me. 223, 44 Atl. 896, 74 Am. St. Rep. 341; Harby *v.* Wells, 52 S. C. 156, 29 S. E. 563.

A colt foaled on the twelfth day of July, 1898, became "six months old" at the beginning of the eleventh day of January, 1899, within the meaning of Me. Stat. (1895), c. 25, giving the owner of a stallion a lien for service fee on the colt, "to continue in force until the foal is six months old." Gile *v.* Atkins, 93 Me. 223, 44 Atl. 896, 74 Am. St. Rep. 341.

Sufficiency of judgment in proceedings to enforce.— In an action to enforce the statutory lien against a colt for service of the mare after the mare and colt have been sold and transferred, a judgment for the amount claimed, with a lien against the colt, is sufficient, though it be indefinite as to whether the personal judgment be against the defendant who procured the service or the subsequent owner. Harby *v.* Wells, 52 S. C. 156, 29 S. E. 563.

Evidence as to time of commencing suit.— There was evidence that the suit to enforce a lien on a colt for services of a stallion was instituted within twelve months after the claim accrued, where the action was brought March 7, 1897, and plaintiff testified that the mare was impregnated April 21, 1896, and "that a mare carried her colt between eleven and twelve months." Harby *v.* Wells, 52 S. C. 156, 29 S. E. 563.

statute [20] the lien attaches to both mother and offspring and exists from the time of service, and one who purchases the mare after service, but before the filing of a notice of lien and before the time for filing such notice has expired, takes her subject to the existing lien.[21]

b. Priorities. The lien on the offspring given by statute to the keeper of a stallion for public use has been held to be superior to the right of a mortgagee to whom the mare is conveyed while in foal and whose mortgage is registered before the foal is dropped;[22] but the statutory lien on the mare has been held subordinate to a prior recorded mortgage.[23]

C. Liability for Negligence. The owner of a stallion is liable for injuries to a mare, while being served by the stallion, due to such owner's negligence.[24]

D. Giving False Pedigree.[25] To convict one of the offense of giving a false pedigree of an animal, with intent to defraud, it must be shown that such pedigree was given "knowingly."[26]

E. Gelding Male Animal. Under the Oregon statute, if a stallion is found running at large, out of the inclosed grounds of his owner, during certain months, such stallion may be gelded without first twice taking him to the owner, provided the animal is not kept for breeding purposes, or, if so kept, the person gelding him has no actual or constructive notice that he is so kept.[27]

VI. CONTAGIOUS AND INFECTIOUS DISEASES OF ANIMALS.

A. Civil Liabilities[28] — **1. NATURE AND EXTENT OF — a. Diseases Generally** — (I) *LIABILITY OF OWNER* — (A) *For Allowing Animals at Large.* Except where the owner knows that it is probable that the animals may intrude on an adjoining inclosure,[29] or the statute law forbids,[30] he may keep his diseased cattle in his own pasture.[31] He will not be liable for injury to cattle in an adjoining pasture unless negligent in the manner of keeping his own.[32] The duty devolves upon the owner of cattle affected with a contagious disease to use all necessary care to prevent such cattle from communicating the disease to healthy cattle of others;[33] if, knowing them to be infected, he suffers them to run at large,[34] or to escape

20. N. Y. Laws (1887), c. 458, as amended by N. Y. Laws (1888), c. 457.

21. Tuttle *v.* Dennis, 58 Hun (N. Y.) 35, 11 N. Y. Suppl. 600, 33 N. Y. St. 445. See also Harby *v.* Wells, (S. C. 1898) 29 S. E. 563.

22. Sims *v.* Bradford, 12 Lea (Tenn.) 434.

23. Easter *v.* Goyne, 51 Ark. 222, 11 S. W. 212.

24. Cavender *v.* Fair, 40 Kan. 182, 19 Pac. 638.

25. **For form of information** for giving false pedigree of a horse see People *v.* Umlauf, 88 Mich. 274, 50 N. W. 251.

26. People *v.* Umlauf, 88 Mich. 274, 50 N. W. 251, wherein it was held that defendant could not be convicted, it appearing that, although he gave a false pedigree, he could not read, and thought it was true, and there was no evidence to the contrary.

27. Tucker *v.* Constable, 16 Oreg. 407, 19 Pac. 13.

28. **Agistor's liability** for injuries resulting from disease see *supra*, III, B, 3, a, (I).

29. Clarendon Land, etc., Co. *v.* McClelland, 86 Tex. 179, 23 S. W. 576, 1100, 22 L. R. A. 105.

30. Under the Illinois act of Feb. 16, 1865, relating to diseased sheep, it is clear that the owner of sheep having a contagious disease has no right to let them run, even upon his own land, where they can communicate disease to sheep lawfully pastured in an adjoining field. Herrick *v.* Gary, 65 Ill. 101.

31. Fisher *v.* Clark, 41 Barb. (N. Y.) 329, holding that pasturing sheep having an infectious disease on one's own land is not a nuisance in the absence of a statute making it so, and that no liability attaches for damage caused thereby to another.

32. Mills *v.* New York, etc., R. Co., 2 Rob. (N. Y.) 326; Clarendon Land, etc., Co. *v.* McClelland, 89 Tex. 483, 34 S. W. 98, 35 S. W. 474, 59 Am. St. Rep. 70, 31 L. R. A. 669.

Degree of care required. — The owner of diseased horses, knowing their disorder to be contagious, is bound to exercise all the care that a prudent man would exercise, or a rightful regard for the interests of others requires, such as placing his diseased horses so remote from a partition between his stable and that of a neighbor as to render contact with his neighbor's horse impossible. Mills *v.* New York, etc., R. Co., 2 Rob. (N. Y.) 326.

33. Grayson *v.* Lynch, 163 U. S. 468, 16 S. Ct. 1064, 41 L. ed. 230 [*affirming* 5 N. M. 487, 25 Pac. 992].

34. Herrick *v.* Gary, 83 Ill. 85; Mills *v.* New York, etc., R. Co., 2 Rob. (N. Y.) 326.

Watering at public tank. — The owner of

from his pasture into the premises of another, through a defect in his part of a division fence, which he neglects to keep in repair,[35] he is liable for all damages occasioned thereby to the animals of others.[36]

(B) *For Placing on Another's Premises.* The owner of an animal is liable to another, ignorant of the danger to which his own property is exposed, for all damages occasioned thereto, where, under express or implied license, he drives upon another's premises diseased animals, known by him to be infected;[37] so likewise when the owner places the animals in such other's charge without notifying him of the disease,[38] or representing that the animals are sound.[39]

(C) *For Selling.* One who knowingly sells diseased animals, representing them to be sound, is liable for all the direct consequences that naturally follow, if the purchaser acts upon such representation as if it were true,[40] and which could not have been avoided by the exercise of due care and diligence on the part of the latter.[41] This rule holds whether or not the vendor knew at the time such representations were made that the purchaser owned other animals.[42] When the soundness of the animal is warranted the vendor is liable in an action for breach of warranty.[43]

(II) *Liability of Carrier*[44]—(A) *For Transporting to Prohibited District.* A railroad company carrying animals to a prohibited district, with knowledge of their destination, is guilty of "causing the movement" of the animals within

diseased horses has no right to water them at a public tank used for watering the sound horses of other persons. Mills *v.* New York, etc., R. Co., 2 Rob. (N. Y.) 326.

35. Herrick *v.* Gary, 83 Ill. 85.

36. Herrick *v.* Gary, 83 Ill. 85.

Care required in treatment of infected animals.— Where plaintiff's sheep are infected from the sheep of defendant, the former will not be held responsible for more than ordinary care and skill in their treatment; but, even if they could have been cured by proper care and treatment, this will not exonerate defendant from liability for the trouble and expense incurred by plaintiff. Herrick *v.* Gary, 65 Ill. 101.

37. Hite *v.* Blandford, 45 Ill. 9; Eaton *v.* Winnie, 20 Mich. 156, 4 Am. Rep. 377.

Scienter essential.— In Hawks *v.* Locke, 139 Mass. 205, 208, 1 N. E. 543, 52 Am. Rep. 702, the court said: "No decision, so far as we know, has gone further than to hold persons answerable if they knew that the animals were diseased."

38. Penton *v.* Murdock, 22 L. T. Rep. N. S. 371, 18 Wkly. Rep. 382.

39. Fultz *v.* Wycoff, 25 Ind. 321.

40. Rose *v.* Wallace, 11 Ind. 112; Sherrod *v.* Langdon, 21 Iowa 518; Jeffrey *v.* Bigelow, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; Mullett *v.* Mason, L. R. 1 C. P. 559.

Knowledge of disease at former time.— Where an administratrix, under authority of the court, sold heifers infected with tuberculosis, from a herd of cattle left by deceased, she was not personally liable because she knew that such disease had shown itself in this herd at some former time, if at the time of the sale she had reason to believe, and did believe, that the disease had been entirely eradicated. Newell *v.* Clapp, (Wis. 1897) 72 N. W. 366.

Merely exposing diseased animals for sale, although an offense under the statute, does not amount to a representation that they were free from disease. Ward *v.* Hobbs, 3 Q. B. D. 150 [*affirmed* in 4 App. Cas. 13].

41. Sherrod *v.* Langdon, 21 Iowa 518.

42. Sherrod *v.* Langdon, 21 Iowa 518.

43. Mullett *v.* Mason, L. R. 1 C. P. 559.

Injury to lambs as item of damage.—Where sheep are purchased under a warranty that they are sound and healthy, but they are diseased with an infectious disease, the injury to the lambs resulting from such disease, and which were dropped soon after the purchase, is a proper item of damages to be considered in an action upon a breach of such warranty. Broquet *v.* Tripp, 36 Kan. 700, 14 Pac. 227.

44. **By act of congress** of May 29, 1884, the transportation by any person of any live stock with knowledge that it is infected with a communicable disease, with the qualification that Texas fever shall not be considered such a disease as to cattle transported by rail to slaughter, is forbidden. By section 7 of the act, which was afterward made to apply to the secretary of agriculture, it was made the duty of the commissioner of agriculture to notify transportation commissioners of the existence of a contagion, and declares a violation of the act to be a misdemeanor. It has been held that the secretary has no power to make regulations on compliance with which cattle may be removed from any state in which contagion exists to other parts of the United States. Mullen *v.* Western Union Beef Co., 9 Colo. App. 497, 49 Pac. 425. But after the cattle become domiciled in a state, their management therein is regulated by the state laws and not by this act, unless the state has determined to coöperate with the secretary of agriculture in the execution of such act. Mullen *v.* Western Union Beef Co., 9 Colo. App. 497, 49 Pac. 425. See also Cotting *v.* Kansas City Stock-Yards Co., 79 Fed. 679.

an order regulating the movement of animals, though such carrier does not carry the animals further than to a point outside the district and does not go within it.[45]

(B) *For Cleaning Cars.* A railroad company which furnishes, for the carriage of ties, cattle cars which contain such an accumulation of refuse matter, resulting from the carriage of cattle, that the loading of ties on the cars necessarily involves the ejection of some of this refuse matter, unloads such matter within the purview of the statutory inhibition, though the ties are loaded on the cars by the servants of an independent contractor, and the company is liable for damages resulting therefrom.[46]

b. Texas Fever—(I) *In General.* In a number of the western states statutes have been passed prohibiting the driving or conveying into those states, at certain seasons of the year, of any Texas, Cherokee, or Indian cattle. Such statutes have been held void as interfering with the power of congress to regulate interstate commerce,[47] as have similar statutes so far as they forbid the transportation through the states of cattle affected with Texas fever.[48] But the states may prevent the importation of diseased cattle into their territory,[49] and may prescribe the kind of cars in which they may be transported through the states, and such other precautionary measures as may be reasonably necessary.[50] A statute providing that a person, having in his possession Texas cattle which have not been wintered north, shall be liable for damages accruing from allowing them to run at large, is constitutional.[51] These statutes are not repealed or nullified by the act of congress of May 29, 1884, which establishes the bureau of animal industry.[52]

(II) *Liability of Owner.* One who, with knowledge that his cattle are infected with Texas fever, brings them into a state, and allows them to run at large on the range used by the cattle of another, whereby the other's cattle become infected and die, is guilty of negligence, and he is liable to such other for the damage thus caused, without regard to any state statute prohibiting the introduction of such cattle, and giving damages therefor.[53]

45. Midland R. Co. *v.* Freeman, 33 L. J. M. C. 79.

46. Pike *v.* Eddy, 53 Mo. App. 505.

47. Chicago, etc., R. Co. *v.* Erickson, 91 Ill. 613, 33 Am. Rep. 70; Salzenstein *v.* Mavis, 91 Ill. 391 [*overruling* Yeazel *v.* Alexander, 58 Ill. 254 (*followed* in Chicago, etc., R. Co. *v.* Gasaway, 71 Ill. 570; Somerville *v.* Marks, 58 Ill. 371; Stevens *v.* Brown, 58 Ill. 289)]; Urton *v.* Sherlock, 75 Mo. 247; Gilmore *v.* Hannibal, etc., R. Co., 67 Mo. 323; Hannibal, etc., R. Co. *v.* Husen, 95 U. S. 465, 24 L. ed. 527.

48. Selvege *v.* St. Louis, etc., R. Co., 135 Mo. 163, 36 S. W. 652; Grimes *v.* Eddy, 126 Mo. 168, 28 S. W. 756, 47 Am. St. Rep. 653, 26 L. R. A. 638, 27 S. W. 479.

49. Missouri Pac. R. Co. *v.* Finley, 38 Kan. 550, 16 Pac. 951; Grimes *v.* Eddy, 126 Mo. 168, 28 S. W. 756, 47 Am. St. Rep. 653, 26 L. R. A. 638; Hannibal, etc., R. Co. *v.* Husen, 95 U. S. 465, 24 L. ed. 527.

Presumption in favor of state officers' orders.— Where a state sanitary commission, as a precautionary measure, has excluded the cattle of another state from the state, as affected with a contagious and infectious disease, it will be presumed that their judgment and discretion was properly exercised. St. Louis Southwestern R. Co. *v.* Smith, 20 Tex. Civ. App. 451, 49 S. W. 627.

50. Grimes *v.* Eddy, 126 Mo. 168, 28 S. W. 756, 47 Am. St. Rep. 653, 26 L. R. A. 638.

51. Kimmish *v.* Ball, 129 U. S. 217, 9 S. Ct. 277, 32 L. ed. 695.

52. Missouri, etc., R. Co. *v.* Haber, 56 Kan. 694, 44 Pac. 632 [*affirmed* in 169 U. S. 613, 18 S. Ct. 488, 42 L. ed. 878].

53. Kimmish *v.* Ball, 30 Fed. 759. See also Croff *v.* Cresse, 7 Okla. 408, 54 Pac. 558, holding that one who moves cattle from an infected district, against which the United States and the territory have quarantined, into a protected area, and places them in the pasture of another, where other cattle are running, is liable for the loss by death of such other cattle by taking such contagious disease, even though he had no actual knowledge that the cattle which he placed in the pasture were affected with a contagious disease.

Under the Illinois statute held unconstitutional in Salzenstein *v.* Mavis, 91 Ill. 391, it was held that, to make one liable to damages as the owner of Texas or Cherokee cattle for infection to other cattle, he must be the owner in the natural and ordinary sense of that term, and that a conditional ownership growing out of a lien would not make a party liable unless he had the actual possession and control of the cattle. Smith *v.* Race, 76 Ill. 490; Hatch *v.* Marsh, 71 Ill. 370. And where several owners of different droves of Texas and Cherokee cattle drove their respective cattle over the herding-ground of another at different times, and by reason thereof,

(III) *Liability of Carrier*—(A) *For Transporting.* The liability of railroads, etc., for violating the provisions of the statute which prohibit the transportation of cattle suffering from Texas fever is limited to the disease communicated to other cattle in the neighborhood or along the line of such transportation or removal,[54] and such liability may be rebutted by showing that the company was free from negligence.[55] Where such cattle are brought by a railroad company into one county, and afterward transported by an owner, having no connection with the road, into another county, such transportation is a new and independent offense under the statute; and the company is not liable for disease communicated by the cattle while in the latter county.[56]

(B) *For Escape of Animals Having.* A railway company which negligently allows Texas cattle to escape from its cars and run at large, is liable for the resulting loss if native cattle are infected thereby with Texas fever.[57]

2. Actions — a. For Damages — (I) *Jurisdiction.* Actions for violations of the statute relating to Texas cattle are within the exclusive jurisdiction of a justice of the peace.[58]

(II) *Form of Action.* An action under the Illinois statute making the owner or person having possession of diseased sheep liable for all damages resulting from their running at large should be in case and not in debt, the action being remedial and not penal.[59]

(III) *Parties.* In an action for damages resulting from driving into the state cattle which communicated Texas fever, the purchasers of the cattle who have assumed the liability for damages are properly joined as defendants, and a personal judgment may be had against them as well as against the vendor.[60] All persons injured may be joined as defendants in an action against the owner of the cattle communicating such disease, and in such action defendants sustaining such injuries, and entitled to a lien on the same cattle, may set up their causes of action and obtain judgments thereon, and the liens of all persons entitled to recover against the owner may be adjusted in one action.[61] A railroad company, acting in conjunction with the owner of cattle communicating such disease in

through one or the other, or both, of such droves, disease was imparted to cattle owned by the latter, it was held there was no joint liability for such injury, of the several owners. Yeazel *v.* Alexander, 58 Ill. 254.

54. Coyle *v.* Chicago, etc., R. Co., 27 Mo. App. 584.

Under the earlier Missouri statute, which was declared to be unconstitutional in Hannibal, etc., R. Co. *v.* Husen, 95 U. S. 465, 24 L. ed. 527, the liability of the carrier was not limited to damages resulting from disease communicated while the animals were under his control, or by his want of proper care, but was liable for all damages, direct or remote, caused by the introduction of the stock. Mercer *v.* Kansas City, etc., R. Co., 60 Mo. 397; Dimond *v.* Kansas City, etc., R. Co., 60 Mo. 393; Husen *v.* Hannibal, etc., R. Co., 60 Mo. 226; Wilson *v.* Kansas City, etc., R. Co., 60 Mo. 184. See also Chicago, etc., R. Co. *v.* Gasaway, 71 Ill. 570.

55. Furley *v.* Chicago, etc., R. Co., 90 Iowa 146, 57 N. W. 719, 23 L. R. A. 73.

56. Surface *v.* Hannibal, etc., R. Co., 63 Mo. 452.

57. Selvege *v.* St. Louis, etc., R. Co., 135 Mo. 163, 36 S. W. 652; Grimes *v.* Eddy, 126 Mo. 168, 28 S. W. 756, 47 Am. St. Rep. 653, 26 L. R. A. 638.

Where a train is wrecked while transporting cattle diseased with the Texas, splenic, or Spanish fever, so as to make it necessary to unload the cattle, and thereupon the company is notified that the cattle are from Texas, and will spread disease among the domestic cattle if permitted to run at large or if driven upon the public highway, it should corral the cattle at or near the wreck, or otherwise prevent them from running at large or getting upon the public highway, until reloaded. If, however, it drives the cattle, after receiving notice of their diseased condition, upon the public highway, it does so at its own peril, and is liable, under the statute, for the damages arising from the communication of the disease or fever to domestic cattle from the cattle so diseased. Missouri Pac. R. Co. *v.* Finley, 38 Kan. 550, 16 Pac. 951.

58. Evans *v.* Adams, 21 Kan. 119.

59. Mount *v.* Hunter, 58 Ill. 246.

Statutory action not exclusive.— The right of action afforded by the common law has not been superseded by the act to prevent the spread of contagious and infectious diseases among swine, and the remedy furnished by the statute must be considered cumulative, rather than as a substitute, and it is optional with plaintiff to resort to the one or the other. Conard *v.* Crowdson, 75 Ill. App. 614.

60. Woodrum *v.* Clay, 33 Fed. 897.

61. Missouri, etc., R. Co. *v.* Haber, 56 Kan. 694, 44 Pac. 632.

bringing them into the state, may also be joined as defendant in such action, and all questions affecting its liability, not only to plaintiff, but to each of defendants, may be determined in the case.[62]

(IV) *DEFENSES*—(A) *Contributory Negligence.* The contributory negligence of plaintiff is a competent defense;[63] but when the importation of certain cattle was prohibited by law it was held that nothing less than gross negligence on the part of a plaintiff whose cattle became infected in consequence thereof would defeat his right of recovery.[64]

(B) *Disease Contracted from Plaintiff's Animals.* The fact that one of plaintiff's sheep communicated the disease to defendant's flock will not exonerate the defendant from liability to the plaintiff if he thereafter permits his flock to run where it can do injury to plaintiff.[65]

(C) *Plaintiff's Unlawful Act.* Where plaintiff's own unlawful act concurs in causing the damage he complains of he cannot recover compensation for such damage.[66]

(V) *PLEADING*[67]—(A) *In General.* A complaint by a livery-stable keeper for damages caused by the placing of a diseased horse in his care need not allege that the injury occurred without fault or negligence on his part, or that he did not, in his business, receive sick and diseased horses for keeping.[68]

(B) *Scienter.* It should be alleged that defendant knew that the cattle were diseased, whether in an action to recover damages for failure to restrain,[69] for driving into the county cattle having Texas fever,[70] or against a carrier for turning loose cattle infected therewith;[71] but, when the owner is guilty of a trespass in permitting his diseased animals to enter a neighbor's close, knowledge of their condition is immaterial.[72]

(C) *Conviction of Criminal Offense.* In a civil action to recover damages for a violation of the act to prevent the spread of contagious and infectious diseases among swine, it is not necessary to allege or prove that the defendant has been convicted in a criminal prosecution for a violation of the act.[73]

(D) *Against the Form of the Statute.* When the statute giving a right of action for damages resulting from diseased animals running at large is remedial and not penal the declaration need not conclude that the act is against the form of the statute.[74]

(VI) *EVIDENCE*—(A) *Burden of Proof.* Where plaintiff seeks to recover

62. Missouri, etc., R. Co. *v.* Haber, 56 Kan. 694, 44 Pac. 632.

63. St. Louis, etc., R. Co. *v.* Goolsby, 58 Ark. 401, 24 S. W. 1071; Missouri Pac. R. Co. *v.* Finley, 38 Kan. 550, 16 Pac. 951; Patee *v.* Adams, 37 Kan. 133, 14 Pac. 505; Demetz *v.* Benton, 35 Mo. App. 559; Coyle *v.* Conway, 35 Mo. App. 490; Walker *v.* Herron, 22 Tex. 55.

See 2 Cent. Dig. tit. "Animals," § 85.

Mere failure to prevent intermingling.—Failure of the owner of cattle to prevent them from being intermingled with those of other owners whose cattle are infected with Texas fever is not so clearly contributory negligence, where the cattle ranges are unfenced, that it must be so held on appeal, where the trial court has held to the contrary. Grayson *v.* Lynch, 163 U. S. 468, 16 S. Ct. 1064, 41 L. ed. 230 [*affirming* 5 N. M. 487, 25 Pac. 992].

64. Sangamon Distilling Co. *v.* Young, 77 Ill. 197; Somerville *v.* Marks, 58 Ill. 371.

65. Herrick *v.* Gary, 83 Ill. 85.

66. Harris *v.* Hatfield, 71 Ill. 298.

67. For form of declaration for injuries caused by communication of infectious disease to sheep see Eaton *v.* Winnie, 20 Mich. 156, 4 Am. Rep. 377.

Variance.—A variance between an allegation that cattle communicated "Texas cattle fever," which is a "contagious" disease, and a finding that they communicated "Texas fever," an "infectious" disease, is immaterial, as is a variance between an allegation that the disease was communicated on plaintiff's range and a finding that it could not be determined whether it was on that range, or on defendant's range, or in the road, where the cattle were indiscriminately mixed on both ranges, which were unfenced. Grayson *v.* Lynch, 163 U. S. 468, 16 S. Ct. 1064, 41 L. ed. 230 [*affirming* 5 N. M. 487, 25 Pac. 992].

68. Fultz *v.* Wycoff, 25 Ind. 321.

69. Bradford *v.* Floyd, 80 Mo. 207; Coyle *v.* Conway, 35 Mo. App. 490.

70. Patee *v.* Adams, 37 Kan. 133, 14 Pac. 505.

71. St. Louis, etc., R. Co. *v.* Goolsby, 58 Ark. 401, 24 S. W. 1071.

72. Lee *v.* Burk, 15 Ill. App. 651.

73. Conard *v.* Crowdson, 75 Ill. App. 614.

74. Mount *v.* Hunter, 58 Ill. 246.

damages caused by the communication of disease to his cattle in a pasture by defendant's cattle breaking into such pasture through a fence, he must prove that his own fence was reasonably sufficient.[75] In an action for permitting infected animals to run at large, or for selling such animals, the burden is on plaintiff to show that defendant knew, or had notice of facts which would make him chargeable with knowledge, that his cattle were infected and liable to communicate disease,[76] and that plaintiff's animals suffered from the same disease.[77]

(B) *Judicial Notice.* It has been held that courts will take judicial notice of the fact that Texas cattle have some contagious or infectious disease communicable to native cattle.[78]

(C) *Admissibility.* In an action to recover damages for communicating an infectious disease to plaintiff's sheep, defendant's witnesses having testified that they had cured sheep of the disease by a certain treatment, the refusal to allow plaintiff to show, by other witnesses, that they had tried the same prescription without success is error;[79] and defendant having introduced testimony that plaintiff's sheep were seen running at large prior to their infection, for the purpose of showing that they were infected while so running at large, the court should not refuse to allow plaintiff to show that the said sheep were not his.[80] Where two lots of sheep had been bought by two persons of one vendor and for convenience were placed in one flock, and one purchaser sued for a breach of warranty that they were healthy, it was held not error to allow testimony to be introduced showing the general condition of all the sheep after they had been in one flock some time, it appearing that the commingling of the flock was not for the purpose of defrauding defendant, nor in any way concealing evidence from him, or manufacturing evidence in favor of plaintiff.[81]

(D) *Sufficiency as to Knowledge.* Evidence that it is a matter of general notoriety that native cattle, treading over the ground after Texas cattle, are liable to contract Texas fever does not show that defendant company had knowledge of the fact;[82] but under the act of congress of May 29, 1884, prohibiting the transportation of infected cattle from one state to another, it is sufficient to show that the locality from which the cattle were shipped was known to have been infected, without showing actual knowledge that the cattle were diseased.[83] And when plaintiff protested to a railroad company against the unloading of Texas cattle, lest his cattle might contract some disease from them, the defendant company must be held to have been fully informed and warned of the danger of communicating the disease.[84]

(VII) *TRIAL* — (A) *Instructions.* Where injury is done by two lots of cattle, so that it is impossible to say that one lot was more concerned in it than the other, it is error to instruct the jury to find for a defendant, who owned one lot;[85] but it is proper to refuse instructions for plaintiff that, if the cattle on the section with plaintiff's cattle infected them, defendant could not be acquitted on the ground that the damages might have accrued from the acts of the owners of the other lot, or that if certain cattle caused the danger, without limiting it to defendant's cattle, he should be found guilty.[86] If it is doubtful whether plaintiff's animals became infected directly by defendant's diseased sheep which were trespassing, or indirectly through other sheep pastured in plaintiff's fields, which first caught the disease, it is error to instruct that, if it was as likely plaintiff's sheep caught the

75. Clarendon Land, etc., Co. *v.* McClelland, 89 Tex. 483, 34 S. W. 98, 35 S. W. 474, 59 Am. St. Rep. 70, 31 L. R. A. 669.

76. St. Louis, etc., R. Co. *v.* Goolsby, 58 Ark. 401, 24 S. W. 1071; O'Hair *v.* Morris, 87 Ill. App. 393.

77. O'Hair *v.* Morris, 87 Ill. App. 393.

78. Grimes *v.* Eddy, 126 Mo. 168, 28 S. W. 756, 47 Am. St. Rep. 653, 26 L. R. A. 638 [*overruling* Bradford *v.* Floyd, 80 Mo. 207]. But see *infra*, VI, A, 2, a, (VII), (B).

79. Herrick *v.* Gary, 83 Ill. 85.

80. Herrick *v.* Gary, 83 Ill. 85.

81. Broquet *v.* Tripp, 36 Kan. 700, 14 Pac. 227.

82. Grimes *v.* Eddy, (Mo. 1894) 27 S. W. 479.

83. Lynch *v.* Grayson, 5 N. M. 487, 25 Pac. 992.

84. Lynch *v.* Grayson, 5 N. M. 487, 25 Pac. 992.

85. Newkirk *v.* Milk, 62 Ill. 172; Frazee *v.* Milk, 56 Ill. 435.

86. Newkirk *v.* Milk, 62 Ill. 172.

disease elsewhere as from defendant's sheep, the jury should find for defendant.[87] Where it appears that none of defendant's animals were from a prohibited section, but were native animals which had never been in such prohibited section, the court should instruct the jury to find for defendant.[88] Where damages are sought for disease communicated by cattle which have broken through a fence it is error to charge that it is incumbent on defendant to prove that the fence was insufficient.[89]

(B) *Questions of Law and Fact.* The question whether the disease called scab is contagious among sheep is for the jury upon the evidence before them;[90] so likewise is the question whether Texas cattle, though free from disease, do communicate disease to other cattle.[91]

b. For Penalty. In an action under a statute giving a penalty against the owner of a dog, if the owner has good reason to believe that it was bitten by a mad dog, and neglects or refuses to kill it immediately, it is not necessary to prove that the biting dog was in fact mad; it is sufficient if the owner of the dog had good reason to believe it was mad.[92]

B. Criminal Offenses — 1. Bringing Glandered Horses into Public Place. Bringing a glandered horse into public place is an offense at common law.[93]

2. Failure to Cure after Inspection. An indictment for failure to cure diseased sheep within a specified time after inspection must allege that the defendant had knowledge of the inspection, the date on which he acquired such knowledge, and that he failed to effect a cure within the specified time thereafter.[94]

3. Keeping Diseased Animals. In an indictment for keeping a diseased animal where other animals could have access to it, the prosecution must prove that defendant was the owner of an animal affected by an infectious disease, and knew him to be so affected, and that the animal was kept by him where other animals could have access to and become infected by him.[95]

4. Removing Diseased Animals. In an indictment for removing sheep infected with scab it is unnecessary to aver that defendant had knowledge that the sheep had scab at the time of their removal;[96] but it must be alleged that defendant was the owner of the sheep at the time of their alleged removal.[97] The material questions of fact in such case being whether or not defendant's sheep were infected with scab, and whether or not defendant violated the act in relation thereto, the charge of the court should submit these issues to the jury.[98]

5. Selling Diseased Animals. When the statute forbids the sale of diseased animals the sale must have been made with knowledge, or such notice as would

87. Herrick *v.* Gary, 65 Ill. 101.

88. Stager *v.* Harrington, 27 Kan. 414.

89. Clarendon Land, etc., Co. *v.* McClelland, 89 Tex. 483, 34 S. W. 98, 35 S. W. 474, 59 Am. St. Rep. 70, 31 L. R. A. 669.

90. Mount *v.* Hunter, 58 Ill. 246.

91. Davis *v.* Walker, 60 Ill. 452; Clarendon Land, etc., Co. *v.* McClelland, 89 Tex. 483, 34 S. W. 98, 35 S. W. 474, 59 Am. St. Rep. 70, 31 L. R. A. 669. But see *supra*, VI, A, 2, a, (VI), (B).

92. Wallace *v.* Douglas, 32 N. C. 79.

93. Reg. *v.* Henson, 1 Dears. 24.

94. Hand *v.* State, 37 Tex. Crim. 310, 39 S. W. 676.

95. Wirth *v.* State, 63 Wis. 51, 22 N. W. 860, holding that when the disease is nothing but a bad cold or influenza, certainly not generally regarded as infectious or contagious, defendant cannot be presumed to have had such knowledge of the infectious character of the disease.

96. State *v.* Sterritt, 19 Oreg. 352, 24 Pac. 523.

Offense, when complete.— Under orders under the English act declaring that no diseased animal, and no animal which has within twenty-eight days been in the same shed or stable with a diseased animal, shall be removed without a license from the local authority, and that no cattle shall be moved out of the district in which they are without such a license, under a penalty, etc., the offense is complete as soon as the animal has been removed from its place of location, and the justices of the county from which removal was had alone have jurisdiction, and the justices of the county into which the animal is taken have no jurisdiction. Reg. *v.* Williams, 15 L. T. Rep. N. S. 290.

The act of congress of May 29, 1884, relating to the exportation of diseased cattle and the suppression and extirpation of pleuropneumonia and other contagious diseases, and making their removal a misdemeanor, does not relate to shipments of cattle made between different points in the same state. Davis *v.* Texas, etc., R. Co., 12 Tex. Civ. App. 427, 34 S. W. 144.

97. State *v.* Sterritt, 19 Oreg. 352, 24 Pac. 523.

98. Troy *v.* State, 10 Tex. App. 319.

impute knowledge, of the fact and condition of the animals on the part of the vendor.[99] So, too, where the statute forbids the sale of animals knowing them to be under quarantine, if the defendant shows that on fair and just grounds he believed the legal impediment to be out of the way, guilty knowledge is disproved and the defense is sufficient.[1]

5. Shipping into State without Filing Certificate. An indictment for shipping a cow into the state without sending the secretary of agriculture a certificate that she was free from tuberculosis, as far as could be determined by physical examination and the tuberculin test, need not more particularly describe the animal or the certificate, nor need it recite that the complaint was made by the secretary of the state, though the statute requires him to make it.[2]

6. Who May Lay Information. The right to lay an information for an offense in contravention of the English diseased animals act of 1894 is not restricted by the act to the local authority whose duty it is to execute and enforce it but such an information may be laid by a common informer.[3]

C. Suppression — 1. In General. Under the English contagious diseases act, empowering the privy council to make such general or special orders as they see fit for applying the law or any of the provisions of the act to certain animals and diseases, and also empowering the council to extend for every or any of the purposes of the act the definition of diseases therein mentioned so that the same shall for those purposes comprise any disease of animals in addition to the diseases mentioned in the act, it has been held that the council have power to make orders for the suppression of rabies,[4] to prescribe the amount of air-space for each animal kept in a building,[5] and to regulate the removal of dung, etc.[6]

2. Right to Kill Diseased Animals — a. In General. Any person may kill a mad dog, or one that is justly suspected of being mad, or that is known to have been bitten by a dog which was mad.[7]

b. Under Statutes. Under statutes authorizing the summary killing of certain diseased animals an adjudication of commissioners that an animal had the disease is not conclusive,[8] and the burden is on the officials to establish affirmatively the actual existence of disease or exposure thereto.[9] When the killing was done in a

99. Stryker *v.* Crane, 33 Nebr. 690, 50 N. W. 1132.

Statute construed.— Under a statute making it unlawful to sell animals "infected with contagious or infectious disease," the use of the words "contagious or infectious" in the statute is believed to have been intended to describe one disease, and not distinctive diseases. Stryker *v.* Crane, 33 Nebr. 690, 50 N. W. 1132.

1. Hess *v.* State, 45 N. J. L. 445.
2. State *v.* Snell, 21 R. I. 232, 42 Atl. 869.
3. Reg. *v.* Stewart, 65 L. J. M. C. 83.
4. Bellhouse *v.* Leighton, 58 L. J. M. C. 67.
5. Baker *v.* Williams, 66 L. J. Q. B. 880.
6. **Horse-litter is not dung** liable to propagate infection within the meaning of a cattle-plague order empowering the quarter sessions to prohibit the removal of "all dung, hay, straw, fodder, or litter liable to propagate infection." Youngman *v.* Morris, 15 L. T. Rep. N. S. 276.
7. Woolf *v.* Chalker, 31 Conn. 121, 81 Am. Dec. 175; Brent *v.* Kimball, 60 Ill. 211, 14 Am. Rep. 35; Putnam *v.* Payne, 13 Johns. (N. Y.) 312; Laverty *v.* Hogan, 2 N. Y. City Ct. 197; Perry *v.* Phipps, 32 N. C. 259, 51 Am. Dec. 387.
8. Miller *v.* Horton, 152 Mass. 540, 26 N. E. 100, 23 Am. St. Rep. 850, 10 L. R. A. 116.
9. Pearson *v.* Zehr, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113.

It would seem that farmers and other persons who for many years have had the personal care of horses, both sick and well, and have had extensive practical experience with such animals, and with some particular disease to which they are subject, and ample opportunity to observe and know the characteristics and symptoms of such disease, are well qualified to state whether, in a particular case, such characteristics and symptoms do or do not exist, and that, after detailing facts which show that they have a practical and personal knowledge and experience in respect thereto, they may properly venture an opinion in regard to the existence or non-existence of a disease with which observation has made them familiar. Pearson *v.* Zehr, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113.

Destruction of sound animals tortious.— Where cattle are destroyed by authority of the state veterinarian, under color of Wis. Laws (1885), c. 467, as amended by Laws (1887), c. 76, providing for the destruction of such animals when affected with a "contagious or infectious disease of malignant or very fatal nature," none of which cattle were

reckless and offensive manner the owner may recover exemplary damages over and above the value of the property destroyed;[10] but when the animal is diseased and the statute directs the payment to the owner of "the actual value at the time of destruction of any animal" so killed, the owner is not entitled to the value of the animal considered as sound and unaffected by disease, but simply its actual value in its diseased condition.[11] Failure of the proper local authorities to act, whereby the owner failed to receive compensation for animals which died, does not make a case for an action at law for damages, but is clearly a case for a complaint to the body appointing such local officials.[12]

3. RIGHT TO QUARANTINE.[13] Under the Kansas statute providing for the taking up, inspection, and placing in custody of the sheriff of certain diseased animals, the report of inspectors, and the order of the justice to the sheriff commanding him to keep the cattle, are not conclusive against the owner; he may, in an action of replevin, or in an action in the nature of trover, show that such animals were not diseased within the meaning of the statute.[14] Such order constitutes a sufficient *prima facie* justification of the sheriff's refusal to return the cattle to the owner during the quarantine period.[15] Under this statute the justice can act only within his own township, and if he act outside thereof his proceedings are void.[16]

at the time affected with any disease whatever, such destruction is without authority of law and tortious. Houston *v.* State, 98 Wis. 481, 74 N. W. 111, 42 L. R. A. 39.

State not liable.— Where sound cattle are destroyed by the state live-stock sanitary commission, as diseased cattle, under 3 How. Anno. Stat. Mich. p. 3150, providing for the appointment of a commission to prevent contagious disease among cattle, the state is not liable for the wrongful act, but the remedy of the owner, if he has any, is against the commissioners individually. Shipman *v.* State Live-Stock Sanitary Commission, 115 Mich. 488, 73 N. W. 817.

A resolution by a city board of health that the health officer request the Society for the Prevention of Cruelty to Animals to send their veterinary surgeon and investigate all stables, and that the health officer be authorized to condemn and destroy such horses as may be found glandered, is no justification to an officer of the Society for the Prevention of Cruelty to Animals for killing glandered horses found by him before same have been reported to the board of health, and the report acted upon by it. Westchester Electric R. Co. *v.* Angevine, 52 N. Y. App. Div. 239, 65 N. Y. Suppl. 376.

10. Pearson *v.* Zehr, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113.

11. Tappen *v.* State, 146 N. Y. 44, 40 N. E. 499. See also Shipman *v.* State Live-Stock Sanitary Commission, 115 Mich. 488, 73 N. W. 817; Campbell *v.* Manchester, 67 N. H. 148, 36 Atl. 877.

Right of appeal.— N. H. Laws (1889), c. 93, giving the owner of a diseased animal killed by direction of a municipal corporation the right to appeal by petition to the trial term of the supreme court when he is "aggrieved by the amount of [the] appraisement" of the animal, does not permit an appeal because of the corporation's refusal to pay the appraisement. Campbell *v.* Manchester, 67 N. H. 148, 36 Atl. 877.

Requisites of appraiser's report.— Where commissioners appointed by the county judge to appraise horses afflicted with glanders reported that they examined the animals, and found them diseased, and assessed their value at ninety dollars, the objection that the report as returned did not show the value of the animals as diseased was without merit. Maynard *v.* Freeman, (Tex. Civ. App. 1900) 60 S. W. 334.

12. Mulcahy *v.* Kilmacthomas, 18 L. R. Ir. 200.

13. **Limited to certain season.**— Under Tex. Rev. Stat. (1895), art. 5043*k*, providing that the quarantine line, as fixed by the live-stock sanitary commission, shall not apply from the first day of November to the fifteenth day of May of each year, an order of the commission prohibiting the moving of cattle across a certain line from February 15th to November 15th was void. The further provision of said section that the quarantine line must conform with the federal line has nothing to do with the question of the time cattle may be moved within the state. Roberson *v.* State, 38 Tex. Crim. 507, 43 S. W. 989.

Expenses of quarantine.—Under Mass. Stat. (1894), c. 491, which provides that when cattle are quarantined under the act on the premises of the owner the expense shall be paid by him, and when taken from such premises the expense shall be paid by the town wherein the cattle are kept, if the animals are quarantined on the premises of the owner at his own expense, and are afterward, by order of the cattle commissioners, shipped on cars, the expense thereof is to be borne by the owner. Kenneson *v.* Framingham, 168 Mass. 236, 46 N. E. 704.

14. Wilcox *v.* Johnson, 34 Kan. 655, 9 Pac. 610; Verner *v.* Bosworth, 28 Kan. 670.

15. Hardwick *v.* Brookover, 48 Kan. 609, 30 Pac. 21.

16. Wilcox *v.* Johnson, 34 Kan. 655, 9 Pac. 610.

VII. CRUELTY TO ANIMALS.

A. The Offense — 1. Nature of — a. At Common Law. At common law cruelty to an animal was not an offense on the ground of the pain and suffering inflicted;[17] but when the act was committed publicly and so as to constitute a nuisance,[18] or when committed with a malicious intent to injure the owner,[19] it was indictable.

b. Under Statutes — (I) *In General.* In comparatively recent times the subject of cruelty to animals has been made the subject of legislation, with the result that there now generally exist statutes having for their object the protection of dumb animals from wilful or wanton abuse, neglect or cruel treatment, by providing punishment for the infliction upon them of such pain or suffering as is not necessarily involved in the execution of some lawful purpose.[20]

(II) *General and Local Laws.* A general law, confiding in the courts the power to punish violations of such a statute, according to the circumstances of aggravation, will supersede a local law punishing the like offense by a maximum or minimum fine, irrespective of the aggravated circumstances.[21]

(III) *Construction of Statutes* — (A) *Generally.* Acts having for their object the prevention of cruelty to animals should be construed so as to effectuate the legislative intention and attain the practical object of such laws, so far as the rules of construction may warrant without involving absurd consequences.[22]

(B) *Kinds of Animals Protected.* Where the object intended is to protect animals generally, the language of the statute, unless qualified, will be construed

17. Waters *v.* People, 23 Colo. 33, 46 Pac. 112, 58 Am. St. Rep. 215, 33 L. R. A. 836; State *v.* Bruner, 111 Ind. 98, 12 N. E. 103; People *v.* Brunell, 48 How. Pr. (N. Y.) 435; Branch *v.* State, 41 Tex. 622. And see Ross' Case, 3 City Hall Rec. (N. Y.) 444, holding that killing a balky horse with a single blow is not cruelty, where there was an absence of deliberation.

18. Stage Horse Cases, 15 Abb. Pr. N. S. (N. Y.) 51; People *v.* Brunell, 48 How. Pr. (N. Y.) 435; People *v.* Stakes, 1 Wheel. Crim. (N. Y.) 111; Ross' Case, 3 City Hall Rec. (N. Y.) 191; State *v.* Briggs, 1 Aik. (Vt.) 226; U. S. *v.* McDuell, 5 Cranch C. C. (U. S.) 391, 26 Fed. Cas. No. 15,672; U. S. *v.* Jackson, 4 Cranch C. C. (U. S.) 483, 26 Fed. Cas. No. 15,453; U. S. *v.* Logan, 2 Cranch C. C. (U. S.) 259, 26 Fed. Cas. No. 15,623.

The New York act of 1867 is declaratory of the common law. Stage Horse Cases, 15 Abb. Pr. N. S. (N. Y.) 51.

19. People *v.* Brunell, 48 How. Pr. (N. Y.) 435.

For form of an indictment: For the common-law offense of beating a cow in public see U. S. *v.* Jackson, 4 Cranch C. C. (U. S.) 483, 26 Fed. Cas. No. 15,453. For inciting a dog to bite and tear a cow in a public street see U. S. *v.* McDuell, 5 Cranch C. C. (U. S.) 391, 26 Fed. Cas. No. 15,672.

20. Hodge *v.* State, 11 Lea (Tenn.) 528, 47 Am. Rep. 307; Turman *v.* State, 4 Tex. App. 586; Benson *v.* State, 1 Tex. App. 6.

Statutes repealed.—The Georgia act of 1879, § 6, when read with the title of the act, imports a repeal of the acts of 1875 and 1876 respecting cruelty to animals; but the act of Sept. 21, 1881, § 4310, respecting the punishment, is reinstated. McKinne *v.* State, 81 Ga. 164, 9 S. E. 1091.

Ind. Rev. Stat. (1881), § 2101, was repealed by the Indiana act embodied in Elliott Suppl. § 329 *et seq.*, which is much broader and more exact, and which in one clause repeals all statutes inconsistent with it. State *v.* Giles, 125 Ind. 124, 25 N. E. 159.

Failure to provide punishment.— An act making the forbidden cruelty a misdemeanor, but failing to provide the mode of punishment, will not preclude its infliction under a general statute providing for such omissions. State *v.* Greenlees, 41 Ark. 353.

The passage of municipal ordinances to prevent and punish such cruelty is within the police power, or such other authority as may have been conferred upon the municipality to enable it to maintain its peace and good government and to promote its general welfare. St. Louis *v.* Schoenbusch, 95 Mo. 618, 8 S. W. 791.

Interference with property.— An ordinance passed to prevent cruelty is not an interference with private property rights. State *v.* Karstendiek, 49 La. Ann. 1621, 22 So. 845, 39 L. R. A. 520.

21. State *v.* Falkenham, 73 Md. 463, 21 Atl. 370.

22. Grise *v.* State, 37 Ark. 456. And see State *v.* Allison, 90 N. C. 733, and State *v.* Simpson, 73 N. C. 269, holding that a statute denouncing the offense of killing or abusing an animal must be construed as not to include a mere accidental or permissive killing.

"Maim" in a statute punishing the wilful maiming, etc., of any dumb animal, is synonymous, or nearly so, with the word "cripple." Turman *v.* State, 4 Tex. App. 586.

broadly and so as to embrace all living animals, including birds and fowls;[23] but if a kind or class of animals is sought to be protected, the application of the statute will be restricted to the consideration of offenses concerning those animals which are intended.[24]

2. What Constitutes Cruelty — a. Active Cruelty — (1) *In General.* Cruelty to animals may consist of wilful or wanton abuse or ill treatment, or unnecessary or unreasonable acts or conduct which cause pain and suffering;[25] a needless killing, unaccompanied by torture, is an act within this class.[26] No general statement can be made as to what particular acts will constitute the offense;[27] but the infliction of pain and suffering, consequent upon the performance of a customary and proper lawful act, and to serve some useful purpose, is not cruelty, where the act is done in good faith and with reasonable care and skill.[28] Neither will acts be deemed cruel where there is no pain or suffering in fact,[29] nor when done to protect property from depredations.[30]

23. The word "animal" will include a dog not listed for taxation (State *v.* Giles, 125 Ind. 124, 25 N. E. 159), a captive fox (Com. *v.* Turner, 145 Mass. 296, 14 N. E. 130), and a goose (State *v.* Bruner, 111 Ind. 98, 12 N. E. 103).

"Bird or animal" includes a game-cock. People *v.* Klock, 48 Hun (N. Y.) 275.

"Useful fowl or animal" includes chickens (State *v.* Neal, 120 N. C. 613, 616, 27 S. E. 81, 58 Am. St. Rep. 810), and pigeons (State *v.* Porter, 112 N. C. 887, 16 S. E. 915).

"Every living creature" will include captive doves. Waters *v.* People, 23 Colo. 33, 46 Pac. 112, 58 Am. St. Rep. 215, 33 L. R. A. 836.

"Animal" in its common acceptation includes all irrational creatures, and in a statute will embrace wild and noxious animals, unless a different meaning is indicated. Com. *v.* Turner, 145 Mass. 296, 14 N. E. 130.

24. "Domestic animals" will include a dog (Wilcox *v.* State, 101 Ga. 563, 28 S. E. 981, 39 L. R. A. 709), mules (State *v.* Gould, 26 W. Va. 258), game-cocks (Budge *v.* Parsons, 3 B. & S. 382, 113 E. C. L. 382, 7 L. T. Rep. N. S. 784, 32 L. J. M. C. 95; Bates *v.* McCormick, 8 Ir. Jur. N. S. 239, 9 L. T. Rep. N. S. 174, 175), and captive birds trained as decoys for bird-catching (Colam *v.* Pagett, 12 Q. B. D. 66, 55 L. J. M. C. 167); but not captive rabbits (Aplin *v.* Porritt, [1893] 2 Q. B. 57, 17 Cox C. C. 662), caged lions (Harper *v.* Marcks, [1894] 2 Q. B. 319, 63 L. J. M. C. 167), a tame sea-gull (Yates *v.* Higgins, [1896] 1 Q. B. 166), parrots (Swan *v.* Sanders, 50 L. J. M. C. 67, 44 L. T. Rep. N. S. 424, 14 Cox C. C. 566), or captive lizards or chameleons (*In re* Racey, [Canada] 54 Alb. L. J. 252).

"Cattle" will include pigs (State *v.* Pruett, 61 Mo. App. 156, 1 Mo. App. Rep. 356) and goats (State *v.* Groves, 119 N. C. 822, 25 S. E. 819).

"Swine" includes hogs. Rivers *v.* State, 10 Tex. App. 177.

25. Hunt *v.* State, 3 Ind. App. 383, 29 N. E. 933; Budge *v.* Parsons, 3 B. & S. 382, 113 E. C. L. 382, 7 L. T. Rep. N. S. 784, 32 L. J. M. C. 95, 9 Jur. N. S. 796, 11 Wkly. Rep. 424; Ford *v.* Wiley, 23 Q. B. D. 203; Murphy *v.* Manning, 2 Ex. D. 307, 46 L. J. M. C. 211; Swan *v.* Sanders, 44 L. T. Rep. N. S. 424, 50 L. J. M. C. 67, 14 Cox C. C. 566; Callaghan *v.* Society, etc., 16 L. R. Ir. 325; Brady *v.* McArgle, 14 L. R. Ir. 174, 15 Cox C. C. 516.

"Torture" *ex vi termini*, involves cruelty (Brady *v.* McArgle, 14 L. R. Ir. 174, 15 Cox C. C. 516), and consists in some violent, wanton, and cruel act, necessarily producing pain and suffering (State *v.* Pugh, 15 Mo. 500).

The instant killing of a dog is not cruelty within a statute designed to prevent unnecessary torture and cruelty. Horton *v.* State, 124 Ala. 80, 27 So. 468.

26. State *v.* Neal, 120 N. C. 613, 27 S. E. 81, 58 Am. St. Rep. 810.

The easy death of the animal is not a justification where cruelty is no part of the charge. Grise *v.* State, 37 Ark. 456.

27. Among acts amounting to cruelty are beating an animal in a wanton and cruel manner (Com. *v.* Miller, 3 Lanc. L. Rev. 175; U. S. *v.* Logan, 2 Cranch C. C. (U. S.) 259, 26 Fed. Cas. No. 15,623); striking and hacking a pig with an axe (Adcock *v.* Murrell, 54 J. P. 776); dislocating the limbs of hogs and plunging them alive in boiling water, during the process of slaughtering them (Davis *v.* American Soc., etc., 16 Abb. Pr. N. S. (N. Y.) 73 [*affirmed* in 75 N. Y. 362]); cutting the combs of cocks (Murphy *v.* Manning, 2 Ex. D. 307, 46 L. J. M. C. 211, 20 Moak 558), or otherwise torturing them (Budge *v.* Parsons, 3 B. & S. 382, 113 E. C. L. 382, 7 L. T. Rep. N. S. 784, 32 L. J. M. C. 95, 9 Jur. N. S. 796, 11 Wkly. Rep. 424; Bates *v.* McCormick, 9 L. T. Rep. N. S. 174, 12 Ir. C. L. 577); the administration of poison (People *v.* Davy, 32 N. Y. Suppl. 106, 65 N. Y. St. 162); the harsh and unreasonable treatment of a dog on a treadmill or inclined plane (People *v.* Ct. of Special Sessions, 4 Hun (N. Y.) 441).

28. As beating a horse to train or discipline him, though the beating was unnecessarily severe (State *v.* Avery, 44 N. H. 392), or spaying swine, though in fact the operation was unnecessary and useless (Lewis *v.* Fennor, 18 Q. B. D. 532, 56 L. J. M. C. 45, 56 L. T. Rep. N. S. 236, 35 Wkly. Rep. 378, 51 J. P. 371, 16 Cox C. C. 176).

29. State *v.* Pugh, 15 Mo. 509, tying brush or boards to a horse's tail.

30. Hodge *v.* State, 11 Lea (Tenn.) 528,

(II) *Cock-Fighting.* Cock-fighting, if not specifically made an offense, will ordinarily come within the terms of enactments to prevent cruelty to animals.[31]

(III) *Dishorning Cattle.* There are cases holding that the dishorning of cattle for convenience and profit, and not wantonly, constitutes cruelty, because unnecessary and unreasonable;[32] but, by the weight of authority, if the operation is a customary one in the locality, is performed with care and skill, enables the owner of the animals to keep them more easily by rendering them more tractable, to transport them with safety and convenience, and to realize a greater profit, the dishorning is not violative of the statute.[33]

(IV) *Fox-Hunting.* Releasing a captive fox and permitting it to be hunted by dogs let loose for the purpose, who tear and mangle it, is an exposure of the animal to unnecessary suffering.[34]

(V) *Overdriving or Overloading.* Another species of cruelty denounced consists of the overdriving or overloading of horses and work-animals. This offense may be committed by cruel driving or cruel treatment.[35]

(VI) *Pigeon-Shooting.* The shooting of captive pigeons for sport, or as a means of improving marksmanship, has been held to constitute cruelty under the statute.[36] It has also been held that where the wounded birds are at once killed, and, with those shot dead, are sold and eaten as food, there is not such a needless killing as will constitute the offense.[37]

b. Passive Cruelty — (I) *In General.* "Cruelty, torture, or torment," denounced by statute, may consist also of acts of omission, neglect, and the like, whereby unnecessary or unjustifiable pain or suffering is caused or permitted, where a reasonable remedy or relief may be afforded;[38] but accidental injury or

47 Am. Rep. 307, wherein the defendant caught, in a steel trap, a depredatory dog which was not allured on the premises.

31. Finnem *v.* State, 115 Ala. 106, 22 So. 593; Bates *v.* McCormick, 8 Ir. Jur. N. S. 239, 9 L. T. Rep. N. S. 174, 175, 12 Ir. C. L. 577 [*distinguishing* Coyne *v.* Brady, 7 Ir. Jur. N. S. 66]; Budge *v.* Parsons, 3 B. & S. 382, 113 E. C. L. 382, 7 L. T. Rep. N. S. 784, 32 L. J. M. C. 95, 9 Jur. N. S. 796, 11 Wkly. Rep. 424, wherein defendant fought his cock against another having a broken thigh.

32. State *v.* Crichton, 4 Ohio Dec. 481; Ford *v.* Wiley, 23 Q. B. D. 203, 58 L. J. M. C. 145, 53 J. P. 485; Brady *v.* McArgle, 14 L. R. Ir. 174, 15 Cox C. C. 516.

33. Rex *v.* McDonagh, 28 L. R. Ir. 204; Callaghan *v.* Society, etc., 16 L. R. Ir. 325, 16 Cox C. C. 101; Renton *v.* Wilson, 15 Justiciary Cas. (Scotch) 84, 53 J. P. 491, 2 White Just. Rep. 43; Todrick *v.* Wilson, 2 White Just. Rep. 636.

34. Com. *v.* Turner, 145 Mass. 296, 14 N. E. 130, holding that under the statute no allegation or proof of torture or cruelty is necessary except as involved in unnecessary suffering, knowingly and wilfully permitted.

35. State *v.* Bosworth, 54 Conn. 1, 4 Atl. 248; McKinne *v.* State, 81 Ga. 164, 9 S. E. 1091; State *v.* Roche, 37 Mo. App. 480; Stage Horse Cases, 15 Abb. Pr. N. S. (N. Y.) 51; People *v.* Tinsdale, 10 Abb. Pr. N. S. (N. Y.) 374.

See 2 Cent. Dig. tit. "Animals," §§ 101, 102.

Using animals unfit for labor.— In England keepers of places for the slaughter of animals may be punished for using or working animals delivered to them for destruction because unfitted for labor. Benford *v.* Sims, 2 Q. B. 641, 67 L. J. Q. B. 655, 78 L. T. Rep. N. S. 718, 47 Wkly. Rep. 46. And this is true of unlicensed as well as of licensed slaughterers. Colam *v.* Hall, 40 L. J. M. C. 100.

36. State *v.* Porter, 112 N. C. 887, 16 S. E. 915. Especially where the shooting is for a cup (Paine *v.* Bergh, 1 N. Y. City Ct. 160), and though there is no intention to torture or inflict pain (Waters *v.* People, 23 Colo. 33, 46 Pac. 112, 58 Am. St. Rep. 215, 33 L. R. A. 836).

See 2 Cent. Dig. tit. "Animals," § 104.

37. State *v.* Bogardus, 4 Mo. App. 215; Com. *v.* Lewis, 140 Pa. St. 261, 21 Atl. 396, 27 Wkly. Notes Cas. (Pa.) 359, 11 L. R. A. 522.

At common law shooting live doves as they are released from a trap is not an offense. Waters *v.* People, 23 Colo. 33, 46 Pac. 112, 58 Am. St. Rep. 215, 33 L. R. A. 836.

38. Waters *v.* People, 23 Colo. 33, 46 Pac. 112, 58 Am. St. Rep. 215, 33 L. R. A. 836 (construing Mill's Anno. Stat. Colo. § 117); Com. *v.* Thornton, 113 Mass. 457.

Keeping a horse with a diseased leg from which the hoof has rotted, in a pasture in which, in its effort to support life by grazing, it is inevitably put to intense pain, is cruelty of this character. Everitt *v.* Davies, 38 L. T. Rep. N. S. 360, 26 Wkly. Rep. 332. See also Westbrook *v.* Field, 51 J. P. 726 (wherein a drover, acting under instructions, left a sheep with a broken leg in a pen with others, and it was held that, though carelessness was shown, the offense of cruelty was not established), and Adcock *v.* Murrell, 54 J. P. 776 (wherein a person was convicted for hacking a pig with an axe, and permitting it to lie wounded for over twenty-four hours).

permissive suffering will not constitute cruelty.[39] And it has been held that the mere omission to destroy a suffering animal, and leaving it in pain, after a justifiable injury, is no more than passive cruelty, which, not being provided for by statute, is not punishable.[40]

(II) *Failure to Provide Food, Water, or Shelter.* The failure to provide horses and cattle with proper food, water, or shelter is a statutory offense in some jurisdictions, in which the cruel suffering of the animal is not a necessary ingredient.[41] The elements of this form of the offense may combine with those necessary to constitute overdriving or overworking so as to contravene the statute.[42]

3. Wilfulness, Wantonness, and Intent — a. In General. Where it is expressly or impliedly required that the prohibited act should have been done wilfully or wantonly, or with an intent to ill-use the animal, or subject it to unnecessary pain and suffering, it must appear that the act was intentional as distinguished from accidental or involuntary, or that the accused was actuated with a malevolent purpose or reckless disregard of the consequences.[43] The evil motive need not be actual, however. If the act is of such a character as to evince an absence of proper regard for animal life or feelings the intention will be presumed and the necessary motive supplied by construction.[44] An intent to cause pain and suffering is immaterial when such elements are unnecessary to constitute the offense,[45] provided the conduct of defendant was wilful and not accidental.[46]

b. Malice toward Owner. The object of statutes to prevent cruelty is the protection of the animals themselves, and not the owner's property rights, therefore malice toward the owner, or intent to injure him, is not an ingredient of the offense.[47]

4. Persons Liable — a. Agents and Servants. Irrespective of the criminal liability of the owners of animals for causing or permitting them to be cruelly treated, persons employed by them and actively engaged in the commission of

39. State *v.* Allison, 90 N. C. 733; State *v.* Simpson, 73 N. C. 269.

40. Powell *v.* Knights, 38 L. T. Rep. N. S. 607, 26 Wkly. Rep. 721.

41. State *v.* Bosworth, 54 Conn. 1, 4 Atl. 248; Com. *v.* Curry, 150 Mass. 509, 23 N. E. 212.

The failure to provide young parrots with water, while placed in a box for shipment, during their transportation for a short time, is not ill usage, in the absence of any proof of suffering. Swan *v.* Sanders, 50 L. J. M. C. 67.

42. State *v.* Bosworth, 54 Conn. 1, 4 Atl. 248.

43. *Indiana.*— Hunt *v.* State, 3 Ind. App. 383, 29 N. E. 933.

Massachusetts.— Com. *v.* Wood, 111 Mass. 408.

New York.— Davis *v.* American Soc., etc., 6 Daly (N. Y.) 81 [*affirmed* in 75 N. Y. 362].

Texas.— Branch *v.* State, 41 Tex. 622; Gerdes *v.* State, (Tex. Crim. 1896) 34 S. W. 268; Thomas *v.* State, 14 Tex. App. 200.

England.— Westbrook *v.* Field, 51 J. P. 726.

"Wilful" and "wanton" defined.— A wilful act is one committed with an evil intent, with legal malice and without legal justification. A wanton act is one committed regardless of the rights of the owner of the animal, in reckless sport or under such circumstances as indicate wicked or mischievous intent, and without excuse. Thomas *v.* State, 14 Tex. App. 200. An unlawful act is not necessarily wilful and wanton. Jones *v.* State, 9 Tex. App. 178.

Ignorance of animal's condition.— Driving a horse, while ignorant that it is sick, is not, *per se*, tormenting or torturing it. Stage Horse Cases, 15 Abb. Pr. N. S. (N. Y.) 51.

44. Hunt *v.* State, 3 Ind. App. 383, 29 N. E. 933; People *v.* Tinsdale, 10 Abb. Pr. N. S. (N. Y.) 374.

Malice presumed.— If the act was cruel, severe, and intentional, and was committed without just cause or excuse, the law will regard it as malicious. State *v.* Avery, 44 N. H. 392.

45. *Colorado.*— Waters *v.* People, 23 Colo. 33, 46 Pac. 112, 58 Am. St. Rep. 215, 33 L. R. A. 836.

Massachusetts.— Com. *v.* Wood, 111 Mass. 408; Com. *v.* Lufkin, 7 Allen (Mass.) 579.

Missouri.— State *v.* Hackfath, 20 Mo. App. 614.

New York.— People *v.* Tinsdale, 10 Abb. Pr. N. S. (N. Y.) 374.

North Carolina.— State *v.* Neal, 120 N. C. 613, 27 S. E. 81, 58 Am. St. Rep. 810.

Guilt of the offense does not depend on whether or not the accused thought he was not wilfully or unnecessarily cruel, but whether he intentionally and knowingly did acts which were plainly of a nature to inflict unnecessary pain, and so were unnecessarily cruel. Com. *v.* Magoon, 172 Mass. 214, 51 N. E. 1082.

46. State *v.* Hackfath, 20 Mo. App. 614.

47. State *v.* Avery, 44 N. H. 392; Branch *v.* State, 41 Tex. 622.

the cruel acts are punishable under statutes prohibiting the commission of such acts by "any person," etc.[48]

b. Master for Act of Servant. The owner or custodian is not criminally liable for cruelty, active or passive, done or caused by his agents or servants, with respect to animals owned by him or in his charge, unless knowledge and approval are in some way brought home to him.[49]

c. Owner. The owner of an animal, if guilty of cruelty toward it, is liable to the same extent as a third person.[50]

d. Aiders and Abettors. One who counsels the perpetration of an act of cruelty may be convicted as an aider and abettor, though the advice given was only the remote cause of the cruelty.[51]

5. Jurisdiction. To confer jurisdiction to entertain prosecutions for infractions of statutes forbidding cruelty to animals, the proceedings must be instituted in the mode prescribed by statute.[52]

6. Indictment, Information, or Complaint — a. Charging Offense — (1) *In General.* The indictment, information, or complaint must describe the offense with reasonable certainty;[53] such complaint must be sufficient to apprise the defendant with that of which he is charged,[54] and to enable him to plead a conviction or an acquittal in bar of another prosecution for the same offense.[55] Charg-

48. **The employment by a street railway company** of a conductor and driver to operate a car will not exempt the latter from punishment for overloading and overdriving a horse attached thereto. People *v.* Tinsdale, 10 Abb. Pr. N. S. (N. Y.) 374.

49. Roeber *v.* Society, etc., 47 N. J. L. 237; Small *v.* Warr, 47 J. P. 20.

There is no presumption of the approval, by the master in his absence, of the cruel act of his servant. Roeber *v.* Society, etc., 47 N. J. L. 237.

A receiver of cattle which are suffering who has directed his employees to alleviate their condition is not liable for such employees' neglect when he has no knowledge of their disobedience, or has not wilfully shut his eyes to the facts. Elliott *v.* Osborn, 65 L. T. Rep. N. S. 389, 17 Cox C. C. 346.

50. Com. *v.* Lufkin, 7 Allen (Mass.) 579; Benson *v.* State, 1 Tex. App. 6.

51. Benford *v.* Sims, 2 Q. B. 641, 67 L. J. Q. B. 655, 78 L. T. Rep. N. S. 718, 47 Wkly. Rep. 46.

52. **In New York** certain courts are vested with exclusive jurisdiction of the offense, unless it is certified that the trial should be by indictment, and unless a certificate is obtained a prosecution by indictment is precluded. People *v.* Davy, 32 N. Y. Suppl. 106, 65 N. Y. St. 162.

53. Rose *v.* State, 1 Tex. App. 400.

There is no jurisdiction to issue a warrant where the complaint insufficiently charges the offense. Warner *v.* Perry, 14 Hun (N. Y.) 337.

"Beating" a horse, in an indictment charging that defendant "did beat a certain horse," refers to the infliction of blows, and cannot be understood as referring to a race or other act of contest. Com. *v.* McClellan, 101 Mass. 34.

A simple charge of cruelly killing an animal does not charge the offense of cruelly beating, or needlessly mutilating, etc. Hunt *v.* State, 3 Ind. App. 383, 29 N. E. 933.

54. State *v.* Greenlees, 41 Ark. 353; State *v.* Haley, 52 Mo. App. 520.

Facts must be set out showing that defendant was active in some way in causing or procuring the cruelty complained of. Roeber *v.* Society, etc., 47 N. J. L. 237.

The defendant cannot successfully object to an indictment, which is defective under the law in force when the offense was committed, if it is a good pleading under the law in force when the presentment was made, and when the trial was had. Rountree *v.* State, 10 Tex. App. 110.

55. Rose *v.* State, 1 Tex. App. 400.

Forms.— For form of an affidavit charging the overdriving of horses see Friedline *v.* State, 93 Ind. 366. Of an information for same offense see State *v.* Haley, 52 Mo. App. 520. Of a complaint for cruelly driving see Com. *v.* Porter, 164 Mass. 576, 42 N. E. 97. Of an indictment for overloading street-car horses, by a driver and car conductor, see People *v.* Tinsdale, 10 Abb. Pr. N. S. (N. Y.) 374. Of complaints for failure to provide horse with proper food and shelter see State *v.* Clark, 86 Me. 194, 29 Atl. 984; Com. *v.* Edmands, 162 Mass. 517, 39 N. E. 183. Of complaint for beating horses see Com. *v.* Lufkin, 7 Allen (Mass.) 579. Of an indictment for same offense see Com. *v.* McClellan, 101 Mass. 34. Of indictment for cruelty to a horse see State *v.* Falkenham, 73 Md. 463, 21 Atl. 370. Of an indictment for shooting a mule see State *v.* Gould, 26 W. Va. 258. Of a complaint for beating a cow see Com. *v.* Whitman, 118 Mass. 458. Of an indictment for same offense see State *v.* Allison, 90 N. C. 733. Of an information for beating, maiming, and killing pigs see State *v.* Pruett, 61 Mo. App. 156. Of an indictment for permitting a dog to be submitted to unnecessary torture see Com. *v.* Thornton, 113 Mass. 457. Of a complaint for releasing a captive fox and dogs to hunt it see Com. *v.* Turner, 145 Mass. 296, 14 N. E. 130. Of an affidavit charging the burning and torturing of a goose

ing the offense in the statutory language, or language substantially equivalent thereto, will ordinarily be deemed sufficient.[56]

(II) *Particular Averments*—(A) *Charge and Custody of Animal.* Where the charge and custody of the animal by the person ill-treating it is necessary to make out the offense, the fact that at the time of the offense such person had the charge and custody of the animal in question must be appropriately averred.[57]

(B) *Wilfulness, Wantonness, and Intent.* Where, to constitute the offense, it is necessary that the alleged cruelty or abuse should have been done unlawfully, maliciously, wilfully, needlessly, or the like, the act should be so characterized by the use of the statutory language or its equivalent.[58] Such a characterization of the act is necessary, too, in an indictment framed on a statute simply denouncing the killing or abuse of animals, for it will not be presumed that the legislature intended to punish a mere unintentional or accidential injury;[59] but, if the intent with which the act is done forms no ingredient of the offense, it need not be averred.[60]

(C) *Cruelty*—(1) Mode or Means Employed—(A) In General. Where the act of cruelty charged is made illegal by statute the particular means and instruments made use of to accomplish it need not be averred, but may be proven to establish the offense.[61] Where, however, the language of the statute is not precise, but

see State *v.* Bruner, 111 Ind. 98, 12 N. E. 103.

56. *Indiana.*— State *v.* Giles, 125 Ind. 124, 25 N. E. 159.

Maine.— State *v.* Clark, 86 Me. 194, 29 Atl. 984.

Maryland.— State *v.* Falkenham, 73 Md. 463, 21 Atl. 370.

Massachusetts.— Com. *v.* Edmands, 162 Mass. 517, 39 N. E. 183; Com. *v.* Thornton, 113 Mass. 457; Com. *v.* McClellan, 101 Mass. 34.

Minnesota.— State *v.* Comfort, 22 Minn. 271.

Missouri.— State *v.* Goss, 74 Mo. 592; State *v.* Haley, 52 Mo. App. 520; State *v.* Hackfath, 20 Mo. App. 614.

New Jersey.— Roeber *v.* Society, etc., 47 N. J. L. 237.

North Carolina.— State *v.* Watkins, 101 N. C. 702, 8 S. E. 346.

Texas.— Turman *v.* State, 4 Tex. App. 586; Benson *v.* State, 1 Tex. App. 6.

West Virginia.— State *v.* Gould, 26 W. Va. 258.

See 2 Cent. Dig. tit. "Animals," § 108 *et seq.*

57. State *v.* Clark, 86 Me. 194, 29 Atl. 984; State *v.* Haskell, 76 Me. 399.

Sufficiency of allegation.—A charge of having the "custody and control" is sufficient (State *v.* Clark, 86 Me. 194, 29 Atl. 984); but an allegation of ownership is not (State *v.* Spink, 19 R. I. 353, 36 Atl. 91).

Nature of custody.— It is not necessary to specify the nature of the custody. State *v.* Clark, 86 Me. 194, 29 Atl. 984.

Unnecessarily charging defendant with having the "charge or custody" of the animal alleged to have been cruelly treated will not render a count indefinite, and the unnecessary words may be rejected as surplusage. Com. *v.* Whitman, 118 Mass. 458.

58. Com. *v.* Thornton, 113 Mass. 457; Warner *v.* Perry, 14 Hun (N. Y.) 337; State *v.* Rector, 34 Tex. 565.

"Cruelly" will include both the wilfulness and cruel temper with which the act was done and the pain inflicted (Com. *v.* McClellan, 101 Mass. 34), and also knowledge of the commission of a wrongful act (Com. *v.* Porter, 164 Mass. 576, 42 N. E. 97). So a charge of "wilfully and unlawfully" doing a cruel act will be equivalent to a charge of its wilful commission (State *v.* Allison, 90 N. C. 733, 735).

"Knowingly, wilfully, and needlessly."— An averment that defendant did "knowingly, wilfully, and needlessly act in a cruel manner toward a certain fowl, to wit, a chicken, by killing said chicken," is a sufficiently intelligible charge that defendant was guilty of cruelty to the fowl by needlessly and wilfully killing it. State *v.* Neal, 120 N. C. 613, 27 S. E. 81, 58 Am. St. Rep. 810.

"Unlawfully."—A count of an information charging defendant with cruelty to an animal, by unlawfully causing its death by failing to provide it with proper shelter, does not charge the statutory offense of unnecessarily failing to provide an animal with proper shelter, since "unlawfully" is not the equivalent of "unnecessarily." Ferrias *v.* People, 71 Ill. App. 559.

59. State *v.* Simpson, 73 N. C. 269. But see Burgman *v.* State, (Tex. Crim. 1896) 34 S. W. 111, holding that the overdriving of a horse need not be charged to have been wilful or wanton, though the statute so characterizes the offense.

60. State *v.* Hackfath, 20 Mo. App. 614.

61. *Arkansas.*— State *v.* Greenlees, 41 Ark. 353.

Maryland.— State *v.* Falkenham, 73 Md. 463, 21 Atl. 370.

Minnesota.— State *v.* Comfort, 22 Minn. 271.

Missouri.— State *v.* Goss, 74 Mo. 592.

North Carolina.— State *v.* Neal, 120 N. C. 613, 27 S. E. 81, 58 Am. St. Rep. 810; State *v.* Watkins, 101 N. C. 702, 8 S. E. 346.

Pennsylvania.— Com. *v.* Lewis, 140 Pa. St. 261, 21 Atl. 396, 27 Wkly. Notes Cas. (Pa.) 359, 11 L. R. A. 522.

implies that a variety of acts or things, in whole or in part, may or may not constitute the offense, the facts which give special character and significance to the particular form of the offense should be appropriately set out.[62] A statute inhibiting the actual or permissive driving or working of animals unfit for labor, or the cruel abandonment or transportation of animals in an unnecessarily cruel manner, does not require allegations of torture or cruelty except as they are involved in unnecessary suffering knowingly and wilfully permitted;[63] and it has been held that, in charging the offense of torturing or mutilating an animal, the method of torture or mutilation, as well as the effect produced, should be stated.[64]

(b) Repugnancy. The means alleged to have been used in the commission of the act or acts of cruelty should not be repugnant; and a count alleging the commission of the offense in two different and inconsistent ways is objectionable.[65]

(2) Description of Injury. Where the statute does not describe the injury, it is not necessary to describe or characterize it, unless some sufficient reason exists for such particularity.[66] On the other hand, it has been held that, where mutilation is charged, its kind or character must be alleged.[67]

(d) *Description of Animal* — (1) In General. The animal as to which the cruelty is alleged to have been perpetrated need not be described with extreme particularity; but it will ordinarily be sufficient to show that the animal is within the protection of the statute.[68]

(2) Ownership. Statutes denouncing cruelty to animals are designed for

West Virginia.— State *v.* Gould, 26 W. Va. 258, holding this to be true as to some forms of the offense, as overdriving, beating, mutilating, killing, etc.; but otherwise as to "torturing or tormenting," as to which the manner and circumstances of the act must be stated.

62. **Averring intent of statute.**—The words of the statute — "overloaded," "injured," "tortured," and "tormented"— do not imply or describe the acts charged to have been done with certainty. They each imply a variety of acts that may or may not constitute the offense, or parts of it. The acts should be so specified and charged as to show that they mean what the statute intends by overdriving, injury, torture, and torment. The court must see that the offense is charged, and it, and not the pleader, must determine that the acts done constitute the offense denounced by the statute. State *v.* Watkins, 101 N. C. 702, 8 S. E. 346.

63. Com. *v.* Turner, 145 Mass. 296, 14 N. E. 130.

64. **Merely charging tying things to a horse's tail,** without averring the effect of such act, does not charge a torturing. State *v.* Pugh, 15 Mo. 509.

Burning fowl.— A charge of torturing, tormenting, and needlessly mutilating an animal, by then and there unlawfully turpentining and burning the animal in a cruel and wanton manner, while possibly inapt and not so full as it might be, warrants a fair inference that the accused put turpentine on the animal and thereby caused it to be burned in a cruel and wanton manner. State *v.* Bruner, 111 Ind. 98, 12 N. E. 103.

65. State *v.* Haskell, 76 Me. 399, holding that a count charging that the defendant did cruelly torment, torture, maim, beat, and wound a horse, and deprive him of necessary sustenance, stated a single offense, the different descriptions of the offense not being repugnant.

66. State *v.* Giles, 125 Ind. 124, 25 N. E. 159, holding that a statement of the means employed in the commission of the act apprises the accused of the charge as fully as though the injury was fully described.

A charge of "shooting" is equivalent to a charge of "wounding." State *v.* Butts, 92 N. C. 784.

67. Avery *v.* People, 11 Ill. App. 332.

68. Com. *v.* Whitman, 118 Mass. 458; Com. *v.* McClellan, 101 Mass. 34. But see State *v.* Watkins, 101 N. C. 702, 8 S. E. 346, holding that the animal abused should be described with reasonable certainty.

Illustrations.—A designation of the animal as a "hog" is sufficient under a statute protecting "swine." Rivers *v.* State, 10 Tex. App. 177. Charging the killing of a "barrow" is a charge of killing an animal. State *v.* Greenlees, 41 Ark. 353. The court will take judicial notice that a mule is a "domestic animal" so protected (State *v.* Gould, 26 W. Va. 258), and an averment that a goose is the property of some person unknown is equivalent to an averment that it was a domestic fowl (State *v.* Bruner, 111 Ind. 98, 12 N. E. 103), and an information charging the wounding of an animal of the class enumerated in the statute need not further allege that it was a "domesticated animal" (Rivers *v.* State, 10 Tex. App. 177).

Color of animal.—"A certain horse, a dumb animal under the statute," is sufficient without a specification of the color of the animal. Benson *v.* State, 1 Tex. App. 6.

Protection from second prosecution.— Particularity for the sake of distinguishing the animal from others of the same kind is unnecessary to protect the accused from a second prosecution for the same offense. Com. *v.* McClellan, 101 Mass. 34.

the protection of the animals themselves irrespective of their ownership; it is not necessary to allege the ownership, nor is it necessary to negative the idea of a property right in the accused unless the statute so requires.[69]

(3) VALUE. Where the punishment which may be imposed is not in any way dependent on the value of the animal killed, injured, or abused, averments of such value are not requisite.[70]

b. Unnecessary Averments. Unnecessary averments will not render defective an indictment otherwise good; but the redundant statements may be rejected as surplusage,[71] unless the unnecessary allegation is descriptive of the animal, in which case it cannot be disregarded.[72]

c. Duplicity. A charge of more than one distinct and separate offense of cruelty or ill-treatment is bad for duplicity;[73] but the pleading will not be bad for duplicity if, though the language be inappropriate, no more than one offense is charged in fact.[74] Offenses involving continuous action, and which may be continued from day to day, may be so alleged.[75]

d. Indorsement of Prosecutor's Name. A statutory requirement of the indorsement of the prosecutor's name, on an indictment charging a trespass against the property of another, has no application to an indictment against a person for cruelty to his own animals.[76]

69. *Arkansas.*— Grise *v.* State, 37 Ark. 456.

Indiana.— State *v.* Bruner, 111 Ind. 98, 12 N. E. 103.

Massachusetts.— Com. *v.* Whitman, 118 Mass. 458; Com. *v.* McClellan, 101 Mass. 34; Com. *v.* Lufkin, 7 Allen (Mass.) 579.

Texas.— State *v.* Brocker, 32 Tex. 611 [*overruling* State *v.* Smith, 21 Tex. 748]; Rivers *v.* State, 10 Tex. App. 177; Darnell *v.* State, 6 Tex. App. 482; Turman *v.* State, 4 Tex. App. 586; Collier *v.* State, 4 Tex. App. 12; Rose *v.* State, 1 Tex. App. 400; Benson *v.* State, 1 Tex. App. 6.

West Virginia.— State *v.* Gould, 26 W. Va. 258.

See 2 Cent. Dig. tit. "Animals," § 110.

70. Grise *v.* State, 37 Ark. 456; Turman *v.* State, 4 Tex. App. 586; State *v.* Gould, 26 W. Va. 258.

71. Thus the unnecessary insertion of the word "cruelly" in an indictment for the failure of the custodian of a horse to furnish it with proper shelter and protection (Com. *v.* Edmands, 162 Mass. 517, 39 N. E. 183) or in an indictment for overdriving (Com. *v.* Flannigan, 137 Mass. 560); of allegations as to ownership, charge, or custody (Com. *v.* Whitman, 118 Mass. 458; Rivers *v.* State, 10 Tex. App. 177; State *v.* Gould, 26 W. Va. 258); and of allegations that defendant did "shoot, torture, and otherwise ill-treat," etc., following a direct charge of cruelty (State *v.* Gould, 26 W. Va. 258) do not render the indictment bad. Nor is an allegation of torture or cruelty necessary except as involved in unnecessary suffering, knowingly and wilfully permitted (State *v.* Porter, 112 N. C. 887, 16 S. E. 915).

72. As the color of the animal (Benson *v.* State, 1 Tex. App. 6), or its ownership (Rose *v.* State, 1 Tex. App. 400).

73. As charging the cruel treatment of an animal in a specific way, and also charging the distinct offense of failing, as custodian, to provide for the wants of an animal in defendant's care (State *v.* Haskell, 76 Me. 399); or charging in one count separate and distinct offenses of a similar character, set out in the statute in the disjunctive, and each of which constitutes a misdemeanor (State *v.* Gould, 26 W. Va. 258).

Distinct charges in separate counts.— A count charging defendant with overworking oxen, on certain days, a count charging him with neglect to provide the animals with proper food, drink, and protection during the same period, and a count charging that during the same period he deprived them of proper sustenance, each charge one offense. State *v.* Bosworth, 54 Conn. 1, 4 Atl. 248.

74. Animal owned by two persons.— A complaint based on Mass. Gen. Stat. c. 165, § 41, charging that defendant, at a time and place named, "with force and arms, unlawfully and cruelly did beat and torture a certain horse, of the property of" two persons named, does not charge two offenses. Com. *v.* Lufkin, 7 Allen (Mass.) 579.

Surplus averments.— The addition, in any one count for overdriving, overloading, or depriving of necessary sustenance, or unnecessarily or cruelly beating, or needlessly mutilating or killing, of the words "torture and torment," or either of them, would not cause such count to be fatally defective as including a charge of more than one offense in a single count, though, in a separate count stating the mode of torturing, the torture would constitute a separate offense, the added words being mere surplusage. State *v.* Gould, 26 W. Va. 258. If an attempt to charge in one count two separate and distinct infractions of the statute would be bad for duplicity if they were appropriately set out, and one charge is defective, it may be rejected as surplusage, and the complaint sustained as to the offense which is adequately alleged. State *v.* Haskell, 76 Me. 399.

75. State *v.* Bosworth, 54 Conn. 1, 4 Atl. 248.

76. State *v.* Goss, 74 Mo. 592.

7. **Defenses — a. Act of Mercy.** It seems that a person, who kills an enfeebled and incapacitated horse as an act of mercy, is not guilty of cruelty.[77]

b. Anger. The impulse of anger is not a defense where animals were wilfully and needlessly killed.[78]

c. Good Faith. It is available, as a defense to a charge of wilfully and cruelly overdriving a horse, that defendant, a minor, honestly exercised his judgment.[79]

d. Intoxication — Bewilderment. Though intoxication would be no defense to a charge of unnecessarily leaving a horse uncared for, yet bewilderment from other causes, so as to incapacitate defendant in locating the animal, might be.[80]

e. Protection of Property. It has been held that the fact that the animal was trespassing and committing depredations at the time of the killing or infliction of the injury is no justification to the wrong-doer.[81] It has also been held in numerous cases that, where the injury results from the employment of necessary and proper means in driving off trespassing animals,[82] such killing or injury will not be deemed cruelty, in the absence of wilfulness, or wantonness, or an intention to inflict unnecessary pain or suffering. The same rule applies where the owner of land, after ineffectually using ordinary care to protect his property, kills or injures animals invading his premises, and ravaging his crops, or otherwise damaging his property.[83]

f. Sport or Amusement. The defendant cannot plead that the killing or wounding was done in the gratification of a taste for sport or amusement.[84]

g. Useful Purpose. It has been held that the fact that the alleged cruel act was not done wantonly, but for convenience and profit, is not a defense; but that to constitute a defense the act must be shown to be necessary and reasonable under the circumstances.[85]

8. **Evidence — a. Burden of Proof.** Where the issue is whether defendant "needlessly" killed the animal, the burden of proof is upon the state to show, not only the killing, but that it was done under such circumstances as, unexplained, would authorize the jury to believe that it was needless, in the sense of the statute.[86]

b. Admissibility. Evidence is admissible to show the extent of the injury, as the apparent effect of blows,[87] or the value of an animal before the commission of

77. Ferrias *v.* People, 71 Ill. App. 559.

78. State *v.* Neal, 120 N. C. 613, 27 S. E. 81, 58 Am. St. Rep. 810.

79. Com. *v.* Wood, 111 Mass. 408, holding that in such a case evidence is inadmissible to show a request of the owner of the horse, on a former occasion, not to permit defendant to have horses, as the question was whether or not the offense had been committed, and not whether it was discreet or judicious to afford an opportunity for its commission.

80. Com. *v.* Curry, 150 Mass. 509, 23 N. E. 212.

81. State *v.* Butts, 92 N. C. 784. See also State *v.* Neal, 120 N. C. 613, 27 S. E. 81, 58 Am. St. Rep. 810, where the prosecutor had been warned to prevent his fowls from trespassing.

82. Avery *v.* People, 11 Ill. App. 332.

83. Stephens *v.* State, 65 Miss. 329, 3 So. 458; Hodge *v.* State, 11 Lea (Tenn.) 528, 47 Am. Rep. 307; McMahan *v.* State, 29 Tex. App. 348, 16 S. W. 171; Brewer *v.* State, 28 Tex. App. 565, 13 S. W. 1004; Reedy *v.* State, 22 Tex. App. 271, 2 S. W. 591; Farmer *v.* State, 21 Tex. App. 423, 2 S. W. 767; Payne *v.* State, 17 Tex. App. 40; Thomas *v.* State, 14 Tex. App. 200; Lott *v.* State, 9 Tex. App. 206.

Protecting horse.— In Farmer *v.* State, 21 Tex. App. 423, 2 S. W. 767, defendant was held entitled to an instruction that if it reasonably appeared to him that his horse was in danger of serious injury from the attack of the other one, and he inflicted the wound upon the attacking horse to protect his own horse from the threatened injury, he should be acquitted.

Trapping a dog while he is engaged in depredations will not constitute "needless" mutilation, torture, etc. Hodge *v.* State, 11 Lea (Tenn.) 528, 47 Am. Rep. 307.

Evidence of habits of animal — Recompensing owner.— Defendant may show the habit of the animal to invade and damage defendant's property, and also that, after wounding it, he sent to the owner its money value. Lott *v.* State, 9 Tex. App. 206.

84. State *v.* Neal, 120 N. C. 613, 27 S. E. 81, 58 Am. St. Rep. 810; State *v.* Porter, 112 N. C. 887, 16 S. E. 915.

85. Dishorning cattle (Brady *v.* McArgle, 14 L. R. Ir. 174, 15 Cox C. C. 516 [but see *supra*, VII, A, 2, a, (III)]); cutting the combs of cocks for fighting purposes, or to enter them for competition at an exhibition (Cleasby, B., in Murphy *v.* Manning, 2 Ex. D. 307, 46 L. J. M. C. 211).

86. Grise *v.* State, 37 Ark. 456.

87. State *v.* Avery, 44 N. H. 392.

the offense, and the extent to which such value was impaired.[88] A witness may testify, also, as to knowledge of the disposition of a horse alleged to have been ill-treated, and give his opinion that the horse was kind and manageable.[89]

c. Sufficiency — (I) *In General.* The commission of the offense by the accused must be made out by proof sufficient to connect him therewith.[90] The sufficiency of such proof is dependent on the particular circumstances of the individual case;[91] but a conviction is improper where the evidence as to the abuse and ill-treatment is very slight and utterly fails to show that the animal's death, which is charged as a part of the offense, was caused thereby.[92]

(II) *As to Mode or Means Employed.* Where the act is alleged to have been accomplished by more than one means, proof that any of the means charged were used proves the offense where the penalty is the same whether one or all the means were used.[93]

(III) *As to Wilfulness, Wantonness, and Intent.* Proof of the mere fact of the infliction of the injury is not sufficient to establish the offense, where malice, wilfulness, wantonness, or the like is an essential ingredient; but the wilful or wanton spirit which accompanied the commission of the act must be shown by proof of acts or conduct which will satisfy the jury that the offense was knowingly committed, or of the wicked intent of the accused.[94]

d. Variance. There must be no variance between the indictment and the evidence.[95] Thus a charge of causing the death of an animal by neglect is not sustained by proof of a killing by blows;[96] an allegation that the animal was wounded and killed, by evidence of wounding only;[97] of ownership in one, by evidence of ownership in another;[98] nor is a charge of cruelty sustained by evidence of the killing of a trespassing animal, which killing constitutes the statutory offense of malicious mischief.[99] It has been held, however, that proof of the killing of a particular kind of animal will support an averment of the killing of one of the same species differently described.[1]

9. Trial — a. Instructions — (I) *In General.* The instructions should be sufficiently full and explicit to enable the jury to understand the precise nature of the offense;[2] and when, to convict, the jury must find that the act charged was done in a prescribed manner, the particular word used should be so defined that its effect will not be misapprehended in determining the guilt or innocence of the accused.[3] The instructions should not assume facts not proven, such, for

88. For the purpose of showing the nature of their treatment, and whether or not such unjustifiable pain or suffering was caused as would constitute the offense. McKinne *v.* State, 81 Ga. 164, 9 S. E. 1091.

89. State *v.* Avery, 44 N. H. 392.

90. Thus evidence that the animal was found dead on the farm of one of two defendants, and that the other, who was assisting in working the farm for a few days, gave no information to persons inquiring about the animal, is insufficient to convict the latter. Collier *v.* State, 4 Tex. App. 12. But evidence tending to prove that defendant released a fox in the presence of dogs; that the fox ran into a wood; that five minutes thereafter the dogs were loosed, upon which they pursued, caught the fox, and mangled it, is sufficient to convict. Com. *v.* Turner, 145 Mass. 296, 14 N. E. 130.

91. **Neglect to feed and water.**— Unnecessarily leaving a horse harnessed to a carriage in the woods, where it remained all night uncared for, when it appears that the horse was actually without food and drink for more than twenty-four hours, except the food which it obtained in the woods, is evidence of a failure to provide the horse with proper food and drink sufficient to convict. Com. *v.* Curry, 150 Mass. 509, 23 N. E. 212.

92. Burgman *v.* State, (Tex. Crim. 1896) 34 S. W. 111.

93. State *v.* Haskell, 76 Me. 399.

94. State *v.* Roche, 37 Mo. App. 480.

95. Avery *v.* People, 11 Ill. App. 332.

96. Ferrias *v.* People, 71 Ill. App. 559.

97. Reid *v.* State, 8 Tex. App. 430.

98. Collier *v.* State, 4 Tex. App. 12.

99. Brewer *v.* State, 28 Tex. App. 565, 13 S. W. 1004; McRay *v.* State, 18 Tex. App. 331; Payne *v.* State, 17 Tex. App. 40.

1. Grise *v.* State, 37 Ark. 456, where the killing of a hog was charged, and the killing of a pig proved.

2. Com. *v.* Lufkin, 7 Allen (Mass.) 579.

3. **"Needlessly."**— A definition of "needlessly" as without necessity or unnecessarily, as where one kills the domesticated animal of another, either in mere wantonness or to satisfy a depraved disposition, or for sport or pastime, or to gratify one's anger, or for any other unlawful purpose, is erroneous where the lawfulness or unlawfulness of the act has no bearing upon its character as

example, as the mutilation of the animal,[4] or the commission of the particular act charged.[5]

(II) *As to Kind of Animal.* On trial of an indictment framed under a statute forbidding the killing, maiming, etc., of "any domesticated animal," an instruction that the offense consisted of the killing, etc., of "any animal," while inaccurate, will not require reversal, where it was not objected to or sought to be corrected, and no prejudice resulted.[6]

(III) *As to Ownership of Animal.* The giving of instructions which might possibly have misled the jury, by causing them to regard as important the ownership of the animal in question, is error requiring reversal.[7]

(IV) *As to Wilfulness or Wantonness.* Where wilful or wanton conduct or intent is an ingredient of the offense, the jury should be informed as to the necessity of direct proof of this character, or of inferences which they may draw from the facts and circumstances, and the effect of such proof.[8] If the evidence clearly establishes the existence of these elements, or conclusively negatives the idea that the act was unintentional, accidental, or done with a proper motive, it is error to permit the jury to consider whether or not the accused acted in good faith.[9]

(V) *As to Justification.* Where there is no evidence of justification an instruction that defendant must have been justified beyond a reasonable doubt is harmless error.[10]

b. Province of Jury. Where the evidence as to the commission of constituent acts of the offense is conflicting or inconclusive, the question of their commission is for the jury.[11]

10. Appeal. Mere formal defects in the indictment in characterizing the offense,[12] or non-prejudicial inaccuracies in an instruction defining the offense,[13] cannot be availed of for the first time on appeal. In New Jersey, on appeal

charged. Neither would the definition be sufficiently instructive to authorize the refusal of instructions, requested by the accused, which substantially define the word correctly, and which he is entitled to have particularly impressed upon the jury — it being new, and a matter which they might misapprehend. Grise *v.* State, 37 Ark. 456.

"Wilfully and wantonly."— Where it is necessary that the act should have been "wilful and wanton," the court should expound the legal signification of the words "wilfully" and "wantonly." Thomas *v.* State, 14 Tex. App. 200.

4. Avery *v.* People, 11 Ill. App. 332.

5. There being no presumption of the approval, by the master, in his absence, of the cruel act of his servant, a charge that the master, by his employee, acted cruelly is founded on no facts, and is not equivalent to a charge of causing or procuring the cruel act. Roeber *v.* Society, etc., 47 N. J. L. 237.

6. Achterberg *v.* State, 8 Tex. App. 463.

7. Com. *v.* Lufkin, 7 Allen (Mass.) 579.

8. Degree of force.—An instruction is erroneous which makes the guilt or innocence of the accused dependent on whether or not he used unnecessary force in protecting his property, where that fact is not an issue involved except in so far as it might be considered by the jury in determining whether or not the force used was wilfully used. Farmer *v.* State, 21 Tex. App. 423, 2 S. W. 767.

9. State *v.* Neal, 120 N. C. 613, 27 S. E. 81, 58 Am. St. Rep. 810; Tinsley *v.* State, (Tex. Crim. 1893) 22 S. W. 39, 40, wherein the testimony shows that the chastisement inflicted on a horse was cruel in the extreme and manifested a spirit of heartless and brutal rage; and it was held that an instruction that the jury might acquit if the beating was done "with the intent and design of compelling said horse to obey him, and he did not strike and beat the horse in a wilful and wanton manner, with intent to injure him," was unauthorized.

Motive.— An instruction is improper, if it is calculated to make the determination turn on the question of whether or not defendant thought he was unnecessarily cruel where there was cruelty in fact. Com. *v.* Magoon, 172 Mass. 214, 51 N. E. 1082.

10. State *v.* Neal, 120 N. C. 613, 27 S. E. 81, 58 Am. St. Rep. 810.

11. Overloading.— People *v.* Tinsdale, 10 Abb. Pr. N. S. (N. Y.) 374.

Good faith or wilful purpose.— State *v.* Isley, 119 N. C. 862, 26 S. E. 35.

The inexperience and want of knowledge of a minor as to the proper treatment of horses, charged to have been overdriven and abused. Com. *v.* Wood, 111 Mass. 408.

Continunity of offense.— On evidence of a beating for a long time, with occasional interruptions of a few minutes' duration, the jury may find the beating to have been continuous. State *v.* Avery, 44 N. H. 392.

12. Com. *v.* Flannigan, 137 Mass. 560.

13. Achterberg *v.* State, 8 Tex. App. 463.

from a judgment for a penalty rendered by a justice, defendant is entitled to relief, both as to matters of law and fact, as in other appeals from justices of the peace.[14]

B. Societies for Prevention of Cruelty — 1. Exemptions — a. From Taxation. A society for the prevention of cruelty to animals, the members of which derive no benefit or profit from its operations, which educates men in the diseases of the domestic animals, and the proper mode of dealing with them, and inculcates the duty of kindness and humanity to them, is a benevolent and charitable institution within a statutory exemption of such institutions from taxation.[15]

b. From Payment of Dog License. A statute requiring the owners of dogs to pay a license-fee, and permitting a society for the prevention of cruelty to animals to appropriate and dispose of unlicensed dogs, or, in its discretion, to keep them without the payment of any fee, is unconstitutional. Such a statute conflicts with the provision which forbids the grant of exclusive privileges and immunities.[16]

2. Rights — a. To License-Fees. An act requiring the owners of dogs to pay a license-fee to a humane society for its own use is unconstitutional, for a provision of the constitution forbids the giving of public moneys to any association or private undertaking.[17]

b. To Fines and Penalties. Under a statute requiring fines and penalties collected for infractions of the acts to prevent and punish cruelty to animals, to be paid on demand to a designated society formed to prevent such cruelty, where such moneys have been collected by, and are in the possession of, a municipality or its officers, the society may recover the same by an action against the municipality,[18] after duly demanding the same.[19]

c. To Kill — (I) *Power of Legislature to Grant* — (A) *As to Dogs.* A statute authorizing a humane society to appropriate, dispose of, or destroy unlicensed dogs is not unconstitutional as a delegation of governmental power; nor is it so as assuming to vest in a private corporation the execution of police power, the authority vested in the officers or agents of such society to kill dogs being neither greater nor less than that conferred on other citizens.[20]

(B) *As to Other Animals.* Statutes which authorize agents of societies for the prevention of cruelty to animals to condemn, conclusively fix the value of, and destroy animals, without notice to the owners, are violative of a constitutional provision that no person shall be deprived of his property without due process of law;[21] and a similar statute authorizing such agents to destroy or cause the destruction of animals found neglected or abandoned, and which, in the opinion of a specified number of citizens, are injured or diseased past recovery, or by age have become useless, is likewise in contravention of a constitutional provision protecting the property of every individual, and providing for compensation when taken, there being no condition of the animal described in the statute such as would make it dangerous to public health and safety.[22] If the legislature

14. Roeber *v.* Society, etc., 47 N. J. L. 237; Pennsylvania R. Co. *v.* New Jersey Soc., etc., 39 N. J. L. 400, convictions under the New Jersey acts of 1873 and 1880 (Pamph. L. 80; Pamph. L. 212) prescribing penalties for cruelty to animals.

15. Massachusetts Soc., etc. *v.* Boston, 142 Mass. 24, 6 N. E. 840.

16. Fox *v.* Mohawk, etc., River Humane Soc., 165 N. Y. 517, 59 N. E. 353 [*affirming* 25 N. Y. App. Div. 26, 48 N. Y. Suppl. 625],

17. Fox *v.* Mohawk, etc., River Humane Soc., 165 N. Y. 517, 59 N. E. 353 [*affirming* 25 N. Y. App. Div. 26, 48 N. Y. Suppl. 625], wherein it is said that, conceding that a humane society was created as a subordinate governmental agency to assist in the enforcement of laws relative to animals, the devotion of the fees received to the care or destruction of unlicensed dogs is an unauthorized appropriation of public moneys, and not a lawful setting aside of public funds for the use of a corporation discharging duties as a governmental agency.

18. American Soc., etc., *v.* Cohoes, 4 N. Y. St. 808.

19. American Soc., etc. *v.* Gloversville, 78 Hun (N. Y.) 40, 29 N. Y. Suppl. 257, 60 N. Y. St. 808.

20. Fox *v.* Mohawk, etc., River Humane Soc., 165 N. Y. 517, 59 N. E. 353 [*reversing* 25 N. Y. App. Div. 26, 48 N. Y. Suppl. 625].

21. King *v.* Hayes, 80 Me. 206, 13 Atl. 882.

22. Brill *v.* Ohio Humane Soc., 4 Ohio Cir. Ct. 358.

were empowered to authorize the killing of an animal under the circumstances prescribed, it could not impart, as against the owner, a conclusive character to the determination of the persons designated, for the reason that the owner is entitled to be heard and have his property rights determined in a proper tribunal.[23]

(II) *Liability of Society or Agent.* An owner whose animal has been destroyed, without notice to him, by such an agent, has a right of action for damages, if he can establish that the circumstances authorizing the officer to act did not exist; but the agent or officer may justify by showing that the animal killed was past recovery.[24] If the agent transcends the authority specially conferred on him by statute and not delegated to him by the society, he is personally liable, and the society is not, unless it directed the commission of the act complained of.[25]

d. To Arrest. Where acts have been passed authorizing arrests to be made by a humane society's officers or agents duly designated by the sheriff and authorized by the act to execute laws against cruelty, the commission of the forbidden acts in the presence of such an officer will authorize the latter to arrest without a warrant.[26]

3. Injunction to Restrain — a. When Proper. An injunction will not issue to restrain a society, organized to enforce the laws respecting cruelty to animals, or to restrain its officers, who are vested with power to make arrests for that purpose, from exercising those powers, on the ground that the statute conferring such power is unconstitutional, or that the officers are exceeding their powers or using them oppressively by making arrests, where there is an adequate remedy at law and the pecuniary responsibility of the society and its officers is unquestioned.[27] The court may, however, enjoin the society or its agents from stopping the vehicles of a public carrier of passengers, except for the purpose of an arrest for a palpable violation of the law, and from taking possession of the vehicles or the horses attached, or of interfering with the passengers.[28]

b. Ascertaining Commission of Offense in Action for. In an action of this character the violation of a statute denouncing cruelty cannot be determined; such an issue must be tried at law, where the people as well as the accused may be represented.[29]

c. Violation of — Contempt. Stopping a passenger vehicle and arresting the driver for an actual violation of the statute is not a violation of the injunction which should be punished as a contempt, although, on trial for the offense, the driver was acquitted, but the plaintiff will be left to his action for damages.[30]

23. Brill *v.* Ohio Humane Soc., 4 Ohio Cir. Ct. 358. To the same effect see Sahr *v.* Scholle, 89 Hun (N. Y.) 42, 35 N. Y. Suppl. 97, 69 N. Y. St. 453, holding that the determination of the fact that the animal was past recovery can be had only after notice to the owner entitling him to be heard.

The Connecticut statute authorizing in one section the destruction by an agent of incapacitated animals "in his charge," after condemnation by him with the aid of citizens called in, will not justify him in taking up and killing an animal when he has failed to comply with other sections requiring him to give a prescribed notice to the owner of the taking, and to afford the latter an opportunity to retake the animal. Goodwin *v.* Toucey, 71 Conn. 262, 41 Atl. 806.

24. Sahr *v.* Scholle, 89 Hun (N. Y.) 42, 35 N. Y. Suppl. 97, 69 N. Y. St. 453.

25. Dillon *v.* American Soc., etc., 2 N. Y. City Ct. 45; Hanna *v.* New Jersey Soc., 63 N. J. L. 303, 43 Atl. 886.

26. Davis *v.* American Soc., etc., 75 N. Y. 362 [*affirming* 6 Daly (N. Y.) 81, 16 Abb. Pr. N. S. (N. Y.) 73]; Fox *v.* Mohawk, etc., River Humane Soc., 20 Misc. (N. Y.) 461, 46 N. Y. Suppl. 232; Stage Horse Cases, 15 Abb. Pr. N. S. (N. Y.) 51.

The New York statutes (Laws (1886), c. 682; Laws (1867), c. 375) do not require a special appointment by the sheriff for each arrest, but the agent designated is authorized to act under a general appointment until it is revoked. Davis *v.* American Soc., etc., 75 N. Y. 362 [*affirming* 6 Daly (N. Y.) 81, 16 Abb. Pr. N. S. (N. Y.) 73].

27. Davis *v.* American Soc., etc., 6 Daly (N. Y.) 81, 16 Abb. Pr. N. S. (N. Y.) 73 [*affirmed* in 75 N. Y. 362].

For a substantial form of complaint to enjoin a society for the prevention of cruelty to animals from interfering with plaintiff's business of slaughtering hogs see Davis *v.* American, Soc., etc., 6 Daly (N. Y.) 81.

28. Stage Horse Cases, 15 Abb. Pr. N. S. (N. Y.) 51.

29. Davis *v.* American Soc., etc., 75 N. Y. 362 [*affirming* 6 Daly (N. Y.) 81, 16 Abb. Pr. N. S. (N. Y.) 73.

30. Stage Horse Cases, 15 Abb. Pr. N. S. (N. Y.) 51.

VIII. Driving Away Animals or Removing from Range.

A. Civil Remedy. In some jurisdictions the statutes impose civil penalties on persons engaged in driving cattle, if such persons, without authority, drive away stock not their own to or beyond a prescribed distance from their proper range or premises, or wilfully permit or suffer others so to do.[31] Knowledge of wrongdoing on the part of the person charged is a prerequisite to liability under statutes of this nature.[32] Consequently, it must be properly alleged and proved that defendant had some knowledge that the animals of another entered his drove, or were being taken away, before he can be charged in a civil action for damages.[33]

B. Criminal Prosecutions — 1. In General. The offense of wilfully driving away or removing from its accustomed range or place an animal not one's own, and without consent of the owner, is, in contemplation of law, not only an acquisition, but an appropriation of the property, and is not clearly distinguishable from the ordinary definition of theft.[34] In fact, in Texas, one form of the offense is denominated theft by statute.[35] However, although the commission of such an act will ordinarily constitute larceny, this particular form of misappropriation has been made the subject of legislation, with the result that the offense is specifically denounced, the degrees thereof made dependent on the presence or absence of an intent to defraud, and matters of defense or mitigation prescribed.[36]

2. Elements of Offense. Where the degree of the offense is based on the fact of wilfulness and intention to defraud the owner of his animals, to constitute the

31. See Arnold *v.* Ludlam, 38 Ill. 190 (decided under Ill. Rev. Stat. c. 35); Chamberlain *v.* Gage, 20 Iowa 303 (decided under Iowa Laws (1862), c. 34).

Instruction not warranted.— It is misleading and erroneous to instruct that the moving of cattle by the owner thereof from one feeding or grazing-place to another in the same neighborhood does not constitute him a "drover or person engaged in driving cattle" so as to subject him to the prescribed penalty for such driving when no proof was adduced that he was so engaged, but, on the contrary, the statutory offense was made out. Arnold *v.* Ludlam, 38 Ill. 190.

32. Chamberlain *v.* Gage, 20 Iowa 303, wherein it was said by Lowe, J., that the statute under consideration (Iowa Laws (1862), c. 34) was apparently enacted upon the hypothesis that a diligent drover could not reasonably drive off the stock more than five miles, the prescribed distance, without knowledge of the presence in his drove of the animal of another, and upon acquiring such knowledge would be bound at his peril, within that distance, to turn out of his drove such cattle as did not belong to him.

Evidence sufficient.—Evidence that defendant drove a herd through part of the state, with knowledge that cattle belonging to another were in the drove; that he branded and exercised other acts of ownership over such animals; that he drove them twenty-five miles from their usual range along a route through a thickly settled country with a habitation on every mile of the route, sufficiently establishes the offense of wilfully and knowingly driving or permitting the driving through the state of cattle driven from the premises or range of another, and belonging to such other, to any distance exceeding five miles, provided that if such driver shall not pass any habitation within five miles, and shall separate from the drove the cattle so driven off at the next habitation, no cause of action shall accrue. Arnold *v.* Ludlam, 38 Ill. 190.

33. Chamberlain *v.* Gage, 20 Iowa 303. In this case, Lowe, J., after announcing the opinion of the court, said, in substance, that when a recovery is sought for willingly permitting or suffering others to drive away animals, or where the alleged wrongdoer is sought to be held in treble damages for doing so himself, knowledge is a necessary element which must be charged and proven; but that if defendant is charged to have committed the wrongful act personally, and actual damages alone are claimed, it is not necessary to aver that defendant acted knowingly or willingly.

34. Counts *v.* State, 37 Tex. 593.

35. Shubert *v.* State, 20 Tex. App. 320.

36. **The effect of the Colorado statute** is not to take the larceny of any of the animals named therein out of the provisions of the general act (Colo. Crim. Code, § 65; Colo. Gen. Stat. § 753), but to leave it indictable under either act. To this extent the provisions are concurrent. Kollenberger *v.* People, 9 Colo. 233, 11 Pac. 101.

The offense denounced by the Texas statute (Tex. Pen. Code, art. 766*a*; Paschal's Dig. art. 2410*b*) was not abrogated by the act of May 17, 1873, which amends section 766 of the Penal Code and, by an article also numbered 766*a*, prescribing a penalty for the theft of certain enumerated animals. Smith *v.* State, 43 Tex. 433.

offense it is necessary that those elements should have existed.[37] They do not exist if the accused, in removing the animals, acted on a well-founded belief in his right to take them,[38] or where the object is to save the life of the animal, and no claim of right to possession is made,[39] or where one turns animals out of his own pasture and notifies their owner of his action.[40] Nor is an employee guilty of wilfully driving off cattle, where, acting under instructions, he drives cattle from his employer's pasture, although the owner of the cattle owns a few acres, inclosed within the pasture, with his consent, since in such a case the cattle are not on their accustomed range.[41]

3. Venue. Where the offense is complete the instant a county line or boundary is passed it may be prosecuted either in the county from which or in the county to which the animal is driven.[42]

4. Indictment — a. In General. Ordinarily, and where there is no cause for any exception to the general rule, it is sufficient to charge the offense in the language of the statute.[43]

b. Charging Several Offenses by One Act. Where the offense consists of the removal by one act of several animals which are the property of different owners, the state is not bound to divide the single act into as many different charges as might be formed out of it, but may charge the taking by one act of the property of different persons as one offense.[44] Such joinder is immaterial where the grade of the offense is not thereby affected.[45]

c. Particular Averments — (I) *As to Driving Off.* It is not necessary, where the offense consists in driving the animal away, to state the distance it was driven.[46]

(II) *Description of Animal.* It is unnecessary to charge that the animal taken was alive, since that fact will be presumed unless the contrary is stated.[47]

(III) *Description of Range.* An indictment for the wilful driving of an animal from its accustomed range need not particularize or describe by limits the

37. "**Wilfully,**" in Tex. Pen. Code, art. 749, denouncing the offense of wilfully, fraudulently, etc., taking and driving away an animal without the owner's consent, means with evil intent or without reasonable ground to believe that the act was lawful. Yoakum *v.* State, 21 Tex. App. 260, 17 S. W. 254; Owens *v.* State, 19 Tex. App. 242.

To same effect see Beachamp *v.* State, (Tex. Crim. 1894) 28 S. W. 807, holding that the question of wilful intent is not an issue, where the taking was without any excuse or reasonable belief in the right to take the animal, and the existence of the fraudulent intent is beyond doubt.

38. Yoakum *v.* State, 21 Tex. App. 260, 17 S. W. 254.

39. Wilson *v.* State, (Tex. App. 1892) 19 S. W. 255, where, to save its life, the accused permitted a motherless calf to follow his cow to and remain at his place for a short time.

40. Mahle *v.* State, (Tex. App. 1890) 13 S. W. 999.

41. Wells *v.* State, (Tex. App. 1890) 13 S. W. 889.

42. Because by a general provision (Paschal's Dig. art. 2659) the jurisdiction of the county from which the animal is driven is extended four hundred feet beyond the boundary line, and the offense is necessarily completed within the jurisdiction of the county from which the animal is driven. Rogers *v.* State, 9 Tex. App. 43 [*distinguishing* Senterfit *v.* State, 41 Tex. 186, a prosecution based on a statute defining a different offense]. See also *infra*, VIII, B, 5, a, (I), (B), (2).

43. State *v.* Thompson, 40 Tex. 515.

For forms of indictment: For stealing, leading, driving, and carrying away cattle, framed under Colo. Gen. Stat. p. 931, § 22, see Kollenberger *v.* People, 9 Colo. 233, 11 Pac. 101.

For wilfully removing from accustomed range, with intent to defraud, based on Tex. Crim. Code, art. 766, see Darnell *v.* State, 43 Tex. 147.

For removing horse from range, based on Tex. Pen. Code, art. 749, see Shubert *v.* State, 20 Tex. App. 320, 329.

44. Long *v.* State, 43 Tex. 467, wherein an indictment, containing a charge of driving one animal was followed by another charge of the driving of another, which was in turn followed by another as to a third animal, the averments being connected by the words "then and there," was held sufficient to charge the driving of three animals by one act.

For form of indictment charging the taking by one act of the property of different persons see Long *v.* State, 43 Tex. 467.

45. Long *v.* State, 43 Tex. 467.

46. Darnell *v.* State, 43 Tex. 147.

47. Kollenberger *v.* People, 9 Colo. 233, 11 Pac. 101, further stating that if the animals are dead that fact must be set out.

place in question further than to characterize it as the accustomed range from which the animal was removed.[48]

(IV) *NEGATIVING OWNERSHIP OR CONSENT.* If the indictment fails to negative the ownership of the alleged wrong-doer, or fails to allege that the animals were driven away without having the written authority of the owner as prescribed by law, no conviction can be had.[49]

(V) *INTENT.* A charge of a fraudulent intent "to deprive" the owner of his animal is equivalent to the statutory language: "to defraud" the owner.[50]

d. Immaterial Statements. An indictment appropriately charging the offense of removing cattle is not vitiated by a statement which of itself charges nothing, but merely states, by way of summation, that defendant was guilty of theft.[51]

5. TRIAL — a. Proofs — (I) *OF PROSECUTION* — (A) *Necessary Proofs* — (1) OF OWNERSHIP. A *prima facie* case is made out when accused is shown to have had possession of cattle off their range, without having the evidence of title required by statute;[52] likewise, such a case is made out by proof that the cattle were estrays, or belonged to, or were controlled by, some person other than the defendant;[53] though, if the ownership of the animal is unnecessarily alleged, the allegation must be proved, because of the material aid in identification.[54]

(2) OF VALUE. Where the penalty which may be inflicted is dependent on the value of the animals removed, their value must be proved[55] as alleged;[56] but it is otherwise where the value is not material to the punishment.[57]

(B) *Sufficiency of* — (1) IN GENERAL. Under the Texas statute, a *prima facie* case is made out by proof of the driving, using, or removing from a range of cattle which do not belong to the accused, or are not under his control.[58] A conviction is warranted by proof that the animal of another was in defendant's herd, with his knowledge, at a place eight to ten miles distant from its accustomed range;[59] or by proof of possession of the animal at a distance from its accustomed range, and in an unusual place, with other suspicious circumstances respecting inspection and shipment.[60] A conviction is not justified where the evidence fails to show that accused drove the animals from the range, and it appears that he brought the animal to a place near the range and expressed his desire to find the owner;[61] or where the ownership of the animal, though alleged, is not satisfactorily proven.[62]

(2) AS TO PLACE OF OFFENSE. In Texas an indictment laying the venue in the county into which the animals were taken is supported by proof that they were taken from a range in another county.[63]

48. Darnell *v.* State, 43 Tex. 147; State *v.* Thompson, 40 Tex. 515, 519, holding that "range" or "accustomed range" in the Texas statute is a matter of local description and, unlike a generic term requiring the species to be stated, it admits of proof under the general allegation, without defining the limits of the range by averments.

"The accustomed range" is equivalent to a charge of driving it from "its accustomed range," the statutory language. Fowler *v.* State, 38 Tex. 559.

49. Heard *v.* State, 8 Tex. App. 466; Covington *v.* State, 6 Tex. App. 512 — prosecutions for unlawfully driving cattle out of the county without having them inspected according to law.

50. Shubert *v.* State, 20 Tex. App. 320.

51. Long *v.* State, 43 Tex. 467.

52. Wills *v.* State, 40 Tex. 69.

53. Wills *v.* State, 40 Tex. 69.

54. Smith *v.* State, 43 Tex. 433.

55. Wills *v.* State, 40 Tex. 69.

56. Marshall *v.* State, 4 Tex. App. 549.

57. Wills *v.* State, 40 Tex. 69.

58. Wills *v.* State, 40 Tex. 69, decided under the Texas act of Nov. 12, 1866, art. 2410*e*.

59. Owens *v.* State, 19 Tex. App. 242.

60. Shubert *v.* State, 20 Tex. App. 320.

61. Saltillo *v.* State, 16 Tex. App. 249.

So, too, where defendant had called a neighbor's attention to the fact that his hogs were getting into defendant's field, and destroying crops, and the neighbor offered to help defendant fix his fences so that the hogs could not get in, to which defendant would not agree, he stating his fences were good enough, whereupon defendant finally shut them up in a pen in his field, refused to turn them loose on request, but let the owner have them when he came for them, it was held in a prosecution for wilfully driving and removing the hogs from their accustomed range, that the evidence was insufficient to support a conviction. Butcher *v.* State, (Tex. Crim. 1900) 56 S. W. 923.

62. Smith *v.* State, 43 Tex. 433.

63. Because the offense is denounced as theft, which offense may, by statute, be prosecuted not only in the county from which the

(3) As to Want of Authority. Lack of authority or of the owner's consent is shown by evidence that defendant gathered cattle not his own, turned them loose, because he was unable to produce a bill of sale, again took them up and again for the same reason released them.[64]

(II) *Of Defense.* Where the prosecution makes out a *prima facie* case,[65] it then devolves on accused to present any fact under which he can justify or mitigate the offense.[66] Mere possession of animals, without the evidence of title required by statute, raises no presumption of ownership;[67] but, where accused acted in apparent good faith, he may show that his possession was under a claim of ownership;[68] and though, for want of written evidence of title, his possession is *prima facie* illegal, yet such possession is not conclusive of a felonious taking; and the defendant, to overcome the presumption against him, may prove his ownership or show his right to control the stock,[69] or adduce evidence as to statements, explanations, disclosures of ownership or right to possession, or as to other matters or things bearing on the question of intention[70] or of the character of the possession.[71]

b. Instructions—(I) *Generally*—(A) *As to Offense*—(1) In General. In prosecutions for wilfully driving off or removing an animal, with intent to defraud the owner thereof, it is unnecessary to explain the legal meaning of "wilful," for the reason that the existence of an intent to defraud *per se* renders the act wilful; an instruction that the act must have been committed with such an intent is sufficient.[72]

(2) Degrees of Offense. Where the offense consists of different degrees, for which different punishments are prescribed, and the proof warrants a conviction for either degree of the offense, the jury should be informed of the elements of both;[73] but, unless the higher degree is charged, it is improper to instruct that a conviction can be had therefor,[74] though, in a proper case, the jury may be restricted in its finding to a consideration of guilt of the inferior degree.[75]

(3) Authority of Defendant. An instruction which misstates the law, as that one acting under the authority of another must know that the latter had the right to give it, and that one person cannot give authority over stock in more than one brand, justifies the reversal of a judgment of conviction.[76]

(B) *As to Concurrent Offenses.* Where the state proves that, at the time of the

property was taken, but also in any county through or into which the thief may have carried the same. Shubert *v.* State, 20 Tex. App. 320. See also *supra*, VIII, B, 3.

64. Kemp *v.* State, 38 Tex. 110.

65. See *supra*, VIII, B, 5, a, (I), (B), (1).

66. Texas act of Nov. 12, 1866, art. 2410*e*.

67. Wills *v.* State, 40 Tex. 69.

68. Darnell *v.* State, 43 Tex. 147.

69. Wills *v.* State, 40 Tex. 69; Kemp *v.* State, 38 Tex. 110. See also Smith *v.* State, 41 Tex. 168, holding that accused may prove his purchase of the cattle from one having authority from its owner, without supplementing this evidence by proof that such owner had a bill of sale, duly recorded and certified, etc.

70. Saltillo *v.* State, 16 Tex. App. 249; Beachamp *v.* State, (Tex. Crim. 1894) 28 S. W. 807 (also holding that unless the explanations or statements offered are set out in the bill of exceptions the error is unavailable on appeal); Bawcom *v.* State, 41 Tex. 189 (wherein the court refused to permit defendant to prove instructions given to his employees).

71. Saltillo *v.* State, 16 Tex. App. 249.

72. Wheeler *v.* State, 23 Tex. App. 598, 5 S. W. 160 [*disapproving* the *dicta* in Owens *v.* State, 19 Tex. App. 242, and Shubert *v.* State, 20 Tex. App. 320, in which latter case the holding *obiter*, was that an instruction that "by 'wilfully' is meant that the act was done without any claim or right in the animal," although not so full as it might be, was sufficient in the absence of any exception thereto].

73. Campbell *v.* State, 42 Tex. 591.

74. Long *v.* State, 43 Tex. 467, wherein the court, erroneously assuming that both degrees were charged, whereas the lesser one alone was well charged, instructed that there might be a conviction under either count, and the jury found a general verdict of guilty and assessed the punishment as imprisonment, it being held immaterial that the punishment inflicted might have been assessed as the maximum for the lesser and the minimum for the higher grade.

75. Marshall *v.* State, 4 Tex. App. 549 [*citing*, in support of the text, Counts *v.* State, 37 Tex. 593; Campbell *v.* State, 42 Tex. 591].

76. Wills *v.* State, 40 Tex. 69.

driving off of the animal named in the indictment, defendant committed a similar act in respect to animals of another owner, it devolves on the trial court to limit in its charge the purpose for which such testimony was admitted, and the failure to do so is error.[77]

(c) *Nullifying Effect of Defense.* An instruction which tends to deprive accused of exculpatory circumstances in his defense, as where accused defended on the ground of mistake, and the jury were informed that the taking could not be presumed to be in good faith, but was presumptively felonious, is prejudicial error.[78]

(II) *Non-Prejudicial Instructions.* Mere non-prejudicial instructions cannot be successfully complained of.[79]

c. Province of Jury — Intent. It is for the jury to determine whether or not defendant acted in good faith in believing that he had authority to control the stock in question;[80] and where fraudulent intent is one of the elements of the higher grade of the offense the question of its existence is for the jury, in order that they may determine the punishment to be assessed.[81]

d. Verdict — Conviction of Lesser Offense. A verdict finding defendant guilty, and fixing the amount of the fine, in legal effect acquits of the higher, and convicts of the lower, degree of the offense, where, by reference to the charge of the court, the intention of the jury is manifest.[82] Where a statute denounces the offense in two sections, each prescribing a different grade — one constituting theft, and the other the wilful driving, by a person, from its accustomed range, of an animal not his own, a misdemeanor constituting an offense of lesser degree — on trial of an indictment for the greater offense accused may be convicted of the lesser, in view of a general statutory provision that, on trial of an offense consisting of different degrees, there may be a conviction for the lesser one.[83]

IX. ESTRAYS.

A. Definition. An estray is defined at common law as a wandering animal[84]

77. Wheeler *v.* State, 23 Tex. App. 598, 5 S. W. 160.

78. State *v.* Swayze, 11 Oreg. 357, 359, 3 Pac. 574, where the erroneous instruction was "that the taking of such live animals out of the range, with intent to appropriate the entire dominion over them and convert them to the taker's use, cannot be presumed to be in good faith," and that such a taking is presumptively felonious; defendant claiming to have taken the property as abandoned or lost, although that was not the fact.

79. As where the jury were informed that, under certain circumstances, the grade of the offense could be reduced by them. Darnell *v.* State, 43 Tex. 147.

80. Wills *v.* State, 40 Tex. 69.

81. Bawcom *v.* State, 41 Tex. 189.

82. Marshall *v.* State, 4 Tex. App. 549, intimating, however, that it would have been better for the jury to have acquitted of the higher grade of offense, that is, theft,— and to have convicted of the inferior offense,— that is, illegally driving cattle from their accustomed range.

83. Counts *v.* State, 37 Tex. 593.

84. **Tame or reclaimable animals.**— In 1 Bl. Comm. 298, it is said: "Any beasts may be estrays that are by nature tame or reclaimable, and in which there is a valuable property, as sheep, oxen, swine and horses, which we in general call cattle. . . . Animals upon which the law sets no value, as a dog or cat, and animals *feræ naturæ*, as a bear or wolf, cannot be considered as estrays. . . . The reason of which distinction seems to be that cattle and swans being of a reclaimed nature, the owner's property in them is not lost merely by their temporary escape; and they, also, from their intrinsic value, are a sufficient pledge for the expense of the lord of the franchise in keeping them the year and day."

A gelding may become an estray. Owens *v.* State, 38 Tex. 555.

Oxen other than work-oxen are included in the generic term "cattle" employed in the statute relating to estrays. State *v.* Moreland, 27 Tex. 726.

"Stray beast in suffering condition."— Conn. Stat. tit. 59, § 5, provides for the taking up, care, and ultimate disposition of "any stray beast in a suffering condition." It has been held that by the term "stray beast in a suffering condition" is meant any beast gone astray and likely, unless taken care of, to suffer injury or be wholly lost to the owner. Sturges *v.* Raymond, 27 Conn. 473.

Fowl.— In Case of Swans, 7 Coke 18*a*, it is said that "a swan may be an estray, and so cannot any other fowl." But see Amory *v.* Flyn, 10 Johns. (N. Y.) 102, 6 Am. Dec. 316, wherein it was held that where wild

whose owner is unknown;[85] but in some statutes the term is used in the broader sense of any wandering or roving animal.[86]

B. Taking Up — 1. Right to Take Up — a. Who May Exercise Right. By some statutes it is provided that none but a householder[87] or freeholder[88] can take up an estray, and under such statutes the power cannot be delegated.[89]

b. Where. In some of the states the place where estrays may lawfully be taken up is prescribed by statute,[90] while under the statutes of others the place

geese, which had been tamed and strayed away, but without regaining their natural liberty, are found, the finder of the property has no right to a reward from the owner, but is entitled to pay for his necessary expenses in their preservation.

85. Kinney *v.* Roe, 70 Iowa 509, 30 N. W. 776; People *v.* Kaatz, 3 Park. Crim. (N. Y.) 129; Shepherd *v.* Hawley, 4 Oreg. 206; Roberts *v.* Barnes, 27 Wis. 422, in which latter case it was held that the statutory provision that "any person taking up a stray shall, within seven days thereafter, notify the owner thereof, if to him known," must be understood as referring to a case in which the owner becomes known within the seven days.

Other definitions of the word have been given as follows: "A beast which, having escaped from its keeper, wanders over the fields, its owner being unknown." Spelman Gloss. [*quoted* in Roberts *v.* Barnes, 27 Wis. 422].

"An animal found in an unusual place for such an animal, or an animal that has roved for some time in a certain place whose owner is unknown." E. Imbeaux Co. *v.* Severt, 9 La. Ann. 124.

"An animal that has escaped from its owner and wanders or strays about." Stewart *v.* Hunter, 16 Oreg. 62, 65, 16 Pac. 876, 8 Am. St. Rep. 267; Burrill L. Dict. [*quoted* in Shepherd *v.* Hawley, 4 Oreg. 206].

"Any valuable animal, not wild, found wandering from its owner." Webster Dict. [*quoted* in Kinney *v.* Roe, 70 Iowa 509, 30 N. W. 776].

"A wandering beast, which no one seeks, follows, or claims." Burrill L. Dict. [*quoted* in Roberts *v.* Barnes, 27 Wis. 422].

"Cattle whose owner is unknown." 2 Kent Comm. 359 [*quoted* in Weber *v.* Hartman, 7 Colo. 13, 1 Pac. 230, 49 Am. Rep. 339; Kinney *v.* Roe, 70 Iowa 509, 30 N. W. 776; Walters *v.* Glats, 29 Iowa 437].

"Such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner thereof." 1 Bl. Comm. 297 [*quoted* in Weber *v.* Hartman, 7 Colo. 13, 1 Pac. 230, 49 Am. Rep. 339; Kinney *v.* Roe, 70 Iowa 509, 30 N. W. 776].

See 2 Cent. Dig. tit. "Animals," § 194.

Manner of animal's escape immaterial.— Under the definitions it is plainly immaterial how the animal escaped from the owner — whether by his voluntary act, by the act of a trespasser upon his premises, or by a thief. Kinney *v.* Roe, 70 Iowa 509, 30 N. W. 776; Thompson *v.* Cullinane, 22 La. Ann. 586; Patterson *v.* McVay, 7 Watts (Pa.) 482.

A horse tied to a post in the highway by its owner (Alok *v.* Gerke, 6 Hawaii 569), or by a thief (Hall *v.* Gildersleeve, 36 N. J. L. 235), is not an estray.

An animal running on the range where it is used, or where it was permitted to run by its owner, could not be considered an estray, because in so doing it could not be considered as having escaped or wandered away from its owner. Stewart *v.* Hunter, 16 Oreg. 62, 16 Pac. 876, 8 Am. St. Rep. 267; Shepherd *v.* Hawley, 4 Oreg. 206.

Cattle, driven along the road in charge of a herder, which, in passing, casually eat of the grass growing on the roadside, are not estrays, nor does the fact that the herder accidentally falls asleep constitute them such. Thompson *v.* Corpstein, 52 Cal. 653.

Hogs left in pen of stock-yard by an unknown owner are not estrays within the meaning of the Ohio statute which has reference to animals "running at large." Millcreek Tp. *v.* Brighton Stock Yards Co., 27 Ohio St. 435.

Where person who had charge of animal was known such animal is not an estray. Lyons *v.* Van Gorder, 77 Iowa 600, 42 N. W. 500.

Question for jury.— The question as to whether the animals were estrays or not was a very proper one for the jury to determine after being instructed as to what constitutes an estray under the statute referred to. Stewart *v.* Hunter, 16 Oreg. 62, 16 Pac. 876, 8 Am. St. Rep. 267.

86. Thus, in Wood *v.* Davis, 12 Kan. 575, 577, the court, per Brewer, J., said: "We are inclined . . . to think that the word 'stray' is used in the statute in the sense of wandering — roving — as defined by Webster, and as ordinarily understood, and not in the sense of the old common-law term, 'estrays;'" and to the same effect see Worthington *v.* Brent, 69 Mo. 205; State *v.* Apel, 14 Tex. 428.

87. Weber *v.* Hartman, 7 Colo. 13, 1 Pac. 230, 49 Am. Rep. 339; Shepherd *v.* Hawley, 4 Oreg. 206.

88. Newsom *v.* Hart, 14 Mich. 233.

Evidence of right to take up.— Where the statute authorizes a person "holding land in this state by deed, title-bond, or lease" to take up estrays, the deed, title-bond, or lease is the best evidence of such holding until shown to have been lost or destroyed, and parol evidence of possession of the land is not admissible until such ownership is shown. McDevitt *v.* Powel, Tappan (Ohio) 54.

89. Weber *v.* Hartman, 7 Colo. 13, 1 Pac. 230, 49 Am. Rep. 339; Newsom *v.* Hart, 14 Mich. 233.

90. Improved lands.— Under the New Jersey statute an estray can be taken up only

where they are taken up may affect the time of year when taking up is permissible.[91]

c. When. With respect to the time when estrays may be taken up, some statutes provide that if the animal be unbroken it can be taken up only at certain seasons,[92] unless it be found in a lawful inclosure.[93]

2. Duty of Taker-Up — a. Advertising and Posting — (I) *Necessity for.* At common law estrays were required to be proclaimed in the church and two market-towns next adjoining the place where they were found,[94] and under most statutes relating to estrays the taker-up must give notice of the facts by posting or advertising.[95] A person who takes up an estray and fails to advertise it as required by law cannot acquire property therein by lapse of time or continued possession,[96] and is not entitled to any compensation.[97]

(II) *Sufficiency.* The advertisement must be in the time[98] and manner[99] pro-

when on improved lands. Hall *v.* Gildersleeve, 36 N. J. L. 235.

Must have broken over or through lawful fence.— In order to justify the taking up and posting of cattle under Mo. Rev. Stat. § 7333, it must be pleaded and shown by the evidence that they had broken over or through a lawful fence, and without this proof, plaintiff, in an action of replevin for the cattle so taken up and posted, is entitled to a judgment on proof of ownership of the cattle. Storms *v.* White, 23 Mo. App. 31.

Plantation or place of residence.— Under the Iowa statute the right of the taker-up of an estray is confined to his plantation or place of residence, and does not extend to the entire township in which he resides; but, if his farm or plantation be situated in different townships, he may take up in either, only it must be on such plantation or farm. In section 6 of the statute, which provides that the taker-up must make oath that the property was taken up at his or her plantation or place of residence in said county, "or otherwise, as the case may be," these latter words refer to, and contemplate, a case of taking up without, and not within, the settlement, as provided for in section 8 of the statute. Howes *v.* Carver, 3 Iowa 257.

Vicinity of residence.— Under the Colorado statute an estray may be taken up only by a householder when found in the vicinity of his residence. Weber *v.* Hartman, 7 Colo. 13, 1 Pac. 230, 49 Am. Rep. 339. And in Shepherd *v.* Hawley, 4 Oreg. 206, it was held that the animal must be in the "habit of running at large about his premises."

91. See *infra*, IX, B, 1, c.

92. Ray *v.* Davison, 24 Mo. 280; Parker *v.* Evans, 23 Mo. 67.

An estray can be taken up only between the months of November and May, "except breachy or vicious animals, which may be taken up in any month." Shepherd *v.* Hawley, 4 Oreg. 206, 208.

Hogs cannot be taken up as estrays in August. White *v.* Brim, 48 Mo. App. 111.

93. Parker *v.* Evans, 23 Mo. 67.

Not applicable to broken animals.— Iowa Code, § 1464, provides "that no person shall take up any unbroken animal, as a stray, between the first day of May, and the first day of November, unless the same is found within his lawful inclosure." Under this statute it has been held that if the estray is not an unbroken animal, or is not taken up between the first day of May and the first day of November, there is no qualification or restriction of the right of a householder to take it up, and hence a broken animal, to wit, a work-horse, may be taken up as an estray when running in the highway. Knudson *v.* Gilson, 38 Iowa 234.

94. 1 Bl. Comm. 298.

95. Cory *v.* Dennis, 93 Ala. 440, 9 So. 302; McMillan *v.* Andrew, 50 Ill. 282; Hyde *v.* Pryor, 13 Ill. 64; Harryman *v.* Titus, 3 Mo. 302; Wright *v.* Richmond, 21 Mo. App. 76; Chaffee *v.* Harrington, 60 Vt. 718, 15 Atl. 350.

See 2 Cent. Dig. tit. "Animals," § 199.

It is no excuse for failure to advertise a stray animal that the owner has claimed the animal and promised to produce proof of ownership. Wright *v.* Richmond, 21 Mo. App. 76. But see Campbell *v.* Headen, 89 Ill. App. 172, holding that where the owner of a horse which had strayed away sent word to the finder not to advertise, and that he would come and get him, he is estopped from urging the failure to advertise as an objection to the finder's claim for repayment for feed and care.

96. McMillan *v.* Andrew, 50 Ill. 282; Hyde *v.* Pryor, 13 Ill. 64 (wherein it was held that he could not recover the animal in trover from another to whom it had escaped, and who had advertised it as required by law); Wright *v.* Richmond, 21 Mo. App. 76 (wherein it was held that he could not maintain replevin for the animal against the owner, who had taken it from his possession).

97. Harryman *v.* Titus, 3 Mo. 302.

98. **Computation of time.**— The statute requires that the person who finds a stray beast shall advertise the same within six days. The date when the advertisement is posted is excluded in the computation of time. Chaffee *v.* Harrington, 60 Vt. 718, 15 Atl. 350.

99. Thus, where the statute requires notice, if the owner is unknown, "to be posted in three public places near the lands of complainant," the constable's return, stating that he "executed the within by posting three notices near the place where taken up," is not sufficient proof that the statutory notice was

vided by statute. It must correctly name the taker-up,[1] and must describe the animal as accurately as possible.[2]

b. Affidavit of Taker-Up. Where the statute provides that, in case no person claims and proves property in an estray within the time limited, the taker-up shall make affidavit to certain facts before a justice of the peace, such oath need not be in writing, although the information required must be reduced to writing and entered on the justice's estray-book.[3]

c. Appraisement. Where the statute prescribes for the appraisement of estrays the appraisement must be made by the persons mentioned in the statute,[4] and should show that the appraisers acted under oath.[5] A delay of one day in making the return will not, however, render the proceedings void or subject the taker-up to any penalty.[6]

d. Bond. Under the Kansas statute requiring the taker-up to give bond in double the value of the estray it has been held that the bond is based upon the value of the property as ascertained by proceedings under the subsequent sections of the statute, and is not to be given until their termination.[7]

e. Manner of Keeping. The taker-up of an estray, in order to acquire title, is not required to keep the animal within an inclosure for the time limited by law. It is sufficient if he bestow such care and attention upon the animal as a prudent and careful man bestows upon his own animals of the same kind.[8]

f. Notice of Accident. Some statutes require the taker-up of an estray, in order to exempt himself from any liability for an unavoidable accident thereto, to certify the same to the clerk, who shall make an entry thereof in the estray-book. Since the object is to advise the owner of the property, when examining the estray-books, of such loss or accident, if actual notice is given him the object of the law is fully accomplished.[9]

3. Duty of Claimant. Before the taker-up of an estray is bound to deliver the same, it is necessary for plaintiff to prove his property before a justice of the peace, and to procure an order from such justice requiring defendant to deliver the same to plaintiff, and also that he should then and there tender the fees for posting and keeping said animal.[10]

given. Cory *v.* Dennis, 93 Ala. 440, 9 So. 302.

Where the owner is known N. H. Gen. Laws, c. 144. does not require the taker-up of an estray to give notice in the manner there specified. Hardy *v.* Nye, 63 N. H. 612, 3 Atl. 631 [*citing* Jones *v.* Smyth, 18 N. H. 119].

1. A mistake in the name of the taker-up is a fatal defect, in the advertisement of estrays, where the notice fails to so describe the locality as will enable the owner to find his property. McMillan *v.* Andrew, 50 Ill. 282.

2. Chaffee *v.* Harrington, 60 Vt. 718, 15 Atl. 350.

3. Harryman *v.* Titus, 3 Mo. 302.

The affidavit is no evidence of the facts therein stated in a suit brought by such person against one claiming to be the general owner of the estray. Parker *v.* Evans, 23 Mo. 67.

4. Under the Georgia code the estrays must be appraised by two freeholders of the militia district where taken up, and if appraised by persons not freeholders, no cause, providential or otherwise, appearing for not complying with the statute, the taker-up is liable to the penalty prescribed by Ga. Code, § 1436. Walker *v.* Collier, 61 Ga. 341.

Interest in a homestead estate is sufficient to qualify one as an appraiser. Houser *v.* Scott, 65 Ga. 425.

5. Harryman *v.* Titus, 3 Mo. 302.

6. Houser *v.* Scott, 65 Ga. 425.

7. Culbert *v.* Taylor, 7 Kan. 243.

8. Parker *v.* Evans, 23 Mo. 67.

9. Culbert *v.* Taylor, 7 Kan. 243.

10. Davis *v.* Calvert, 17 Ark. 85; Phelan *v.* Bonham, 9 Ark. 389.

Notice of time and place of proving claim. — Ala. Code (1876), § 1569, provides that if the owner of an estray, within one year from the execution of the bond given under section 1558, claims the same he must notify the taker-up, and satisfactorily establish his claim before a justice of the county, either by his own or another's oath. By a fair and reasonable interpretation of this statute the party claiming an estray must notify the taker, not only of his claim, but also of the time, place, and before what justice he will establish it. The intention of the statute is that the taker-up shall have an opportunity to appear and contest claimant's ownership. If the owner of an estray does not appear within the time prescribed, and as provided by statute, he forfeits his right thereto, and the property is vested in the taker-up. It could not be intended that the taker-up should be deprived of his possession and qualified property in the estray, and of his absolute right thereto, in event the owner forfeits his right by an *ex parte* proceeding. Stephenson *v.* Brunson, 83 Ala. 455, 3 So. 768.

4. Right of Taker-Up — a. To Appeal from Justice. Under the Arkansas statute it is held that an appeal will not lie from an order of a justice of the peace in reference to estrays, the only object of the statute being to enable the taker-up to restore the animal to its owner and obtain indemnity against the bond given to the county, the right to the animal not being determined.[11]

b. To Compensation. The taker-up of an estray has a lien upon the property for his lawful charges,[12] and cannot be divested of his possession until such charges are paid.[13] The rate of compensation is prescribed by some statutes,[14] while under others the amount must be determined by certain judicial officers.[15] The right of compensation may be lost by failure to advertise,[16] or by putting the estray to work;[17] but, where the right has been lost by failure to advertise, the owner, by an express promise to pay him, waives his right to take advantage of the taker-up's non-compliance with the statute.[18]

c. To Use Animal. The taker-up of an estray cannot use it except when necessary for its preservation and for the benefit of the rightful owner,[19] and if the taker-up do so he forfeits his claim for compensation,[20] besides subjecting himself to an action.[21]

d. Property — (I) *In General.* A person who takes up an estray and complies with the requirements of the statute is constituted a bailee of the animal during the time he is required to keep it; he is vested with a qualified property in the subject of the bailment,[22] which becomes absolute on failure of the owner

11. Langley *v.* Barkman, 23 Ark. 293.

12. Garabrant *v.* Vaughn, 2 B. Mon. (Ky.) 327; Ford *v.* Ford, 3 Wis. 399.

13. *Illinois.*— Mahler *v.* Holden, 20 Ill. 363.

Indiana.— Logan *v.* Marquess, 53 Ind. 16.

Kentucky.— Garabrant *v.* Vaughn, 2 B. Mon. (Ky.) 327.

Missouri.— Rice *v.* Underwood, 27 Mo. 551; Gorman *v.* Studt, 10 Mo. App. 584.

England.— 1 Bl. Comm. 298.

See 2 Cent. Dig. tit. "Animals," § 201.

But see E. Imbeaux Co. *v.* Severt, 9 La. Ann. 124, to the effect that a person who takes up an estray has no right to retain possession of it until the damages and charges are paid, since he has a direct action therefor.

Right to reimburse by sale.— The Oregon statute gives the party a claim upon the animal for the reasonable expense incurred, and authorizes a sale of it in order to reimburse him, the remainder of the proceeds of the sale being deposited for the owner. Such a statute is constitutional. Stewart *v.* Hunter, 16 Oreg. 62, 16 Pac. 876, 8 Am. St. Rep. 267.

Not recoverable in trespass.— In an action of trespass *quare clausum fregit* for taking from plaintiff a cow which he had taken up and held as an estray, it is not proper to allow as damages what it was worth to pasture the cow while plaintiff had it, nor expense incurred by him in advertising her as an estray. Gervais *v.* Powers, 1 Minn. 45.

Owner's property is not lost by failure, before the expiration of one year within which the owner is required to appear and prove his property, to pay the legal costs for keeping an estray, if he has established his claim within the limited period, and such failure is caused by the absence or other act of the taker-up, or by any other reason which excuses delay. Stephenson *v.* Brunson, 83 Ala. 455, 3 So. 768.

14. Hause *v.* Rose, 6 Colo. 24; Jones *v.* Clouser, 114 Ind. 387, 16 N. E. 797.

15. Stephenson *v.* Brunson, 83 Ala. 455, 3 So. 768; Parker *v.* King, Ga. Dec. pt. 1, 131.

By whom determined.— The same justice before whom the owner proved his property must determine the compensation to which the taker-up is entitled, if the parties cannot agree. Stephenson *v.* Brunson, 83 Ala. 455, 3 So. 768.

16. See *supra*, IX, B, 2, a, (I).

17. See *infra*, IX, B, 4, c.

18. Boothe *v.* Fitzpatrick, 36 Vt. 681.

19. Weber *v.* Hartman, 7 Colo. 13, 1 Pac. 230, 49 Am. Rep. 339; Barrett *v.* Lightfoot, 1 T. B. Mon. (Ky.) 241, 15 Am. Dec. 110; Oxley *v.* Watts, 1 T. R. 12; 1 Bl. Comm. 298.

No necessity of his own, as to send for a physician, will justify such use. Barrett *v.* Lightfoot, 1 T. B. Mon. (Ky.) 241, 15 Am. Dec. 110.

20. Weber *v.* Hartman, 7 Colo. 13, 1 Pac. 230, 49 Am. Rep. 339; Parker *v.* King, Ga. Dec. pt. 1, 131.

21. See *infra*, IX, B, 6, a, (I).

22. McCrossin *v.* Davis, 100 Ala. 631, 13 So. 607; Stephenson *v.* Brunson, 83 Ala. 455, 3 So. 768; Hudgins *v.* Glass, 34 Ala. 110. But see 1 Bl. Comm. 298, to the effect that "the king or lord has no property till the year and day passed: for if a lord keepeth an estray three quarters of a year, and within the year it strayeth again, and another lord getteth it, the first lord cannot take it again."

Right to pursue, recapture, or recover.— Where the taker-up has pursued the statutory course, and the animal escapes during the bailment, he may pursue and recapture it, or recover it from the person into whose possession it has passed (Hudgins *v.* Glass, 34 Ala. 110; Hendricks *v.* Decker, 35 Barb. (N. Y.) 298), but he does not have such right if he has failed to comply with the requirements

to appear and prove his property within the time prescribed.[23] Laws like the estray laws, however, are construed strictly against the party claiming the benefit thereof, and he must follow their provisions closely, or lose all benefit therefrom;[24] and it has been held that he must not only show that he did all on his part exactly as the law requires it, but must also show that all which the law required of the justice was done by him.[25]

(II) *How Pleaded.* In an action of replevin a plea[26] that defendant took up the animal as an estray and regularly posted it as such, as required by law, and that plaintiff did not prove property in said estray, and pay or tender the necessary fees as required by law, is sufficient without setting forth in detail the compliance with all the steps required by the statute in posting a stray animal;[27] nor need it be averred that defendant was not guilty of any abuse of the animal, or that he had not suffered him to be worked, or that he did not drive him out of the woods, etc., for if defendant, in regard to the estray, violated the law, that is matter to be shown in replication.[28]

(III) *How Proved.* Where the law requires all proceedings in posting estrays before a justice of the peace to be in writing, it is error to permit the fact that animals were posted to be proved by parol,[29] without laying a foundation by showing that the original papers and the justice's docket were lost or destroyed;[30] but if such evidence be not pertinent to any issue in the cause, and could not mislead,[31] or if produced to the jury without objection by plaintiff,[32] a judgment will not be reversed for such error.

of the statute (Hyde *v.* Pryor, 13 Ill. 64; Bayless *v.* Lefaivre, 37 Mo. 119; Wright *v.* Richmond, 21 Mo. App. 76; Duncan *v.* Starr, 9 Lea (Tenn.) 238).

Supports allegation of ownership in indictment.— The taker-up of an estray has such a property in the animal as will support an allegation of ownership in him in an indictment, whether he has proceeded in conformity with the estray laws (Jinks *v.* State, 5 Tex. App. 68), or not (Blackburn *v.* State, 44 Tex. 457).

23. McCrossin *v.* Davis, 100 Ala. 631, 13 So. 607; Stephenson *v.* Brunson, 83 Ala. 455, 3 So. 768; Hudgins *v.* Glass, 34 Ala. 110; Crook *v.* Peebly, 8 Mo. 344; 1 Bl. Comm. 298.

See 2 Cent. Dig. tit. "Animals," § 205.

Keeping requisite time.— One must have kept the animal for the length of time prescribed in the act in order to acquire property in an estray. Geohagan *v.* Baker, 3 Bibb (Ky.) 284; Hudson *v.* Agee, 6 Bush (Ky.) 366. The forfeiture of the owner's title to the taker-up does not depend, however, upon the fact that the possession of the latter is continuous and without any interruption during the statutory period. If it did, the escape of the animal three days, or even one day, before the end thereof would defeat the bailee's title, and the taker-up might be held responsible for the value of the property to the owner, without any right of recapture. Hudgins *v.* Glass, 34 Ala. 110.

24. *Alabama.*— McCrossin *v.* Davis, 100 Ala. 631, 13 So. 607.

Georgia.— Walker *v.* Collier, 61 Ga. 341.

Illinois.— McMillan *v.* Andrew, 50 Ill. 282.

Indiana.—Haffner *v.* Barnard, 123 Ind. 429, 24 N. E. 152.

Kentucky.— Geohagan *v.* Baker, 3 Bibb (Ky.) 284.

Michigan.— Newsom *v.* Hart, 14 Mich. 233.

Missouri.— Crook *v.* Peebly, 8 Mo. 344.

But see Chicago, etc., R. Co. *v.* Schultz, 55 Ill. 421, to the effect that a person in possession of an animal which he has taken up as an estray may maintain an action against a wrongdoer for injury thereto, although, in endeavoring in good faith to comply with the statutory provisions regarding estrays, he failed to give the requisite notice in respect to the same; and that such a recovery will be a bar to any subsequent action by the true owner for the same injury.

The requisitions of the statute are necessary muniments of title against the original owner, and it is incumbent upon one who relies on such a title to see that the statute has been complied with, and to preserve the evidence to show such compliance. McCrossin *v.* Davis, 100 Ala. 631, 13 So. 607.

25. Harryman *v.* Titus, 3 Mo. 302.

26. **For forms of pleas** in replevin that animal had been estrayed see Davis *v.* Calvert, 17 Ark. 85; Barnes *v.* Tannehill, 7 Blackf. (Ind.) 604.

27. Davis *v.* Calvert, 17 Ark. 85.

28. Barnes *v.* Tannehill, 7 Blackf. (Ind.) 604.

29. Mattingly *v.* Crowley, 42 Ill. 300; Watson *v.* Mathews, 36 Tex. 278.

The law will not presume in favor of the taker-up that an officer, who, upon receipt of his fees, is bound to transmit a notice to the publisher of advertisements of estrays, has done his duty. Crook *v.* Peebly, 8 Mo. 344.

Insufficient evidence.— Evidence by the probate judge that he was "satisfied that the advertisement was duly made" is insufficient to show that the provisions of Ala. Code (1886), §§ 1343, 1344, were complied with. McCrossin *v.* Davis, 100 Ala. 631, 13 So. 607.

30. Mattingly *v.* Crowley, 42 Ill. 300.

31. Mattingly *v.* Crowley, 42 Ill. 300.

32. Phelan *v.* Bonham, 9 Ark. 389.

5. Right of Owner to Proceeds of Sale. Under a Wyoming statute which provides that the secretary of the live-stock commission shall pay the proceeds from a sale of estrays to the claimant thereof, on proof of ownership, which shall be in the form prescribed by the statute, it has been held that the secretary may, in addition to the statutory evidence, require corroboration of claimant's proof; and mandamus will not lie to compel the secretary to pay such proceeds to a claimant, unless the former has abused his discretion and refused to consider proofs presented to him.[33]

6. Liability of Taker-Up — a. Civil — (I) *In General.* A taker-up who neglects to pursue the course prescribed by statute is liable to an action of trover if he refuse to deliver the animal to its owner upon demand,[34] and to an action of trespass for working an estray, although the original taking was lawful.[35]

(II) *Under Statutes* — (A) *In General.* Under some statutes the taker-up may be proceeded against in a civil action for penalties for violation of the laws in regard to estrays;[36] but, where one has proceeded in good faith, he will not be liable to the statutory penalty for trifling irregularities.[37]

(B) *Form of Action.* Where the statute points out a particular way for recovering the penalty, it cannot be recovered in any other way.[38]

(C) *Pleading.* The complaint or declaration must aver facts which bring the case within the statute.[39]

33. State *v.* Live Stock Com'rs, 4 Wyo. 126, 32 Pac. 114.

34. Wilson *v.* McLaughlin, 107 Mass. 587; Nelson *v.* Merriam, 4 Pick. (Mass.) 249.

To support a special action on the case for negligence in not complying with the requisites of the act concerning estrays, it is necessary for plaintiff to show both the negligence and the injury sustained by him in consequence thereof. Palmer *v.* West, 12 Johns. (N. Y.) 186.

35. Barrett *v.* Lightfoot, 1 T. B. Mon. (Ky.) 241, 15 Am. Dec. 110; Wilson *v.* McLaughlin, 107 Mass. 587; Nelson *v.* Merriam, 4 Pick. (Mass.) 249; Murgoo *v.* Cogswell, 1 E. D. Smith (N. Y.) 359; Oxley *v.* Watts, 1 T. R. 12; Bagshawe *v.* Goward, Cro. Jac. 147; 1 Bl. Comm. 298.

36. A person who kills an estray within twelve months after the straying, and appropriates it to his own use, is liable to the penalty given by the statutes against "any person who shall take up or use an estray contrary to the meaning of the act," this statute referring to any kind of use or disposition which will defeat its general objects. Simpson *v.* Talbot, 25 Ala. 469.

Failure to notify of delivery, death, or escape.— The taker-up of estrays is required by law to give the clerk of the court notice, if any have been delivered to the owner, died, or escaped without his fault, within twelve months, and to account with him for such as he still holds; yet, if he fails to do so, he is not liable beyond the condition of his bond — that is, one half the appraised value of such as are not reclaimed by the owner or such as have not died or escaped. Lowndes County Ct. *v.* Anderson, 11 Ala. 410.

Insufficient appraisement.—The person who takes up estrays, has them appraised by two persons not freeholders and sold, no cause, providential or otherwise, appearing for not complying with the statute, is liable to the penalty prescribed in the Code, § 1436. Walker *v.* Collier, 61 Ga. 341.

Selling at residence instead of court-house. — The taker-up of an estray who sells the animal at his residence instead of at the court-house is liable to the county for one half the value of the animal; and the fact that the party paid into the county treasury one half the proceeds of the sale is no satisfaction of his bond. Erath County *v.* Robinson, 30 Tex. 435.

Selling within twelve months.— The fourth section of the Alabama act of 1820 (Clay's Dig. p. 550, § 4), which gives a penalty against any person who shall sell an estray before the expiration of twelve months, applies only to estrays which are taken up and appraised as required by the first section of the act. Smith *v.* Ewers, 21 Ala. 38.

Working an animal which one has received as an estray, from another person who had taken it up but failed to comply with the law in regard to estrays, while rendering the one working it a trespasser, will not make him liable to the statutory penalty. Butler *v.* Cook, 14 Ala. 576.

37. Houser *v.* Scott, 65 Ga. 425.

38. Ward *v.* Tyler, Nott & M. (S. C.) 22.

Brought in whose name.— A suit to recover a penalty, under Ill. Rev. Stat. c. 50, § 34, giving a penalty for failure to comply with the requisites of the chapter relating to estrays, may be brought in the name of the informer, and the state has no interest in the recovery. Such suit should be brought in the name of the informer, for use of himself and the county. Ryder *v.* Hulscher, 40 Ill. App. 77.

39. Thus, a declaration upon N. H. Gen. Laws, c. 144, § 10, to recover twice the value of stray beasts found and taken up by defendant whereof no notice has been given, must allege that the owner was unknown, since

b. Criminal—(I) *In General.* An indictment charging a person who has taken up an estray with non-compliance with the provisions of the statute must state the particular acts which defendant has omitted to perform.[40]

(II) *Converting.* An affidavit and information which charges defendant with the unlawful conversion of estrayed property is sufficient if the charge is made substantially in the language of the statute defining the offense.[41] It should be shown by proper allegations that the animal was the subject of illegal conversion;[42] but in describing the conversion the use of the word "convert" is sufficient, and alleges a fact the particulars of which need not be set out.[43]

(III) *Killing.* The gist of the offense of unlawfully killing an estray is the unlawful disposition of the animal, and the venue should be laid where such disposition is made, and not where the animal is estrayed.[44] The indictment should sufficiently charge that defendant did the killing,[45] and should charge that the act was done "without complying with the laws regulating estrays."[46]

(IV) *Selling.* Under a statute against disposing of an estray before title vests, an indictment for selling an estray must allege that the sale was before the title was vested in the taker-up.[47]

(V) *Taking Up and Using*—(A) *In General.* Taking up and using an estray without first having legally advertised the same, and without first having made oath and estrayed the same according to law, authorizes a criminal prosecution;[48] but to constitute the offense the accused must both "take up and use" the animal. It is not enough to use it.[49]

no notice is required if the owner is known. Hardy *v.* Nye, 63 N. H. 612, 3 Atl. 631. And, in an action for the penalty given by the Alabama statute against "any person who shall take up or use an estray contrary to the meaning of the act," the complaint or declaration should aver that the killing was within twelve months after the appraisement, and since, where the time is alleged under a *videlicet*, the pleader is not required to prove it as alleged, when the time of killing an estray is thus alleged, although the time specified is within twelve months after the alleged estraying, it is not a sufficient averment that it was within the twelve months. Simpson *v.* Talbot, 25 Ala. 469.

40. Dixon *v.* State, 4 Blackf. (Ind.) 312.

41. Smith *v.* State, 85 Ind. 553, wherein it was held that the affidavit and information would not be held bad on motion to quash merely because they contained other matter not sufficient to constitute a charge of knowingly violating the provisions of the estray law in regard to advertising the taking up of stray property.

42. Thus the Indiana statute provides that no animal shall be taken up between the first day of April and the first day of November unless the same be found in the inclosure of the taker-up; hence an indictment for converting estrays must allege that the animals were taken up on a day between the first day of November and the first day of April, or that they were found in the inclosure of the taker-up. Greene *v.* State, 79 Ind. 537.

43. Greene *v.* State, 79 Ind. 537.

44. Brogden *v.* State, 44 Tex. 103.

45. State *v.* Derossett, 19 Mo. 383; State *v.* Hutchinson, 26 Tex. 111, wherein it was held that the omission of the word "did" was a fatal defect which could not be supplied by intendment.

46. State *v.* Hutchinson, 26 Tex. 111.

47. State *v.* Williams, 19 Mo. 389.

Sufficient indictment.—An indictment, alleging time and place, which charged that defendant did wilfully and unlawfully take up and trade off to certain named persons one estray bay gelding, of a brand stated, and of the value of thirty dollars, without having first complied with the laws regulating estrays, was held to sufficiently charge an offense, although it would have been better to have followed more closely the language of the statute. State *v.* Dunham, 34 Tex. 675.

48. State *v.* Armontrout, 21 Tex. 472.

Extends to what cases.—"Where the statute provided how estrays 'when on the plantation or land of any citizen of this state' should be taken up by 'such citizen' and disposed of; and, further, 'that any person who shall take up and use any "such estray" contrary to the intent and meaning of this act shall be guilty of a misdemeanor,' etc., it was held that the penalty was not confined to cases where such estrays were taken up by a citizen on his plantation or land, but extended to all cases where any such estrays were taken up and used contrary to the intent and meaning of the act." State *v.* Apel, 14 Tex. 428. The animal must, however, have been running at large, and one who takes a horse which was saddled and bridled and hitched to a tree, and uses it without the consent of the owner, cannot be prosecuted under such statute. Cochran *v.* State, 36 Tex. Crim. 115, 35 S. W. 968.

49. Davis *v.* State, 30 Tex. 352, holding that a bail-bond describing the indictment as being for "unlawfully using an estray horse" did not describe an offense known to the law.

(B) *Limitations.* Prosecutions for unlawfully using an estray must be commenced within one year after the commission of the offense.[50]

(C) *Requisites of Indictment* — (1) In General. An indictment which charges the offense of taking up and using an estray in the language of the statute is sufficient.[51]

(2) Particular Averments — (a) Description of Animal. The indictment need not describe the animal by age, sex, color, marks, and brands.[52]

(b) That Animal Was Estray. The indictment must aver that the animal was an estray, and it is not sufficient to describe the animal as "coming within the meaning of an estray."[53]

(c) Value of Animal. Where the punishment depends upon the value of the animal taken up and used, an indictment which fails to aver the value is fatally defective.[54]

(d) Naming Owner. The indictment should state the name of the owner of the estray, if known;[55] but an allegation that the animal was an "estray" is a sufficient averment that the ownership was unknown.[56]

(e) Non-Compliance with Law. The indictment must aver that the taking up and using was done "without complying with the law regulating estrays."[57]

(D) *Evidence.* The evidence must show that the offense was committed within the county where the indictment was found;[58] but beyond this the state has only to prove that the animal was running at large, without a known owner, and that the accused took it up and used it. The burden of proof is then upon the accused to show his compliance with the laws regulating estrays.[59]

X. HERDING ON INCLOSED LANDS OF ANOTHER.

A. Nature and Elements of Offense. In some jurisdictions it is made a penal offense to knowingly cause cattle to go within the inclosed land of another without his consent. Such a statute is designed for the better protection of agri-

50. Owens *v.* State, 38 Tex. 555. But see Davis *v.* State, 2 Tex. App. 162, holding that an indictment for unlawfully taking up and using an estray is not barred by limitation, after the lapse of one year from the taking up of the animal, if the accused continue to use the animal in violation of law within one year before the indictment was found.

51. State *v.* Crist, 32 Tex. 99; Jinks *v.* State, 5 Tex. App. 68.

For forms of indictments for taking up and using an estray see State *v.* Carabin, 33 Tex. 697; State *v.* Crist, 32 Tex. 99; Davis *v.* State, 2 Tex. App. 162.

52. State *v.* Crist, 32 Tex. 99.

Sufficient descriptions.— The following descriptions have been held sufficient: "One bay horse of the value of one hundred dollars." State *v.* Carabin, 33 Tex. 697.

"One horse of the value of one hundred dollars, the property of some person whose name is to the grand jurors unknown, and which horse was then an estray." State *v.* Ivy, 33 Tex. 646.

"A certain stray mule, then and there being found branded with a mule-shoe on the left shoulder, and the tip of the right ear off, of the value of one hundred dollars." State *v.* Anderson, 34 Tex. 611.

53. State *v.* Meschac, 30 Tex. 518.

54. Osborn *v.* State, 33 Tex. 545; Tharp *v.* State, 28 Tex. 696; State *v.* McCormack, 22 Tex. 297.

55. State *v.* Apel, 14 Tex. 428.

Describing owner as "known to the grand jury."— Where the indictment charged defendant with "taking up and using an estray whose owner was known to the grand jury," it was held that the indictment was improperly quashed, for the fact that the owner of the animal had been discovered, and was known when the indictment was found, is no proof that the animal was not an estray when taken up. State *v.* Fletcher, 35 Tex. 740.

56. State *v.* Anderson, 34 Tex. 611.

57. Gonzales *v.* State, 31 Tex. 205.

"Without estraying in manner prescribed by law."— An averment that defendant took up and used certain oxen "without estraying them in the manner prescribed by law" is equivalent to saying that they were taken up and used "without complying with the laws regulating estrays" in the language of the statute; but it is better to pursue the words of the statute, as it precludes all doubt about the meaning of the expression used. State *v.* Moreland, 27 Tex. 726.

58. Tharp *v.* State, 28 Tex. 696.

59. Ashcroft *v.* State, 32 Tex. 108.

Insufficient evidence.— Evidence that a horse broke into defendant's pasture, and was there for three years, and that defendant's boys were seen to use it, where there is no evidence that defendant ever handled the horse, or used it in any way, does not justify a conviction for violation of the estray law. Thompson *v.* State, 37 Tex. Crim. 654, 40 S. W. 997.

culturists against wanton or reckless depredation of live stock upon their crops, by furnishing to such persons another and more efficient remedy than a suit for damages.[60] To render one guilty of the offense it is essential that the inclosed lands be another's;[61] and that the act be knowingly done.[62] Where the statute makes it a misdemeanor for any person, occupying or cultivating lands under a common fence with others, to "turn stock of any kind into such inclosure, or knowingly suffer such stock to go at large therein, without a sufficient guard to prevent injury to crops," though the inclosing fence should be substantial, it is not necessary that it should be a statutory fence.[63]

B. Indictment. The indictment is sufficient if it describe the stock as a certain number of "head of cattle," without using the statutory word "drove;"[64] and it need not be alleged who owns the land, it being sufficient to charge that accused is not the owner.[65] Where the punishment is determined by the number of hours the stock was herded after notice to leave, the indictment should allege the number of hours the stock was so herded.[66]

C. Defenses. It is no defense to a prosecution for this offense that defendant's father owned a part of the fence which inclosed the land, nor that part of such land was not owned by the complainant.[67]

D. Evidence. On a prosecution for knowingly causing cattle to go within the inclosed land of another, without consent of the owner, it is pertinent to show that defendant had no right, claim, or interest in the pasture, and that the prosecutor was not only the possessor, but the rightful possessor thereof.[68]

XI. INJURIES BY ANIMALS.

A. In General — 1. NATURE AND EXTENT OF LIABILITY FOR — a. Generally — (1) *WILD ANIMALS.* While it is not in itself unlawful for a person to keep wild beasts, though they may be such as are of a nature fierce, dangerous, and irreclaimable,[69] yet it is the duty of those who own or keep them to do it in such a manner

60. Cleveland *v.* State, 8 Tex. App. 44 [*quoted* with approval in Jones *v.* State, 18 Tex. App. 366].

61. Thus where accused was convicted of knowingly causing horses to go within the inclosed land of one B without his consent, and the proof was that he rented from B a part of a field, and turned his horses upon the part he rented, whence they strayed on to the other part; that the crop had been gathered, and nothing was stipulated in the rental contract upon the subject, it was held that he had the right to pasture his horse on the land he had rented and that the conviction was not warranted by law. Coggins *v.* State, 12 Tex. App. 109.

So, too, defendant cannot be punished for putting more cattle in a pasture than he is authorized to do by reason of the quantity of land owned by him there. Yarbrough *v.* State, 37 Tex. Crim. 357, 39 S. W. 941.

62. Yarbrough *v.* State, 28 Tex. App. 481, 13 S. W. 775, holding that where defendant put his cattle into A's lot, supposing it belonged to B, and with the latter's consent, the act was not knowingly done.

63. Cole *v.* State, 72 Ala. 216.

64. Caldwell *v.* State, 2 Tex. App. 53.

65. Caldwell *v.* State, 2 Tex. App. 53.

66. Linney *v.* State, 5 Tex. App. 344.

67. Clayton *v.* State, (Tex. Crim. 1894) 25 S. W. 122.

68. Dickens *v.* State, (Tex. Crim. 1898) 46 S. W. 246.

Insufficient evidence.— Under a statute making it a misdemeanor for any person, occupying or cultivating land under a common fence with others, to "turn stock of any kind into such inclosure, or knowingly suffer stock to go at large therein, without a sufficient guard to prevent injury to crops," a conviction cannot be had on proof that defendant, acting in good faith, suffered his hogs to range at large in a woodland adjoining such inclosure, where they made their way into it through defects in the common fence. Cole *v.* State, 72 Ala. 216. See also a somewhat similar state of facts, held insufficient to sustain a conviction under the Texas statute, in Clements *v.* State, 21 Tex. App. 258, 17 S. W. 156.

Variance.— Where defendant was prosecuted for knowingly causing his horse to go within the inclosure of one Vinson, without the latter's consent, and the proof showed that Vinson and one Vaughn, the defendant's employer, separately rented and cultivated distinct parts of the same field, and that defendant, in disregard of repeated warnings, turned his horse loose on his employer's part of the field, whence it passed to, and trespassed upon, Vinson's crop, there was no variance between the information and the proof, and the conviction was sustained. Cleveland *v.* State, 8 Tex. App. 44.

69. Muller *v.* McKesson, 10 Hun (N. Y.) 44; Scribner *v.* Kelley, 38 Barb. (N. Y.) 14.

as will absolutely prevent the occurrence of an injury to others through such vicious acts of the animals as they are naturally inclined to commit.[70] For any injury they may do to others the person keeping them is liable,[71] without any particular notice that they did any such things before,[72] such notice being conclusively presumed from the nature of the animal.[73] It seems, however, that evidence of tameness may be received, under some circumstances, in reduction of damages.[74]

(II) *Domestic Animals* — (A) *In General.* The owner or keeper of a domestic animal not naturally inclined to commit mischief, while bound to exercise ordinary care to prevent injury being done by it to another,[75] is not liable for such injury if the animal be rightfully in the place when the mischief is done,[76] unless it is affirmatively shown, not only that the animal was vicious, but that the owner or keeper had knowledge of the fact.[77] When such *scienter* exists, the

70. Vredenburg *v.* Behan, 33 La. Ann. 627; Scribner *v.* Kelley, 38 Barb. (N. Y.) 14; Besozzi *v.* Harris, 1 F. & F. 92.

The strange appearance of an elephant, whereby plaintiff's horse became unruly, is not such an act of the elephant as to render its keeper liable without showing that such was the effect on horses, generally, and that the keeper knew thereof. Scribner *v.* Kelley, 38 Barb. (N. Y.) 14.

71. *Delaware.*— Warner *v.* Chamberlain, 7 Houst. (Del.) 18, 30 Atl. 638.

Illinois.— Moss *v.* Pardridge, 9 Ill. App. 490.

Louisiana.— Vredenburg *v.* Behan, 33 La. Ann. 627.

Maine.—Decker *v.* Gammon, 44 Me. 322, 69 Am. Dec. 99.

New York.— Muller *v.* McKesson, 73 N. Y. 195, 29 Am. Rep. 123.

See 2 Cent. Dig. tit. "Animals," § 227.

72. *Maine.*— Decker *v.* Gammon, 44 Me. 322, 69 Am. Dec. 99.

Missouri.— Bell *v.* Leslie, 24 Mo. App. 661.

New York.— Muller *v.* McKesson, 10 Hun (N. Y.) 44.

Pennsylvania.— Com. *v.* Fourteen Hogs, 10 Serg. & R. (Pa.) 393.

United States.— Congress, etc., Spring Co. *v.* Edgar, 99 U. S. 645, 25 L. ed. 487.

England.— Filburn *v.* People's Palace, etc., Co., 25 Q. B. D. 258; Rex *v.* Huggins, 2 Ld. Raym. 1574; Buller N. P. 77; Baker's Case [*cited* in 1 Hale P. C. 430].

Thus, in an action to recover damages for personal injuries, sustained by plaintiff from an elephant which was exhibited by defendants, the jury found that defendants did not know the elephant to be dangerous. It was held, however, that defendants were liable, as the animal did not belong to a class which, according to the experience of mankind, is not dangerous to man, and therefore the owner kept such an animal at his own risk, and his liability for damage done by it was not affected by his ignorance of its dangerous character. Filburn *v.* People's Palace, etc., Co., 25 Q. B. D. 258.

73. Laverone *v.* Mangianti, 41 Cal. 138, 10 Am. Rep. 269; Moss *v.* Pardridge, 9 Ill. App. 490; Decker *v.* Gammon, 44 Me. 322, 69 Am. Dec. 99; Muller *v.* McKesson, 73 N. Y. 195, 29 Am. Rep. 123; Keenan *v.* Gutta Percha, etc., Mfg. Co., 46 Hun (N. Y.) 544 [*affirmed* in 120 N. Y. 627, 24 N. E. 1096]; Earl *v.* Van Alstine, 8 Barb. (N. Y.) 630.

74. Besozzi *v.* Harris, 1 F. & F. 92.

75. Meredith *v.* Reed, 26 Ind. 334.

76. Reed *v.* Southern Express Co., 95 Ga. 108, 22 S. E. 133, 51 Am. St. Rep. 62; Decker *v.* Gammon, 44 Me. 322, 69 Am. Dec. 99; Johanson *v.* Howells, 55 Minn. 61, 56 N. W. 460; Morgan *v.* Hudnell, 52 Ohio St. 552, 40 N. E. 716, 49 Am. St. Rep. 741, 27 L. R. A. 862.

Injuries by animals while running at large see *infra*, XI, A, 1, d.

Injuries by trespassing animals see *infra*, XI, A, 1, e.

77. *Alabama.*— Kitchens *v.* Elliott, 114 Ala. 290, 21 So. 965; Smith *v.* Causey, 22 Ala. 568; Durden *v.* Barnett, 7 Ala. 169.

California.— Clowdis *v.* Fresno Flume, etc., Co., 118 Cal. 315, 50 Pac. 373, 62 Am. St. Rep. 238; Finney *v.* Curtis, 78 Cal. 498, 21 Pac. 120.

Delaware.— Warner *v.* Chamberlain, 7 Houst. (Del.) 18, 30 Atl. 638.

Georgia.— Reed *v.* Southern Express Co., 95 Ga. 108, 22 S. E. 133, 51 Am. St. Rep. 62.

Illinois.— Mareau *v.* Vanatta, 88 Ill. 132; Stumps *v.* Kelley, 22 Ill. 140; West Chicago St. R. Co. *v.* Walsh, 78 Ill. App. 595; Moss *v.* Pardridge, 9 Ill. App. 490.

Indiana.— Klenberg *v.* Russell, 125 Ind. 531, 25 N. E. 596.

Kentucky.— Murray *v.* Young, 12 Bush (Ky.) 337.

Maine.— Decker *v.* Gammon, 44 Me. 322, 69 Am. Dec. 99.

Missouri.— Beckett *v.* Beckett, 48 Mo. 396; Staetter *v.* McArthur, 33 Mo. App. 218; Bell *v.* Leslie, 24 Mo. App. 661.

New Jersey.— Angus *v.* Radin, 5 N. J. L. 957, 8 Am. Dec. 626.

New York.— Moynahan *v.* Wheeler, 117 N. Y. 285, 22 N. E. 702, 27 N. Y. St. 152; Van Leuven *v.* Lyke, 1 N. Y. 515, 49 Am. Dec. 346 [*affirming* 4 Den. (N. Y.) 127]; Vrooman *v.* Lawyer, 13 Johns. (N. Y.) 339; Lawlor *v.* French, 2 N. Y. App. Div. 140, 37 N. Y. Suppl. 807; Muller *v.* McKesson, 10 Hun (N. Y.) 44; Quinn *v.* Knickerbocker Ice Co., 2 N. Y. City Ct. 202 note.

North Carolina.— Hallyburton *v.* Burke County Fair Assoc., 119 N. C. 526, 26 S. E. 114, 38 L. R. A. 156.

owner or keeper is accountable for all the injury such animal may do,[78] without proof of any negligence or fault in the keeping,[79] and regardless of his endeavors to so keep the animal as to prevent the mischief.[80] Knowledge of such propensity

Ohio.— Morgan *v.* Hudnell, 52 Ohio St. 552, 40 N. E. 716, 49 Am. St. Rep. 741, 27 L. R. A. 862.

Oklahoma.— Meegan *v.* McKay, 1 Okla. 59, 30 Pac. 232.

Oregon.— Dufer *v.* Cully, 3 Oreg. 377.

Pennsylvania.— Com. *v.* Fourteen Hogs, 10 Serg. & R. (Pa.) 393; Curtis *v.* Schlosser, 14 Pa. Co. Ct. 600, 3 Pa. Dist. 598.

Wisconsin.— Dearth *v.* Baker, 22 Wis. 73.

United States.— Congress, etc., Spring Co. *v.* Edgar, 99 U. S. 645, 25 L. ed. 487.

England.— Cox *v.* Burbridge, 13 C. B. N. S. 430, 106 E. C. L. 430; Rex *v.* Huggins, 2 Ld. Raym. 1574; Buller N. P. 77.

See 2 Cent. Dig. tit. "Animals," §§ 228 *et seq.*, 288 *et seq.*

Must recognize general propensities of class.— The owner of a domestic animal is bound to take notice of the general propensities of the class to which it belongs, and must anticipate and guard against them, if of a nature to cause injury, for he necessarily knows that the act will be committed if opportunity offers. So the keeper of a stallion is bound to take notice of the well-known propensities of stallions in general, and to use such degree of care to avoid injury from such propensities as the nature of the animal may reasonably require; but he is under no obligation to guard against injuries which he has no reason to expect from the animal, either on account of the propensities of stallions in general, or some disposition of the individual animal of which he has notice. Hammond *v.* Melton, 42 Ill. App. 186.

There is no general propensity on part of horses to bite persons who come near them, and, if done at all, it is done by one that is exceptionally vicious. No such disposition having been discovered in a horse, the owner is under no obligation to anticipate that it will suddenly bite a passer-by, and is not bound to guard against such an occurrence; and if the horse bites somebody, and is not wrongfully in the place where this happens, the owner will not be held liable for the injury. Reed *v.* Southern Express Co., 95 Ga. 108, 22 S. E. 133, 51 Am. St. Rep. 62.

The owner of a cat, which has no known mischievous tendencies other than such as ordinarily belong to its species, is not liable for any damage which it may commit. McDonald *v.* Jodrey, 8 Pa. Co. Ct. 142.

The owner of a cow, accustomed to hook — the vicious propensity being known to her owner — is liable for damage done by her, although it be done in the highway against the land of her owner, and while going to her usual watering-place. Coggswell *v.* Baldwin, 15 Vt. 404, 40 Am. Dec. 686.

The owner of bees is not liable, at all events, for any accidental injury they may do. Earl *v.* Van Alstine, 8 Barb. (N. Y.) 630.

78. *Illinois.*— Pickering *v.* Orange, 2 Ill. 492, 32 Am. Dec. 35; Norris *v.* Warner, 59 Ill. App. 300; Hammond *v.* Melton, 42 Ill. App. 186.

Indiana.— Graham *v.* Payne, 122 Ind. 403, 24 N. E. 216; Partlow *v.* Haggarty, 35 Ind. 178.

Kentucky.— Com. *v.* Steffee, 7 Bush (Ky.) 161.

Maine.— Decker *v.* Gammon, 44 Me. 322, 69 Am. Dec. 99.

Michigan.— Knowles *v.* Mulder, 74 Mich. 202, 41 N. W. 896, 16 Am. St. Rep. 627.

New Jersey.— Roehers *v.* Remhoff, 55 N. J. L. 475, 26 Atl. 860.

New York.— Quilty *v.* Battie, 135 N. Y. 201, 32 N. E. 47, 48 N. Y. St. 413, 17 L. R. A. 521; Kinmouth *v.* McDougall, 64 Hun (N. Y.) 636, 19 N. Y. Suppl. 771, 46 N. Y. St. 211 [*affirmed* in 139 N. Y. 612, 35 N. E. 204]; Muller *v.* McKesson, 10 Hun (N. Y.) 44; Koney *v.* Ward, 2 Daly (N. Y.) 295, 36 How. Pr. (N. Y.) 255; Jacoby *v.* Ockerhausen, 13 N. Y. Suppl. 499, 37 N. Y. St. 710 [*affirmed* in 129 N. Y. 649, 29 N. E. 1032].

Vermont.— Oakes *v.* Spaulding, 40 Vt. 347, 94 Am. Dec. 404; Coggswell *v.* Baldwin, 15 Vt. 404, 40 Am. Dec. 686.

England — 1 Hale P. C. 430.

79. *Alabama.*— Strouse *v.* Leipf, 101 Ala. 433, 14 So. 667, 46 Am. St. Rep. 122, 23 L. R. A. 622.

Illinois.— Ahlstrand *v.* Bishop, 88 Ill. App. 424.

Indiana.— Partlow *v.* Haggarty, 35 Ind. 178.

Louisiana.—Montgomery *v.* Koester, 35 La. Ann. 1091, 48 Am. Rep. 253.

Massachusetts.— Popplewell *v.* Pierce, 10 Cush. (Mass.) 509.

Michigan.— Snow *v.* McCracken, 107 Mich. 49, 64 N. W. 866; Brooks *v.* Taylor, 65 Mich. 208, 31 N. W. 837.

Missouri.— Forbes *v.* Shellabarger, 50 Mo. 558.

New Hampshire.— Chickering *v.* Lord, 67 N. H. 555, 32 Atl. 773.

New York.— Lynch *v.* McNally, 73 N. Y. 347 [*affirming* 7 Daly (N. Y.) 126]; Kelly *v.* Tilton, 2 Abb. Dec. (N. Y.) 495; Keenan *v.* Gutta Percha, etc., Mfg. Co., 46 Hun (N. Y.) 544 [*affirmed* in 120 N. Y. 627, 24 N. E. 1096]; Woodbridge *v.* Marks, 14 Misc. (N. Y.) 368, 36 N. Y. Suppl. 81, 71 N. Y. St. 417; Rogers *v.* Rogers, 4 N. Y. St. 373.

Pennsylvania.—Barry *v.* Johnston, 16 Wkly. Notes Cas. (Pa.) 35.

United States.— Congress, etc., Spring Co. *v.* Edgar, 99 U. S. 645, 25 L. ed. 487.

England.— Jackson *v.* Smithson, 15 M. & W. 563; Card *v.* Case, 5 C. B. 622, 57 E. C. L. 622; May *v.* Burdett, 9 Q. B. 101, 58 E. C. L. 101; 1 Hale P. C. 430.

80. Hammond *v.* Melton, 42 Ill. App. 186; Blackman *v.* Simmons, 3 C. & P. 138, 14 E. C. L. 491. But see Worthen *v.* Love, 60 Vt. 285, 14 Atl. 461 (to the effect that one, though he knows of a vicious propensity of

only at a particular season, as when a mare is in heat, imposes no duty on the owner to restrain the animal at other times.[81]

(B) *Dogs*[82] — (1) Liability of Owner or Keeper — (a) Civilly — aa. *In General.* By the common law the rule applicable to domestic animals, generally,[83] was equally applicable to dogs;[84] but in some jurisdictions it is provided

his dog, is not liable for damages caused by the dog if such owner exercises proper care and diligence to secure the animal so that the latter will not injure any one who does not unlawfully provoke or intermeddle with him), and Hayes *v.* Smith, 62 Ohio St. 161, 56 N. E. 879 (holding that the gist of an action to recover damages for a personal injury inflicted by a vicious dog is the keeping of the dog "in a negligent manner" after knowledge of his vicious propensities, rather than the keeping of the animal with such knowledge; but that, where it is shown that the animal has been kept after knowledge of his dangerous character has been acquired, or circumstances have been shown from which the law would imply knowledge, and an injury has followed, it is *prima facie* evidence of negligence).

The reason of the rule is to enable strangers to pursue their own objects with security from vicious animals. The public are entitled to act upon the presumption that all dangerous animals are properly confined, and people are therefore exonerated from any special caution against such beasts, except when, without right, persons go upon the land of the owner of such animals, and within the place where the latter may be lawfully kept. Earhart *v.* Youngblood, 27 Pa. St. 331.

Among the ancient Jews an increased liability was recognized in cases of injury by animals known to be vicious, and in Exodus xxi: 28, 29, it is written: "If an ox gore a man or woman, that they die; then the ox shall be surely stoned, and the flesh shall not be eaten; but the owner of the ox shall be quit. But if the ox were wont to push with his horn in time past, and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or a woman; the ox shall be stoned, and his owner also shall be put to death."

81. Tupper *v.* Clark, 43 Vt. 200.

82. **Peculiar status of dogs.** — In Briscoe *v.* Alfrey, 61 Ark. 196, 199, 32 S. W. 505, 54 Am. St. Rep. 203, 30 L. R. A. 607, the court said: "The status of the dog before the law is *sui generis.* Bishop Non-Contr. Law, § 1233. The vicious dog, in general, and the odious sheep-killer in particular . . . are under the law's especial condemnation. Without entering upon a discussion of the reasons therefor, it suffices to say that no legislation or decision with reference to injuries by dogs do we regard as analogous to that of the other purely domestic animals of the kind enumerated in our statute." And in Van Horn *v.* People, 46 Mich. 183, 9 N. W. 246, 41 Am. Rep. 159, it was held that dogs are properly subjected to special and peculiar regulations, for the purpose of repressing the mischief likely to be done by them to more valuable property and to persons.

83. See *supra,* XI, A, 1, a, (II), (A).

84. *Alabama.* — Smith *v.* Causey, 22 Ala. 568; Durden *v.* Barnett, 7 Ala. 169.

California. — Laverone *v.* Mangianti, 41 Cal. 138, 10 Am. Rep. 269.

Connecticut. — Woolf *v.* Chalker, 31 Conn. 121, 81 Am. Dec. 175.

Delaware. — Barclay *v.* Hartman, 2 Marv. (Del.) 351, 43 Atl. 174; Jones *v.* Carey, 9 Houst. (Del.) 214, 31 Atl. 976; Warner *v.* Chamberlain, 7 Houst. (Del.) 18, 30 Atl. 638.

District of Columbia. — Murphy *v.* Preston, 5 Mackey (D. C.) 514.

Illinois. — Mareau *v.* Vanatta, 88 Ill. 132; Kightlinger *v.* Egan, 75 Ill. 141; Wormley *v.* Gregg, 65 Ill. 251; Brent *v.* Kimball, 60 Ill. 211, 14 Am. Rep. 35; Stumps *v.* Kelley, 22 Ill. 140; Pickering *v.* Orange, 2 Ill. 492, 32 Am. Dec. 35; Ahlstrand *v.* Bishop, 88 Ill. App. 424; Moss *v.* Pardridge, 9 Ill. App. 490.

Indiana. — Dockerty *v.* Hutson, 125 Ind. 102, 25 N. E. 144.

Kentucky. — Murray *v.* Young, 12 Bush (Ky.) 337.

Maryland. — Goode *v.* Martin, 57 Md. 606, 40 Am. Rep. 448.

Michigan. — Kennett *v.* Engle, 105 Mich. 693, 63 N. W. 1009; Elliott *v.* Herz, 29 Mich. 202.

Minnesota. — Cuney *v.* Campbell, 76 Minn. 59, 78 N. W. 878.

Missouri. — Speckmann *v.* Kreig, 79 Mo. App. 376; Curtwright *v.* Crow, 44 Mo. App. 563.

New Hampshire. — Kittredge *v.* Elliott, 16 N. H. 77, 41 Am. Dec. 717.

New Jersey. — Smith *v.* Donohue, 49 N. J. L. 548, 10 Atl. 150, 60 Am. Rep. 652; Evans *v.* McDermott, 49 N. J. L. 163, 6 Atl. 653, 60 Am. Rep. 602; Perkins *v.* Mossman, 44 N. J. L. 579; Angus *v.* Radin, 5 N. J. L. 957, 8 Am. Dec. 626.

New York. — Muller *v.* McKesson, 73 N. Y. 195, 29 Am. Rep. 123 [*affirming* 10 Hun (N. Y.) 44]; Rider *v.* White, 65 N. Y. 54, 22 Am. Rep. 600; Strubing *v.* Mahar, 46 N. Y. App. Div. 409, 61 N. Y. Suppl. 799; O'Connell *v.* Jarvis, 13 N. Y. App. Div. 3, 43 N. Y. Suppl. 129; Fairchild *v.* Bentley, 30 Barb. (N. Y.) 147; Wheeler *v.* Brant, 23 Barb. (N. Y.) 324; Laherty *v.* Hogan, 13 Daly (N. Y.) 533, 1 N. Y. St. 84 [*affirming* 2 N. Y. City Ct. 197]; Lynch *v.* McNally, 7 Daly (N. Y.) 126; Van Ness *v.* Desheimer, 2 N. Y. City Ct. 208 note; Feick *v.* Andel, 1 N. Y. City Ct. Suppl. 61; Tifft *v.* Tifft, 4 Den. (N. Y.) 175; Hinckley *v.* Emerson, 4 Cow. (N. Y.) 351, 15 Am. Dec. 383.

Ohio. — Gries *v.* Zeck, 24 Ohio St. 329; Job *v.* Harlan, 13 Ohio St. 485.

Pennsylvania. — Sylvester *v.* Maag, 155 Pa. St. 225, 26 Atl. 392, 35 Am. St. Rep. 878; Mann *v.* Weiand, 81* Pa. St. 243; Mulherrin

by statute that the owner or keeper shall be liable for injuries to person or property, without regard to his knowledge of the animal's mischievous propensity,[85] while in others such knowledge is not an element of liability when the injury is to sheep or other live stock.[86] Such statutes, however, have been strictly construed,[87]

v. Henry, 11 Pa. Co. Ct. 49, 1 Pa. Dist. 607; Zimett *v.* Hollenback, 9 Kulp (Pa.) 564.

Tennessee.— Wheatley *v.* Harris, 4 Sneed (Tenn.) 468, 70 Am. Dec. 258; Sherfey *v.* Bartley, 4 Sneed (Tenn.) 58, 67 Am. Dec. 597.

Texas.— Triolo *v.* Foster, (Tex. Civ. App. 1900) 57 S. W. 698.

Wisconsin.— Slinger *v.* Henneman, 38 Wis. 504; Kertschacke *v.* Ludwig, 28 Wis. 430.

United States.—Shaw *v.* Craft, 37 Fed. 317.

England.— Cox *v.* Burbridge, 13 C. B. N. S. 430, 106 E. C. L. 430; Hogan *v.* Sharpe, 7 C. & P. 755, 32 E. C. L. 856; Sarch *v.* Blackburn, 4 C. & P. 297, 19 E. C. L. 523; Stiles *v.* Cardiff Steam Nav. Co., 33 L. J. Q. B. 310; Mason *v.* Keeling, 1 Ld. Raym. 606, 12 Mod. 332; Smith *v.* Pelah, 2 Str. 1264; Fleeming *v.* Orr, 29 Eng. L. & Eq. 16; Sanders *v.* Teape, 51 L. T. Rep. N. S. 263; Buller N. P. 77.

See 2 Cent. Dig. tit. "Animals," §§ 233 *et seq.*, 283 *et seq.*

Chasing pheasants.— An action lies against the owner of a dog who, knowing the animal to have a propensity for chasing and destroying game, permits it to be at large, and the dog in consequence "breaks and enters" plaintiff's wood, and chases and destroys young pheasants which are being reared there under domestic hens. Read *v.* Edwards, 17 C. B. N. S. 245, 112 E. C. L. 245.

Following and lying under team.— A person who knows that his dog is in the habit of following his teams and watching them after they are hitched and left by him; and that such dog is accustomed to attack and bite strangers approaching teams so watched, is liable for any injury done by the dog to a person lawfully approaching the team for the purpose of unhitching it. A man owning such a dog, knowing its character, must secure it at home so that it will not follow him. If it follows him, and bites a person rightfully coming to remove the team from an inn-shed where the owner has left it, and where the dog is watching it, such owner is liable in damages. Fairchild *v.* Bentley, 30 Barb. (N. Y.) 147.

Defendant is not liable where her dog, while following her along the street, ran into an adjoining yard and there seized and killed plaintiff's dog, the act of defendant's dog not being attributable to any active or passive volition on the part of defendant. Buck *v.* Moore, 35 Hun (N. Y.) 338.

85. *Connecticut.*— Woolf *v.* Chalker, 31 Conn. 121, 81 Am. Dec. 175.

Kentucky.— Koestel *v.* Cunningham, 97 Ky. 421, 17 Ky. L. Rep. 296, 30 S. W. 970.

Massachusetts.— Pressey *v.* Wirth, 3 Allen (Mass.) 191; Brewer *v.* Crosby, 11 Gray (Mass.) 29.

Michigan.— Newton *v.* Gordon, 72 Mich. 642, 40 N. W. 921; Elliott *v.* Herz, 29 Mich. 202.

New Hampshire.— Orne *v.* Roberts, 51 N. H. 110.

Ohio.— Gries *v.* Zeck, 24 Ohio St. 329.

Wisconsin.— Meracle *v.* Down, 64 Wis. 323, 25 N. W. 412; Schaller *v.* Connors, 57 Wis. 321, 15 N. W. 389.

Barking and leaping at horse's head.— The keeper of a dog is liable, under the Massachusetts statute, for double the amount of damages sustained in consequence of a sudden attack by the dog upon plaintiff's horse, and barking and leaping at the horse's head, and thereby frightening him and rendering him unmanageable. Sherman *v.* Favour, 1 Allen (Mass.) 191.

Causing horse to kick plaintiff.— Under Mich. Comp. Laws (1897), § 5593, providing that the owner or keeper of a dog assaulting, biting, or otherwise injuring any person, while traveling the highway, shall be liable in double the amount of damages sustained, plaintiff was entitled to recover for injuries sustained while traveling on a highway by a dog attacking his horse, causing it to kick him in the face and run away. Jenkinson *v.* Coggins, 123 Mich. 7, 81 N. W. 974.

86. *Illinois.*— Brent *v.* Kimball, 60 Ill. 211, 14 Am. Rep. 35.

Kansas.—Ballou *v.* Humphrey, 8 Kan. 220.

Michigan.— Trompen *v.* Verhage, 54 Mich. 304, 20 N. W. 53.

Missouri.—Jacobsmeyer *v.* Poggemoeller, 47 Mo. App. 560; Curtwright *v.* Crow, 44 Mo. App. 563.

New Hampshire.— East Kingston *v.* Towle, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174.

New York.— Fish *v.* Skert, 21 Barb. (N. Y.) 333.

Ohio.— Job *v.* Harlan, 13 Ohio St. 485.

Pennsylvania.— Kerr *v.* O'Connor, 63 Pa. St. 341.

Wisconsin.— Slinger *v.* Henneman, 38 Wis. 504.

Canada.— Reg. *v.* Perrin, 16 Ont. 446.

87. **Apply only to enumerated animals.**— The fact that the legislature dispensed with this proof as to "sheep or lamb" is indicative of an intention to leave attacks upon other animals, or upon human beings, to be governed by the common-law rule in regard to *scienter*. Van Ness *v.* Desheimer, 2 N. Y. City Ct. 208 note. See also Kertschacke *v.* Ludwig, 28 Wis. 430, wherein it is doubted if Wis. Laws (1886), c. 110, § 13, changed the common-law rule, except as to injuries done by killing or worrying sheep. But see Wright *v.* Pearson, L. R. 4 Q. B. 582, holding that the term "cattle" in 28 & 29 Vict. c. 60, § 1, includes horses and mares.

Apply only to enumerated injuries.— The statute making the owner of a dog which shall kill or wound sheep liable, without notice that he was mischievous, has no application where the sheep were only chased and

and *scienter* continues to be an element of the liability, unless explicitly dispensed with.[88]

bb. *For Penalty.* By some statutes a penalty is imposed for failure to kill a dog within a specified time after notice that it has bitten a person, or killed other domestic animals. Under such statutes it has been held that only the owner is liable for the penalty,[89] and that, where the statute authorizes a supervisor to sue for the penalty in the name of the township, a ward supervisor is not authorized to bring such action where, under the city charter, the ward is a mere territorial division of the municipal corporation, with no treasury of its own, and no capacity of suit.[90]

(b) Criminally. It seems that it is an indictable offense to keep a dog accustomed to bite mankind, to the terror and common nuisance of the people,[91] and it is competent for a municipal corporation to provide that, if any citizen keep or harbor such an animal, he shall be fined therefor.[92]

(2) Liability of Municipal Corporations — (a) In General. The legislature has power to make towns liable for damage done within their limits by dogs, and to give towns a right of action to recover, from the owners of the dogs, the actual damage done;[93] and statutes providing for a tax on dogs, and appropriating the resulting fund to the payment of damages done by such dogs, are constitutional, being an exercise of the police power of the state.[94]

worried. In that case there must be proof of the *scienter* to render defendant liable. Osincup *v.* Nichols, 49 Barb. (N. Y.) 145; Auchmuty *v.* Ham, 1 Den. (N. Y.) 495.

Apply only to owner.— It is only when the declaration alleges defendant to be the owner of the dog that the allegation of knowledge of its vicious propensity, and proof thereof, is dispensed with. Wormley *v.* Gregg, 65 Ill. 251.

Does not apply to rabid dog.— Mich. Comp. Laws (1871), § 2065, making the owner liable in double damages for the killing, wounding, or worrying of domestic animals by a dog, is penal in its consequences, and is not designed for cases where the owner was in no manner in fault. It does not apply to the case of a rabid dog. Elliott *v.* Herz, 29 Mich. 202.

88. Murphy *v.* Preston, 5 Mackey (D. C.) 514, holding that the act of congress of June 19, 1878, c. 323, § 5, making the owner of a dog in the District of Columbia liable in a civil action for any damage done by such animal, does not relieve plaintiff of the necessity of averring and proving that the owner had knowledge of the animal's vicious propensities.

89. Williamson *v.* Carroll, 16 N. J. L. 217.

90. Bixby *v.* Steketee, 44 Mich. 613, 7 N. W. 229.

91. U. S. *v.* McDuell, 5 Cranch C. C. (U. S.) 391, 26 Fed. Cas. No. 15,672.

92. Com. *v.* Steffee, 7 Bush (Ky.) 161.

93. East Kingston *v.* Towle, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174.

94. Cole *v.* Hall, 103 Ill. 30; Longyear *v.* Buck, 83 Mich. 236, 47 N. W. 234, 10 L. R. A. 43; Van Horn *v.* People, 46 Mich. 183, 9 N. W. 246, 41 Am. Rep. 159; Fairchild *v.* Rich, 68 Vt. 202, 34 Atl. 692.

Statute not retrospective.— Where plaintiff's sheep were injured by dogs before the passage of Vt. Stat. (1894), § 4841, providing that, on failure of the town selectmen to appraise before the first day of December the loss caused by dogs, and to transmit before the thirty-first day of December orders to the township treasurer for the payment of such loss, the party suffering the loss may recover the same from the town, in an action founded on such statute a demurrer to plaintiff's declaration was improperly overruled. Barber *v.* Dummerston, 72 Vt. 330, 47 Atl. 1069.

Acts held unconstitutional.— The Pennsylvania act of June 12, 1878, for the taxation of dogs and the protection of sheep, and providing that it shall only take effect where a majority vote for it, is unconstitutional, under article 3, section 7, of the constitution, prohibiting local legislation. Bowen *v.* Tioga County, 6 Pa. Co. Ct. 613. The New Hampshire act of July 3, 1863, entitled "An act in relation to damages occasioned by dogs," so far as it undertakes to charge the owner with the amount of damage done by his dog, as fixed by the selectmen of the town, without an opportunity to be heard, is unconstitutional because it is contrary to natural justice and not within the scope of legislative authority conferred by the constitution on the general court; and also because it is in violation of the provision in the bill of rights which secures the right of trial by jury in all controversies concerning property, except in cases where it had heretofore been otherwise used and practised. East Kingston *v.* Towle, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174. But see Fairchild *v.* Rich, 68 Vt. 202, 34 Atl. 692, holding that the Vermont statute relating to the payment and collection of damages done by dogs to sheep and other domestic animals is not unconstitutional because the damages are appraised without notice to the owner of the dogs, such appraisal not being conclusive upon the owner, nor being made with reference to the recovery of damages from him.

Additional tax by borough not allowed.— The Pennsylvania acts of April 3, 1867, and

(b) Rights of Injured Person. Under such statutes the injured person has his election to call upon the town or other corporate body for the actual damage, in which case it is not material to inquire who owns or keeps the dog; or the injured person may call directly upon the owner or keeper for double, or sometimes treble, the amount of the damages suffered.[95] The right to recover against a municipal corporation is not confined to persons engaged in sheep husbandry.[96] The claim of owners of sheep to remuneration from the sheep-fund is not affected by the fact that untaxed dogs are kept on the same farm where the sheep were killed, unless the owner had control of the dogs on such farm,[97] or by the fact that the sheep were injured in a township of which the owner was not a resident.[98] Where the intent of the statute is that a permanent fund shall be provided and kept to reimburse owners for all damages done by dogs, if the damages have been properly ascertained[99] they must be paid out of such fund, without reference to the year when the same accrued,[1] such claims being paid in the order of their priority.[2] The injured person cannot maintain an action either of contract or of tort against the town for omission, neglect, or refusal of its selectmen to draw an order in his favor;[3] but in such case the selectmen may be compelled by mandamus to draw such order.[4] Where an order has been issued, assumpsit is the proper form of action thereon,[5] and mandate against the officer holding the fund is not the proper remedy.[6] Under the Connecticut statute it has been held that the town is liable by direct force of the statute, and that the statute does not create a contract obligation, on the part of the town, to make the payment provided for.[7] A complaint founded on the Indiana statute must allege the filing of a sworn statement with the township trustee in accordance with law.[8] In the absence of fraud or mistake on the part of

March 20, 1868, impose an annual tax upon all the dogs in Westmoreland county, to create a fund to pay damages for sheep killed by dogs. An ordinance passed by the borough of Ligonier, in said county, pursuant to the act of May 15, 1889, annually levies and collects an additional tax of like amount on all dogs in the borough. Such additional tax cannot be levied and collected. Crawford *v.* Ligonier, 20 Pa. Co. Ct. 369, 7 Pa. Dist. 176, 28 Pittsb. Leg. J. (Pa.) 328.

Repeal of statute.— The Indiana act of March 5, 1891 (Burns' Rev. Stat. (1894), §§ 2856–2864), which created a method for the taxation of dogs, to the exclusion of all other methods of taxation for such animals, and provided for payment, by township trustees, for horses and other animals maimed and killed by dogs, out of the dog-fund raised by such taxation, was impliedly repealed by the act of March 6, 1891 (Burns' Rev. Stat. (1894), §§ 8457, 8654), which provides another and antagonistic method of taxing such animals, and makes no provision for payment by township trustees for horses so injured. Flatrock Civil Tp. *v.* Rust, 18 Ind. App. 282, 47 N. E. 934.

95. Orne *v.* Roberts, 51 N. H. 110.

See 2 Cent. Dig. tit. "Animals," § 314 *et seq.*

96. Columbia Tp. *v.* Pipes, 122 Ind. 239, 23 N. E. 750.

97. Wetherill *v.* Delaware County, 2 Del. Co. (Pa.) 45, 14 Wkly. Notes Cas. (Pa.) 42.

98. Washington *v.* Applegate, 22 N. J. L. 42.

99. When the statute provides the method by which claims for stock killed by dogs shall be collected, and that payment shall be made upon proof satisfactory to the board of supervisors, the district court has no jurisdiction to pass upon such claims. Hodges *v.* Tama County, 91 Iowa 578, 60 N. W. 185.

1. Morgan *v.* Tioga County, 17 Pa. Co. Ct. 246; Nevin *v.* Dreher School Dist., 2 Pa. Dist. 565.

An unpaid balance of a claim in one year may be carried forward and paid out of the fund collected in the following year. Nevin *v.* Dreher School Dist., 12 Pa. Co. Ct. 449.

Where a permanent fund is not created the township committee for the year 1890 are not charged with the duty of paying damages for the year 1886, the fund for that purpose not going into their hands. Rogers *v.* Neptune Tp. Committee, 52 N. J. L. 487, 20 Atl. 61.

2. Shelby Tp. *v.* Randles, 57 Ind. 390.

3. Chenery *v.* Holden, 16 Gray (Mass.) 125.

4. Osborn *v.* Lenox, 2 Allen (Mass.) 207. See also Washington *v.* Applegate, 22 N. J. L. 42, holding that the remedy of the injured person was not by suit against the township, but not deciding whether it was by mandamus, or original suit against the town committee.

5. Jones *v.* Chester, 67 N. H. 191, 29 Atl. 452.

6. Shelby Tp. *v.* Randles, 57 Ind. 390.

7. Davis *v.* Seymour, 59 Conn. 531, 21 Atl. 1004, 13 L. R. A. 210.

8. Columbia Tp. *v.* Pipes, 122 Ind. 239, 23 N. E. 750.

the selectmen, whose duty it is to appraise the damages, the town is bound to pay only the amount estimated by them.[9]

(c) Rights of Corporation. Where the damage is paid by the town it has a remedy over against the owner or keeper, if a resident,[10] without regard to his knowledge of the animal's vicious propensities.[11] If a non-resident, under some statutes, suit may be instituted against the town where he resides, unless he or such town shall, on notice, pay to the treasurer of the former town the amount of damage.[12] The amount recoverable by the town is the actual damage,[13] not exceeding the amount of the order drawn for the damage by the proper officers,[14] and no more than actual damage can be recovered even when the town has paid more.[15] Under some statutes, the total amount of damage may be recovered from the owner of any one dog, even though part of the damage was done by a dog which belonged to the owner of the injured animal.[16] In an action by a town to recover damages paid by it to the owners of sheep alleged to have been killed by dogs, statements of a selectman that he was satisfied that the injury was the work of dogs, and evidence that defendant's dogs were not vicious, and when in the vicinity of sheep did not attack them, whether in the presence of their owners or not, are admissible.[17]

b. While Being Driven through Street. A person driving animals through the streets will be liable for injuries inflicted by such animals if he was not in the exercise of due care,[18] and in such case the fact that the animal was never actually vicious up to the time of his attack upon plaintiff, and that the person then driving him had no knowledge of such viciousness, will not bar a recovery.[19]

9. Van Hoosear *v.* Wilton, 62 Conn. 106, 25 Atl. 457.

10. Wilton *v.* Weston, 48 Conn. 325; Orne *v.* Roberts, 51 N. H. 110; Tenney *v.* Lenz, 16 Wis. 566.

11. Orne *v.* Roberts, 51 N. H. 110.

12. Wilton *v.* Weston, 48 Conn. 325, holding that such a statute was not invalid, on the ground that it did not provide for an adjudication upon the fact and amount of damage, it being fairly implied that, if the matter is not settled without suit, the fact and amount of damage are to be determined in the suits for which the statute provides, or because it required the town to assume the burden of paying the damage in the first instance.

What constitutes payment.— Where selectmen give to a person, whose sheep have been injured by dogs, an order on the town treasurer, which order was given and received in satisfaction of the claim, it constitutes a payment. Wilton *v.* Weston, 48 Conn. 325.

13. Fairchild *v.* Rich, 68 Vt. 202, 34 Atl. 692.

Payment to one for several.— Under N. H. Pub. Stat. c. 118, §§ 9–13, which provide that a town may pay the owner of sheep for loss occasioned by reason of the worrying or killing of them by dogs, and recover the amount so paid in an action of assumpsit against the owner of the dogs, in an action by the town to recover money paid to one for loss and injury to his own sheep, as well as those of others which he was pasturing, the town cannot recover more than the actual loss occasioned to the party to whom the money was paid, unless the others are joined as parties to the action or are compelled to file releases, or it is shown that they authorized the town to pay damages to the party pasturing their sheep. Unity *v.* Pike, 68 N. H. 71, 44 Atl. 78.

The finding by the township auditors, of the ownership of dogs doing damage to sheep, and of the amount of such damage, is not conclusive. An appeal will be allowed in a suit for such damage. Weakland *v.* Yahner, 2 Pa. Dist. 777. See also Fairchild *v.* Rich, 68 Vt. 202, 34 Atl. 692.

14. East Kingston *v.* Towle, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174.

15. Wilton *v.* Weston, 48 Conn. 325.

16. Worcester County *v.* Ashworth, 160 Mass. 186, 35 N. E. 773.

17. Dover *v.* Winchester, 70 Vt. 418, 41 Atl. 445.

Evidence in rebuttal.— Where, in such an action, defendants introduced testimony to show that, only the summer before the sheep were killed, their dogs went among their sheep, and did not offer to molest them, it was competent for plaintiff to prove that sheep-killing dogs are not accustomed to attack the sheep of their owners, but that they go away to do it. Dover *v.* Winchester, 70 Vt. 418, 41 Atl. 445.

18. Pfaffinger *v.* Gilman, 18 Ky. L. Rep. 1071, 38 S. W. 1088; Hewes *v.* McNamara, 106 Mass. 281; Tillett *v.* Ward, 10 Q. B. D. 17.

It is negligence to turn bulls loose in the streets of a city (Byrne *v.* Morel, 20 Ky. L. Rep. 1311, 49 S. W. 193; Pfaffinger *v.* Gilman, 18 Ky. L. Rep. 1071, 38 S. W. 1088), or to drive a vicious and unmanageable stallion into a crowd of vehicles standing in a place set apart for them away from the traveled road, and, knowing the vicious disposition of the animal, to strike him with a whip (Clore *v.* McIntire, 120 Ind. 262, 22 N. E. 128).

19. Barnum *v.* Terpening, 75 Mich. 557, 42 N. W. 967. See also Puechner *v.* Braun, 10 Pa. Super. Ct. 595.

c. While on Owner's Premises. One who puts a dangerous animal upon his own premises, in a place where he knows that others are in the habit of going, is liable for injuries inflicted by such animal,[20] whether such others have a right to go there or not.[21] The mere keeping of a ferocious dog, for the purpose of protecting one's premises, is not in itself unlawful,[22] though it has been held that if the owner permit it to be at large on his premises, and another person is injured by it in the daytime, the keeper is liable in damages,[23] even though the person injured is at the time a trespasser.[24] Where, however, the dog is lawfully kept, a trespasser cannot maintain an action for an injury if he come in the way of the dog.[25] If the owner of such a dog keep him properly secured,[26] but another without authority lets him loose and urges him to mischief, the owner is not liable.[27]

d. While Running at Large. A person who allows his horses to be at large where they have no right to be, as on a sidewalk,[28] or who allows his cattle to run in a highway,[29] in violation of a statute prohibiting them from running at large therein, is liable in damages for injuries committed by them while so running at large,[30] without reference to the question of the animal's viciousness,[31] and even

20. Melsheimer *v.* Sullivan, 1 Colo. App. 22, 27 Pac. 17; Glidden *v.* Moore, 14 Nebr. 84, 15 N. W. 326, 45 Am. Rep. 98; Mahoney *v.* Dwyer, 84 Hun (N. Y.) 348, 32 N. Y. Suppl. 346, 65 N. Y. St. 608; Brock *v.* Copeland, 1 Esp. 203.

Freedom of pasture-field.— Where a mischievous or vicious animal is given the freedom of a pasture-field, and thereby afforded an opportunity to injure and molest any person who may have occasion to go into, or pass through, the field, the confinement is not such as is regarded in the law. Graham *v.* Payne, 122 Ind. 403, 24 N. E. 216.

21. Glidden *v.* Moore, 14 Nebr. 84, 15 N. W. 326, 45 Am. Rep. 98.

22. Woodbridge *v.* Marks, 17 N. Y. App. Div. 139, 45 N. Y. Suppl. 156; Loomis *v.* Terry, 17 Wend. (N. Y.) 496, 31 Am. Dec. 306; Sarch *v.* Blackburn, 4 C. & P. 297, 19 E. C. L. 523; Brock *v.* Copeland, 1 Esp. 203.

23. Loomis *v.* Terry, 17 Wend. (N. Y.) 496, 31 Am. Dec. 306. See also Wheeler *v.* Brant, 23 Barb. (N. Y.) 324, wherein it was held that where such a dog is suffered to go at large on its owner's premises, and attacks and kills the dog of a person lawfully coming upon the premises where he is, his owner is liable in damages for the value of the dog so killed, where it is shown that such owner had knowledge of the viciousness of his dog.

24. Loomis *v.* Terry, 17 Wend. (N. Y.) 496, 31 Am. Dec. 306; Sawyer *v.* Jackson, 5 N. Y. Leg. Obs. 380.

25. Loomis *v.* Terry, 17 Wend. (N. Y.) 496, 31 Am. Dec. 306; Sarch *v.* Blackburn, 4 C. & P. 297, 19 E. C. L. 523. See also Woodbridge *v.* Marks, 17 N. Y. App. Div. 139, 45 N. Y. Suppl. 156, holding that the owner of a vicious dog kept to guard his premises need not, as against trespassers, give notice of its vicious character.

One is not a trespasser who enters the back-yard of another, through an open gate, on lawful business (Conway *v.* Grant, 88 Ga. 40, 13 S. E. 803, 30 Am. St. Rep. 145, 14 L. R. A. 196; Riley *v.* Harris, (Mass. 1900) 58 N. E. 584), or who, having left his horse and buggy in defendant's livery-stable, enters the barn-yard to see that the buggy is put under shelter, and to get some articles therefrom (Shultz *v.* Griffith, 103 Iowa 150, 72 N. W. 445, 40 L. R. A. 117).

26. Dogs are cautiously used and sufficiently confined where they are so chained that they can move along the portion of the premises to be protected, but are secured from reaching any one coming to the house by any of the approaches provided for that purpose. Woodbridge *v.* Marks, 17 N. Y. App. Div. 139, 45 N. Y. Suppl. 156. But the fact that defendant or defendant's wife may have been able to control a dog, by calling him off or speaking to him when he would run at any one, is not such a restraining as is contemplated by the law. Dockerty *v.* Hutson, 125 Ind. 102, 25 N. E. 144.

27. Fleming *v.* Orr, 2 Macq. 14.

28. Hardiman *v.* Wholley, 172 Mass. 411, 52 N. E. 518, 70 Am. St. Rep. 292; Stern *v.* Hoffman Brewing Co., 26 Misc. (N. Y.) 794, 56 N. Y. Suppl. 188. See also Jones *v.* Owen, 24 L. T. Rep. N. S. 587, wherein it was held that, upon a reference of all matters, a finding of arbitrators, that defendant was negligent in that his two greyhounds, coupled together, rushed against plaintiff on a high-road, knocked him down, and broke his leg, is good in law, although there was no evidence of *scienter*.

29. Need not be legally established.— It is not necessary that the highway where the animal was at large be legally established, but it is sufficient to show that the road was open to the public, and used by the public as a highway. Meier *v.* Shrunk, 79 Iowa 17, 44 N. W. 209. But neither is it sufficient that the animal was running in an inclosure. Scott *v.* Grover, 56 Vt. 499, 48 Am. Rep. 814. See also Carpenter *v.* Latta, 29 Kan. 591.

30. Shipley *v.* Colclough, 81 Mich. 624, 45 N. W. 1106, 21 Am. St. Rep. 546; Bowyer *v.* Burlew, 3 Thomps. & C. (N. Y.) 362.

31. *Connecticut.*— Baldwin *v.* Ensign, 49 Conn. 113, 44 Am. Rep. 205.

Iowa.— Meier *v.* Shrunk, 79 Iowa 17, 44 N. W. 209.

though the owner did not know that they were in the highway at the time of the injury,[32] unless their presence there is not due to his fault,[33] or constitutes no breach of duty due from defendant to plaintiff,[34] in which latter cases *scienter* must exist. When a lien is provided for by statute for injuries committed by stock voluntarily allowed to go at large, such lien does not arise by operation of law from the act done, or the injury sustained, but depends upon the subsequent reduction of the claim to judgment, and is subordinate to the lien of a prior recorded mortgage.[35]

e. While Trespassing — (I) *In General.* While knowledge of the animal's vicious propensities is generally necessary to make the owner of a domestic animal liable for his acts,[36] yet, when such an animal breaks into the close of another, unless through defective fences which the latter ought to repair,[37] the owner will be liable without such notice for injuries then committed on the person or cattle of such other,[38] or on the cattle of others lawfully in such close.[39]

(II) *On Railroad.* In the absence of a duty on the part of the railroad company requiring it to fence along the line of its road,[40] the owner of cattle trespassing upon such road is liable for the injury done to the company,[41]

Massachusetts.— Barnes *v.* Chapin, 4 Allen (Mass.) 444, 81 Am. Dec. 710.

New York.— Dickson *v.* McCoy, 39 N. Y. 400.

Pennsylvania.—Goodman *v.* Gay, 15 Pa. St. 188, 53 Am. Dec. 589.

But see Klenberg *v.* Russell, 125 Ind. 531, 25 N. E. 596 (holding that the owner of a domestic animal is not liable because of a negligent failure to keep it confined on his own premises, except for the consequences which may be anticipated because of its well-known disposition and habits, unless it is possessed of a vicious disposition, of which he had notice), and Meegan *v.* McKay, 1 Okla. 59, 30 Pac. 232 (holding that the laws of Nebraska, in force in Oklahoma by virtue of the organic act, and which provide for the recovery of damages for trespasses committed on cultivated lands by stock running at large, have no application to an injury done by a mule running at large, to a young colt, by which the colt was killed).

See 2 Cent. Dig. tit. "Animals," § 175.

32. Jewett *v.* Gage, 55 Me. 538, 92 Am. Dec. 615.

33. Briscoe *v.* Alfrey, 61 Ark. 196, 32 S. W. 505, 54 Am. St. Rep. 203, 30 L. R. A. 607 (wherein it was held that the owner of an unaltered mule is not liable, under Sandels & H. Dig. Ark. § 7301, to the owner of a filly killed by the mule while at large, where the mule was kept confined in a strong stable, surrounded by a strong, high fence, but had broken out during the night without the owner's knowledge); Moynahan *v.* Wheeler, 117 N. Y. 285, 22 N. E. 702, 27 N. Y. St. 152; Fallon *v.* O'Brien, 12 R. I. 518, 34 Am. Rep. 713.

The owner of a turkey-cock which, without negligence, strays upon the highway, contrary to a by-law of the municipality, is not liable for damages resulting from a horse taking fright and running away at the sight of the bird acting as turkey-cocks usually do. Zumstein *v.* Shrumm, 22 Ont. App. 263.

34. Chase *v.* McDonald, 25 U. C. C. P. 129.

35. Lehman *v.* Ferrell, 71 Ala. 458.

36. See *supra*, XI, A, 1, a, (II), (A).

37. Angus *v.* Radin, 5 N. J. L. 957, 8 Am. Dec. 626; Scott *v.* Grover, 56 Vt. 499, 48 Am. Rep. 814.

38. *Illinois.*—Lee *v.* Burk, 15 Ill. App. 651 [*distinguishing* Seeley *v.* Peters, 10 Ill. 130].

Maine.—Decker *v.* Gammon, 44 Me. 322, 69 Am. Dec. 99.

Massachusetts.— Lyons *v.* Merrick, 105 Mass. 71.

New Jersey.— Angus *v.* Radin, 5 N. J. L. 957, 8 Am. Dec. 626.

New York.— Van Leuven *v.* Lyke, 1 N. Y. 515, 49 Am. Dec. 346 [*affirming* 4 Den. (N. Y.) 127]; Fairchild *v.* Bentley, 30 Barb. (N. Y.) 147; Dunckle *v.* Kocker, 11 Barb. (N. Y.) 387; Keshan *v.* Gates, 2 Thomps. & C. (N. Y.) 288; Malone *v.* Knowlton, 15 N. Y. Suppl. 506, 39 N. Y. St. 901.

Ohio.—Morgan *v.* Hudnell, 52 Ohio St. 552, 40 N. E. 716, 49 Am. St. Rep. 741, 27 L. R. A. 862.

Pennsylvania.— Dolph *v.* Ferris, 7 Watts & S. (Pa.) 367, 42 Am. Dec. 246 [*citing* the unreported Pennsylvania case of Sample *v.* Foster]; Proth *v.* Wills, 42 Wkly. Notes Cas. (Pa.) 504.

Wisconsin.—Chunot *v.* Larson, 43 Wis. 536, 28 Am. Rep. 567.

United States.— Mosier *v.* Beale, 43 Fed. 358.

England.— Ellis *v.* Loftus Iron Co., L. R. 10 C. P. 10.

Where defendant's beast escaped from his field, through an insufficient fence, into the field of A, thence into the field of B, and thence into the field of plaintiff, and injured plaintiff's mare, it was held that defendant was liable for the injuries, although, as between him and A, the latter was bound to keep the fence between their fields in repair, although the fence between plaintiff's field and B's was insufficient, and although defendant did not know that the beast was vicious. Lyons *v.* Merrick, 105 Mass. 71.

39. Green *v.* Doyle, 21 Ill. App. 205.

40. Sherman *v.* Anderson, 27 Kan. 333, 41 Am. Rep. 414.

41. Sinram *v.* Pittsburgh, etc., R. Co., 28 Ind. 244; New York, etc., R. Co. *v.* Skinner,

or to a passenger of said company who receives injuries by reason of such trespass.[42]

3. What Constitutes Knowledge or Notice — a. In General. The notice of an animal's vicious propensity must be such as to put a prudent man on his guard;[43] but there is no rule which requires any particular number of instances of unprovoked injury in order to show knowledge of past mischievous disposition;[44] and, although no injury has been actually committed, the owner or keeper is chargeable with knowledge if he knew that the animal was of a disposition such as to make it highly probable that it would commit injury.[45] So, too, if a person keeps an animal upon his place and omits to exercise ordinary supervision over it, lets it run, and fails to obtain the knowledge which such supervision would give, he is chargeable with the same knowledge that he would have obtained had he inquired and supervised in the ordinary and usual way;[46] and if a dog is kept for protection to premises, the purpose for which he is kept charges his master with knowledge that he is of fierce and dangerous character.[47] Knowledge of the vicious habits of an animal need not refer to circumstances of the same kind;[48] but it has been held that knowledge of a tendency

19 Pa. St. 298, 57 Am. Dec. 654. See also Hannibal, etc., R. Co. *v.* Kenny, 41 Mo. 271, to the effect that while, by the laws of that state, the owner of animals is not bound to confine his stock within his own inclosures, he may be guilty of such wilfulness or negligence in regard to his animals as to render himself liable to a railroad company for damages caused by their being upon its tracks.

Negligence essential to liability.— One whose cattle stray upon a railway, where they are run over by a train, which is damaged by the collision, is liable to the railway company therefor if he was negligent in his care of the cattle, but not otherwise. Annapolis, etc.. R. Co. *v.* Baldwin, 60 Md. 88, 45 Am. Rep. 711.

42. New York, etc., R. Co. *v.* Skinner, 19 Pa. St. 298, 57 Am. Dec. 654.

43. Fake *v.* Addicks, 45 Minn. 37, 47 N. W. 450, 22 Am. St. Rep. 716.

See 2 Cent. Dig. tit. "Animals," §§ 228 *et seq.*, 288 *et seq.*

44. Arnold *v.* Norton, 25 Conn. 92.

A single instance of mischievous conduct is sufficient, it seems, to charge the owner or keeper with knowledge of the vicious nature and habits of the animal.

Connecticut.— Arnold *v.* Norton, 25 Conn. 92.

Iowa.— Marsel *v.* Bowman, 62 Iowa 57, 17 N. W. 176.

Minnesota.— Cuney *v.* Campbell, 76 Minn. 59, 78 N. W. 878.

New Hampshire.— Kittredge *v.* Elliott, 16 N. H. 77, 41 Am. Dec. 717.

Pennsylvania.— Mann *v.* Weiand, 81* Pa. St. 243, 34 Leg. Int. (Pa.) 77, 4 Wkly. Notes Cas. (Pa.) 6.

Two instances of killing sheep is sufficient to charge defendant with notice of a dog's habits. Buller N. P. 77.

From time to time biting people, under circumstances which would not provoke a dog of good temper, is sufficient to charge with knowledge. Charlwood *v.* Greig, 3 C. & K. 46.

45. *Delaware.*— Barclay *v.* Hartman, 2 Marv. (Del.) 351, 43 Atl. 174; Warner *v.* Chamberlain, 7 Houst. (Del.) 18, 30 Atl. 638.

Illinois.— Kolb *v.* Klages, 27 Ill. App. 531: Flansburg *v.* Basin, 3 Ill. App. 531.

Louisiana.—Montgomery *v.* Koester, 35 La. Ann. 1091, 48 Am. Rep. 253.

New Hampshire.— Reynolds *v.* Hussey, 64 N. H. 64, 5 Atl. 458.

New Jersey.—Evans *v.* McDermott, 49 N. J. L. 163, 6 Atl. 653, 60 Am. Rep. 602.

New York.— Rider *v.* White, 65 N. Y. 54, 22 Am. Rep. 600; McGarry *v.* New York, etc., R. Co., 60 N. Y. Super. Ct. 367, 18 N. Y. Suppl. 195, 45 N. Y. St. 564 [*affirmed* in 137 N. Y. 627, 33 N. E. 745]; Rogers *v.* Rogers, 4 N. Y. St. 373.

Vermont.— Godeau *v.* Blood, 52 Vt. 251, 36 Am. Rep. 751.

Washington.—Robinson *v.* Marino, 3 Wash. 434, 28 Pac. 752, 28 Am. St. Rep. 50.

United States.— Shaw *v.* Craft, 37 Fed. 317.

England.—Worth *v.* Gilling, L. R. 2 C. P. 1.

46. Knowles *v.* Mulder, 74 Mich. 202, 41 N. W. 896, 16 Am. St. Rep. 627; Turner *v.* Craighead, 83 Hun (N. Y.) 112, 31 N. Y. Suppl. 369, 63 N. Y. St. 853; Lawlor *v.* French, 14 Misc. (N. Y.) 497, 35 N. Y. Suppl. 1077, 70 N. Y. St. 721; Hayes *v.* Smith, 62 Ohio St. 161, 56 N. E. 879 [*affirming* 8 Ohio Dec. 92]. See also Clark *v.* Hite, Tappan (Ohio) 33, to the effect that the presumption of law is that every man is acquainted with the habits of his domestic animals; and that, in a case for keeping a dog accustomed to bite, etc., while the *scienter* is to be averred, knowledge is to be inferred from the fact of domestication. But see Laherty *v.* Hogan, 13 Daly (N. Y.) 533, 1 N. Y. St. 84, to the effect that actual notice is necessary.

47. Goode *v.* Martin, 57 Md. 606, 40 Am. Rep. 448; Hahnke *v.* Friederich, 140 N. Y. 224, 35 N. E. 487, 55 N. Y. St. 411; Brice *v.* Bauer, 108 N. Y. 428, 15 N. E. 695, 2 Am. St. Rep. 454.

48. *Alabama.*— Strouse *v.* Leipf, 101 Ala. 433, 14 So. 667, 46 Am. St. Rep. 122, 23 L. R. A. 622.

Illinois.— Pickering *v.* Orange, 2 Ill. 338.

to attack mankind is not enough to charge one with knowledge of a tendency to attack animals,[49] and *vice versa*, that a knowledge of a tendency to attack animals will not charge one with knowledge of such tendency toward mankind.[50]

b. Knowledge of Servant or Agent. Knowledge of a servant or agent of an animal's vicious propensities will be imputed to the master when such servant or agent has charge or control over the animal,[51] but not otherwise;[52] and a wife's knowledge may be sufficient to charge her husband,[53] though the converse is not true, and notice to the husband will not, taken alone, be sufficient proof of *scienter* to render the wife liable after her husband's death.[54] Notice to one of several joint keepers is notice to all.[55]

3. Parties Liable — a. In General — (I) *Owner or Keeper.* No one is liable in damages for injuries by an animal which he does not own, harbor, or control;[56] but one who keeps, harbors, or has the charge of vicious animals is liable for injuries caused by them, regardless of ownership,[57] and even when

Iowa.— Cameron *v.* Bryan, 89 Iowa 214, 56 N. W. 434.

New Hampshire.— Reynolds *v.* Hussey, 64 N. H. 64, 5 Atl. 458.

England.— Jenkins *v.* Turner, 1 Ld. Raym. 109; Getting *v.* Morgan, 5 Wkly. Rep. 536; Buller N. P. 77.

49. Cockerham *v.* Nixon, 33 N. C. 269; Hartley *v.* Harriman, 1 B. & Ald. 620, S. C. *sub nom.* Hartley *v.* Halliwell, 2 Stark. 212, 3 E. C. L. 381. *Contra*, Getting *v.* Morgan, 5 Wkly. Rep. 536.

50. Keightlinger *v.* Egan, 65 Ill. 235; Osborne *v.* Chocqueel, 65 L. J. Q. B. 534, [1896] 2 Q. B. 109, 74 L. T. Rep. N. S. 786, 44 Wkly. Rep. 575.

51. *California.*— Clowdis *v.* Fresno Flume, etc., Co., 118 Cal. 315, 50 Pac. 373, 62 Am. St. Rep. 238.

Delaware.— Brown *v.* Green, 1 Pennew. (Del.) 535, 42 Atl. 991; Friedmann *v.* McGowan, 1 Pennew. (Del.) 436, 42 Atl. 723.

New York.— Brice *v.* Bauer, 108 N. Y. 428, 15 N. E. 695, 2 Am. St. Rep. 454; Niland *v.* Geer, 46 N. Y. App. Div. 194, 61 N. Y. Suppl. 696; Muller *v.* McKesson, 10 Hun (N. Y.) 44.

Vermont.— Corliss *v.* Smith, 53 Vt. 532.

England.—Baldwin *v.* Casella, L. R. 7 Exch. 325, 41 L. J. Exch. 167, 26 L. T. Rep. N. S. 707.

The manager of a stable maintained by a number of persons is the servant of any one of such persons, so that knowledge of the manager of the vicious character of a horse owned by such person, and kept in the stable, is imputed to the owner. Brown *v.* Green, 1 Pennew. (Del.) 535, 42 Atl. 991.

Superintendent of car-stables.— Notice of the vicious character of a horse to the superintendent of the stable of a horse-car company, and to a superior hostler, of lesser authority than the superintendent, having other hostlers under him, is notice to the company. McGarry *v.* New York, etc., R. Co., 60 N. Y. Super. Ct. 367, 18 N. Y. Suppl. 195, 45 N. Y. St. 564 [*affirmed* in 137 N. Y. 627, 33 N. E. 745].

Person employed as driver.— Knowledge of the vicious character of a horse, by one employed to drive it in delivering goods, is imputed to the owner. Brown *v.* Green, 1 Pennew. (Del.) 535, 42 Atl. 991.

52. *Delaware.*— Friedmann *v.* McGowan, 1 Pennew. (Del.) 436, 42 Atl. 723.

Maryland.— Twigg *v.* Ryland, 62 Md. 380, 50 Am. Rep. 226.

New York.— Shaver *v.* New York, etc., Transp. Co., 31 Hun (N. Y.) 55.

North Carolina.—Harris *v.* Fisher, 115 N. C. 318, 20 S. E. 461, 44 Am. St. Rep. 452.

England.— Stiles *v.* Cardiff Steam Nav. Co., 33 L. J. Q. B. 310; Applebee *v.* Percy, L. R. 9 C. P. 647, 43 L. J. C. P. 365.

53. Barclay *v.* Hartman, 2 Marv. (Del.) 351, 43 Atl. 174; Muller *v.* McKesson, 10 Hun (N. Y.) 44; Gladman *v.* Johnson, 36 L. J. C. P. 153, 15 L. T. Rep. N. S. 476.

54. Miller *v.* Kimbray, 16 L. T. Rep. N. S. 360.

55. Hayes *v.* Smith, 8 Ohio Dec. 92.

56. Marsh *v.* Hand, 120 N. Y. 315, 24 N. E. 463, 30 N. Y. St. 1003 [*affirming* 40 Hun (N. Y.) 339]; Fitzgerald *v.* Brophy, 1 Pa. Co. Ct. 142.

The owner of an animal is answerable for the damage he has caused (McGuire *v.* Ringrose, 41 La. Ann. 1029, 6 So. 895), even while it is under the control of a kennel club (Bush *v.* Wathen, 20 Ky. L. Rep. 731, 47 S. W. 599).

57. *California.*— Wilkinson *v.* Parrott, 32 Cal. 102.

Colorado.— Hornbein *v.* Blanchard, 4 Colo. App. 92, 35 Pac. 187.

Indiana.— Frammell *v.* Little, 16 Ind. 251.

Iowa.— Marsel *v.* Bowman, 62 Iowa 57, 17 N. W. 176.

Maine.—Smith *v.* Montgomery, 52 Me. 178.

Missouri.— Bell *v.* Leslie, 24 Mo. App. 661.

New York.— Bundschuh *v.* Mayer, 81 Hun (N. Y.) 111, 30 N. Y. Suppl. 622, 62 N. Y. St. 597; Keenan *v.* Gutta Percha, etc., Mfg. Co., 46 Hun (N. Y.) 544 [*affirmed* in 120 N. Y. 627, 24 N. E. 1096]; Lawlor *v.* French, 14 Misc. (N. Y.) 497, 35 N. Y. Suppl. 1077, 70 N. Y. St. 721.

Ohio.— Hayes *v.* Smith, 62 Ohio St. 161, 56 N. E. 879.

Pennsylvania.— Snyder *v.* Patterson, 161 Pa. St. 98, 34 Wkly. Notes Cas. (Pa.) 288, 28 Atl. 1006.

Vermont.— Marsh *v.* Jones, 21 Vt. 378, 52 Am. Dec. 67.

England.— McKone *v.* Wood, 5 C. & P. 1, 24 E. C. L. 423.

such keeping is without the consent and against the wishes of the animal's owner.[58]

(II) *Who Is Owner or Keeper.* Harboring means protecting,[59] and one who treats a dog as living at his house, and undertakes to control his actions, is the owner or keeper within the meaning of the law;[60] but the casual presence of an animal on his premises, if not so treated, does not constitute him such owner or keeper.[61] If the head of a family, having possession and control of a house or premises, suffer or permit an animal to be kept on the premises in this way he may be regarded as keeper,[62] whether the animal be owned by his child[63] or his wife;[64] and, where a married woman has all the rights of a *feme sole* in respect of her separate property, she may be liable as keeper though the animal be actually owned by her husband,[65] though this is not necessarily so.[66] So, too, a corporation,[67] or the officers thereof,[68] an innkeeper,[69] or a ship[70] may be liable. A person who knowingly permits a dog to be kept on his premises, by a servant or agent, is a keeper within the purview of the statute;[71] but this is not true where the employee occupies a separate residence on the employer's premises.[72] The fact that others than defendant had some part in taking charge of an animal does not prevent his being the keeper within the meaning of the statute.[73]

Canada.—Wood *v.* Vaughan, 28 N. Brunsw. 472.

See 2 Cent. Dig. tit. "Animals," §§ 242 *et seq.*, 293 *et seq.*

58. Mitchell *v.* Chase, 87 Me. 172, 32 Atl. 867; Burnham *v.* Strother, 66 Mich. 519, 33 N. W. 410; Bell *v.* Leslie, 24 Mo. App. 661.

59. Fitzgerald *v.* Brophy, 1 Pa. Co. Ct. 142.

60. Shultz *v.* Griffith, 103 Iowa 150, 72 N. W. 445, 40 L. R. A. 117; O'Harra *v.* Miller, 64 Iowa 462, 20 N. W. 760; Burnham *v.* Strother, 66 Mich. 519, 33 N. W. 410.

61. O'Harra *v.* Miller, 64 Iowa 462, 20 N. W. 760; O'Donnell *v.* Pollock, 170 Mass. 441, 49 N. E. 745.

Merely permitting a stray dog to live under a building in defendant's coal-yard does not make him a harborer. Fitzgerald *v.* Brophy, 1 Pa. Co. Ct. 142. And where a dog was brought, by a little son of the steward, upon the farm of the directors of the poor, without authority, and afterward maintained on the farm and left there when that steward was succeeded by another, the ownership of the dog did not thereby become vested in the poor district. Sproat *v.* Directors of Poor, 145 Pa. St. 598, 23 Atl. 380.

62. Cummings *v.* Riley, 52 N. H. 368.

63. Jenkinson *v.* Coggins, 123 Mich. 7, 81 N. W. 974; Plummer *v.* Ricker, 71 Vt. 114, 41 Atl. 1045.

64. Strouse *v.* Leipf, 101 Ala. 433, 14 So. 667, 46 Am. St. Rep. 122, 23 L. R. A. 622.

65. Quilty *v.* Battie, 135 N. Y. 201, 32 N. E. 47, 48 N. Y. St. 413, 17 L. R. A. 521; Valentine *v.* Cole, 1 N. Y. St. 719; Shaw *v.* McCreary, 19 Ont. 39. But see Bundschuh *v.* Mayer, 81 Hun (N. Y.) 111, 30 N. Y. Suppl. 622, 62 N. Y. St. 597.

66. McLaughlin *v.* Kemp, 152 Mass. 7, 25 N. E. 18.

67. A horse-railroad company may be held liable for double the amount of damages sustained in consequence of the bite of a dog kept by its servants or agents. Barrett *v.* Malden, etc., R. Co., 3 Allen (Mass.) 101.

A steam-railroad company may be liable, where a steer, which, owing to its crippled condition, has been removed from a car to be killed, is allowed to recover, and, in an apparently vigorous condition, roam around the railroad yard, which is open to the public, without any attempt to control it, to one injured by the steer while passing through the yard. Texas, etc., R. Co. *v.* Juneman, 71 Fed. 939, 30 U. S. App. 541, 18 C. C. A. 394.

68. Thus where an animal is used in the business of a corporation, the president and manager, who controls and conducts the business, and may hire or discharge the animal, is the keeper, and is responsible for any injury it may do. Lawlor *v.* French, 14 Misc. (N. Y.) 497, 35 N. Y. Suppl. 1077, 70 N. Y. St. 721.

69. Under 28 & 29 Vict. c. 60, an innkeeper is deemed to be the owner of a dog living in his hotel, and is liable for injuries caused by such dog to other animals, notwithstanding the dog was under control of a guest to whom it had been committed by the real owner. Gardner *v.* Hart, 44 Wkly. Rep. 527.

70. A ship is liable for injuries inflicted by the bite of a dog, on board by consent of the master and owners, upon a person lawfully on board, and entitled to be carried safely. The Lord Derby, 17 Fed. 265.

71. Jacobsmeyer *v.* Poggemoeller, 47 Mo. App. 560; Harris *v.* Fisher, 115 N. C. 318, 20 S. E. 461, 44 Am. St. Rep. 452.

Where a toll-keeper was not authorized or required to keep a dog, and it was not needed for the conduct or protection of the business in which the owner of the bridge is engaged, the latter is not liable for an injury caused by such dog. Baker *v.* Kinsey, 38 Cal. 631, 99 Am. Dec. 438.

72. Auchmuty *v.* Ham, 1 Den. (N. Y.) 495; Simpson *v.* Griggs, 58 Hun (N. Y.) 393, 12 N. Y. Suppl. 162, 34 N. Y. St. 899.

73. Grant *v.* Ricker, 74 Me. 487; Gardner *v.* Hart, 44 Wkly. Rep. 527. See also Lettis *v.* Horning, 67 Hun (N. Y.) 627, 22 N. Y. Suppl. 565, 51 N. Y. St. 225.

Thus, where a dog is owned by a member of a firm, and is in the keeping of the firm,

b. Jointly. It seems that, under proper allegations and proof, one who owns and one who harbors a vicious animal may both be made responsible, in the same action, for a resulting injury,[74] and all who take part in harboring a vicious animal may be sued jointly in an action for damages resulting from the vicious conduct of such animal.[75] Where dogs, belonging to several persons, unite in killing sheep, each owner, in the absence of statute, is liable only for the acts of his own dog;[76] but in some states, by statute, each owner is answerable for the whole damage done in which his dog was jointly engaged.[77]

4. Actions — a. Who May Sue. Under the statute a parent may sue for double damages, sustained by him by reason of the loss of his child's services, caused by injuries inflicted by a dog;[78] and for injuries inflicted upon cattle a bailee may sue.[79]

b. Form of Action. By some statutes the form of the action is prescribed;[80] but, in the absence of such statutory provision, case is the proper remedy for an injury sustained from the act of a mischievous animal.[81] But, where an animal is unlawfully in plaintiff's close, the action should be trespass *quare clausum fregit*, and the particular mischief — for example, the killing of another domestic animal — should be alleged in aggravation of the trespass.[82] A statute giving a right of action for certain injuries does not, however, supersede common-law actions.[83]

c. Defenses — (I) *Contributory Negligence.* In some cases it is held that plaintiff's contributory negligence will bar his right of recovery,[84] while others

an action may properly be maintained against the owner, as owner and keeper, under Me. Rev. Stat. c. 30, § 1, for damages done by the dog, and it is not necessary to join the other members of the firm. Grant *v.* Ricker, 74 Me. 487.

74. Quilty *v.* Battie, 135 N. Y. 201, 32 N. E. 47, 48 N. Y. St. 413, 17 L. R. A. 521. But see Galvin *v.* Parker, 154 Mass. 346, 28 N. E. 244, holding that, under Mass. Pub. Stat. c. 102, § 93, making the "owner or keeper" of a dog liable for injuries caused by it, the owner and keeper are not jointly and severally liable as tort-feasors; and, after the recovery of a judgment for such an injury against one of them, which remains unsatisfied by reason of his taking the poor-debtor's oath, an action cannot be maintained against the other for the same injury.

75. Hayes *v.* Smith, 62 Ohio St. 161, 56 N. E. 879 [*affirming* 8 Ohio Dec. 92]; Kerr *v.* O'Connor, 63 Pa. St. 341.

A joint owner of a ram is chargeable with damage done by it by butting while in the pasture of his co-owner, although the latter, of his own accord, and without permission of, or consultation with, the former, and in his absence, took the ram, and put it into his pasture, where the injury was done, without trying to restrain it, the first joint owner having given no directions as to restraining the ram, and not having been consulted as to the keeping, care, and management of it. Oakes *v.* Spaulding, 40 Vt. 347, 94 Am. Dec. 404.

76. *Connecticut.*— Russell *v.* Tomlinson, 2 Conn. 206.

Indiana.— Denny *v.* Correll, 9 Ind. 72.

Massachusetts.— Buddington *v.* Shearer, 20 Pick. (Mass.) 477.

New York.— Auchmuty *v.* Ham, 1 Den. (N. Y.) 495; Van Steenburgh *v.* Tobias, 17 Wend. (N. Y.) 562, 31 Am. Dec. 310; Carroll *v.* Weiler, 1 Hun (N. Y.) 605, 4 Thomps. & C. (N. Y.) 131.

Tennessee.— Dyer *v.* Hutchins, 87 Tenn. 198, 10 S. W. 194.

Vermont.— Rowe *v.* Bird, 48 Vt. 578; Adams *v.* Hall, 2 Vt. 9, 19 Am. Dec. 690.

See also Flansburg *v.* Basin, 3 Ill. App. 531.

77. Kerr *v.* O'Connor, 63 Pa. St. 341; Remele *v.* Donahue, 54 Vt. 555; Nelson *v.* Nugent, 106 Wis. 477, 82 N. W. 287.

78. McCarthy *v.* Guild, 12 Metc. (Mass.) 291.

79. Mason *v.* Morgan, 24 U. C. Q. B. 328.

80. Trespass in Maine. Smith *v.* Montgomery, 52 Me. 178.

Trespass vi et armis in Pennsylvania. Paff *v.* Slack, 7 Pa. St. 254; March *v.* Smith, 11 York Leg. Rec. (Pa.) 42.

81. Durden *v.* Barnett, 7 Ala. 169; Stumps *v.* Kelley, 22 Ill. 140; Mulherrin *v.* Henry, 11 Pa. Co. Ct. 49, 1 Pa. Dist. 607; Fallon *v.* O'Brien, 12 R. I. 518, 34 Am. Rep. 713.

82. Van Leuven *v.* Lyke, 1 N. Y. 515, 49 Am. Dec. 346 [*affirming* 4 Den. (N. Y.) 127]; Dolph *v.* Ferris, 7 Watts & S. (Pa.) 367, 42 Am. Dec. 246 [*citing* Sample *v.* Foster, an unreported case decided at Harrisburg, in June, 1834].

83. Monroe *v.* Rose, 38 Mich. 347.

84. *Illinois.*— Mareau *v.* Vanatta, 88 Ill. 132.

Indiana.— Dockerty *v.* Hutson, 125 Ind. 102, 25 N. E. 144; Williams *v.* Moray, 74 Ind. 25, 39 Am. Rep. 76.

Kentucky.— Bush *v.* Wathen, 20 Ky. L. Rep. 731, 47 S. W. 599.

Massachusetts.— Marble *v.* Ross, 124 Mass. 44.

New Hampshire.— Chickering *v.* Lord, 67 N. H. 555, 32 Atl. 773; Quimby *v.* Woodbury, 63 N. H. 370.

hold that the owner will not be relieved from liability by slight negligence or want of ordinary care on the part of the person injured; but that, to constitute a defense, acts must be proved, with notice of the character of the animal, which would establish that the injured person voluntarily brought the injury upon himself,[85] or that amount to an unlawful act on plaintiff's part.[86] The fact that plaintiff wantonly provoked the animal,[87] or went within reach of a confined

Pennsylvania.— Earhart *v.* Youngblood, 27 Pa. St. 331.

Texas.— Badali *v.* Smith, (Tex. Civ. App. 1896) 37 S. W. 642.

Vermont.— Coggswell *v.* Baldwin, 15 Vt. 404, 40 Am. Dec. 686.

England.— Abbott *v.* Freeman, 35 L. T. Rep. N. S. 783; Sarch *v.* Blackburn, M. & M. 505.

But see Jones *v.* Carey, 9 Houst. (Del.) 214, 31 Atl. 976 (holding that the owner or harborer of a vicious dog, which was in the habit of running out at travelers passing by on the highway, after he has knowledge of the habit of such dog, is guilty of wilful negligence in longer keeping him at large, and is liable for damages sustained by a traveler passing by on the highway, such damages being occasioned by the dog running out and frightening his horse; and such owner or harborer, being guilty of wilful negligence, cannot set up a plea of contributory negligence on the part of the traveler); and Vredenburg *v.* Behan, 33 La. Ann. 627 (holding that the responsibility of one keeping an animal *ferœ naturœ* [a bear] is of such strict character that contributory negligence is no defense).

See 2 Cent. Dig. tit. "Animals," § 238 *et seq.*

Endeavoring to pass in front of an animal, ordinarily muzzled, without observing that he was not then muzzled, is not such contributory negligence as will prevent a recovery for injuries received. Koney *v.* Ward, 2 Daly (N. Y.) 295, 36 How. Pr. (N. Y.) 255.

Examining cattle in a public stock-pen, in a reasonable and prudent manner, does not make a buyer guilty of contributory negligence so as to preclude him from recovering for injuries inflicted by a vicious animal. Brooks *v.* Brooks, 21 Ky. L. Rep. 940, 53 S. W. 645.

Failure to inquire and ascertain whether vicious dogs are kept upon premises upon which one is about to enter, especially where he has obtained permission to enter, does not constitute contributory negligence. Sanders *v.* O'Callaghan, (Iowa 1900) 82 N. W. 969.

Going on premises where notice is posted. — It is not necessarily contributory negligence to go on premises where a sign of warning is displayed. Sylvester *v.* Maag, 155 Pa. St. 225, 26 Atl. 392, 35 Am. St. Rep. 878. And see Sarch *v.* Blackburn, M. & M. 505.

Leading a horse behind a wagon on a country road is not such contributory negligence as will preclude the owner from maintaining an action, under Mass. Pub. Stat. c. 102, § 93, against the owner of a dog by whom the horse is bitten while being so led. Boulester *v.* Parsons, 161 Mass. 182, 36 N. E. 790.

Remaining on the street, at the time of a runaway, to guard one's own team and its occupants, is not contributory negligence. Hall *v.* Huber, 61 Mo. App. 384.

That plaintiff raised himself to his feet by the reins, when his horses were suddenly attacked by dogs, and while in that posture was thrown from the wagon and injured, is held not to show contributory negligence on his part. Meracle *v.* Down, 64 Wis. 323, 25 N. W. 412.

The shying of a horse which contributed to plaintiff's injury does not prevent him from maintaining an action against the owner of a dog where the act of the dog was the sole and proximate cause of such shying. Denison *v.* Lincoln, 131 Mass. 236.

85. Lynch *v.* McNally, 73 N. Y. 347 [*affirming* 7 Daly (N. Y.) 126]; Muller *v.* McKesson, 73 N. Y. 195, 29 Am. Rep. 123; Rogers *v.* Rogers, 4 N. Y. St. 373.

86. Shultz *v.* Griffith, 103 Iowa 150, 72 N. W. 445, 40 L. R. A. 117.

Throwing stones at dog some months before.— Under Iowa Code (1873), § 1485, providing that the owner of a dog shall be liable to the party injured for all damages done by his dog, except when the party injured is doing an unlawful act, it is no defense to an action for injuries from a bite of defendant's dog to show that several months before the injury the plaintiff threw stones at the dog. Van Bergen *v.* Eulberg, (Iowa 1900) 82 N. W. 483.

87. *Illinois.*— Mareau *v.* Vanatta, 88 Ill. 132; Keightlinger *v.* Egan, 65 Ill. 235.

Michigan.—Brooks *v.* Taylor, 65 Mich. 208, 31 N. W. 837.

Minnesota.— Fake *v.* Addicks, 45 Minn. 37, 47 N. W. 450, 22 Am. St. Rep. 716.

New Hampshire.— Chickering *v.* Lord, 67 N. H. 555, 32 Atl. 773.

New York.— Rogers *v.* Rogers, 4 N. Y. St. 373.

Oregon.— Dufee *v.* Cully, 3 Oreg. 377.

But see May *v.* Burdett, 9 Q. B. 101, 58 E. C. L. 101, which was an action for personal injury inflicted by a monkey, wherein it was doubted if it would be a defense that the injury was occasioned solely by the wilfulness of plaintiff, after warning.

If plaintiff's dog provoked the quarrel and caused the fight, defendant, as the owner of the other dog, cannot be made responsible for the consequences. Wiley *v.* Slater, 22 Barb. (N. Y.) 506.

Accidentally stepping upon a dog is not such a provocation as will constitute a defense. Fake *v.* Addicks, 45 Minn. 37, 47 N. W. 450, 22 Am. St. Rep. 716; Smith *v.* Pelah, 2 Str. 1264; Buller N. P. 77.

Acts of children not imputed to teacher.— Mischievous conduct of school-children, dur-

animal, known by him to be vicious, is a defense.[88] Where a child is injured, it is no defense that he did not act with the discretion and judgment of a person of mature years, and the defendant will be liable if the child used such care as is usual with children of his age;[89] and the negligence of a parent cannot be imputed to the child.[90]

(II) *General Good Character of Animal.* The fact that an animal of a dangerous character is generally inoffensive, and had never attacked any one prior to the injury sued for, will not bar a recovery.[91]

(III) *Injury Done in Play.* It is no defense to an action under the statute that the injury done by a dog was done in play, and without any vicious intent.[92]

(IV) *Plaintiff or Animal Trespassing at Time of Injury.* It is no defense that plaintiff, at the time of the injury, was a technical trespasser upon defendant's premises,[93] such fact being material, if at all, upon the question of damages.[94] Nor is it a defense that plaintiff's sheep were trespassing upon defendant's premises when injured by the latter's dog,[95] or that the animals of both plaintiff and defendant were technically trespassing upon the land of another person.[96]

(V) *That Defendant Was Not Keeper.* A denial that defendant kept the animal which caused the injury is, if made good, a perfect bar to the action.[97]

(VI) *That Ordinance Violated by Defendant Was Dead Letter.* Where a complaint, in an action to recover for injuries inflicted by a vicious horse, alleged that defendant permitted the horse to run at large, in violation of a city ordinance, a plea to such complaint, that the ordinance was not being enforced at the time the alleged wrong was committed, is bad.[98]

(VII) *That Plaintiff Was Unlawfully Traveling on Sunday.* The plaintiff's right to recover for injuries sustained by reason of attacks by defendant's dog is not affected by the fact that the injury occurred while plaintiff was unlawfully traveling on Sunday.[99]

(VIII) *Want of Scienter.* Where *scienter* is an essential ingredient of liability a want thereof is a bar to the action, and defendant may avail himself of such want of knowledge under the general issue.[1]

ing recess, without their teacher's knowledge or consent, in vexing a ram, which attacked and injured the teacher, cannot be imputed to her in an action by her for injuries. Kinmouth *v.* McDougall, 64 Hun (N. Y.) 636, 19 N. Y. Suppl. 771, 46 N. Y. St. 211 [*affirmed* in 139 N. Y. 612, 35 N. E. 204].

88. Buckley *v.* Gee, 55 Ill. App. 388; Farley *v.* Picard, 78 Hun (N. Y.) 560, 29 N. Y. Suppl. 802, 61 N. Y. St. 516; Werner *v.* Winterbottom, 56 N. Y. Super. Ct. 126, 1 N. Y. Suppl. 417, 17 N. Y. St. 751. See also Logue *v.* Link, 4 E. D. Smith (N. Y.) 63; Sawyer *v.* Jackson, 5 N. Y. Leg. Obs. 380.

89. Plumley *v.* Birge, 124 Mass. 57, 26 Am. Rep. 645; Munn *v.* Reed, 4 Allen (Mass.) 431; Meibus *v.* Dodge, 38 Wis. 300, 20 Am. Rep. 6.

90. Fye *v.* Chapin, 121 Mich. 675, 80 N. W. 797.

91. Barnum *v.* Terpening, 75 Mich. 557, 42 N. W. 967; Buckley *v.* Leonard, 4 Den. (N. Y.) 500.

92. Hathaway *v.* Tinkham, 148 Mass. 85, 19 N. E. 18.

93. Marble *v.* Ross, 124 Mass. 44; Pierret *v.* Moller, 3 E. D. Smith (N. Y.) 574; Sherfey *v.* Bartley, 4 Sneed (Tenn.) 58, 67 Am. Dec. 597; Dandurand *v.* Pinsonnault, 7 L. C. Jur. 131.

Not applicable to dog attacking another.—The cases in which dogs have attacked human beings, although trespassers, and their owners have been held liable, are not applicable to the case of one dog attacking another. Wiley *v.* Slater, 22 Barb. (N. Y.) 506.

94. Pierret *v.* Moller, 3 E. D. Smith (N. Y.) 574.

95. Grange *v.* Silcock, 77 L. T. Rep. N. S. 340.

96. Hill *v.* Applegate, 40 Kan. 31, 19 Pac. 315.

97. Strouse *v.* Leipf, 101 Ala. 433, 14 So. 667, 46 Am. St. Rep. 122, 23 L. R. A. 622.

Defendant is estopped from denying ownership where he represented himself to be the owner for the purpose of misleading plaintiff, who thereby lost his right of action against the true owner. Baird *v.* Vaughn, (Tenn. 1890) 15 S. W. 734.

98. Kitchens *v.* Elliott, 114 Ala. 290, 21 So. 965.

99. Schmid *v.* Humphrey, 48 Iowa 652, 30 Am. Rep. 414; White *v.* Lang, 128 Mass. 598, 35 Am. Rep. 402.

1. Hogan *v.* Sharpe, 7 C. & P. 755, 32 E. C. L. 856; Card *v.* Case, 5 C. B. 622, 57 E. C. L. 622; Thomas *v.* Morgan, 2 C. M. & R. 496, 5 Tyrw. 1085.

d. Jurisdiction. Under the Massachusetts statute it has been held that if a dog, owned and kept in that state, strays into another state and there bites a person, an action lies in Massachusetts against the owner or keeper for such injury.[2]

e. Pleading[3]—(I) *In General.* Where plaintiff seeks to recover under a statute he must aver facts bringing his case within the provisions thereof;[4] but, though a petition be insufficient as a pleading framed on the statute, if it set forth a good cause of action at common law it will not be demurrable merely because it asks for double damages.[5]

(II) *Particular Averments*—(A) *As to Defendant's Negligence.* Where negligence on the part of defendant need not be shown to fix his liability,[6] it is unnecessary for plaintiff to aver negligence.[7]

(B) *As to Scienter.* Where defendant's knowledge of the animal's vicious propensities is an essential element of his liability,[8] *scienter* must be alleged;[9]

2. Le Forest *v.* Tolman, 117 Mass. 109, 19 Am. Rep. 400.

3. **Forms.**—For form of declaration for personal injuries inflicted by a bear see Marquet *v.* La Duke, 96 Mich. 596, 55 N. W. 1006.

For form of declaration for personal injuries inflicted by a bull see Brooks *v.* Taylor, 65 Mich. 208, 31 N. W. 837.

For forms of complaints or declarations for personal injuries inflicted by dogs see:

Delaware.—Friedmann *v.* McGowan, 1 Pennew. (Del.) 436, 42 Atl. 723.

Indiana.—Clanin *v.* Fagan, 124 Ind. 304, 24 N. E. 1044; Partlow *v.* Haggarty, 35 Ind. 178.

Kansas.—Hahn *v.* Kordula, 5 Kan. App. 142, 48 Pac. 896.

Maine.—Mitchell *v.* Chase, 87 Me. 172, 32 Atl. 867; Hussey *v.* King, 83 Me. 568, 22 Atl. 476; Fitzgerald *v.* Dobson, 78 Me. 559, 7 Atl. 704.

Massachusetts.—Searles *v.* Ladd, 123 Mass. 580.

Michigan.—French *v.* Wilkinson, 93 Mich. 322, 53 N. W. 530.

England.—Curtis *v.* Mills, 5 C. & P. 489, 24 E. C. L. 670.

For forms of complaints or declarations for personal injuries inflicted by a horse see Kitchens *v.* Elliott, 114 Ala. 290, 21 So. 965; Popplewell *v.* Pierce, 10 Cush. (Mass.) 509.

For form of declaration for injury to a horse, inflicted by another horse running at large, see Decker *v.* Gammon, 44 Me. 322, 69 Am. Dec. 99.

For form of declaration for injuries to sheep, inflicted by a dog, see Smith *v.* Montgomery, 52 Me. 178.

4. Monroe *v.* Rose, 38 Mich. 347.

"Hurried" for "worried."—In an action brought against the owner of dogs to recover damages for killing and "worrying" plaintiff's sheep, founded on Mich. Comp. Laws, § 1645, it was held that the words "drove, chased, and hurried," used in plaintiff's declaration, are equivalent to, or within the meaning of, the word "worried," as used in said section, and an allegation that the sheep were pasturing on plaintiff's farm and in his possession when the wrong was done sufficiently alleges that they were out of defendant's inclosure. Dorr *v.* Loucks, 2 Mich. N. P. 182.

5. Kneale *v.* Price, 21 Mo. App. 295.

6. See *supra*, XI, A, 1, a, (I), (II).

7. *Massachusetts.*—Popplewell *v.* Pierce, 10 Cush. (Mass.) 509.

Michigan.—Snow *v.* McCracken, 107 Mich. 49, 64 N. W. 866; Brooks *v.* Taylor, 65 Mich. 208, 31 N. W. 837.

Missouri.—Forbes *v.* Shellabarger, 50 Mo. 558.

New Hampshire.—Chickering *v.* Lord, 67 N. H. 555, 32 Atl. 773.

New York.—Woodbridge *v.* Marks, 5 N. Y. App. Div. 604, 40 N. Y. Suppl. 728, 75 N. Y. St. 126 [*affirming* 14 Misc. (N. Y.) 368, 36 N. Y. Suppl. 81, 71 N. Y. St. 417].

United States.—Congress, etc., Spring Co. *v.* Edgar, 99 U. S. 645, 25 L. ed. 487.

Sufficient averment.—In an action to recover damages for an injury inflicted on plaintiff's horse by defendant's bull, an averment that, by reason of the negligence and default of defendant in failing to keep his part of a line fence in repair, the horse passed into defendant's pasture and was gored, was a sufficient averment that the results charged were caused by defendant's negligence. Burke *v.* Daley, 32 Ill. App. 326.

8. See *supra*, XI, A, 1, a, (II), (A), (B).

9. *Alabama.*—Smith *v.* Causey, 22 Ala. 568; Durden *v.* Barnett, 7 Ala. 169.

California.—Laverone *v.* Mangianti, 41 Cal. 138, 10 Am. Rep. 269.

District of Columbia.—Murphy *v.* Preston, 5 Mackey (D. C.) 514.

Illinois.—Mareau *v.* Vanatta, 88 Ill. 132; Stumps *v.* Kelley, 22 Ill. 140; Moss *v.* Pardridge, 9 Ill. App. 490.

Maine.—Decker *v.* Gammon, 44 Me. 322, 69 Am. Dec. 99.

Missouri.—Beckett *v.* Beckett, 48 Mo. 396.

New York.—Laherty *v.* Hogan, 13 Daly (N. Y.) 533, 1 N. Y. St. 84 [*affirming* 2 N. Y. City Ct. 197]; Van Ness *v.* Desheimer, 2 N. Y. City Ct. 208 note.

Oklahoma.—Meegan *v.* McKay, 1 Okla. 59, 30 Pac. 232.

United States.—Congress, etc., Spring Co. *v.* Edgar, 99 U. S. 645, 25 L. ed. 487.

England.—Buxendin *v.* Sharp, 2 Salk. 662; Fleeming *v.* Orr, 29 Eng. L. & Eq. 16.

Canada.—Chase *v.* McDonald, 25 U. C. C. P. 129.

Insufficient averment.—An averment "that the defendant heretofore," etc., "was the

but this is unnecessary where *scienter* is dispensed with by statute,[10] and, if averred, may be treated as mere surplusage.[11]

(C) *Negativing Contributory Negligence.* In some states the plaintiff need not aver his freedom from contributory negligence,[12] while in others such an averment is necessary,[13] though it is sufficient to do so in general terms, without setting forth specific facts.[14]

(D) *Negativing Plaintiff's Engagement in Unlawful Act.* The petition, in an action, under the Kentucky statute, to recover damages for injuries from the bite of a dog owned and kept by defendants, need not allege that the injury did not occur upon the premises of the owners after night, or that plaintiff was not engaged in some unlawful act during the daytime, these exceptions to the statute being matters of defense.[15]

(E) *Place of Keeping Animal.* The place of keeping the animal need not be stated.[16]

(F) *That Animal Was Not Confined.* In an action for injuries sustained from being attacked by a vicious animal it is not necessary to allege that the animal was not confined, that being an affirmative defense, to be alleged and proved by defendant.[17]

(G) *Viciousness of Animal.* Unless defendant's liability has been enlarged by statute,[18] if the injury is inflicted by a vicious animal, plaintiff's pleading should show that the animal was possessed of such vicious propensity;[19] but this may appear from the facts set out, without a specific allegation.[20] It has also been held that the plaintiff should state the particular mischief which the animal had done before.[21]

(H) *Contra Formam Statuti.* Where the action is brought under a statute it has been held necessary to allege that the acts were done contrary to the form of the statute;[22] but a declaration in common-law form is amendable by

owner and possessor, in the District of Columbia, of a vicious dog, which dog was well known to the defendant but which was unknown to the plaintiff," is ambiguous in meaning and is insufficient. Murphy *v.* Preston, 5 Mackey (D. C.) 514, 516.

10. Pressey *v.* Wirth, 3 Allen (Mass.) 191: Newton *v.* Gordon, 72 Mich. 642, 40 N. W. 921; Gries *v.* Zeck, 24 Ohio St. 329; Job *v.* Harlan, 13 Ohio St. 485.

11. Jacobsmeyer *v.* Poggemoeller, 47 Mo. App. 560.

12. Hussey *v.* King, 83 Me. 568, 22 Atl. 476; Brooks *v.* Taylor, 65 Mich. 208, 31 N. W. 837.

13. Eberhart *v.* Reister, 96 Ind. 478; Williams *v.* Moray, 74 Ind. 25, 39 Am. Rep. 76; Gregory *v.* Woodworth, 93 Iowa 246, 61 N. W. 962.

14. Gregory *v.* Woodworth, 93 Iowa 246, 61 N. W. 962.

15. Wolff *v.* Lamann, 21 Ky. L. Rep. 1780, 56 S. W. 408; Bush *v.* Wathen, 20 Ky. L. Rep. 731, 47 S. W. 599.

16. Brooks *v.* Taylor, 65 Mich. 208, 31 N. W. 837.

17. Graham *v.* Payne, 122 Ind. 403, 24 N. E. 216.

18. **Where statutes have enlarged the common-law liability** of owners or keepers of dogs it is no longer necessary to allege that the dog was, in fact, accustomed to bite. Pressey *v.* Wirth, 3 Allen (Mass.) 191.

19. Klenberg *v.* Russell, 125 Ind. 531, 25 N. E. 596; Meegan *v.* McKay, 1 Okla. 59, 30 Pac. 232.

20. Graham *v.* Payne, 122 Ind. 403, 24 N. E. 216.

21. Jenkins *v.* Turner, 1 Ld. Raym. 109, holding, however, that an averment that defendant kept a boar, which he knew was accustomed to bite animals, was good after verdict. But see Hartley *v.* Harriman, 1 B. & Ald. 620, S. C. *sub nom.* Hartley *v.* Halliwell, 2 Stark. 212, 3 E. C. L. 381 (from which it seems that an averment that dogs were of a ferocious disposition would be sufficient, without alleging specifically that they were accustomed to bite and worry sheep); and Guenther *v.* Fohey, (Ind. App. 1901) 59 N. E. 182 (holding that where the complaint averred the dog's fierce disposition, and defendant's knowledge of the same, it was sufficient without allegations showing it was the dog's habit to bite mankind).

22. Cockfield *v.* Singletary, 15 Rich. (S. C.) 240. But see Mitchell *v.* Clapp, 12 Cush. (Mass.) 278, holding that, in an action upon Mass. Rev. Stat. c. 58, § 13, to recover double damages for an injury by a dog, judgment will not be arrested because the declaration does not set forth that the acts were done *contra formam statuti.*

Sufficient count.— A count alleging in substance that defendant's dog, by him owned and kept, at a time and place named, did worry and wound plaintiff's sheep, in consequence whereof some died, etc., to the great damage of plaintiff, and contrary to the form, force, and effect of section 9, chapter 104, of the General Statutes, is a declaration on the statute. Rowe *v.* Bird, 48 Vt. 578.

adding an averment thereto that the action is brought under the statute which allows the recovery of double damages.[23]

(III) *Joinder of Counts.* A count on a statute, for double damages, may be joined with a count at common law for damages of like kind, where the form of action given by the statute is the same as that at common law.[24] Where plaintiff, having declared in one count for entering his close, and there destroying his mare, and in another in case for keeping the bull which did the damage, knowing his vice, etc., plaintiff having recovered a general verdict, is not bound to elect upon which count to take his verdict.[25]

f. Evidence — (I) *Burden of Proof.* Plaintiff must show that defendant was the keeper or owner of the animal, within the meaning of the statute;[26] negligence on the part of defendant;[27] and, where contributory negligence must be negatived, his own freedom from such negligence.[28] Plaintiff need not show the place of the biting, as alleged in the declaration, unless it is made issuable by defendant's pleading.[29] Where plaintiff has made out a *prima facie* case the burden is cast on defendant of showing that he was not at fault.[30]

(II) *Admissibility* — (A) *As to Character of Animal* — (1) In General. As tending to show the vicious character of the animal, evidence of specific attacks thereby,[31] or proof that defendant had warned a person to beware of him lest such person be injured,[32] is admissible; but such character cannot be shown by evidence of the general reputation of the animal for viciousness,[33] or by evidence as to the character of a breed of dogs, it not being shown that defendant's dog was of such breed.[34] Where *scienter* is not necessary,[35] or where the facts

23. Mitchell *v.* Chase, 87 Me. 172, 32 Atl. 867.

24. Fairfield *v.* Burt, 11 Pick. (Mass.) 244.

Where there are three counts in a declaration in trespass to recover damages for personal injuries received by plaintiff from the dogs of defendants, two of which counts are founded on the common-law liability for such injury, and the other based upon a special statute, it cannot be said, as a legal proposition, that they are all for the same cause of action. And where, in such action, the verdict is for defendant upon the two counts based upon the common-law liability, and for plaintiff upon the other count, it cannot be claimed, in the absence of any motion in the court below for judgment in favor of defendants, that the court erred in not awarding judgment for defendants on the whole record, upon the ground that the verdict rendered in their favor on the two counts was inconsistent with any verdict against them on the other count, for the reason that all were for the same cause of action; nor that the court erred in not awarding costs to defendants upon the issues found in their favor. Swift *v.* Applebone, 23 Mich. 252.

25. Mason *v.* Morgan, 24 U. C. Q. B. 328.

26. Strang *v.* Newlin, 38 How. Pr. (N. Y.) 364.

27. Curtis *v.* Schlosser, 14 Pa. Co. Ct. 600, 3 Pa. Dist. 598.

28. Stuber *v.* Gannon, 98 Iowa 228, 67 N. W. 105.

29. Friedmann *v.* McGowan, 1 Pennew. (Del.) 436, 42 Atl. 723.

30. Ficken *v.* Jones, 28 Cal. 618; Woodbridge *v.* Marks, 14 Misc. (N. Y.) 368, 36 N. Y. Suppl. 81, 71 N. Y. St. 417.

31. *Kentucky.*—Murray *v.* Young, 12 Bush (Ky.) 337.

Maine.— Fitzgerald *v.* Dobson, 78 Me. 559, 7 Atl. 704.

Massachusetts.— Broderick *v.* Higginson, 169 Mass. 482, 48 N. E. 269, 61 Am. St. Rep. 296.

New York.— Rogers *v.* Rogers, 4 N. Y. St. 373.

Washington.—Robinson *v.* Marino, 3 Wash. 434, 28 Pac. 752, 28 Am. St. Rep. 50.

Plaintiff may show by a former owner that the dog was vicious, although the vicious acts he testifies to did not come to defendant's knowledge, there being other evidence that defendant knew the dog was vicious. Plummer *v.* Ricker, 71 Vt. 114, 41 Atl. 1045.

Must be attacks of same character.— In an action for damages resulting from the bite of a dog, under a declaration charging that he was "accustomed to attack and bite mankind," it is error to admit, over the objection of defendant, evidence showing that the dog was vicious toward other dogs, and was accustomed to attack them. Norris *v.* Warner, 59 Ill. App. 300. But see Cheney *v.* Russell, 44 Mich. 620, 7 N. W. 234, wherein, in an action before a justice against the owner of a dog for injury done by the dog to a quantity of fresh meat, it was held not improper to receive testimony as to the dog's vicious character and roving propensities as having some bearing on the probabilities.

Such evidence is not prejudicial even when the statute makes one liable for injuries by a dog, even when the owner is without knowledge of the dog's viciousness. Sanders *v.* O'Callaghan, (Iowa 1900) 82 N. W. 969.

32. Judge *v.* Cox, 1 Stark. 285, 2 E. C. L. 114.

33. Norris *v.* Warner, 59 Ill. App. 300.

34. Lynt *v.* Moore, 5 N. Y. App. Div. 487, 38 N. Y. Suppl. 1095.

35. Kelly *v.* Alderson, 19 R. I. 544, 37 Atl. 12.

that plaintiff has been injured and that defendant knew of previous injuries by the animal have been established, evidence to prove the general good behavior of the animal is inadmissible,[36] even in mitigation of damages.[37] Evidence of an animal's treatment after the injury is admissible to show his previous character;[38] and evidence that he subsequently manifested a similar disposition is competent to prove that his previous conduct was not accidental or unusual, but the result of a fixed habit.[39] Where, in an action for injuries received while harnessing a vicious horse, plaintiff's evidence is confined to showing that it was vicious while being harnessed, evidence that it was gentle while being driven is inadmissible.[40]

(2) Bringing Animal into Court. A dog may be brought into court, and shown to the jury, in order to assist them in judging of his temper and disposition.[41]

(3) Cause of Ferocity. Evidence tending to show what made a dog savage is inadmissible, it being immaterial what tended to make him so.[42]

(B) *As to Character of Injury.* Evidence to prove the extent of plaintiff's injury, and his corporal suffering and pain, is admissible,[43] provided a proper foundation for such proof is laid in the declaration.[44]

(C) *As to Contributory Negligence.* Evidence as to the character and general reputation of an animal as being vicious, and as to what had been told plaintiff on that subject, is admissible as bearing on the question of plaintiff's contributory negligence;[45] but testimony as to character of a dog is inadmissible to show that he probably would not have bitten plaintiff had he not been assaulted by him.[46]

(D) *As to Defendant's Negligence.* Evidence of how defendant's grounds are occupied,[47] that defendant knew that his dog broke away and, unprovoked, bit a child only a short time before the injury complained of,[48] or that the animal never before had attacked anyone,[49] is admissible as bearing on the question of defendant's negligence.

36. Knickerbocker Ice Co. *v.* De Haas, 37 Ill. App. 195; Willet *v.* Goetz, (Mich. 1901) 84 N. W. 1071; Kennett *v.* Engle, 105 Mich. 693, 63 N. W. 1009; Caldwell *v.* Snook, 35 Hun (N. Y.) 73; Buckley *v.* Leonard, 4 Den. (N. Y.) 500; Mann *v.* Weiand, 81* Pa. St. 243, 34 Leg. Int. (Pa.) 77, 4 Wkly. Notes Cas. (Pa.) 6.

37. Kelly *v.* Alderson, 19 R. I. 544, 37 Atl. 12.

38. Carroll *v.* Weiler, 1 Hun (N. Y.) 605, 4 Thomps. & C. (N. Y.) 131; Webber *v.* Hoag, 8 N. Y. Suppl. 76, 28 N. Y. St. 630.

39. Kennon *v.* Gilmer, 131 U. S. 22, 9 S. Ct. 696, 33 L. ed. 110. See also Brown *v.* Green, 1 Pennew. (Del.) 535, 42 Atl. 991, holding that, in an action to recover for injuries from a vicious horse, testimony of a horse-breaker, who took charge of the horse two days after the injury complained of, as to its character at that time, is admissible. But testimony as to the behavior or disposition of a horse shortly subsequent to an accident, offered to show his vicious disposition at the time of the accident, should be excluded. Stone *v.* Langworthy, 20 R. I. 602, 40 Atl. 832.

40. Brown *v.* Green, 1 Pennew. (Del.) 535, 42 Atl. 991.

41. Line *v.* Taylor, 3 F. & F. 731.

42. Kolb *v.* Klages, 27 Ill. App. 531.

43. Arnold *v.* Norton, 25 Conn. 92.

Exclamations of plaintiff.— In giving evidence of plaintiff's nervousness from the injury, it is competent to show that she sprang from bed and exclaimed, "There is Hoag's [defendant's] dog!" as bearing on the question of her injury. Webber *v.* Hoag, 8 N. Y. Suppl. 76, 28 N. Y. St. 630.

Fright at sight of dog.— In an action for an injury, done by a dog to a child four years and eleven months old, in which facts, tending to show a shock to the child's nervous system, have been testified to, evidence is admissible that, ever since his injury, he has shown signs of fright and excitement at the sight of any dog. Roswell *v.* Leslie, 133 Mass. 589.

It is relevant to ask plaintiff whether he has not been afraid of hydrophobia ever since bitten by the dog. Friedmann *v.* McGowan, 1 Pennew. (Del.) 436, 42 Atl. 723.

44. French *v.* Wilkinson, 93 Mich. 322, 53 N. W. 530.

45. Meier *v.* Shrunk, 79 Iowa 17, 44 N. W. 209.

Irrelevant evidence.— Evidence that plaintiff and his daughter had observed the dog when strangers were on the premises, and that it never offered to bite such strangers as long as they walked about quietly, is irrelevant to the issue of plaintiff's contributory negligence. Sanders *v.* O'Callaghan, (Iowa 1900) 82 N. W. 969.

46. Kelly *v.* Alderson, 19 R. I. 544, 37 Atl. 12.

47. Marquet *v.* La Duke, 96 Mich. 596, 55 N. W. 1006.

48. Worthen *v.* Love, 60 Vt. 285, 14 Atl. 461.

49. Barnum *v.* Terpening, 75 Mich. 557, 42 N. W. 967.

(E) *As to Habits of Other Animals.* Evidence as to the habits of another animal, not owned or kept by defendant, but admittedly resembling his animal, is inadmissible.[50]

(F) *As to Registration of Dog.* In an action for damages for being bitten by a dog, evidence that the dog was not registered, as required by a city ordinance, is not admissible.[51]

(G) *To Show Cause of Injury.* The fact that defendant's animal caused the injury complained of must be established by competent evidence,[52] and, since defendant is not liable for injuries committed by other animals, any evidence tending to show that others committed the injuries complained of would be competent evidence to go to the jury.[53] When the injury is admitted, and defendant claims that plaintiff was hurt by stones upon which the dog threw him in play, evidence that a similar injury was caused to another boy, by his being thrown from a velocipede upon the ground near the same place, is rightly excluded.[54]

(H) *To Show Defendant Was Owner or Keeper.* Where the ownership is in question evidence of what was said by drovers, as to wherefrom and whereto they were driving the animals, is admissible,[55] as is evidence of defendant's treatment of the animals.[56]

(I) *To Show Scienter.* Admissions made by defendant after the injury,[57] admissions that defendant's animal did the injury, accompanied by offers from defendant of recompense — although to be received with caution[58] — evidence of notice to defendant's agent,[59] evidence as to how a dog was kept, and why,[60] and evidence of the general reputation of the animal as being vicious and dangerous,[61] are competent, as tending to raise an inference that the owner had knowl-

General reputation of animal.— Evidence that a dog, fastened in a public place by a station porter of a railroad company, was notoriously of a vicious reputation in the town is competent to show notice to defendant's agents who lived in same place, and as bearing on the question of negligence in fastening such a dog in such a place. Trinity, etc., R. Co. *v.* O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389.

50. Meracle *v.* Down, 64 Wis. 323, 25 N. W. 412. See also Rowe *v.* Bird, 48 Vt. 578.

Where, however, plaintiff, by mistake, named the wrong animal in his petition, and defendant's own evidence showed that the animal actually causing the injury was vicious, such evidence was not improperly admitted. Joseph Schlitz Brewing Co. *v.* Blacklay, 18 Ohio Cir. Ct. 359, 10 Ohio Cir. Dec. 17.

51. Barclay *v.* Hartman, 2 Marv. (Del.) 351, 43 Atl. 174.

52. Former acts of mischief incompetent. — By the statute, the owner of a dog is made liable for the damage done, whether the dog was accustomed to kill and worry sheep or not. We are not acquainted with any rule of evidence which will allow the character of the dog, or the fact that he had killed or worried sheep before, to be admitted as evidence that he did the damage complained of in this suit. To show that he did this mischief it is not competent to prove that he had done similar mischief before, more than it would be to prove that a defendant, sued for an assault and battery, had beaten other men before, or the same man. East Kingston *v.* Towle, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174.

53. Ballou *v.* Humphrey, 8 Kan. 220.

54. Hathaway *v.* Tinkham, 148 Mass. 85, 19 N. E. 18.

55. Baird *v.* Vaughn, (Tenn. 1890) 15 S. W. 734.

56. O'Harra *v.* Miller, 64 Iowa 462, 20 N. W. 760; Manger *v.* Shipman, 30 Nebr. 352, 46 N. W. 527.

57. Linnehan *v.* Sampson, 126 Mass. 506, 30 Am. Rep. 692; Hudson *v.* Roberts, 6 Exch. 679, 20 L. J. Exch. 299.

58. Brice *v.* Bauer, 108 N. Y. 428, 15 N. E. 695, 2 Am. St. Rep. 454; Thomas *v.* Morgan, 2 C. M. & R. 496, 5 Tyrw. 1085; Mason *v.* Morgan, 24 U. C. Q. B. 328.

59. Keenan *v.* Gutta Percha, etc., Mfg. Co., 46 Hun (N. Y.) 544 [*affirmed* in 120 N. Y. 627, 24 N. E. 1096]; Corliss *v.* Smith, 53 Vt. 532.

Manner of leading.— Proof that the animal was led by a chain, attached to a ring in his nose, and with a stick attached to the chain, in order to keep him away from the man in charge, such facts being known to defendant, is competent as bearing upon defendant's knowledge of the viciousness of the animal. Brooks *v.* Taylor, 65 Mich. 208, 31 N. W. 837.

60. Plummer *v.* Ricker, 71 Vt. 114, 41 Atl. 1045.

61. Cameron *v.* Bryan, 89 Iowa 214, 56 N. W. 434; Murray *v.* Young, 12 Bush (Ky.) 337; Fake *v.* Addicks, 45 Minn. 37, 47 N. W. 450, 22 Am. St. Rep. 716; Triolo *v.* Foster, (Tex. Civ. App. 1900) 57 S. W. 698.

A report that the dog had been bitten by a mad dog, particularly where defendant, by tying the dog up, showed some knowledge or suspicion of the fact, is admissible on the

edge of his vicious propensities; but statements made by defendant's servant are inadmissible to prove defendant's *scienter*.[62]

(J) *To Show That Animal Was Allowed at Large.* In an action for personal injuries inflicted by an animal while running at large, evidence to the effect that defendant frequently permitted it to run at large in the road is admissible as bearing on the question whether it was at large with defendant's permission at the time of the injuries.[63]

(III) *Sufficiency*— (A) *As to Cause of Injury.* Circumstantial evidence will be sufficient to establish the fact that the injury was done by defendant's animal,[64] and a dog may be found to have attacked a horse upon a highway, although the dog did not leave his master's premises, nor go within fifteen feet of the horse, nor bark or make any noise.[65] The fact that certain dogs killed sheep in one place by attacking them in a certain way is no evidence that they killed, in another place, sheep which appear to have been killed in the same way, since the two facts are not a part of the same transaction, nor related to each other by the chain of cause and effect.[66]

(B) *As to Character of Animal.* Evidence that plaintiff's dog, though muzzled, was accustomed to attack people,[67] that defendant's servant said he would not dare go into the place even though the dog knew him, and that defendant's wife told plaintiff that she did not want him to go in for fear of the dog,[68] or that plaintiff, in stepping out of the house, was attacked and bitten without the slightest warning,[69] is sufficient to show the vicious character of the animal.

question of *scienter*. Jones *v.* Perry, 2 Esp. 482.

62. Shaver *v.* New York, etc., Transp. Co., 31 Hun (N. Y.) 55.

63. Meier *v.* Shrunk, 79 Iowa 17, 44 N. W. 209.

64. Thus, where defendant's bull, with blood on his horns, was running at large in the neighborhood shortly after the death of plaintiff's mare (Arnold *v.* Diggdon, 20 Nova Scotia 303), and where defendant's dog was seen with another dog worrying sheep, and the same day the shepherd found four dead lambs near the place (Lewis *v.* Jones, 49 J. P. 198), the evidence has been deemed sufficient. So, too, where the evidence was that defendant's horse, unattended and unharnessed, was improperly upon the highway, near the house of plaintiff's father, that screams were heard and plaintiff was first seen lying back of the horse's heels and, afterward, near the horse, running toward the house, screaming, covered with blood, and holding his hand to his face, and that the wound was such as might have been caused by a blow from a horse's shoe, the jury was warranted in finding that the injury was caused by a kick of defendant's horse (Marsland *v.* Murray, 148 Mass. 91, 18 N. E. 680, 12 Am. St. Rep. 520); and a finding that defendant's dog killed plaintiff's sheep before a specified date is sustained by evidence that on such date he was found killing plaintiff's sheep, and that, before that time, he was heard, with another dog, barking in plaintiff's pasture, and that after he was sent away no further sheep were killed (Williams *v.* Woodworth, 32 Nova Scotia 271). Where, on the morning a number of plaintiff's sheep had been killed by dogs, tracks of a dog were traced in the snow to defendant's house, and his dog presented an incriminating appearance, a verdict against defendant for the loss of the sheep will not be reversed on appeal, as not supported by the evidence. Nelson *v.* Nugent, 106 Wis. 477, 82 N. W. 287.

65. Denison *v.* Lincoln, 131 Mass. 236. See also Campbell *v.* Brown, 1 Grant (Pa.) 82, holding that, under the Pennsylvania act of March 23, 1809, it is not necessary that a dog should have been seen tearing sheep with his teeth, but that it is sufficient that he has been observed to follow them with a hostile intent, and that the owner knew of his propensity.

66. Dover *v.* Winchester, 70 Vt. 418, 41 Atl. 445.

67. Kessler *v.* Lockwood, 16 N. Y. Suppl. 677, 42 N. Y. St. 563.

68. Jacoby *v.* Ockerhausen, 13 N. Y. Suppl. 499, 37 N. Y. St. 710 [*affirmed* in 129 N. Y. 649, 29 N. E. 1032].

69. Webber *v.* Hoag, 8 N. Y. Suppl. 76, 28 N. Y. St. 630.

Insufficient evidence.—In Genenz *v.* De Forest, 49 Hun (N. Y.) 364, 15 N. Y. Civ. Proc. 145, 147, 2 N. Y. Suppl. 152, 17 N. Y. St. 523, the court, commenting on the evidence, said: "There is little, if any, evidence of viciousness in the dog prior to the accident. Two girls were passing along the highway. The dog ran out and barked, and ran toward them, but did nothing. They were frightened. So they might have been at a mouse; but it would not follow that the mouse was vicious. The dog grabbed a coat hanging down from a man's shoulder. The dog was tied in a woodshed and jumped for Mrs. Genenz's shoulder when she went in. Reynolds, who worked for the defendant and who brought the dog to defendant's house, kept him chained. This is substantially all the proof of viciousness. And it shows little but the playfulness of a puppy, which the animal was." So, too, evi-

(c) *As to Negligence.* The mere presence of defendant's horse in a highway, without showing how he came there, what induced him to kick plaintiff, or that he was accustomed to kick, is insufficient to show negligence in defendant,[70] unless declared so by statute.[71] But an averment of negligence is sustained by proof that cattle were being driven very fast by a man on horseback, that they were running in a wild manner, and were foaming at the mouth, feverish, and overheated.[72]

(d) *As to Ownership or Keeping.* Evidence that a dog was kept in a stable leased by defendant to the owner of the dog is not sufficient to charge defendant with liability;[73] but, where a dog is kept about defendant's stable by one employed to take charge thereof, such keeping being with the knowledge and implied assent of defendant, a jury may properly find that defendant kept such dog.[74] The evidence is also sufficient to justify a finding that defendant was the owner or keeper where it appears that the animal was brought to defendant's premises by one formerly residing there, and continued to remain on such premises after the latter's departure,[75] as is evidence that defendant appeared in the action by attorney, summoned witnesses, and made a vigorous defense, but did not himself testify, nor explain such omission.[76]

(e) *As to Scienter.* Whatever is calculated to establish the dangerous propensity of animals in a sufficient degree tends to support the allegation that the owner had actual knowledge of the same;[77] but any specific demonstration of the

dence that a dog attacked a bicycle the first time one ever passed his house (Cuney *v.* Campbell, 76 Minn. 59, 78 N. W. 878), and evidence that a bull, though ordinarily gentle, was vicious when ill-treated (Erickson *v.* Bronson, (Minn. 1900) 83 N. W. 988), was held insufficient.

70. Cox *v.* Burbridge, 13 C. B. N. S. 430, 106 E. C. L. 430.

71. Fallon *v.* O'Brien, 12 R. I. 518, 34 Am. Rep. 713, holding that R. I. Gen. Stat. c. 96, makes the presence in the highway of a loose and unattended horse *prima facie* evidence of negligence.

72. Eichel *v.* Senhenn, 2 Ind. App. 208, 28 N. E. 193.

73. Jennings *v.* D. G. Burton Co., 73 Hun (N. Y.) 545, 26 N. Y. Suppl. 151, 57 N. Y. St. 268.

74. Barrett *v.* Malden, etc., R. Co., 3 Allen (Mass.) 101.

75. Kessler *v.* Lockwood, 16 N. Y. Suppl. 677, 42 N. Y. St. 563; Vaughan *v.* Wood, 18 Can. Supreme Ct. 703. But see Collingill *v.* Haverhill, 128 Mass. 218, holding that the facts that a dog, owned by, and licensed in the name of, the superintendent of a poor-farm of a city, is kept at the farm, with the knowledge of one of the overseers of the poor of the city, and, without objection by him, is fed with food furnished by the city for common use at the farm, and, during a portion of the time, is allowed the run of the farm, do not, as matter of law, show that the city is a keeper of the dog, within Mass. Gen. Stat. c. 88, § 59.

76. McCormack *v.* Martin, 71 Conn. 748, 43 Atl. 194.

77. McCaskill *v.* Elliott, 5 Strobh. (S. C.) 196, 53 Am. Dec. 706.

Confining, and muzzling while at large.—Evidence that the keeper of a dog had been told by his neighbors that it was unsafe to allow it to run at large, and that he kept it confined a part of the time, and muzzled it a part of the time when he allowed it to run at large, is sufficient. Godeau *v.* Blood, 52 Vt. 251, 36 Am. Rep. 751.

Evidence that the dog habitually assailed people, on the street near defendant's premises, before plaintiff was bitten; that he had attacked a driver on a wagon; that plaintiff's employer informed defendant of this habit of the dog; and that he was also informed that the dog had assailed another person, and torn his coat, is sufficient to charge defendant with knowledge of the dog's viciousness (Webber *v.* Hoag, 8 N. Y. Suppl. 76, 28 N. Y. St. 630), as is evidence that a dog, on two occasions previously, rushed at persons in a vicious manner, and that the owner was obliged to call him off (McConnell *v.* Lloyd, 9 Pa. Super. Ct. 25, 43 Wkly. Notes Cas. (Pa.) 245).

So, too, where several witnesses testify that the dog had always been kept chained; that he would bark and jump at persons going near him, and endeavor to get loose; that, on one occasion, when at large, he ran after and seized a woman's dress as she escaped through the gate; that he sprang upon plaintiff as she went to defendant's house, and bit and bruised her savagely, and that defendant had stated to a neighbor that he was afraid the dog would get loose and bite the neighbor's child, there is sufficient testimony to go to the jury on the points of the ferocious disposition of the dog, and the owner's knowledge thereof. Robinson *v.* Marino, 3 Wash. 434, 28 Pac. 752, 28 Am. St. Rep. 50.

Insufficient evidence.—Evidence that a pair of horses had, to the knowledge of the owner, run away on an occasion ten days before is not sufficient to invoke the rule as to liability for harboring animals of known vicious propensities, where it is also shown that the horses, for several years, had been driven on street-cars, appearing during that time to be

animal's ferocious disposition must be brought to defendant's knowledge.[78] The fact that an animal is commonly kept confined by the owner is evidence from which the jury may infer such knowledge on the part of the owner,[79] and an admission of knowledge by defendant is, of course, sufficient.[80]

(IV) *VARIANCE.* Where the statute provides that every "owner or keeper" of any dog shall forfeit, etc., and the declaration alleged that defendants were the "owners and keepers" of a dog, it has been held that plaintiff must prove that defendants were both "owners and keepers;"[81] but it has also been held that proof that some of the dogs were owned by one of defendants separately, and some by the other defendants separately, does not constitute a material variance.[82]

g. Trial — (I) *NONSUIT.* Where, in an action to recover for personal injuries caused by a domestic animal, it does not appear that the animal ever injured any one before or since, or that any one ever had any difficulty with it other than that on which plaintiff founds his suit, nonsuit should be granted, since there is no evidence that defendant had knowledge of the vicious character of the animal.[83]

(II) *INSTRUCTIONS* — (A) *As to Cause of Injury.* Where there was evidence that the dog was muzzled, and could not, with the muzzle on, have bitten plaintiff, and that the muzzle had two buckles on it, and plaintiff testified that the dog bit her, and that the buckles did not cause the injury, an instruction that, if the dog wounded plaintiff by biting her, the action could be maintained, but, unless it was proved that the dog bit plaintiff, the action could not be maintained, was correct, and plaintiff had no ground of exception to the instructions; and it was not open to her to contend that the instructions were erroneous, because the jury might have found that the injury was caused by the buckles.[84]

(B) *As to Character of Animal.* It is error to instruct the jury that if they believed from the evidence that plaintiff was bitten by defendant's dog, and that said dog was of a savage and ferocious disposition, and known by defendant to be such, they should find for plaintiff, where the evidence was not confined to proof of the dog's disposition toward persons, but evidence was admitted of the dog's attacking a horse, and that witnesses considered him a cross and unsafe dog.[85]

(C) *As to Contributory Negligence.* An instruction that plaintiff could not recover because of contributory negligence is properly refused, that being a question for the jury.[86] In instructing as to contributory negligence it is error to

kind and gentle. Benoit *v.* Troy, etc., R. Co., 154 N. Y. 223, 48 N. E. 524 [*reversing* 40 N. Y. Suppl. 1140].

Evidence that a horse balked and kicked, while on the road, is not sufficient to show knowledge, on the part of the owner, of a propensity to kick while standing in a stall. Bennett *v.* Mallard, 33 Misc. (N. Y.) 112, 67 N. Y. Suppl. 159.

Evidence that, for some time prior to the injury, a horse had been seen to snap at persons, and had kicked a stableman when it was punched with sticks, and also when tickled and teased, is insufficient to show *scienter* on the part of the owner. McHugh *v.* New York City, 31 N. Y. App. Div. 299, 52 N. Y. Suppl. 623.

78. Rogers *v.* Rogers, 4 N. Y. St. 373.

The idea of scienter is rebutted where, in an action against the owner of bees for an injury done by them to the plaintiff's horses while the horses were traveling along the highway past the place where the bees were kept, it appeared that the bees had been kept in the same situation for eight or nine years, and there was no proof of any injury ever having been done by them, but, on the contrary, witnesses residing in the neighborhood testified that they had been in the habit of passing and repassing the place frequently, without having been molested. Earl *v.* Van Alstine, 8 Barb. (N. Y.) 630.

79. Warner *v.* Chamberlain, 7 Houst. (Del.) 18, 30 Atl. 638.

80. Solomon *v.* Miller, 3 N. Y. Suppl. 660, 22 N. Y. St. 39, holding, however, that the admission was not established.

Insufficient admission.— Admissions, made by defendant some years before, are insufficient to show *scienter.* McKenzie *v.* Blackmore, 19 Nova Scotia 203.

81. Buddington *v.* Shearer, 20 Pick. (Mass.) 477.

82. McAdams *v.* Sutton, 24 Ohio St. 333.

83. O'Connell *v.* Mooney, 32 Misc. (N. Y.) 641, 66 N. Y. Suppl. 486.

84. Searles *v.* Ladd, 123 Mass. 580.

85. Keightlinger *v.* Egan, 65 Ill. 235.

86. Sanders *v.* O'Callaghan, (Iowa 1900) 82 N. W. 969. And see *infra,* XI, A, 4, g, (III).

Where, in an action to recover for an injury inflicted upon a child by a dog, the case is submitted to the jury, under instructions requiring them to find that neither the fault of the child nor of the mother, who had care

ignore directions, given by defendant to plaintiff, as to the use of certain premises near which the animal causing the injury was confined,[87] to inform the jury that they may consider, in passing upon this question, the instinct which usually exists in the human breast for self-preservation,[88] or to instruct the jury that plaintiff was guilty of negligence if, "when he might have prevented it," he suffered an animal to follow him.[89] The court should also instruct the jury that, if plaintiff's position at the time he was injured was such as might have been assumed by a person of ordinary sense and prudence, he could recover.[90]

(D) *As to Scienter.* Where there are several facts in evidence tending to prove the *scienter*, it is not the duty of the court to instruct the jury what the consequences would have been if only one of those facts had been in evidence.[91]

(III) *Province of Jury.* The questions whether a dog had such a peculiar bark or voice that witnesses acquainted with the animal could satisfactorily identify it by merely hearing it bark in the night;[92] whether defendant owned or kept the animal which committed the injury;[93] and whether he was chargeable with knowledge of the animal's vicious propensities,[94] or negligent in its management,[95] or in the care of his part of a division fence,[96] are all properly left to the jury. So likewise is the question of plaintiff's contributory negligence,[97] and also whether plaintiff has signified his intention to proceed against the town in such a manner that he could not afterward proceed against defendant.[98] It is also the province of the jury to assess the amount of damage done.[99]

h. Amount Recoverable — (I) *In General.* Where the jury finds for plaintiff he is entitled to such damages as necessarily arise from the injury sustained.[1] If the injury be the death of an animal, the value of such animal would be a just measure of damages.[2] If the injury be to the person he may recover for

of the child, contributed to the injury, a verdict for plaintiff will not be set aside because the judge refused to instruct the jury, at the request of defendant, that it is *prima facie* evidence of want of care for a mother to allow her child to play with a strange dog. Munn *v.* Reed, 4 Allen (Mass.) 431.

87. Dvorak *v.* Maloch, 41 Ill. App. 131.

88. Ellis *v.* Leonard, 107 Iowa 487, 78 N. W. 246.

89. Shehan *v.* Cornwall, 29 Iowa 99.

90. Wooldridge *v.* White, 20 Ky. L. Rep. 1144, 48 S. W. 1081.

91. Keenan *v.* Hayden, 39 Wis. 558.

92. Wilbur *v.* Hubbard, 35 Barb. (N. Y.) 303.

93. Murray *v.* Young, 12 Bush (Ky.) 337; Boylan *v.* Everett, 172 Mass. 453, 52 N. E. 541; Whittemore *v.* Thomas, 153 Mass. 347, 26 N. E. 875; McLaughlin *v.* Kemp, 152 Mass. 7, 25 N. E. 18; Snyder *v.* Patterson, 161 Pa. St. 98, 34 Wkly. Notes Cas. (Pa.) 288, 28 Atl. 1006.

94. *Kentucky.*—Murray *v.* Young, 12 Bush (Ky.) 337.

Michigan.— Knowles *v.* Mulder, 74 Mich. 202, 41 N. W. 896, 16 Am. St. Rep. 627.

New York.— Bauer *v.* Lyons, 23 N. Y. App. Div. 204, 48 N. Y. Suppl. 729; McGarry *v.* New York, etc., R. Co., 60 N. Y. Super. Ct. 367, 18 N. Y. Suppl. 195, 45 N. Y. St. 564 [*affirmed* in 137 N. Y. 627, 33 N. E. 745].

North Carolina.— Cockerham *v.* Nixon, 33 N. C. 269.

Pennsylvania.— McConnell *v.* Lloyd, 9 Pa. Super. Ct. 25, 43 Wkly. Notes Cas. (Pa.) 245.

Wisconsin.— Keenan *v.* Hayden, 39 Wis. 558.

95. Barnum *v.* Terpening, 75 Mich. 557, 42 N. W. 967; Putnam *v.* Wigg, 59 Hun (N. Y.) 627, 14 N. Y. Suppl. 90, 37 N. Y. St. 304; Snyder *v.* Patterson, 161 Pa. St. 98, 34 Wkly. Notes Cas. (Pa.) 288, 28 Atl. 1006; McIlvaine *v.* Lantz, 100 Pa. St. 586, 45 Am. Rep. 400; Puechner *v.* Braun, 10 Pa. Super. Ct. 595.

96. Saxton *v.* Bacon, 31 Vt. 540.

97. *Indiana.*— Eichel *v.* Senhenn, 2 Ind. App. 208, 28 N. E. 193.

Iowa.—Sanders *v.* O'Callaghan, (Iowa 1900) 82 N. W. 969; Meier *v.* Shrunk, 79 Iowa 17, 44 N. W. 209.

Kentucky.— Wolff *v.* Lamann, 21 Ky. L. Rep. 1780, 56 S. W. 408.

Massachusetts.— Raymond *v.* Hodgson, 161 Mass. 184, 36 N. E. 791; Matteson *v.* Strong, 159 Mass. 497, 34 N. E. 1077; Marsland *v.* Murray, 148 Mass. 91, 18 N. E. 680, 12 Am. St. Rep. 520; Linnehan *v.* Sampson, 126 Mass. 506, 30 Am. Rep. 692; Marble *v.* Ross, 124 Mass. 44.

New York.— Putnam *v.* Wigg, 59 Hun (N. Y.) 627, 14 N. Y. Suppl. 90, 37 N. Y. St. 304.

Pennsylvania.— Earhart *v.* Youngblood, 27 Pa. St. 331.

England.— Curtis *v.* Mills, 5 C. & P. 489, 24 E. C. L. 670.

98. Remele *v.* Donahue, 54 Vt. 555.

99. Murray *v.* Young, 12 Bush (Ky.) 337; Fox *v.* Williamson, 20 Ont. App. 610.

1. Warner *v.* Chamberlain, 7 Houst. (Del.) 18, 30 Atl. 638.

2. Dolph *v.* Ferris, 7 Watts & S. (Pa.) 367, 42 Am. Dec. 246.

Death of sheep not necessary.— The owner of a dog is liable for the full value of each

nursing, medical attendance, pain, suffering in body, and fear and apprehension of hydrophobia, if such be shown to have been incurred or felt.[3] Recovery is not limited to such damages as have been sustained before the institution of suit, where it is pleaded and proved that plaintiff is liable to continued suffering, expenditures, and loss of employment from the same cause.[4]

(II) *Double Damages.* By some statutes double, and by still others treble, damages may be recovered by one injured, in his person or property, by a dog.[5] The proper course to pursue to double the damages is to have the jury instructed to assess the amount of single damages, and state the same in their verdict, and for plaintiff then to apply to the court, after verdict, for judgment in double the amount of damages so found by the jury.[6] There is no ground of exception, however, where the jury are directed, after having ascertained the actual damages, to render their verdict for double the amount, for it is immaterial whether the amount of damages be doubled by the court or the jury, and the practice has not been uniform.[7]

(III) *Exemplary or Punitive Damages.* It seems that, in an action against the owner of a dog, the owner not being present at the time of the injury, plaintiff is not, as a matter of course, entitled to recover punitive damages;[8] but where one knowingly keeps a vicious animal and permits it to run at large, with a reckless disregard of the rights of the public, he is liable in some jurisdictions for exemplary or punitive damages to one injured thereby.[9]

(IV) *Apportionment of Damages.* Where two dogs do damage in company, the dogs being owned by different persons, one of whom is sued, the jury may find that defendant's dog did more damage than the other, and their apportionment of the damages, not being shown to be incorrect, will be conclusive.[10] One whose dog kills sheep, in company with another dog less capable of doing mischief, cannot complain because he is compelled to pay half the value of the sheep killed.[11]

B. Trespasses upon Land — 1. Duties and Liabilities of Stock-Owner — a. In General — (I) *At Common Law.* It is well settled that at common law every man was bound, at his peril, to keep his cattle within his own close, and, if he failed to do so, was liable for their trespasses upon the lands of another, whether the lands trespassed upon were inclosed or not,[12] unless the owner of

sheep or lamb wounded by his dog, and, to entitle their owner to recover their value, it is not necessary for him to show that they died of their wounds. Osincup *v.* Nichols, 49 Barb. (N. Y.) 145.

3. Warner *v.* Chamberlain, 7 Houst. (Del.) 18, 30 Atl. 638; Godeau *v.* Blood, 52 Vt. 251, 36 Am. Rep. 751; The Lord Derby, 17 Fed. 265.

If, by reason of unskilful treatment of the wound by plaintiff's physician, plaintiff suffered increased pain and was subjected to additional expense, defendant is not responsible therefor. Moss *v.* Pardridge, 9 Ill. App. 490.

4. Meier *v.* Shrunk, 79 Iowa 17, 44 N. W. 209; Lemoine *v.* Cook, 36 Mo. App. 193.

5. So under Me. Rev. Stat. c. 30, § 1. Smith *v.* Montgomery, 52 Me. 178.

6. Swift *v.* Applebone, 23 Mich. 252.

7. Pressey *v.* Wirth, 3 Allen (Mass.) 191.

8. Keightlinger *v.* Egan, 65 Ill. 235.

9. *Iowa.*— Cameron *v.* Bryan, 89 Iowa 214, 56 N. W. 434.

Kansas.— Hahn *v.* Kordula, 5 Kan. App. 142, 48 Pac. 896.

Missouri.— Von Fragstein *v.* Windler, 2 Mo. App. 598.

Texas.— Triolo *v.* Foster, (Tex. Civ. App. 1900) 57 S. W. 698.

Wisconsin.— Meibus *v.* Dodge, 38 Wis. 300, 20 Am. Rep. 6; Pickett *v.* Crook, 20 Wis. 358.

Canada.— Falardeau *v.* Couture, 2 L. C. Jur. 96.

In Kentucky the owner of a dog is liable, under the statute (Ky. Stat. § 68), for compensatory damages to any person who is bitten by the dog; and the jury may give punitive damages if the owner had knowledge of the fact, prior to the injury, that the dog was vicious toward persons. Koestel *v.* Cunningham, 97 Ky. 421, 17 Ky. L. Rep. 296, 30 S. W. 970.

10. Wilbur *v.* Hubbard, 35 Barb. (N. Y.) 303.

11. Williams *v.* Woodworth, 32 Nova Scotia 271.

12. *Alabama.*— Joiner *v.* Winston, 68 Ala. 129.

Arkansas.— Little Rock, etc., R. Co. *v.* Finley, 37 Ark. 562.

Colorado.— Morris *v.* Fraker, 5 Colo. 425.

Connecticut.— Hine *v.* Munson, 32 Conn.

such lands was bound, by prescription, agreement, or assignment, to fence his lands.[13]

(II) *In the United States* — (A) *Generally.* In several states of the

219; Wright *v.* Wright, 21 Conn. 329; Studwell *v.* Ritch, 14 Conn. 292.

Dakota.— Sprague *v.* Fremont, etc., R. Co., 6 Dak. 86, 50 N. W. 617.

Florida.— Savannah, etc., R. Co. *v.* Geiger, 21 Fla. 669, 58 Am. Rep. 697.

Georgia.— Bonner *v.* De Loach, 78 Ga. 50, 2 S. E. 546.

Illinois.— Bulpit *v.* Matthews, 145 Ill. 345, 34 N. E. 525, 22 L. R. A. 55 [*affirming* 42 Ill. App. 561]; D'Arcy *v.* Miller, 86 Ill. 102, 29 Am. Rep. 11; McBride *v.* Lynd, 55 Ill. 411; Galena, etc., R. Co. *v.* Crawford, 25 Ill. 529; McCormick *v.* Tate, 20 Ill. 334; Misner *v.* Lighthall, 13 Ill. 609; Seeley *v.* Peters, 10 Ill. 130; McKowan *v.* Harmon, 56 Ill. App. 368; Selover *v.* Osgood, 52 Ill. App. 260; McNeer *v.* Boone, 52 Ill. App. 181.

Indiana.— Cincinnati, etc., R. Co. *v.* Hiltzhauer, 99 Ind. 486; Pittsburgh, etc., R. Co. *v.* Stuart, 71 Ind. 500; Indianapolis, etc., R. Co. *v.* Harter, 38 Ind. 557; Indianapolis, etc., R. Co. *v.* McClure, 26 Ind. 370, 89 Am. Dec. 467; Brady *v.* Ball, 14 Ind. 317; Page *v.* Hollingsworth, 7 Ind. 317; Lafayette, etc., R. Co. *v.* Shriner, 6 Ind. 141; Williams *v.* New-Albany, etc., R. Co., 5 Ind. 111.

Iowa.— Frazier *v.* Nortinus, 34 Iowa 82; Wagner *v.* Bissell, 3 Iowa 396.

Kansas.—Wells *v.* Beal, 9 Kan. 597; Baker *v.* Robbins, 9 Kan. 303.

Kentucky.— Crawford *v.* Hughes, 3 J. J. Marsh. (Ky.) 433.

Maine.— Webber *v.* Closson, 35 Me. 26; Little *v.* Lathrop, 5 Me. 356.

Maryland.— Baltimore, etc., R. Co. *v.* Lamborn, 12 Md. 257; Richardson *v.* Milburn, 11 Md. 340.

Massachusetts.— McDonnell *v.* Pittsfield, etc., R. Corp., 115 Mass. 564; Eames *v.* Salem, etc., R. Co., 98 Mass. 560, 96 Am. Dec. 676.

Missouri.— O'Riley *v.* Diss, 41 Mo. App. 184.

Nebraska.— Lorrance *v.* Hillyer, 57 Nebr. 266, 77 N. W. 755.

Nevada.— Chase *v.* Chase, 15 Nev. 259.

New Hampshire.— Glidden *v.* Towle, 31 N. H. 147, 168.

New Jersey.— Vandegrift *v.* Rediker, 22 N. J. L. 185, 51 Am. Dec. 262.

New York.— Tonawanda R. Co. *v.* Munger, 5 Den. (N. Y.) 255, 49 Am. Dec. 239; Stafford *v.* Ingersol, 3 Hill (N. Y.) 38; Hardenburgh *v.* Lockwood, 25 Barb. (N. Y.) 9.

North Dakota.— Bostwick *v.* Minneapolis, etc., R. Co., 2 N. D. 440, 51 N. W. 781.

Ohio.— O'Neal *v.* Blessing, 34 Ohio St. 33; Marietta, etc., R. Co. *v.* Stephenson, 24 Ohio St. 48; Cleveland, etc., R. Co. *v.* Elliott, 4 Ohio St. 474; Kerwhaker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246; Northcott *v.* Smith, 4 Ohio Cir. Ct. 565.

Oregon.— Walker *v.* Bloomingcamp, 34 Oreg. 391, 43 Pac. 175, 56 Pac. 809; Campbell *v.* Bridwell, 5 Oreg. 311.

Pennsylvania.— Barber *v.* Mensch, 157 Pa. St. 390, 33 Wkly. Notes Cas. (Pa.) 152, 27 Atl. 708; Gregg *v.* Gregg, 55 Pa. St. 227; Dolph *v.* Ferris, 7 Watts & S. (Pa.) 367, 42 Am. Dec. 246; Adams *v.* McKinney, Add. (Pa.) 257; Race *v.* Snyder, 10 Phila. (Pa.) 533, 30 Leg. Int. (Pa.) 361; Thompson *v.* Kyler, 9 Pa. Co. Ct. 205; Arthurs *v.* Chatfield, 9 Pa. Co. Ct. 34.

Rhode Island.— Tower *v.* Providence, etc., R. Co., 2 R. I. 404.

Texas.— Clarendon Land, etc., Co. *v.* McClelland, 86 Tex. 179, 23 S. W. 576, 1100, 22 L. R. A. 105; Pace *v.* Potter, 85 Tex. 473, 22 S. W. 300.

Vermont.— Holden *v.* Shattuck, 34 Vt. 336, 80 Am. Dec. 684; Jackson *v.* Rutland, etc., R. Co., 25 Vt. 150, 60 Am. Dec. 246.

West Virginia.— Blaine *v.* Chesapeake, etc., R. Co., 9 W. Va. 252.

United States.—Buford *v.* Houtz, 133 U. S. 320, 10 S. Ct. 305, 33 L. ed. 618.

England.— Fletcher *v.* Rylands, L. R. 1 Exch. 265; Sanders *v.* Teape, 51 L. T. Rep. N. S. 263; 3 Bl. Comm. 211; Comyns Dig. tit. Droit, M, 2; Dyer 372*b*.

Canada.— Crowe *v.* Steeper, 46 U. C. Q. B. 87.

See 2 Cent. Dig. tit. "Animals," § 327.

Not applicable to dogs.— A dog jumping into a field without the consent of its master will not subject the latter to an action of trespass *quare clausum* (Brown *v.* Giles, 1 C. & P. 118, 12 E. C. L. 79; Sanders *v.* Teape, 51 L. T. Rep. N. S. 263); but if the owner trespass and, while on the land, his dog, unbidden, and against his will, does mischief, that action will lie (Woolf *v.* Chalker, 31 Conn. 121, 81 Am. Dec. 175).

"The rule was not founded on any arbitrary regulation of the common law, but was an incident to the right of property. It is a part of that principle which allows every man the right to enjoy his property free from molestation or interference by others; it is simply the recognition of a natural right. A person owning and occupying land is not vested with the right to enjoy it upon condition that he inclose it by a palisade strong enough to keep his neighbors and their stock from breaking into and destroying the fruits of his labors. Property is not held in civilized communities by so insecure a tenure; but the law surrounds it by an ideal, invisible palladium, more potent than any mechanical paling that can be constructed. The rule in question did not require to be adopted in order to be in force. It always exists where the right of private dominion over things real is recognized. It pertains to ownership." Bileu *v.* Paisley, 18 Oreg. 47, 51, 21 Pac. 934, 4 L. R. A. 840.

13. *Colorado.*— Morris *v.* Fraker, 5 Colo. 425.

Illinois.— D'Arcy *v.* Miller, 86 Ill. 102, 29 Am. Rep. 11.

Union the common-law doctrine is recognized as being in force either *ex proprio vigore*, or by reason of statutes declaratory thereof,[14] except so far as statutes or local regulations permit animals to run at large,[15] or require landowners to fence

Kentucky.— Crawford *v.* Hughes, 3 J. J. Marsh. (Ky.) 433.

Maine.— Little *v.* Lathrop, 5 Me. 356.

Massachusetts.— Thayer *v.* Arnold, 4 Metc. (Mass.) 589.

New Hampshire.— Glidden *v.* Towle, 31 N. H. 147, 168.

Vermont.—Jackson *v.* Rutland, etc., R. Co., 25 Vt. 150, 60 Am. Dec. 246.

14. *Illinois.*— Bulpit *v.* Matthews, 145 Ill. 345, 34 N. E. 525, 22 L. R. A. 55 [*affirming* 42 Ill. App. 561]; McNeer *v.* Boone, 52 Ill. App. 181; Birket *v.* Williams, 30 Ill. App. 451.

Indiana.— Anderson *v.* Worley, 104 Ind. 165, 3 N. E. 817; Lyons *v.* Terre Haute, etc., R. Co., 101 Ind. 419; Stone *v.* Kopka, 100 Ind. 458; Pittsburgh, etc., R. Co. *v.* Stuart, 71 Ind. 500; Indianapolis, etc., R. Co. *v.* Harter, 38 Ind. 557; Michigan Southern, etc., R. Co. *v.* Fisher, 27 Ind. 96; Indianapolis, etc., R. Co. *v.* McClure, 26 Ind. 370, 89 Am. Dec. 467; Page *v.* Hollingsworth, 7 Ind. 317; Lafayette, etc., R. Co. *v.* Shriner, 6 Ind. 141; Crum *v.* Conover, 14 Ind. App. 264, 40 N. E. 644, 42 N. E. 1029.

Maine.— Webber *v.* Closson, 35 Me. 26.

Maryland.— Baltimore, etc., R. Co. *v.* Lamborn, 12 Md. 257; Richardson *v.* Milburn, 11 Md. 340.

Massachusetts.— Lyons *v.* Merrick, 105 Mass. 71.

Michigan.— Wood *v.* La Rue, 9 Mich. 158; Williams *v.* Michigan Cent. R. Co., 2 Mich. 259, 55 Am. Dec. 59.

Minnesota.— Locke *v.* First Div. St. Paul, etc., R. Co., 15 Minn. 350.

New Jersey.— Vandegrift *v.* Rediker, 22 N. J. L. 185, 51 Am. Dec. 262; Chambers *v.* Matthews, 18 N. J. L. 368.

New York.— Wells *v.* Howell, 19 Johns. (N. Y.) 385; Holladay *v.* Marsh, 3 Wend. (N. Y.) 142, 20 Am. Dec. 678; Phillips *v.* Covell, 79 Hun (N. Y.) 210, 29 N. Y. Suppl. 613, 61 N. Y. St. 156; Pierce *v.* Hosmer, 66 Barb. (N. Y.) 345; Taber *v.* Cruthers, 13 N. Y. Suppl. 446, 38 N. Y. St. 331.

North Dakota.— Bostwick *v.* Minneapolis, etc., R. Co., 2 N. D. 440, 51 N. W. 781.

Pennsylvania.— Barber *v.* Mensch, 157 Pa. St. 390, 33 Wkly. Notes Cas. (Pa.) 152, 27 Atl. 708; Stewart *v.* Benninger, 138 Pa. St. 437, 27 Wkly. Notes Cas. (Pa.) 381, 21 Atl. 159; Thompson *v.* Kyler, 9 Pa. Co. Ct. 205; Arthurs *v.* Chatfield, 9 Pa. Co. Ct. 34.

Rhode Island.— Tower *v.* Providence, etc., R. Co., 2 R. I. 404.

Vermont.— Holden *v.* Shattuck, 34 Vt. 336, 80 Am. Dec. 684; Jackson *v.* Rutland, etc., R. Co., 25 Vt. 150, 60 Am. Dec. 246.

Wisconsin.— Stone *v.* Donaldson, 1 Pinn. (Wis.) 393.

See 2 Cent. Dig. tit. "Animals," § 327.

Not applicable to pent roads.— The statutory provision that the owners of lands bordering upon highways need not fence the same along such highways does not apply to pent roads. Carpenter *v.* Cook, 67 Vt. 102, 30 Atl. 998, 71 Vt. 110, 41 Atl. 1038.

In Illinois, prior to the act of 1874, the territory in which domestic animals were prohibited from running at large was an exception out of the general rule, but by that statute the rule was abrogated and the rule stated in the text established. Bulpit *v.* Matthews, 145 Ill. 345, 34 N. E. 525, 22 L. R. A. 55 [*affirming* 42 Ill. App. 561]. The rule was first laid down in Seeley *v.* Peters, 10 Ill. 130, that the common law, requiring the owner of cattle to keep them upon his own land, had never been in force in Illinois. This case was followed in Misner *v.* Lighthall, 13 Ill. 609; Chicago, etc., R. Co. *v.* Patchin, 16 Ill. 198, 61 Am. Dec. 65; Galena, etc., R. Co. *v.* Crawford, 25 Ill. 529; Headen *v.* Rust, 39 Ill. 186; Westgate *v.* Carr, 43 Ill. 450; Stoner *v.* Shugart, 45 Ill. 76; Illinois Cent. R. Co. *v.* Arnold, 47 Ill. 173; Oil *v.* Rowley, 69 Ill. 469. Both the act of 1874 and the act of Jan. 13, 1872, referred to in Fredrick *v.* White, 73 Ill. 590, are now repealed. Ill. Rev. Stat. (1899), c. 8, § 6.

In Maine the common law was changed by the statute of 1834, c. 137; but, by the Revised Statutes, all preceding legislation on this subject was repealed and the rights of parties remain as at common law, except so far as they may be modified by the provisions of such statutes. Webber *v.* Closson, 35 Me. 26.

In Pennsylvania, until the act of April 4, 1889, was passed, the first section of the act of 1700 was in force throughout the state, and the owner of lands was required to fence against the cattle of others. Barber *v.* Mensch, 157 Pa. St. 390, 33 Wkly. Notes Cas. (Pa.) 152, 27 Atl. 708; Gregg *v.* Gregg, 55 Pa. St. 227; Knight *v.* Abert, 6 Pa. St. 472, 47 Am. Dec. 478; Adams *v.* McKinney, Add. (Pa.) 257. Though it seems that, prior to the decision of Gregg *v.* Gregg, 55 Pa. St. 227, the common law was universally held to be the law in the northern counties of the state. Race *v.* Snyder, 10 Phila. (Pa.) 533, 30 Leg. Int. (Pa.) 361.

15. *Dakota.*— Sprague *v.* Fremont, etc., R. Co., 6 Dak. 86, 50 N. W. 617.

Illinois.— Bulpit *v.* Matthews, 145 Ill. 345, 34 N. E. 525, 22 L. R. A. 55 [*affirming* 42 Ill. App. 561]; Selover *v.* Osgood, 52 Ill. App. 260.

Indiana.— Anderson *v.* Worley, 104 Ind. 165, 3 N. E. 817; Lyons *v.* Terre Haute, etc., R. Co., 101 Ind. 419; Stone *v.* Kopka, 100 Ind. 458; Pittsburgh, etc., R. Co. *v.* Stuart, 71 Ind. 500; Indianapolis, etc., R. Co. *v.* Harter, 38 Ind. 557; Michigan Southern, etc., R. Co. *v.* Fisher, 27 Ind. 96; Crum *v.* Conover, 14 Ind. App. 264, 40 N. E. 644, 42 N. E. 1029.

Minnesota.— Locke *v.* First Div. St. Paul, etc., R. Co., 15 Minn. 350.

New York.— Hardenburgh *v.* Lockwood, 25 Barb. (N. Y.) 9.

against roving stock.[16] In many others, however, the doctrine is not deemed applicable to the conditions of the country or in accordance with the customs of the people,[17] or is deemed not in harmony with legislative action.[18] In these states it is held that permitting cattle to range at will on uninclosed lands will subject the owner to no liability,[19] in the absence of statute or local regulations

Wisconsin.— Stone *v.* Donaldson, 1 Pinn. (Wis.) 393.

It is competent for the legislature to declare that an action shall not be maintained, for a trespass committed by cattle, in favor of the owner of lands which are not securely fenced. Myers *v.* Dodd, 9 Ind. 290, 68 Am. Dec. 624; Poindexter *v.* May, 98 Va. 143, 34 S. E. 971, 47 L. R. A. 588.

The county commissioners may direct, by an order of the board, what animals may pasture or run at large on uninclosed lands or public commons within the bounds of any township in their respective counties. Pittsburgh, etc., R. Co. *v.* Stuart, 71 Ind. 500.

Authorized by popular vote.— The people by affirmative vote, authorized by the statute to be taken, may decide to let stock run at large in counties or towns. Bulpit *v.* Matthews, 145 Ill. 345, 34 N. E. 525, 22 L. R. A. 55 [*affirming* 42 Ill. App. 561]; Selover *v.* Osgood, 52 Ill. App. 260.

Statute exempting certain counties constitutional.— In Sprague *v.* Fremont, etc., R. Co., 6 Dak. 86, 50 N. W. 617, it was held that Dak. Spec. Laws (1885), c. 17, § 16, exempting certain Black Hills counties from the operation of Code Civ. Proc. § 747, as amended by Laws (1883), c. 115, which declared owners liable for all damages done by their stock while trespassing on the lands of another, is not unconstitutional by reason of its applying specially to such counties, as the law comes within the police power of the legislature.

16. Bonner *v.* De Loach, 78 Ga. 50, 2 S. E. 546; Indianapolis, etc., R. Co. *v.* Harter, 38 Ind. 557; Wood *v.* La Rue, 9 Mich. 158; Williams *v.* Michigan Cent. R. Co., 2 Mich. 259, 55 Am. Dec. 59.

17. *Alabama.*— Mobile, etc., R. Co. *v.* Williams, 53 Ala. 595.

Arkansas.— Little Rock, etc., R. Co. *v.* Finley, 37 Ark. 562.

Iowa.— Frazier *v.* Nortinus, 34 Iowa 82; Wagner *v.* Bissell, 3 Iowa 396.

Ohio.—Cincinnati, etc., R. Co. *v.* Waterson, 4 Ohio St. 424; Kerwhaker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246; Cranston *v.* Cincinnati, etc., R. Co., 1 Handy (Ohio) 193.

Texas.— Pace *v.* Potter, 85 Tex. 473, 22 S. W. 300.

18. *Alabama.*— Joiner *v.* Winston, 68 Ala. 129; Mobile, etc., R. Co. *v.* Williams, 53 Ala. 595; Nashville, etc., R. Co. *v.* Peacock, 25 Ala. 229.

Arkansas.— Little Rock, etc., R. Co. *v.* Finley, 37 Ark. 562.

California.— Merritt *v.* Hill, 104 Cal. 184, 37 Pac. 893; Waters *v.* Moss, 12 Cal. 535, 73 Am. Dec. 561.

Missouri.— Gorman *v.* Pacific R. Co., 26 Mo. 441, 72 Am. Dec. 220; O'Riley *v.* Diss, 41 Mo. App. 184.

Nevada.— Chase *v.* Chase, 15 Nev. 259.

Ohio.— Cleveland, etc., R. Co. *v.* Elliott, 4 Ohio St. 474; Cincinnati, etc., R. Co. *v.* Waterson, 4 Ohio St. 424; Kerwhaker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246; Northcott *v.* Smith, 4 Ohio Cir. Ct. 565.

Texas.— Pace *v.* Potter, 85 Tex. 473, 22 S. W. 300.

19. *Alabama.*— Hurd *v.* Lacy, 93 Ala. 427, 9 So. 378, 33 Am. St. Rep. 61; Wilhite *v.* Speakman, 79 Ala. 400; Joiner *v.* Winston, 68 Ala. 129; Mobile, etc., R. Co. *v.* Williams, 53 Ala. 595; Nashville, etc., R. Co. *v.* Peacock, 25 Ala. 229.

Arkansas.— Little Rock, etc., R. Co. *v.* Finley, 37 Ark. 562.

California.— Merritt *v.* Hill, 104 Cal. 184, 37 Pac. 893; Logan *v.* Gedney, 38 Cal. 579; Waters *v.* Moss, 12 Cal. 535, 73 Am. Dec. 561.

Colorado.— Nuckolls *v.* Gant, 12 Colo. 361, 21 Pac. 41 [*following* Morris *v.* Fraker, 5 Colo. 425].

Connecticut.— Hine *v.* Munson, 32 Conn. 219; Wright *v.* Wright, 21 Conn. 329; Studwell *v.* Ritch, 14 Conn. 292.

Florida.— Savannah, etc., R. Co. *v.* Geiger, 21 Fla. 669, 58 Am. Rep. 697.

Georgia.— Georgia R., etc., Co. *v.* Neely, 56 Ga. 540; Macon, etc., R. Co. *v.* Lester, 30 Ga. 911.

Idaho.— Johnson *v.* Oregon Short-Line R. Co., (Ida. 1900) 63 Pac. 112.

Iowa.— Harrison *v.* Adamson, 76 Iowa 337, 41 N. W. 34; Frazier *v.* Nortinus, 34 Iowa 82; Camp *v.* Flaherty, 28 Iowa 520; Herold *v.* Meyers, 20 Iowa 378; Russell *v.* Hanley, 20 Iowa 219, 89 Am. Dec. 535; Alger *v.* Mississippi, etc., R. Co., 10 Iowa 268; Wagner *v.* Bissell, 3 Iowa 396.

Kansas.— Fillmore *v.* Booth, 29 Kan. 134; Darling *v.* Rodgers, 7 Kan. 592; Larkin *v.* Taylor, 5 Kan. 433.

Kentucky.— Louisville, etc., R. Co. *v.* Simmons, 85 Ky. 151, 8 Ky. L. Rep. 896, 3 S. W. 10.

Mississippi.— Anderson *v.* Locke, 64 Miss. 283, 1 So. 251; Montgomery *v.* Handy, 62 Miss. 16; New Orleans, etc., R. Co. *v.* Field, 46 Miss. 573; Vicksburg, etc., R. Co. *v.* Patton, 31 Miss. 156, 66 Am. Dec. 552.

Missouri.— Mann *v.* Williamson, 70 Mo. 661; Hannibal, etc., R. Co. *v.* Kenney, 41 Mo. 271; Gorman *v.* Pacific R. Co., 26 Mo. 441, 72 Am. Dec. 220; O'Riley *v.* Diss, 41 Mo. App. 184; Heald *v.* Grier, 12 Mo. App. 556; Kertz *v.* Dolde, 7 Mo. App. 564; Kaes *v.* Missouri Pac. R. Co., 6 Mo. App. 397.

Nebraska.— Delaney *v.* Errickson, 11 Nebr. 533, 10 N. W. 451.

forbidding it,[20] uninclosed lands in such cases being regarded as common of pasturage.[21]

Nevada.— Chase *v.* Chase, 15 Nev. 259.

North Carolina.—Burgwyn *v.* Whitfield, 81 N. C. 261; Laws *v.* North Carolina R. Co., 52 N. C. 468.

Ohio.— Marietta, etc., R. Co. *v.* Stephenson, 24 Ohio St. 48; Cleveland, etc., R. Co. *v.* Elliott, 4 Ohio St. 474; Cincinnati, etc., R. Co. *v.* Waterson, 4 Ohio St. 424; Kerwhaker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246; Cranston *v.* Cincinnati, etc., R. Co., 1 Handy (Ohio) 193; Northcott *v.* Smith, 4 Ohio Cir. Ct. 565.

Oregon.— Walker *v.* Bloomingcamp, 34 Oreg. 391, 43 Pac. 175, 56 Pac. 809; Campbell *v.* Bridwell, 5 Oreg. 311.

South Carolina.— Murray *v.* South Carolina R. Co., 10 Rich. (S. C.) 227, 70 Am. Dec. 219.

Texas.— Clarendon Land, etc., Co. *v.* McClelland, 89 Tex. 483, 34 S. W. 98, 35 S. W. 474, 59 Am. St. Rep. 70, 31 L. R. A. 669, 86 Tex. 179, 23 S. W. 576, 1100, 22 L. R. A. 105; Pace *v.* Potter, 85 Tex. 473, 22 S. W. 300; Davis *v.* Davis, 70 Tex. 123, 7 S. W. 826; Claunch *v.* Osborn, (Tex. Civ. App. 1893) 23 S. W. 937; Haskins *v.* Huling, 2 Tex. App. Civ. Cas. § 161.

Virginia.— Poindexter *v.* May, 98 Va. 143, 34 S. E. 971, 47 L. R. A. 588.

West Virginia.—Blaine *v.* Chesapeake, etc., R. Co., 9 W. Va. 252.

United States.— Lazarus *v.* Phelps, 152 U. S. 81, 14 S. Ct. 477, 38 L. ed. 363; Buford *v.* Houtz, 133 U. S. 320, 10 S. Ct. 305, 33 L. ed. 618.

See 2 Cent. Dig. tit. "Animals," § 327.

The statutes of Oregon, which require fields and inclosures to be inclosed with certain kinds of fence, and provide a remedy in case stock or swine shall break into the same when so fenced, do not apply to ditches constructed across public lands in the state for mining purposes. Bileu *v.* Paisley, 18 Oreg. 47, 21 Pac. 934, 4 L. R. A. 840.

Sufficiency of fences.— Where fences are required it has been held that the owner of cattle will not be liable unless all parts of the inclosure trespassed upon are surrounded by a statutory fence (Polk *v.* Lane, 4 Yerg. (Tenn.) 35); but, by the weight of authority, it is sufficient that the fences substantially comply with the statute (Comerford *v.* Dupuy, 17 Cal. 308; Scott *v.* Buck, 85 Ill. 334; Smith *v.* Williams, 2 Mont. 195; Race *v.* Snyder, 10 Phila. (Pa.) 533, 30 Leg. Int. (Pa.) 361). See also Willard *v.* Mathesus, 7 Colo. 76, 1 Pac. 690.

20. *Alabama.*— Wilhite *v.* Speakman, 79 Ala. 400; Joiner *v.* Winston, 68 Ala. 129.

California.— Merritt *v.* Hill, 104 Cal. 184, 37 Pac. 893; Hahn *v.* Garratt, 69 Cal. 146, 10 Pac. 329.

Colorado.— Morris *v.* Fraker, 5 Colo. 425.

Georgia.— Bonner *v.* De Loach, 78 Ga. 50, 2 S. E. 546.

Iowa.— Hallock *v.* Hughes, 42 Iowa 516; Little *v.* McGuire, 38 Iowa 560, 43 Iowa 447.

Kansas.— Wells *v.* Beal, 9 Kan. 597; Wingrove *v.* Williams, 6 Kan. App. 262, 51 Pac. 52.

Oregon.—Strickland *v.* Geide, 31 Oreg. 373, 49 Pac. 982.

Constitutionality of statute.— In Darling *v.* Rodgers, 7 Kan. 592, it was held that Kan. Laws (1870), c. 115, which attempted to exempt certain counties from the operation of the fence laws, was unconstitutional, as violating a constitutional provision that all laws of a general nature shall have a uniform operation throughout the state.

Common law reënacted as to hogs.— In Kansas the statutes have reënacted the common law as to hogs, though giving to each township the right to suspend this law by vote. Wells *v.* Beal, 9 Kan. 597.

Forbidden on improved lands.— By Iowa Laws (1870), c. 26, the owner of stock is made liable for their trespasses on improved lands, whether inclosed or not, and this act was held to be in force without submission to a vote of the county. Hallock *v.* Hughes, 42 Iowa 516 [*following* Little *v.* McGuire, 38 Iowa 560, 43 Iowa 447]. See also Lorance *v.* Hillyer, 57 Nebr. 266, 77 N. W. 755.

Local act applicable only to enumerated cattle.— Though a local law requires the owner of lands in Umatilla county, Oregon, to fence against certain specified kinds of stock, such law does not apply to sheep, which are not enumerated therein. French *v.* Cresswell, 13 Oreg. 418, 11 Pac. 62.

What are not improved lands.— The casting of a single furrow around an eighty-acre tract of wild and unimproved land, the cultivating of three acres for a garden, the breaking of eight acres, and the cutting of some brush on a portion of the remainder, do not make the whole tract improved land. Otis *v.* Morgan, 61 Iowa 712, 17 N. W. 104.

Where there is no actual inclosure and it is sought to bring lands within the provisions of Nebr. Comp. Stat. c. 2, art. 3, § 8, there must be a strip at least one rod in width plowed around such land; and two furrows, plowed one rod from each other, is not a compliance with the statute. Brown *v.* Sylvester, 37 Nebr. 870, 56 N. W. 709. This statute is applicable to cultivated lands within the limits of cities of the metropolitan class, notwithstanding the charters of such cities grant power to the mayors and councils to provide by ordinance for impounding animals running at large. Lingonner *v.* Ambler, 44 Nebr. 316, 62 N. W. 486.

Where townships have adopted rules prohibiting stock from running at large, and there are no regulations requiring fences, the owners of cattle will be liable for injuries occasioned by their stock going upon unfenced fields. Westgate *v.* Carr, 43 Ill. 450.

21. Wilhite *v.* Speakman, 79 Ala. 400; Joiner *v.* Winston, 68 Ala. 129; Mobile, etc., R. Co. *v.* Williams, 53 Ala. 595; Nashville, etc., R. Co. *v.* Peacock, 25 Ala. 229.

(B) *With Respect to Adjoining Landowners* — (1) GENERALLY. The common-law rule[22] is applicable to adjoining landowners,[23] unless there has been an obligatory division for the maintenance of a partition fence[24] by prescription,[25] by covenant,[26] or by statutes relating to partition, line, or division fences.[27] Where there is an obligation to maintain partition fences, a party who removes such fences will be liable for the trespasses of his cattle,[28] and the same is true if the cattle break through a portion of the fence which the owner of the cattle is bound to repair.[29] If both are equally bound to maintain such fences, there will be no liability for an injury through an insufficient fence,[30] nor is there liability if

22. See *supra*, XI, B, 1, a, (I).

23. *Illinois.*— Headen *v.* Rust, 39 Ill. 186.
Indiana.— Cook *v.* Morea, 33 Ind. 497; Crisman *v.* Masters, 23 Ind. 319; Brady *v.* Ball, 14 Ind. 317.
Maine.— Sturtevant *v.* Merrill, 33 Me. 62.
Missouri.— O'Riley *v.* Diss, 41 Mo. App. 184.
Michigan.— Johnson *v.* Wing, 3 Mich. 163.
New Hampshire.— Tewksbury *v.* Bucklin, 7 N. H. 518.
New Jersey.— Coxe *v.* Robbins, 9 N. J. L. 384.
New York.— Angell *v.* Hill, 64 Hun (N. Y.) 633, 18 N. Y. Suppl. 824, 45 N. Y. St. 83.
Pennsylvania.— Rangler *v.* McCreight, 27 Pa. St. 95; Noel *v.* Brown, 3 Pa. Co. Ct. 204.
Vermont.— Carpenter *v.* Cook, 71 Vt. 110, 41 Atl. 1038, 67 Vt. 102, 30 Atl. 998.

24. Sturtevant *v.* Merrill, 33 Me. 62; Aylesworth *v.* Herrington, 17 Mich. 417.

Voluntary maintenance of fence.— The rule is not dislodged though the adjoining owners may have maintained a line fence by severally building such parts as to be satisfactory to each other. The wrongful removal by plaintiff of the part of the fence built by defendant will not constitute a license for defendant's cattle to cross the undivided line, after there has been such a lapse of time as to give to defendant a reasonable opportunity of building a new fence. Sturtevant *v.* Merrill, 33 Me. 62.

25. D'Arcy *v.* Miller, 86 Ill. 102, 29 Am. Rep. 11; Knox *v.* Tucker, 48 Me. 373, 77 Am. Dec. 233; Little *v.* Lathrop, 5 Me. 356; Thayer *v.* Arnold, 4 Metc. (Mass.) 589.

No prescriptive obligation to maintain any separate and distinct part of a partition fence can arise from the maintenance of such a fence, jointly, by the owners of adjoining land, for however long a period. Webber *v.* Closson, 35 Me. 26.

26. D'Arcy *v.* Miller, 86 Ill. 102, 29 Am. Rep. 11; Knox *v.* Tucker, 48 Me. 373, 77 Am. Dec. 233; Little *v.* Lathrop, 5 Me. 356; Thayer *v.* Arnold, 4 Metc. (Mass.) 589; Aylesworth *v.* Herrington, 17 Mich. 417.

Agreement should be in writing.—An agreement for the division of the line fence, by adjoining owners, must be in writing in order to be binding on them and their privies. Knox *v.* Tucker, 48 Me. 373, 77 Am. Dec. 233.

27. *Illinois.*—D'Arcy *v.* Miller, 86 Ill. 102, 29 Am. Rep. 11; Selover *v.* Osgood, 52 Ill. App. 260; McNeer *v.* Boone, 52 Ill. App. 181; Dexter *v.* Heaghney, 47 Ill. App. 205.
Maine.— Bradbury *v.* Gilford, 53 Me. 99; Knox *v.* Tucker, 48 Me. 373, 77 Am. Dec. 233; Eastman *v.* Rice, 14 Me. 419; Gooch *v.* Stephenson, 13 Me. 371; Little *v.* Lathrop, 5 Me. 356.
Massachusetts.— Thayer *v.* Arnold, 4 Metc. (Mass.) 589.
Michigan.— Aylesworth *v.* Herrington, 17 Mich. 417.
New York.— Stafford *v.* Ingersol, 3 Hill (N. Y.) 38.
Rhode Island.— Tower *v.* Providence, etc., R. Co., 2 R. I. 404.

The legislature has constitutional power to regulate by statute the relative rights and responsibilities of the proprietors of inclosed land, and of the owners of stock going at large or kept in adjacent inclosures, as is done in Ky. Rev. Stat. c. 50, and the act of 1863 amendatory thereof. Wills *v.* Walters, 5 Bush (Ky.) 351.

Where lands are so situated that a division fence cannot be maintained on the dividing line, as when they are divided by a non-navigable river, it is a case not provided for in the statute, and must be governed by the principles of reason and justice; and, under such circumstances, he who keeps cattle must so keep them as to prevent their injuring the property of others. Bissel *v.* Southworth, 1 Root (Conn.) 269. But see Fripp *v.* Hasell, 1 Strobh. (S. C.) 173, holding that a deep, navigable stream is equivalent to a fence.

Where the statute requires a partition fence to be such as will inclose and restrain sheep, unless the parties should agree to build a fence to restrain or inclose only horses, mules, or cattle, so far as hogs are concerned, the statute does not change the common law requiring owners of domestic animals to keep them within their own inclosures. Enders *v.* McDonald, 5 Ind. App. 297, 31 N. E. 1056.

Waiver of right to insist on fence.— One landowner, having waived the duty on the part of his neighbor to maintain fences in consideration of his neighbor's waiver of his duty, is estopped from denying his own duty of keeping up his cattle. Milligan *v.* Wehinger, 68 Pa. St. 235. See also Perkins *v.* Perkins, 44 Barb. (N. Y.) 134.

28. Stoner *v.* Shugart, 45 Ill. 76; Claunch *v.* Osborn, (Tex. Civ. App. 1893) 23 S. W. 937.

29. D'Arcy *v.* Miller, 86 Ill. 102, 29 Am. Rep. 11; Ozburn *v.* Adams, 70 Ill. 291; Selover *v.* Osgood, 52 Ill. App. 260.

30. Walker *v.* Watrous, 8 Ala. 493; Myers *v.* Dodd, 9 Ind. 290, 68 Am. Dec. 624; Aylesworth *v.* Herrington, 17 Mich. 417.

the injury is through a portion of the fence which the adjacent owner was bound to maintain,[31] provided the animals are lawfully on the adjoining land.[32]

(2) Occupying Inclosure without Partition Fence. Under some statutes, where owners of adjoining lands fence in common, without building any partition fence between them, each owner is required to take care of his own cattle, and he cannot permit them to wander from his own premises upon the land of the other.[33]

b. Unruly Cattle. In states where a landowner is required to fence out cattle, the statutes with regard to fences have left the common law as to the duty of owners of cattle to restrain them still in force as to unruly cattle that will not be restrained by ordinary fences.[34]

c. Wilful Trespasses. The owner of cattle who wilfully turns them on to land of another, without his consent, is liable without regard to the question of fences,[35] and in some cases may be held criminally for such trespass.[36]

d. Involuntary Trespasses. A person driving domestic animals along the highway, and exercising due care in so doing, is not liable for the injuries which they commit by escaping from his control and entering private ground.[37]

31. *Connecticut.*— Studwell *v.* Ritch, 14 Conn. 292.

Illinois.—McKowan *v.* Harmon, 56 Ill. App. 368; Selover *v.* Osgood, 52 Ill. App. 260.

Indiana.—Baynes *v.* Chastain, 68 Ind. 376; Hinshaw *v.* Gilpin, 64 Ind. 116.

Missouri.— Hopkins *v.* Ott, 57 Mo. App. 292.

New Hampshire.— Page *v.* Olcott, 13 N. H. 399.

New York.— Tonawanda R. Co. *v.* Munger, 5 Den. (N. Y.) 255, 49 Am. Dec. 239; Deyo *v.* Stewart, 4 Den. (N. Y.) 101; Stafford *v.* Ingersol, 3 Hill (N. Y.) 38; Shepherd *v.* Hees, 12 Johns. (N. Y.) 433; Van Slyck *v.* Snell, 6 Lans. (N. Y.) 299; Cowles *v.* Balzer, 47 Barb. (N. Y.) 562; Griffin *v.* Martin, 7 Barb. (N. Y.) 297.

North Carolina.— Runyan *v.* Patterson, 87 N. C. 343.

Ohio.— Phelps *v.* Cousins, 29 Ohio St. 135.

Rhode Island.— Tower *v.* Providence, etc., R. Co., 2 R. I. 404.

Texas.— Heironimus *v.* Duncan, 11 Tex. Civ. App. 610, 33 S. W. 287.

Vermont.— Watkins *v.* Rist, 67 Vt. 284, 31 Atl. 413, 68 Vt. 486, 35 Atl. 431; Hitchcock *v.* Tower, 55 Vt. 60.

Wisconsin.— Roach *v.* Lawrence, 56 Wis. 478, 14 N. W. 595.

32. *Illinois.*— McPherson *v.* James, 69 Ill. App. 337.

Iowa.— Herold *v.* Meyers, 20 Iowa 378.

Kansas.— Osborne *v.* Kimball, 41 Kan. 187, 21 Pac. 163; Rice *v.* Nagle, 14 Kan. 498.

Maine.— Lord *v.* Wormword, 29 Me. 282, 50 Am. Dec. 586.

Massachusetts.— McDonnell *v.* Pittsfield, etc., R. Corp., 115 Mass. 564; Lyman *v.* Gipson, 18 Pick. (Mass.) 422; Rust *v.* Low, 6 Mass. 90; Melody *v.* Reab, 4 Mass. 471. See also Stackpole *v.* Healy, 16 Mass. 33, 8 Am. Dec. 121.

New Hampshire.— Lawrence *v.* Combs, 37 N. H. 331, 72 Am. Dec. 332; Cornwall *v.* Sullivan R. Co., 28 N. H. 161.

Vermont.— Wilder *v.* Wilder, 38 Vt. 678.

33. Markin *v.* Priddy, 39 Kan. 462, 18 Pac. 514; Baker *v.* Robbins, 9 Kan. 303; Montgomery *v.* Handy, 63 Miss. 43. But see, *contra*, Fort *v.* McGrath, 4 Ill. App. 233; Hooper *v.* Kittredge, 16 Vt. 677.

What constitutes fencing in common.— Where two owners of adjoining farms have the same inclosed by uniting the outside line fences, and there is no partition fence between their farms, each using his farm in severalty, their farms, in law, are fenced in common. Markin *v.* Priddy, 40 Kan. 684, 20 Pac. 474 [*correcting* 39 Kan. 462, 18 Pac. 514].

34. *Connecticut.*— Hine *v.* Wooding, 37 Conn. 123.

Iowa.— McManus *v.* Finan, 4 Iowa 283.

New Hampshire.— Avery *v.* Maxwell, 4 N. H. 36.

Tennessee.— Smith *v.* Jones, 95 Tenn. 339, 32 S. W. 200.

Texas.— Clarendon Land, etc., Co. *v.* McClelland, 86 Tex. 179, 23 S. W. 576, 1100, 22 L. R. A. 105.

35. *California.*— Merritt *v.* Hill, 104 Cal. 184, 37 Pac. 893; Martin *v.* Jacobs, (Cal. 1884) 3 Pac. 122; Logan *v.* Gedney, 38 Cal. 579.

Iowa.— Harrison *v.* Adamson, 76 Iowa 337, 41 N. W. 34; Erbes *v.* Wehmeyer, 69 Iowa 85, 28 N. W. 447; Otis *v.* Morgan, 61 Iowa 712, 17 N. W. 104.

Kansas.— Powers *v.* Kindt, 13 Kan. 74; Larkin *v.* Taylor, 5 Kan. 433.

Montana.— Monroe *v.* Cannon, (Mont. 1900) 61 Pac. 863.

Nebraska.— Delaney *v.* Errickson, 11 Nebr. 533, 10 N. W. 451.

Oregon.— Bileu *v.* Paisley, 18 Oreg. 47, 21 Pac. 934, 4 L. R. A. 840.

Pennsylvania.— Dolph *v.* Ferris, 7 Watts & S. (Pa.) 367, 42 Am. Dec. 246; Adams *v.* McKinney, Add. (Pa.) 257.

Texas.— Ohio Wool-Growing Co. *v.* Bogel, 3 Tex. App. Civ. Cas. § 273; Dignowitty *v.* Ballantyne, 3 Tex. App. Civ. Cas. § 194.

Virginia.— Poindexter *v.* May, 98 Va. 143, 34 S. E. 971, 47 L. R. A. 588.

36. See *supra*, X.

37. Cool *v.* Crommet, 13 Me. 250; McDonnell *v.* Pittsfield, etc., R. Corp., 115 Mass.

2. RIGHTS AND REMEDIES OF LANDOWNER — a. In General. A landowner whose premises have been invaded by trespassing cattle may drive them off his premises,[38] distrain or impound them,[39] maintain an action of trespass against their owner or keeper,[40] or, under some circumstances, treat them as estrays.[41] And statutes giving a remedy for such trespass by proceedings *in rem*, or by giving the injured person a right to take possession of such animals, are not to be considered, ordinarily, as taking away any previously existing common-law remedy.[42] But it is not permissible to recover part of the damages by proceedings under a statute and another part by means of an action at law.[43]

b. To Drive Off. Cattle trespassing upon the lands of another may be driven off by the use of all reasonable means and necessary force, either by the landowner[44] or by members of his family,[45] even when such cattle are on uninclosed lands in jurisdictions where, to maintain an action, landowners are required to fence against their neighbor's cattle.[46] It seems that one who finds cattle doing damage upon his premises may confine them during the night, if necessary to protect his crops, and in the morning turn them into the highway whence they came.[47] A landowner exercising such right must use reasonable care to avoid unnecessary injury.[48] If he exercise such care he will not be liable if the

564; Hartford *v.* Brady, 114 Mass. 466, 19 Am. Rep. 377; Rightmire *v.* Shepard, 12 N. Y. Suppl. 800, 36 N. Y. St. 768; Erdman *v.* Gottshall, 9 Pa. Super. Ct. 295, 43 Wkly. Notes Cas. (Pa.) 405.

Where horses, frightened by a locomotive, become uncontrollable, run away, go upon land of another, and break a post there, the owner of the horses is not liable for the damage if it was not caused by any fault on his part. Brown *v.* Collins, 53 N. H. 442, 16 Am. Rep. 372.

38. See *infra*, XI, B, 2, b.

39. See *infra*, XI, B, 2, c.

40. See *infra*, XI, B, 2, d.

41. See *supra*, IX.

42. *California.*—Trescony *v.* Brandenstein, 66 Cal. 514, 6 Pac. 384.

Hawaii.—Miyagawa *v.* Ferreira, 10 Hawaii 23.

Kansas.— Prather *v.* Reeve, 23 Kan. 627.

Nebraska.— Lorance *v.* Hillyer, 57 Nebr. 266, 77 N. W. 755; Laflin *v.* Svoboda, 37 Nebr. 368, 55 N. W. 1049; Keith *v.* Tilford, 12 Nebr. 271, 11 N. W. 315.

New York.— Stafford *v.* Ingersol, 3 Hill (N. Y.) 38; Colden *v.* Eldred, 15 Johns. (N. Y.) 220.

Pennsylvania.— Robison *v.* Fetterman, (Pa. 1888) 14 Atl. 245; Mitchell *v.* Wolf, 46 Pa. St. 147; Adams *v.* McKinney, Add. (Pa.) 257.

Texas.— Finley *v.* Bradley, (Tex. Civ. App. 1893) 21 S. W. 609.

Statutory remedy exclusive.— The Delaware act of March 2, 1893 (Del. Rev. Code, p. 482), providing a remedy for one who is damaged by the cattle of another escaping and trespassing on the former's uninclosed land, is exclusive of the former common-law remedy (Hill *v.* Ginn, (Del. 1899) 43 Atl. 608); and the Indiana statutes regulating the enforcement of claims for damages from trespassing animals supersede the common-law remedy for such damages by distress (Little *v.* Swafford, 14 Ind. App. 7, 42 N. E. 245).

43. De la Guerra *v.* Newhall, 53 Cal. 141.

44. *Delaware.*—Richardson *v.* Carr, 1 Harr. (Del.) 142, 25 Am. Dec. 65.

Illinois.—Spray *v.* Ammerman, 66 Ill. 309; Snap *v.* People, 19 Ill. 80, 68 Am. Dec. 582.

Indiana.— Knour *v.* Wagoner, 16 Ind. 414.

Maryland.— Knott *v.* Digges, 6 Harr. & J. (Md.) 230.

Massachusetts.— Bonney *v.* Smith, 121 Mass. 155; Stevens *v.* Curtis, 18 Pick. (Mass.) 227.

New Hampshire.— Cory *v.* Little, 6 N. H. 213, 25 Am. Dec. 458.

New York.— Carney *v.* Brome, 77 Hun (N. Y.) 583, 28 N. Y. Suppl. 1019, 60 N. Y. St. 453.

Pennsylvania.— Palmer *v.* Silverthorn, 32 Pa. St. 65.

Tennessee.— Medlin *v.* Balch, 102 Tenn. 710, 52 S. W. 140.

Vermont.— Clark *v.* Adams, 18 Vt. 425, 46 Am. Dec. 161; Humphrey *v.* Douglass, 11 Vt. 22, 34 Am. Dec. 668, 10 Vt. 71, 33 Am. Dec. 177.

England.— Millen *v.* Fandrye, Popham 161; Bacon Abr. tit. Trover, D.

See 2 Cent. Dig. tit. "Animals," § 371 *et seq.*

45. Spray *v.* Ammerman, 66 Ill. 309.

46. *Alabama.*— Wilhite *v.* Speakman. 79 Ala. 400.

Iowa.— Russell *v.* Hanley, 20 Iowa 219, 89 Am. Dec. 535.

Michigan.— Wood *v.* La Rue, 9 Mich. 158.

Missouri.— Heald *v.* Grier, 12 Mo. App. 556.

Vermont.— Clark *v.* Adams, 18 Vt. 425, 46 Am. Dec. 161.

47. Tobin *v.* Deal. 60 Wis. 87, 18 N. W. 634, 50 Am. Rep. 345.

48. Wilhite *v.* Speakman, 79 Ala. 400; Richardson *v.* Carr, 1 Harr. (Del.) 142, 25 Am. Dec. 65; Snap *v.* People, 19 Ill. 80, 68 Am. Dec. 582; Totten *v.* Cole, 33 Mo. 138, 82 Am. Dec. 157; Heald *v.* Grier, 12 Mo. App. 556.

animals are lost,[49] or for any injuries they may subsequently sustain;[50] but if he use unnecessary force he may render himself liable to criminal prosecution[51] as well as civilly liable to the owner.[52] There is nothing illegal in driving such cattle from the premises with dogs, if no unnecessary injury is done to the stock;[53] but the landowner has no right to drive the animals away to any considerable distance,[54] and, when the presence of cattle on a landowner's premises is due to defects in fences which he is bound to repair, he has no right to drive them off into the highway.[55]

c. To Distrain, Impound, or Take Up — (I) *The Right* — (A) *At Common Law.* At the common law, where cattle trespassed on the lands of another, the landowner was permitted to distrain the cattle thus *damage feasant* till their owner should make him satisfaction.[56]

(B) *Under Statutes* — (1) In General. The right to distrain as at common law does not exist in all the states of the Union,[57] and in many of them the matter is regulated by statute.[58] In those jurisdictions where a landowner is required to

49. Cory *v.* Little, 6 N. H. 213, 25 Am. Dec. 458; Humphrey *v.* Douglass, 10 Vt. 71, 33 Am. Dec. 177, 11 Vt. 22, 34 Am. Dec. 668.

50. Richardson *v.* Carr, 1 Harr. (Del.) 142, 25 Am. Dec. 65; Avery *v.* People, 11 Ill. App. 332; Carney *v.* Brome, 77 Hun (N. Y.) 583, 28 N. Y. Suppl. 1019, 60 N. Y. St. 453; Palmer *v.* Silverthorn, 32 Pa. St. 65.

One who commits a trespass, by turning the cattle of another out of an inclosure on to the public lands, cannot be made liable to the owner for the loss of the cattle, caused by starvation for want of grass after they have thus been turned out of the inclosure, if the owner had been notified to take care of them. Story *v.* Robinson, 32 Cal. 205.

51. See *infra*, XII, B.

52. See *infra*, XII, A, 1, a, (I), (A).

53. Spray *v.* Ammerman, 66 Ill. 309; Carney *v.* Brome, 77 Hun (N. Y.) 583, 28 N. Y. Suppl. 1019, 60 N. Y. St. 453; Smith *v.* Waldorf, 13 Hun (N. Y.) 127; Davis *v.* Campbell, 23 Vt. 236; Clark *v.* Adams, 18 Vt. 425, 46 Am. Dec. 161.

54. Knour *v.* Wagoner, 16 Ind. 414; Knott *v.* Digges, 6 Harr. & J. (Md.) 230; Harris *v.* Brummell, 74 Mo. App. 433; Gilson *v.* Fisk, 8 N. H. 404.

55. Knour *v.* Wagoner, 16 Ind. 414; Morse *v.* Glover, 68 N. H. 119, 40 Atl. 396; Roby *v.* Reed, 39 N. H. 461; Carruthers *v.* Hollis, 6 A. & E. 113, 35 E. C. L. 507.

56. *Delaware.*—Richardson *v.* Carr, 1 Harr. (Del.) 142, 25 Am. Dec. 65.

Florida.— Savannah, etc., R. Co. *v.* Geiger, 21 Fla. 669, 58 Am. Rep. 697.

Georgia.— Bonner *v.* De Loach, 78 Ga. 50, 2 S. E. 546.

Illinois.— Snap *v.* People, 19 Ill. 80, 68 Am. Dec. 582.

Iowa.— Wagner *v.* Bissell, 3 Iowa 396.

Kentucky.— Jarman *v.* Patterson, 7 T. B. Mon. (Ky.) 644, 647.

Michigan.— Hamlin *v.* Mack, 33 Mich. 103.

New York.— Cook *v.* Gregg, 46 N. Y. 439.

Ohio.— Northcott *v.* Smith, 4 Ohio Cir. Ct. 565.

England.— 3 Bl. Comm. 211; Bacon Abr. tit. Trover, D; Comyns Dig. tit. Droit, M, 2; Dyer 372*b*.

No right to distrain exists under an agreement whereby defendants, by an agreement under seal with one Staples, acquired a right of user in certain land for the purpose of pasturing their cattle, there being no demise, or right of distress, or anything in the agreement to make defendants tenants of Staples, although there was a covenant that Staples would not allow his own animals, or those of others, to enter upon the land in question. Graham *v.* Spettigue, 12 Ont. App. 261. But where plaintiff's cattle, having broken into defendant's lot and been impounded by him, the damages and costs were paid by plaintiff, who thereupon said to defendant that he should leave his cattle in his lot adjoining that of defendant, and if they got into the latter's lot again to send him word, and he would come and take care of them, and that he did not want them impounded again, to which defendant, though unintentionally, gave plaintiff to understand he assented; this conversation constituted no estoppel to prevent defendant from legally impounding the cattle afterward, nor any contract that he would not do so. Holden *v.* Torrey, 31 Vt. 690.

57. Cutts *v.* Hussey, 15 Me. 237; Eastman *v.* Rice, 14 Me. 419; Northcott *v.* Smith, 4 Ohio Cir. Ct. 565.

See 2 Cent. Dig. tit. "Animals," § 390 *et seq.*

58. *Maine.*—Mosher *v.* Jewett, 59 Me. 453, 63 Me. 84; Cutts *v.* Hussey, 15 Me. 237.

Massachusetts.—Conners *v.* Loker, 134 Mass. 510.

New York.— Cook *v.* Gregg, 46 N. Y. 439; Boyce *v.* Perry, 26 Misc. (N. Y.) 355, 57 N. Y. Suppl. 214; Cowles *v.* Balzer, 47 Barb. (N. Y.) 562.

Pennsylvania.— Com. *v.* Fourteen Hogs, 10 Serg. & R. (Pa.) 393.

Vermont.— Porter *v.* Aldrich, 39 Vt. 326; Harriman *v.* Fifield, 36 Vt. 341.

Wisconsin.— Taylor *v.* Welbey, 36 Wis. 42.

Statutes not derogatory of common law.— The right of distress *damage feasant* existed at common law and is not a creature of the statute, though legislation has been adopted to regulate its exercise so that it is inac-

fence against the cattle of others no right to distrain cattle on uninclosed lands exists,[59] such presence not being an actionable trespass,[60] and the right to distrain not existing where there is no liability to compensate for damage.[61] When the presence of cattle on uninclosed lands is actionable[62] the right to distrain on uninclosed lands exists also.[63] So, too, where one is bound, by prescription or otherwise, to repair a distinct part of a division fence, and animals lawfully on an adjoining close enter through defects in such fence, no right to distrain exists;[64] though it does if the entry be through a portion which the owner of the cattle was bound to repair,[65] even though the balance of the fence is insufficient.[66] Since, however, one is bound, by prescription, agreement, or assignment under the statute, to maintain a fence against an adjoining close only against such cattle as are rightfully on that close, if the fence be not in fact made, the owner of either close, thus adjoining, may distrain the cattle escaping from the adjoining close, and not rightfully there.[67]

(2) Power of Legislature to Authorize. The legislature has power to authorize cattle taken *damage feasant* to be impounded by a landowner and

curate to speak of this remedy as something merely statutory and in derogation of the common-law rights of property. Hamlin *v.* Mack, 33 Mich. 103. But see Dent *v.* Ross, 52 Miss. 188, holding that the right is purely statutory and *stricti juris*.

Statutes apply only to trespasses from highway.— The provision of the New York act of 1867 amending the act to prevent animals from running at large upon the highways (Laws (1867), c. 814, § 2), which gives a remedy for injuries by cattle trespassing, applies only to cattle trespassing upon premises from the highway and has no application to the case of a trespass by the cattle of another gaining access through a division fence to the lands of an adjoining owner. Jones *v.* Sheldon, 50 N. Y. 477.

59. *Connecticut.*— Wright *v.* Wright, 21 Conn. 329.

Illinois.— Oil *v.* Rowley, 69 Ill. 469.

Indiana.— Anderson *v.* Worley, 104 Ind. 165, 3 N. E. 817; Clark *v.* Stipp, 75 Ind. 114; Blizzard *v.* Walker, 32 Ind. 437.

Iowa.— Syford *v.* Shriver, 61 Iowa 155, 16 N. W. 56; Wagner *v.* Bissell, 3 Iowa 396.

Maine.— Cutts *v.* Hussey, 15 Me. 237.

Mississippi.— Dent *v.* Ross, 52 Miss. 188; Vicksburg, etc., R. Co. *v.* Patton, 31 Miss. 156, 66 Am. Dec. 552; Dickson *v.* Parker, 3 How. (Miss.) 219, 34 Am. Dec. 78.

Missouri.— Mackler *v.* Schuster, 68 Mo. App. 670; Storms *v.* White, 23 Mo. App. 31.

Pennsylvania.— Irwin *v.* Mattox, 138 Pa. St. 466, 27 Wkly. Notes Cas. (Pa.) 382, 21 Atl. 209.

Vermont.— Porter *v.* Aldrich, 39 Vt. 326.

Canada.— Ives *v.* Hitchcock, Draper (U. C.) 247. But see McStoy *v.* Smith, 26 Ont. 508, 510, wherein Boyd, C., said: "The law laid down in Ives *v.* Hitchcock does not appear applicable to the present time, because of the changes made in the terms of the statute as to impounding. At that time (1830) the statute limited the right to impound in the case of animals allowed to be at large to cases in which they broke through a lawful and sufficient fence. That clause in the statute has now disappeared and there seems to be the right to impound cattle trespassing and doing damage, but with this condition — that if it is found that the fence broken is not a lawful fence, then no damages can be obtained by the impounding, whatever may be done in an action of trespass. The law is by no means clear in the revised statute, but that is the best meaning I can gather from a consideration of Ont. Rev. Stat. c. 195, §§ 2, 3, 6, 20 and 21."

60. See *supra*, XI, B, 1, a, (II), (A).

The word "inclosure," as used in the Wisconsin statute, means a tract of land surrounded by an actual fence, together with such fence, and does not include that part of a public highway of which the fee belongs to the owner of such adjoining inclosure. A by-law of a town prohibiting cattle from running at large, and inflicting a pecuniary penalty upon the owner of cattle violating the law, confers no right upon the owner in fee of the land included in a highway in such town to distrain cattle grazing upon such highway. Taylor *v.* Welbey, 36 Wis. 42.

61. Wilhite *v.* Speakman, 79 Ala. 400; Oil *v.* Rowley, 69 Ill. 469; Dickson *v.* Parker, 3 How. (Miss.) 219, 34 Am. Dec. 78.

62. See *supra*, XI, B, 1, a, (II), (A).

63. Drew *v.* Spaulding, 45 N. H. 472; Mills *v.* Stark, 4 N. H. 512, 17 Am. Dec. 444; Davis *v.* Campbell, 23 Vt. 236, all of which cases were decided under statutes not requiring landowners to fence against highways.

64. *Illinois.*— Akers *v.* George, 61 Ill. 376.

Iowa.— Barrett *v.* Dolen, 71 Iowa 94, 32 N. W. 189.

Maine.— Webber *v.* Closson, 35 Me. 26; Eastman *v.* Rice, 14 Me. 419.

Massachusetts.— Minor *v.* Deland, 18 Pick. (Mass.) 266.

Michigan.— Cox *v.* Chester, 77 Mich. 494, 43 N. W. 1028.

New Hampshire.— York *v.* Davis, 11 N. H. 241.

Vermont.— Mooney *v.* Maynard, 1 Vt. 470, 18 Am. Dec. 699.

65. Ladue *v.* Branch, 42 Vt. 574.

66. Hine *v.* Munson, 32 Conn. 219.

67. Little *v.* Lathrop, 5 Me. 356.

detained until the damages and costs are paid, and to give such landowner a lien on the animals to secure such damages, and costs;[68] and a statute authorizing the sale of such animals if not redeemed after reasonable notice is a police regulation within the scope of governmental powers, the exercise of which may be delegated to a municipal or other corporation;[69] but a statute authorizing a sale, without provision for any trial or hearing, has been held unconstitutional.[70]

(II) *Who May Distrain.* Only one in actual possession of the land trespassed upon is justified in distraining,[71] although an agent or servant may distrain for, and at the direction of, such person.[72]

(III) *What Animals May Be Distrained* — (A) *In General.* While Blackstone lays down the rule that as everything which is distrained is presumed to be the property of the wrong-doer, it follows that such things wherein no man can have an absolute and valuable property — as dogs, cats, rabbits, and all animals *feræ naturæ* — cannot be distrained,[73] it was held in a very early English case that greyhounds or ferrets, chasing and killing rabbits in a warren, might be distrained *damage feasant.*[74]

(B) *Animals in Actual Care of Person.* It is well established that a landowner cannot distrain an animal while it is in the actual possession, and under the personal care, of another person, as such distraint would perpetually lead to breaches of the peace;[75] but this is not true of dogs.[76]

68. Rood *v.* McCargar, 49 Cal. 117.

The California statute of 1877–78, p. 176, § 3, is constitutional. Wigmore *v.* Buell, 122 Cal. 144, 54 Pac. 600.

69. Dillard *v.* Webb, 55 Ala. 468.

70. The New York act of 1862, c. 459, was held unconstitutional for this reason so far as it authorizes the taking up and selling of cattle found trespassing in a private inclosure. Rockwell *v.* Nearing, 35 N. Y. 302 [*reversing* Hart *v.* Nearing, 44 Barb. (N. Y.) 472].

This act was amended by the New York act of 1867, which was designed to remedy the defects pointed out in the above decision, and, although the constitutionality of this latter act was at one time doubted (Leavitt *v.* Thompson, 56 Barb. (N. Y.) 542; McConnell *v.* Van Aerman, 56 Barb. (N. Y.) 534), its constitutionality has since been affirmed (Leavitt *v.* Thompson, 52 N. Y. 62; Cook *v.* Gregg, 46 N. Y. 439; Campbell *v.* Evans, 54 Barb. (N. Y.) 566; Squares *v.* Campbell, 41 How. Pr. (N. Y.) 193; Fox *v.* Dunckel, 38 How. Pr. (N. Y.) 136).

71. *Alabama.*— Wilhite *v.* Speakman, 79 Ala. 400.

Connecticut.— Herskell *v.* Bushnell, 37 Conn. 36, 9 Am. Rep. 299.

Massachusetts.— Phillips *v.* Bristol, 131 Mass. 426.

New York.—Orser *v.* Storms, 9 Cow. (N. Y.) 687, 18 Am. Dec. 543.

South Carolina.— Holliday *v.* Holliday, 30 S. C. 613, 9 S. E. 104.

Landlord and tenant in joint occupation.— Where A let his farm to B on shares, and both lived in the house on the farm, the occupation of B as tenant did not exclude the occupation of A, and A, under the statute, could seize and take into his custody cattle trespassing upon the farm and was not bound to act jointly with B in seizing the cattle. Herskell *v.* Bushnell, 37 Conn. 36, 9 Am. Rep. 299.

Pending forcible entry and detainer proceedings a landlord cannot enter upon the premises in the actual possession of his tenant for the purpose of seizing and removing animals of the tenant. Such an entry is a trespass even though the tenant is wrongfully holding over. Wright *v.* Mahoney, 61 Ill. App. 125.

One fencing government land with his own, as one inclosure, thereby violating the act of congress of Feb. 25, 1885, prohibiting the fencing of public land, cannot, by detaining cattle found upon his land within such inclosure, avail himself of the provisions of Utah Sess. Laws (1890), p. 82, authorizing the impounding of trespassing animals. Taylor *v.* Buford, 8 Utah 113, 29 Pac. 880.

72. Bearinger *v.* O'Hare, 26 Iowa 259; Barrows *v.* Fassett, 36 Vt. 625.

Defendant, while at home on a visit to his father, impounded plaintiff's cattle on his father's land, but with the approbation of his father and with the assistance of a boy sent by the father for that purpose, he and his father having previously consulted about the expediency of such action. It was held that, in impounding the cattle, defendant acted in the capacity of a servant for his father and was entitled to the same immunity as his father would have been in his place. Barrows *v.* Fassett, 36 Vt. 625.

73. 3 Bl. Comm. 7.

Trespassing chickens could be impounded at common law. State *v.* Neal, 120 N. C. 613, 27 S. E. 81, 58 Am. St. Rep. 810.

74. Y. B. 1 Edw. II, 18, pl. 2 [*cited* in Boden *v.* Roscoe, [1894] 1 Q. B. 608]. See also Bunch *v.* Kennington, 1 Q. B. 679, 41 E. C. L. 726.

75. Field *v.* Adames, 12 A. & E. 649, 40 E. C. L. 324; Storey *v.* Robinson, 6 T. R. 138. But see, *contra,* 3 Bl. Comm. 7.

76. Bunch *v.* Kennington, 1 Q. B. 679, 41 E. C. L. 726.

(IV) *What Damage Justifies Distress.* The right to distrain cattle *damage feasant* does not depend upon the particular kind of injury done, or the place where it is committed;[77] it is not confined to damage to the freehold, but extends to all kinds of damage done by such animals while trespassing, including injuries to personal property.[78] One cannot rightfully impound, however, for damages done on any other occasion than that at which the catttle are taken by him to be impounded;[79] and some actual damage must be shown to justify the impounding of cattle taken *damage feasant*,[80] although it seems that very slight damage is sufficient.[81]

(V) *Proceedings by Distrainer* — (A) *In General.* One proceeding to distrain trespassing animals must at least substantially[82] comply with the provisions of the statute, even if he fails to do so fully and entirely.[83]

(B) *Must Take Animals in Act.* The distrainer must seize the animals in the act of doing damage,[84] for, if they escape, or are driven out of the land, though after view, he cannot distrain them.[85] Where, however, at the precise moment when taken they are trespassing on a different part of the land from that upon which they were first discovered, both reason and authority warrant the holding that they are still *damage feasant* and liable to be impounded.[86]

(C) *Animals — How Kept* — (1) In General. The duty devolves upon the distrainer to feed, water, and care for the stock taken up by him;[87] but in the performance of such duty he is required to exercise only such care as would be exercised by a person of ordinary prudence under the circumstances,[88] and, if he impounds the stock in a town pound, he is not liable for any injury which they may receive from cattle confined therein.[89]

(2) Where Kept. When cattle are distrained the statutes contemplate their strict confinement,[90] and the mere restraining of cattle taken *damage feasant*,

77. Hale *v.* Clark, 19 Wend. (N. Y.) 498.

Breaking fences.— The right of distress of beasts, for breaking fences, does not exist in Missouri, a remedy for such cases being expressly given by statute by suit before a justice of the peace. Crocker *v.* Mann, 3 Mo. 472, 26 Am. Dec. 684. But see Pettit *v.* May, 34 Wis. 666, holding that where plaintiff's horse, being in the street, was destroying the fence surrounding defendant's inclosure, he was liable to be distrained as "doing damage within the inclosure," under Wis. Rev. Stat. c. 51, § 1.

78. Lyman *v.* Gipson, 18 Pick. (Mass.) 422; Boden *v.* Roscoe, [1894] 1 Q. B. 608; Y. B. 1 Edw. II, 18, pl. 2.

79. *New Hampshire.*— McIntire *v.* Marden, 9 N. H. 288.

New Jersey.— Warne *v.* Oberly, 50 N. J. L. 108, 11 Atl. 146.

Vermont.— Holden *v.* Torrey, 31 Vt. 690.

Wisconsin.— Warring *v.* Cripps, 23 Wis. 460.

Canada.— Graham *v.* Spettigue, 12 Ont. App. 261; Buist *v.* McCombe, 8 Ont. App. 598.

80. Dunton *v.* Reed, 17 Me. 178; Osgood *v.* Green, 33 N. H. 318; Dudley *v.* McKenzie, 54 Vt. 394.

81. McConnell *v.* Cate, (N. H. 1900) 47 Atl. 266. See also Pierce *v.* Hosmer, 66 Barb. (N. Y.) 345, holding that some damage is always presumed from a trespass on land.

82. Sloan *v.* Bain, 47 Nebr. 914, 66 N. W. 1013; Hanscom *v.* Burmood, 35 Nebr. 504, 53 N. W. 371; Deirks *v.* Wielage, 18 Nebr. 176, 24 N. W. 728; Bucher *v.* Wagoner, 13 Nebr. 424, 14 N. W. 160, holding that otherwise he will acquire no lien on the stock taken up.

Effect of unnecessary acts.— Entering cattle upon the town-book and notifying a justice, as required in the statute relating to estrays, are unnecessary acts when cattle are taken *damage feasant*, and do not convert the latter proceedings into the former, nor estop one from claiming that he sought the statutory remedy of distraining the cattle. Blair *v.* Small, 55 Mich. 126, 20 N. W. 821.

83. Morse *v.* Reed, 28 Me. 481; Irwin *v.* Mattox, 138 Pa. St. 466, 27 Wkly. Notes Cas. (Pa.) 382, 21 Atl. 209; Fitzwater *v.* Stout, 16 Pa. St. 22, holding that if he fail to do so he will be deemed a trespasser *ab initio*. See also Strauser *v.* Kosier, 58 Pa. St. 496; Ladue *v.* Branch, 42 Vt. 574.

84. Harriman *v.* Fifield, 36 Vt. 341; Lindon *v.* Hooper, Cowp. 414.

85. *Ohio.*—Northcott *v.* Smith, 4 Ohio Cir. Ct. 565.

Vermont.— Holden *v.* Torrey, 31 Vt. 690.

Wisconsin.— Warring *v.* Cripps, 23 Wis. 460.

England.— Clement *v.* Milner, 3 Esp. 95; Lindon *v.* Hooper, Cowp. 414.

Canada.— McIntyre *v.* Lockridge, 28 U. C. Q. B. 204; Graham *v.* Spettigue, 12 Ont. App. 261.

86. McKeen *v.* Converse, 68 N. H. 173, 39 Atl. 435.

87. Richardson *v.* Halstead, 44 Nebr. 606, 62 N. W. 1077.

88. Richardson *v.* Halstead, 44 Nebr. 606, 62 N. W. 1077.

89. Brightman *v.* Grinnell, 9 Pick. (Mass.) 14.

90. Harriman *v.* Fifield, 36 Vt. 341, holding that animals were not sufficiently im-

without placing them in a pound, does not constitute an impounding,[91] even though there is no usable public pound in the town where the cattle are taken up.[92] Where there is a public pound the animals should be confined therein,[93] and should be driven there in a reasonable time after they are taken up;[94] but the taker-up need not personally drive them to the pound or deliver them to the pound-keeper, but may employ others to perform that service.[95] Where there is no pound or pound-keeper in the town, a person may legally detain the animals upon his own premises,[96] or in the inclosure of another person,[97] and, if there be no pound, they may be kept in the barn of the pound-keeper[98] or of a field-driver.[99]

(D) *Notice of Taking Up* — (1) To Owner — (a) Necessity of. In the case of a known owner,[1] one who takes up an animal *damage feasant* must give notice thereof[2] to the owner[3] within the time prescribed by statute,[4] or within a reasonable time,[5] unless such notice is waived.[6] Neglect to give notice works a forfeiture of all damages, and entitles the owner to immediate possession of the animal, without recompense to the party injured,[7] and, under some circumstances, such neglect may render the impounder a trespasser *ab initio*,[8] or subject him to a penalty.[9]

(b) Requisites of — aa. *Whether Written or Oral.* Even where the statute prescribes that the notice which must be given shall be given in writing[10]

pounded when they were allowed to run at large in fields and pastures, and to gather their own living for themselves.

91. Conners *v.* Loker, 134 Mass. 510; Howard *v.* Bartlett, 70 Vt. 314, 40 Atl. 825.

92. Howard *v.* Bartlett, 70 Vt. 314, 40 Atl. 825.

93. Mosher *v.* Jewett, 59 Me. 453, 63 Me. 84.

94. Drew *v.* Spaulding, 45 N. H. 472; Moore *v.* Robbins, 7 Vt. 363.

In New York the distrainer is not entitled to impound the cattle in a public pound until after the damages have been ascertained by fence-viewers, according to the directions of the statute. Merritt *v.* O'Neil, 13 Johns (N. Y.) 477; Hopkins *v.* Hopkins, 10 Johns. (N. Y.) 369; Sackrider *v.* McDonald, 10 Johns. (N. Y.) 253; Pratt *v.* Petrie, 2 Johns. (N. Y.) 191.

95. Eastman *v.* Hills, 18 Me. 247.

96. Mosher *v.* Jewett, 63 Me. 84, 59 Me. 453; Hamlin *v.* Mack, 33 Mich. 103.

97. Riker *v.* Hooper, 35 Vt. 457, 82 Am. Dec. 646.

98. Riker *v.* Hooper, 35 Vt. 457, 82 Am. Dec. 646.

99. Pierce *v.* Josselyn, 17 Pick. (Mass.) 415.

1. Haffner *v.* Barnard, 123 Ind. 429, 24 N. E. 152; Bucher *v.* Wagoner, 13 Nebr. 424, 14 N. W. 160; Vandamayer *v.* Wood, 1 Ashm. (Pa.) 203.

2. *Indiana.*— Haffner *v.* Barnard, 123 Ind. 429, 24 N. E. 152.

Nebraska.—Hanscom *v.* Burmood, 35 Nebr. 504, 53 N. W. 371; Bucher *v.* Wagoner, 13 Nebr. 424, 14 N. W. 160.

New York.— Cook *v.* Gregg, 46 N. Y. 439.

Ohio.— Northcott *v.* Smith, 4 Ohio Cir. Ct. 565.

Pennsylvania.— Vandamayer *v.* Wood, 1 Ashm. (Pa.) 203.

3. Notice to person in charge.— Where the statutory notice is given to the person who has charge of the animal, as well as to the one having charge of the farm on which it is usually kept, it is sufficient, under Iowa Code, §§ 1543, 1544, to give the township trustees jurisdiction to appraise the damages done by the animal, though the owner has not been notified. Lyons *v.* Van Gorder, 77 Iowa 600, 42 N. W. 500.

4. Haffner *v.* Barnard, 123 Ind. 429, 24 N. E. 152; Harriman *v.* Fifield, 36 Vt. 341; Moore *v.* Robbins, 7 Vt. 363.

5. Hanscom *v.* Burmood, 35 Nebr. 504, 53 N. W. 371; Haggard *v.* Wallen, 6 Nebr. 271.

The question of reasonableness of the notice is generally one of fact, depending upon the circumstances of the particular case. Sloan *v.* Bain, 47 Nebr. 914, 66 N. W. 1013.

6. Hanscom *v.* Burmood, 35 Nebr. 504, 53 N. W. 371; Shroaf *v.* Allen, 12 Nebr. 109, 10 N. W. 551.

7. Haffner *v.* Barnard, 123 Ind. 429, 24 N. E. 152; Vandamayer *v.* Wood, 1 Ashm. (Pa.) 203.

8. Porter *v.* Aldrich, 39 Vt. 326. But see Young *v.* Rand, 18 N. H. 569, and Kimball *v.* Adams, 3 N. H. 182, holding that an omission of one who has impounded a beast *damage feasant* to give the notice required is a non-feasance which does not make him a trespasser *ab initio*.

9. The Vermont statute allows fifty cents for every twenty-four hours' neglect to give notice of the impounding of beasts, and where defendant impounded eighty sheep belonging to plaintiff for three days, without giving him notice, it was held that plaintiff could recover only fifty cents for each day, and not fifty cents for each one of the eighty sheep each day. Dudley *v.* McKenzie, 54 Vt. 394.

10. Written notice is required by How. Anno. Stat. Mich. § 8362, which plainly implies that a written notice shall be given by the person impounding beasts to the owner or person in charge of them, if known and liv-

the necessity for such written notice may be waived by the person entitled thereto.[11]

bb. *Contents.* The notice should contain a statement of the trespass and the amount of damages assessed[12] or claimed;[13] should describe all of the animals impounded;[14] and should name a person selected by the impounder as arbitrator in case the owner deems the amount claimed as damages to be excessive.[15] So, too, if the notice is to appoint appraisers, it should be so specified.[16] Defects in the notice may be waived.[17]

(2) To Pound-Keeper — (a) Necessity of. Where the person taking up and impounding cattle is required to give notice to, or leave a certificate with, the pound-keeper, a failure so to do will render him liable as a trespasser *ab initio*.[18] It is sufficient, however, that such notice or certificate is left with the pound-keeper within a reasonable time after the impounding.[19]

(b) Requisites of. The notice or certificate left with the pound-keeper should state the town in which the impounder resides, and the town in which the inclosure wherein the damage has been done is situated;[20] should state the cause of the impounding,[21] and the sum that is demanded.[22] Such certificate should be the personal act of the impounder, or, if he employs the hand of another to make it, it should be done in the name of the party impounding.[23]

(3) Advertisement. Where an advertisement of the impounding is required, it should state the time of impounding.[24] Such advertising or posting is not required in cases where personal notice is given.[25]

(e) *Appraisement of Damages* — (1) Provisions for. At common law, where the amount of compensation was not agreed upon, disinterested appraisers were chosen to assess it,[26] and provision is made by statute for the appointment of appraisers to ascertain the amount of damage done,[27] or for the appointment of arbitrators for such purpose;[28] and in some jurisdictions provision is made for

ing within six miles of the place of impounding. Jones *v.* Dashner, 89 Mich. 246, 50 N. W. 849.

By leaving "word in writing," as the statute expresses it, the impounder is protected, whether the word comes to the knowledge of the owner or not. By taking any other course he must not only be sure that the notice is given and received, but also that he can prove it by satisfactory evidence when the fact is put in issue. Moore *v.* Robbins, 7 Vt. 363. See also Hooper *v.* Kittredge, 16 Vt. 677.

11. Parks *v.* Kerstetter, 113 Mich. 529, 71 N. W. 865.

12. Haffner *v.* Barnard, 123 Ind. 429, 24 N. E. 152.

13. Bucher *v.* Wagoner, 13 Nebr. 424, 14 N. W. 160.

Claiming additional damages after notice. — There is no provision in the statute for adding, after the service of notice, to the damages claimed. Allen *v.* Van Ostrand, 19 Nebr. 578, 27 N. W. 642.

14. Brown *v.* Smith, 1 N. H. 36, holding that any not so described may be replevied.

Describing as "estray." — Where the impounder sent to the owner of the horse a notice containing these words: "I have taken up as an estray, doing damage in my inclosure, a horse belonging to you, and my damages are six dollars," it was held that a sale of the horse in the manner prescribed by statute, in cases of animals taken up *damage feasant*, was nevertheless valid, the word "estray" not being used technically in such notice. Lyman *v.* Gipson, 18 Pick. (Mass.) 422.

15. Bucher *v.* Wagoner, 13 Nebr. 424, 14 N. W. 160.

16. Harriman *v.* Fifield, 36 Vt. 341; Moore *v.* Robbins, 7 Vt. 363.

17. Smith *v.* Ladd, Smith (N. H.) 244.

18. Eastman *v.* Rice, 14 Me. 419; Merrick *v.* Work, 10 Allen (Mass.) 544.

19. Rollins *v.* Jones, 39 N. H. 475 See also Mellen *v.* Moody, 23 Vt. 674, holding that, if the damages are not ascertained within forty-eight hours, but are subsequently ascertained, and a certificate of their amount is furnished to the pound-keeper, the owner of the beasts cannot sustain replevin against the pound-keeper until he has first paid the damages, together with all fees and costs.

20. Morse *v.* Reed, 28 Me. 481.

21. Newhouse *v.* Hatch, 126 Mass. 364; Sherman *v.* Braman, 13 Metc. (Mass.) 407.

22. Sherman *v.* Braman, 13 Metc. (Mass.) 407.

23. Eastman *v.* Hills, 18 Me. 247, holding that the certificate determines who is to be regarded as the impounder, and that the action of replevin may be rightly brought against the person who signs such certificate in his own name. See also Hills *v.* Rice, 17 Me. 187.

24. Morse *v.* Reed, 28 Me. 481.

25. Haffner *v.* Barnard, 123 Ind. 429, 24 N. E. 152.

26. Northcott *v.* Smith, 4 Ohio Cir. Ct. 565.

27. Mosher *v.* Jewett, 59 Me. 453, 63 Me. 84; Cook *v.* Gregg, 46 N. Y. 439; Armbruster *v.* Wilson, 43 Hun (N. Y.) 261.

28. The object of the provision for arbitration is to afford a speedy and inexpensive

complaint to a justice of the peace, and a hearing before him for the assessment of such damages.[29]

(2) Application for. The application for the appointment of appraisers must be made within the time prescribed by statute,[30] and such application need not be joined with an application for the sale or appraisal of the animal, which may be done afterward by separate application.[31]

(3) Who May Act as Appraiser. The nephew of a distrainer is not within the meaning of the statute a disinterested person, to whom a warrant may issue to appraise beasts taken *damage feasant*.[32]

(4) Notice to Owner. The owner should receive notice of the time, place, and purpose of the appraisement;[33] but a verbal notice of the appraiser's meeting is sufficient.[34] No notice is required of the time and place when the appraiser's report will be delivered to the justice.[35] Failure to give notice of the appointment of appraisers does not render the distrainer a trespasser *ab initio*.[36]

(5) Requisites of Justice's Summons. The summons, on complaint to a justice for damages by trespassing animals, should show upon its face that the animals have been impounded by plaintiff, that there was a disagreement between plaintiff and defendant as to the amount of damages claimed, and as to the amount claimed for feeding and caring for the animals.[37]

(6) Requisites and Sufficiency of Appraisement. The appraisement must not include damages done at some previous time,[38] or damages which are not visible to the appraisers and cannot be determined without the intervention of proof by witnesses;[39] but it need not be limited to the amount of damages claimed by the landowner in the notice given by him to the owner of the cattle.[40] All of the appraisers must act, and appraisement by two of three appraisers is insufficient.[41] Failure of the appraisers to take the prescribed oath before issuing notice of their sitting may be waived by the appearance of the party, without objecting, after notice of such omission.[42]

(7) Conclusiveness of Appraisement. The report of appraisers, when made according to the provisions of the statute, and without fraud, is conclusive as to the trespass and the *quantum* of damages.[43]

(vi) *Right of Distrainer*—(a) *To Lien*—(1) In General. The right

mode of ascertaining the damages sustained by trespass of stock upon cultivated lands. Haggard *v.* Wallen, 6 Nebr. 271.

The authority of arbitrators appointed under the herd law is merely to appraise the damages and costs sustained by the landowner, and, therefore, any right of action which may accrue to the owner of the stock by reason of the former's negligence in keeping the same is not barred by the fact that the statutory arbitration was had, and damages assessed and paid. Richardson *v.* Halstead, 44 Nebr. 606, 62 N. W. 1077.

Failure to appoint arbitrator.—Where the taker-up of trespassing stock refuses, upon the application of the owner so to do, to appoint an arbitrator for the purpose of ascertaining the damage done, after an arbitrator has been selected upon the part of the owner, but demands the payment of a specific sum of money, he thereby loses his right to the possession of the stock, and the owner may maintain replevin therefor. Deirks *v.* Wielage, 18 Nebr. 176, 24 N. W. 728. If the cattle-owner fail for twenty-four hours to appoint an arbitrator the amount claimed must be deemed satisfactory to him. Allen *v.* Van Ostrand, 19 Nebr. 578, 27 N. W. 642.

29. Delk *v.* Pickens, 84 Ga. 76, 10 S. E. 596.

30. Pettit *v.* May, 34 Wis. 666.

31. Drew *v.* Spaulding, 45 N. H. 472.

32. Hasceig *v.* Tripp, 20 Mich. 216.

33. Bair *v.* Diller, 18 Pa. Co. Ct. 521; Shugar *v.* Meily, 4 Pa. Co. Ct. 77.

34. Healy *v.* Jordan, 103 Iowa 735, 72 N. W. 495.

35. Osgood *v.* Green, 33 N. H. 318.

36. Keith *v.* Bradford, 39 Vt. 34.

37. Delk *v.* Pickens, 84 Ga. 76, 10 S. E. 596.

For form of summons on complaint to justice of the peace for damages from trespassing animals see Delk *v.* Pickens, 84 Ga. 76, 10 S. E. 596.

38. Warring *v.* Cripps, 23 Wis. 460.

39. Warne *v.* Oberly, 50 N. J. L. 108, 11 Atl. 146.

40. Lyman *v.* Gipson, 18 Pick. (Mass.) 422.

41. Barrett *v.* Dolen, 71 Iowa 94, 32 N. W. 189; Drew *v.* Spaulding, 45 N. H. 472.

42. Drew *v.* Spaulding, 45 N. H. 472.

43. Smith *v.* Ladd, Smith (N. H.) 244; Harriman *v.* Fifield, 36 Vt. 341. See also Nelson *v.* Stewart, 6 N. C. 298.

to distrain until satisfaction made[44] extends only to the landowner's damages and expenses,[45] and, upon a recaption after a pound breach, the costs are the same as upon the original impounding.[46]

(2) How Enforced. Under some statutes the animals may be sold, under certain conditions, for the payment of the distrainer's claim,[47] while other statutes provide for an action *in rem* against the animals when their owner is unknown.[48] Before a party impounding cattle can sell the same at auction he must protect himself by a legal warrant of sale,[49] and the magistrate must have jurisdiction and authority to issue the same.[50] The sale may be invalidated by proof of an unauthorized appraisement of damages done at a previous time.[51]

(3) How Waived or Extinguished. The distrainer's lien may be waived by the release of the stock,[52] or by a purchase of the cattle by the distrainer at a sale void for want of the required notice,[53] and is instantly extinguished by a tender of the amount of damages done.[54]

(B) *To Use Animal.* The party distraining cannot use the distress unless to preserve it, as by milking a cow.[55]

(VII) *Remedies for Wrongful Distress* — (A) *Peaceable Recaption.* Where one without legal authority has distrained another's cattle as *damage feasant*, the latter may peaceably reclaim them,[56] but he cannot lawfully fight himself into legal possession.[57]

(B) *Replevin* — (1) Right to Maintain. Where the original taking was unlawful, or the subsequent detention is unlawful by reason of failure to comply with the statutes, replevin is an appropriate remedy for the recovery of the animals distrained;[58] and, where the statute allows a writ of replevin, and provides for a

44. See *supra*, XI, B, 2, c, (I), (A).

45. Mosher *v.* Jewett, 63 Me. 84, 59 Me. 453; Phillips *v.* Bristol, 131 Mass. 426; Harriman *v.* Fifield, 36 Vt. 341.

Where a landowner makes claim for damages, but none for expenses, and refuses to surrender possession to the owner solely because the latter declines to pay the claim made for damages, and the former thereafter brings suit for the damages, in which he fails to recover anything, he is not entitled to any compensation for keeping the stock pending the suit for damages. Hamil *v.* Cox, 90 Ga. 54, 16 S. E. 346.

46. Bills *v.* Vose, 27 N. H. 212.

47. Miller *v.* Dale, 72 Iowa 470, 34 N. W. 214; Anderson *v.* Locke, 64 Miss. 283, 1 So. 251; Cook *v.* Gregg, 46 N. Y. 439; Harriman *v.* Fifield, 36 Vt. 341.

48. Hanley *v.* Sixteen Horses, etc., 97 Cal. 182, 32 Pac. 10 [*followed* in Hilton *v.* Hanly, (Cal. 1893) 32 Pac. 11].

Where a trespass is committed by the animals of several persons, those of one person cannot be sold to pay the damages caused by animals of others, that one person not having any control over them, and not having contributed to the cause of their trespassing, and no authority for such sale being given by the California act of March 7, 1878, concerning trespassing of animals. Dooley *v.* Seventeen Thousand and Five Hundred Head of Sheep, (Cal. 1894) 35 Pac. 1011.

49. Cate *v.* Cate, 44 N. H. 211.

Mere delay by the party distraining to obtain an order of sale does not make him a wrong-doer *ab initio*. Drew *v.* Spaulding, 45 N. H. 472.

50. To give jurisdiction to the magistrate the party responding is bound to show that the prior proceedings of himself and the pound-keeper have been regular, and in conformity with the law. Cate *v.* Cate, 44 N. H. 211.

In order to give a justice jurisdiction of an application to sell animals, seized, under N. Y. Laws (1862), c. 459, as amended by N. Y. Laws (1867), c. 814, while trespassing upon the lands of the applicant, the complaint must allege that the animals escaped upon the land from the highway, and it is improper to allow the complaint to be amended by the insertion of this allegation after defendant has answered, and the case has been called for trial. Coles *v.* Burns, 21 Hun (N. Y.) 246.

51. Warring *v.* Cripps, 23 Wis. 460.

52. Dunbar *v.* De Boer, 44 Ill. App. 615.

53. Chase *v.* Putnam, 117 Cal. 364, 49 Pac. 204.

54. McPherson *v.* James, 69 Ill. App. 337; Leavitt *v.* Thompson, 52 N. Y. 62.

55. Com. *v.* Fourteen Hogs, 10 Serg. & R. (Pa.) 393; Bagshawe *v.* Goward, Cro. Jac. 147.

56. Taylor *v.* Welbey, 36 Wis. 42, holding that, even if he reclaim them forcibly, the distrainer cannot maintain replevin against him.

57. Bowman *v.* Brown, 55 Vt. 184.

When a person is engaged in a lawful attempt to impound cattle he has the right to defend his possession of them for the purpose for which he has them in charge, and to the same extent that a sheriff has to defend the possession of property taken by him on legal process. Barrows *v.* Fassett, 36 Vt. 625.

58. *Indiana.*— Clark *v.* Stipp, 75 Ind. 114.
Kansas.— Johns *v.* Head, 41 Kan. 282, 21 Pac. 236.

special proceeding therein, replevin in any other manner than is therein provided will not lie.[59]

(2) Time to Commence Suit. A statute which requires that the owner of beasts impounded shall replevy or redeem them within forty-eight hours after he shall have notice of the impounding must be construed as fixing that limit, if the damages can be ascertained within that time; and, if they cannot, the statute requires that the owner shall replevy, or redeem, as soon as they are ascertained.[60]

(3) Parties. The statute in regard to the replevying of beasts distrained does not contemplate that the writ shall be brought against the pound-keeper, but against the impounder, although it may be brought against the former if his act is wrongful.[61]

(4) Jurisdiction. Some statutes give to justices of the peace jurisdiction in replevin for beasts distrained.[62]

(5) Pleading — (a) Avowry. In replevin for beasts impounded defendant can justify only as at common law, under an avowry setting forth the facts relied upon.[63] Such avowry need not state the manner in which notice was given to the owner of the cattle,[64] nor need it contain any specification of defendant's title further than to describe the *locus in quo* as his inclosure;[65] if the avowry fail to give a sufficiently clear description of the premises, such defect will be waived by plaintiff admitting that the cattle were taken within the premises mentioned, and taking issue upon the sufficiency of a fence.[66] Where fences are required the premises should be described as an inclosure, and not as a close.[67]

(b) Plea in Bar. Where plaintiff pleads, in bar to the avowry, that defendant refused to give up the cattle unless plaintiff paid the amount of a void appraisal and all costs, he should further aver a demand for the cattle, accompanied with a tender of the legal charges and the expenses of impounding them.[68] A plea that the cattle escaped from a public highway into the *locus in quo* through a defect of fences is fatally defective unless it aver that the cattle were passing by on the highway.[69] A plea that the animal, at the time of the trespass, was in the actual possession and under the personal care of plaintiff need not aver any actual danger of a breach of the peace.[70]

(6) Evidence — (a) Burden of Proof. Where the statute makes it the duty of county commissioners to build and keep in repair the fence around a certain territory, the presumption is that the fence is in good order, and the burden of showing the contrary is on the party alleging it.[71]

(b) Admissibility. Evidence as to conversation and dealings between plaintiff and the distrainer are admissible to show the latter's course with reference to consenting or refusing to give up the cattle.[72] It is error to exclude

Michigan.— Cox *v.* Chester, 77 Mich. 494, 43 N. W. 1028.

Mississippi.— Dent *v.* Ross, 52 Miss. 188.

New Hampshire.—Dame *v.* Dame, 43 N. H. 37; Osgood *v.* Green, 33 N. H. 318; York *v.* Davis, 11 N. H. 241; Kimball *v.* Adams, 3 N. H. 182; Brown *v.* Smith, 1 N. H. 36.

New York.— Cook *v.* Gregg, 46 N. Y. 439; Hopkins *v.* Hopkins, 10 Johns, (N. Y.) 369; Leavitt *v.* Thompson, 56 Barb. (N. Y.) 542.

Vermont.— Ladue *v.* Branch, 42 Vt. 574.

England.— Lindon *v.* Hooper, Cowp. 414.

59. Cox *v.* Chester, 77 Mich. 494, 43 N. W. 1028; Campau *v.* Konan, 39 Mich. 362; Johnson *v.* Wing, 3 Mich. 163. See also Hamlin *v.* Mack, 33 Mich. 103.

60. Mellen *v.* Moody, 23 Vt. 674.

61. Mellen *v.* Moody, 23 Vt. 674.

62. Pistorius *v.* Swarthout, 67 Mich. 186, 34 N. W. 547.

63. Howard *v.* Black, 49 Vt. 9.

64. Keith *v.* Bradford, 39 Vt. 34.

65. McIntire *v.* Marden, 9 N. H. 288.

66. Loomis *v.* Tyler, 4 Day (Conn.) 141.

67. Porter *v.* Aldrich, 39 Vt. 326.

68. Keith *v.* Bradford, 39 Vt. 34.

69. Dovaston *v.* Payne, 2 H. Bl. 527.

70. Field *v.* Adames, 12 A. & E. 649, 40 E. C. L. 324.

71. Coor *v.* Rogers, 97 N. C. 143, 1 S. E. 613.

72. Toomey *v.* Woodruff, 50 Mich. 31, 14 N. W. 689.

Action against purchaser.— Where a horse was impounded as *damage feasant* by the owner of the land, and subsequently sold at auction, in due form of law, for the indemnification of such landowner, it was held, in an action of replevin brought by the original owner of the horse against the purchaser, that the declarations of the owner of the land, offered in evidence to show that the impounding was illegal, were not admissible, especially declarations such as were made after

evidence offered by plaintiffs as to the actual amount of damages sustained by the landowner by reason of the trespass.[73] Evidence offered by a landowner to prove that, although the inclosure was not such as good husbandmen generally keep, yet it was such as was kept in the locality wherein the land was situated, to avoid the spring freshets, is not admissible.[74]

(7) INSTRUCTIONS. The right of a landowner to distrain cattle depends upon the circumstances of the case, and an instruction which assumes the existence of such a right is erroneous.[75]

(8) JUDGMENT. Plaintiff, if successful, can recover only the loss suffered from being deprived of the use of his property during the time of detention.[76] If unsuccessful, the distrained property may be remanded to the distrainer,[77] who may have an assessment covering every claim arising out of the distress and damages done him by the beasts distrained.[78]

(c) *Payment of Damages and Action against Distrainer.* Where the owner of cattle does not choose to replevy, but is desirous of having his cattle immediately redelivered, he may make amends, and then sue the distrainer in trespass for taking his cattle, particularly charging the money so paid by way of amends as an aggravation of the damage occasioned by the trespass.[79]

d. To Maintain Trespass — (I) *IN GENERAL.* One whose lands have been injured by the trespasses of cattle or animals belonging to another may maintain an action of trespass therefor.[80]

(II) *PERSONS LIABLE* — (A) *Generally* — (1) PERSON HAVING CUSTODY. One who has the use, care, and control of cattle, although not the absolute owner, is liable for their trespasses,[81] even though such person be a gratuitous bailee.[82] The owner, when his cattle are so in the custody of a third person, is not liable.[83] Neither is one liable in trespass for damages done by cattle of another,[84] unless done by the former's agency.[85]

the sale. Lyman *v.* Gipson, 18 Pick. (Mass.) 422.

73. Gilbert *v.* Stephens, 6 Okla. 673, 55 Pac. 1070.

74. Blizzard *v.* Walker, 32 Ind. 437.

75. Ruter *v.* Foy, 46 Iowa 132.

76. Hill *v.* Ginn, (Del. 1899) 43 Atl. 608.

77. Syford *v.* Shriver, 61 Iowa 155, 16 N. W. 56.

78. Sterner *v.* Hodgson, 63 Mich. 419, 30 N. W. 77; Marx *v.* Woodruff, 50 Mich. 361, 15 N. W. 510; Holden *v.* Torrey, 31 Vt. 690.

79. Lindon *v.* Hooper, Cowp. 414, holding that an action for money had and received would not lie to recover back money paid for the release of cattle *damage feasant*, though the distress was wrongful.

80. *Alabama.*— Gresham *v.* Taylor, 51 Ala. 505.

Delaware.— Richardson *v.* Carr, 1 Harr. (Del.) 142, 25 Am. Dec. 65.

Florida.— Savannah, etc., R. Co. *v.* Geiger, 21 Fla. 669, 58 Am. Rep. 697.

Georgia.— Bonner *v.* De Loach, 78 Ga. 50, 2 S. E. 546.

Iowa.— Wagner *v.* Bissell, 3 Iowa 396.

Ohio.— O'Neal *v.* Blessing, 34 Ohio St. 33.

England.— 3 Bl. Comm. 211.

Trespass — When not a proper remedy.— Trespass is not the proper remedy to recover damages for injury done to plaintiff's crops, by reason of the horses and mules of defendant being breachy and entering plaintiff's fields, and thereby letting in others not owned by him, defendant not being liable, in that form of action, for injury occasioned by the stock not his own, unless they were, at the time, under his management and control. Durham *v.* Goodwin, 54 Ill. 469.

81. *California.*— Faber *v.* Cathrin, (Cal. 1884) 2 Pac. 879.

Connecticut.— Smith *v.* Jaques, 6 Conn. 530.

Illinois.— Ozburn *v.* Adams, 70 Ill. 291; Eck *v.* Hocker, 75 Ill. App. 641.

Nebraska.— Laflin *v.* Svoboda, 37 Nebr. 368, 55 N. W. 1049.

New Hampshire.— Kennett *v.* Durgin, 59 N. H. 560; Noyes *v.* Colby, 30 N. H. 143; Tewksbury *v.* Bucklin, 7 N. H. 518.

Vermont.— Moulton *v.* Moore, 56 Vt. 700.

Where a stranger turns out defendant's cow into the highway, whence it strays on to plaintiff's premises, trespass will lie against the owner of the cow. Noyes *v.* Colby, 30 N. H. 143.

82. Laflin *v.* Svoboda, 37 Nebr. 368, 55 N. W. 1049.

83. Eck *v.* Hocker, 75 Ill. App. 641; Atwater *v.* Lowe, 39 Hun (N. Y.) 150 [*following* Van Slyck *v.* Snell, 6 Lans. (N. Y.) 299].

84. *Illinois.*— Durham *v.* Goodwin, 54 Ill. 469.

Indiana.— Cook *v.* Morea, 33 Ind. 497.

Iowa.— Little *v.* McGuire, 43 Iowa 447, 38 Iowa 560.

Kentucky.— Crawford *v.* Hughes, 3 J. J. Marsh. (Ky.) 433.

Massachusetts.— Pool *v.* Alger, 11 Gray (Mass.) 489, 71 Am. Dec. 726.

85. Crawford *v.* Hughes, 3 J. J. Marsh. (Ky.) 433.

(2) Husband for Wife. A husband is liable for the trespasses of his wife's cattle when he has the separate custody and control of them.[86]

(3) Persons Bound to Maintain Gates in Road. It is the duty of persons for whose accommodation a road subject to gates is laid to maintain such gates; for a neglect to do so, such persons, and not the town, are liable for injuries caused by cattle escaping upon plaintiff's land from the land adjoining, provided the cattle were rightfully on such adjoining land.[87]

(b) *Jointly.* A joint action for trespass and damage by stock cannot be maintained, ordinarily, against the several owners of the stock;[88] but where the cattle, though owned severally, are under the joint control of all the owners, a joint liability exists.[89]

(iii) *Action* — (a) *Jurisdiction.* An action before a justice of the peace, to recover damages caused by defendant's stock breaking through a fence and destroying plaintiff's crops growing on lands of which he was a tenant in possession, is an action of trespass to real estate within the meaning of a statute which limits the jurisdiction of justices to cases in which the damages claimed do not exceed one hundred dollars.[90]

(b) *Defenses* — (1) Agreement of Plaintiff to Pasture. In an action for trespass by defendant's cattle in plaintiff's garden and oat-field, plaintiff's existing agreement to pasture said cattle is no defense unless it appear that the cattle strayed into the garden and field through some fault of plaintiff.[91]

(2) Agreement with Third Person to Keep Fence in Repair. It is no protection to defendant that he had made a bargain with some third person, in no way connected with plaintiff, to keep the fence in good repair for the purpose of restraining the cattle.[92]

(3) By-Law Authorizing Animals at Large. A by-law authorizing certain animals to run at large upon the highways and common lands of the town is no excuse for suffering the animals to break through plaintiff's fence and depasture his meadow.[93]

(4) Contributory Negligence. Plaintiff's failure to use ordinary care and prudence to avoid the injury may bar the action.[94]

(5) License from One Occupant of Common Inclosure. It is no defense that one of two persons who occupy adjoining lands, inclosed with one fence and forming one field, authorized defendant to turn cattle into the inclosure, representing to defendant that he owned the whole field.[95]

(6) Want of Fences. In a township in which the hog law has not been suspended it is no defense to an action for damages done to a crop by hogs suffered to run at large, that the crop is not inclosed by a legal and sufficient fence.[96] So, too, where adjacent owners have fields inclosed in common, it is no defense, in an

86. Cram *v.* Dudley, 28 N. H. 537; Arthurs *v.* Chatfield, 9 Pa. Co. Ct. 34.

87. Proctor *v.* Andover, 42 N. H. 362.

88. Westgate *v.* Carr, 43 Ill. 450; Cogswell *v.* Murphy, 46 Iowa 44; Partenheimer *v.* Van Order, 20 Barb. (N. Y.) 479.

89. Smith *v.* Jacques, 6 Conn. 530; Ozburn *v.* Adams, 70 Ill. 291; Jack *v.* Hudnall, 25 Ohio St. 255, 18 Am. Rep. 298.

In an action, brought in a justice's court, for trespass, caused by defendant's cattle by breaking into and entering the close of plaintiff and destroying the crops of the latter, where the evidence is sufficient to sustain the action, a joint liability against the two defendants is *prima facie* made out; and where it does not appear that one of defendants is a married woman, she must be treated as a *feme sole.* If defendants claim a nonsuit on the ground that she is a married woman, and has no joint interest with the other defendant in, or control over, the cattle doing the damage, such facts should be set up in the answer and proved on the trial. Sickles *v.* Gould, 51 How. Pr. (N. Y.) 22.

90. O'Neal *v.* Blessing, 34 Ohio St. 33.

91. Myers *v.* Parker, 74 Hun (N. Y.) 129, 26 N. Y. Suppl. 308, 56 N. Y. St. 423.

92. Cassem *v.* Olson, 45 Ill. App. 38.

93. White *v.* Scott, 4 Barb. (N. Y.) 56.

94. Little *v.* McGuire, 43 Iowa 447, 38 Iowa 560; Hassa *v.* Junger, 15 Wis. 598, in which latter case it was so held, where plaintiff sued for damages to his crop by cattle in consequence of defendant's removal of what plaintiff alleged was a division fence, but it appeared that plaintiff had sown his crop some time after the fence was removed.

95. Daniels *v.* Aholtz, 81 Ill. 440.

96. Wells *v.* Beal, 9 Kan. 597.

action by one against the other, for wilfully and intentionally allowing his stock to run in the inclosure and upon plaintiff's crops, that the fence surrounding the inclosure was not a lawful fence.[97]

(c) *Pleading*—(1) Complaint or Declaration[98]—(a) Act Purposely Done. A complaint for trespass on uninclosed lands, in a portion of the state in which the fence law applies, should allege that defendant purposely drove his animals on such lands, or intentionally retained the animals thereon, for the special object of depasturing plaintiff's land.[99]

(b) Appraisal of Damages. In New Jersey, where the plaintiff intends to proceed under the statute he must set out the appraisement, and all the other requisites of the statute.[1]

(c) Continuando. Any number of trespasses may properly be alleged as having been committed on a day named, and on divers other days and times between that day and the commencement of the suit.[2]

(d) Demand for Damages. In an action before a justice of the peace for damages sustained from trespassing animals, it is not necessary to aver that a demand has been made for such damages.[3]

(e) Description of Land. It should be averred upon whose land the damage was done;[4] but, if it be averred that the lands trespassed on are situated in the county, no other description of them is necessary.[5]

(f) Existence of Fences. Where the common law obtains, and there is no order or local statute allowing animals to run at large, it is not necessary to allege the existence of fences;[6] but, where cattle are allowed to run at large on uninclosed lands, plaintiff must set forth facts showing an inclosure built in substantial compliance with the statute.[7]

(g) Knowledge of Animal's Propensity to Roam. It need not be averred that defendant knew of the propensity of his cattle to wander and roam about, such knowledge being presumed.[8]

(h) Negligence. It is unnecessary to allege that defendant was negligent, or that plaintiff was not guilty of contributory negligence, where the common law obtains, and no order or statute exists allowing animals to run at large.[9]

(2) Plea. Where defendant relies upon the insufficiency of plaintiff's fences to turn ordinary stock, such defense must be specially pleaded;[10] and where the damage arose by reason of the removal of a partition fence, of which removal plaintiff had been notified, the plea should show that notice of such removal was given in due time, and to a proper person, and an averment that plaintiff had reasonable notice thereof is insufficient.[11]

(d) *Process.* A warrant is the proper process in this form of action, and it is sufficient if the *locus in quo* be reasonably certain in the description.[12]

(e) *Evidence*—(1) Judicial Notice. The court cannot take judicial notice as to whether a partition fence sufficient to restrain and inclose sheep will also restrain and inclose hogs,[13] nor of an order by the board of commissioners permit-

97. Broadwell *v.* Wilcox, 22 Iowa 568, 92 Am. Dec. 404. See also Noble *v.* Chase, 60 Iowa 261, 14 N. W. 299.

98. For forms of complaints for trespasses by cattle see Joiner *v.* Winston, 68 Ala. 129; Jean *v.* Sandiford, 39 Ala. 317.

99. Fry *v.* Hubner, 35 Oreg. 184, 57 Pac. 420; Walker *v.* Bloomingcamp, 34 Oreg. 391, 56 Pac. 809 [*affirming* 34 Pac. 175, 43 Pac. 175].

1. Voorheis *v.* Perrine, 16 N. J. L. 359; Brittin *v.* Van Camp, 3 N. J. L. 240; Jessup *v.* Sharp, 2 N. J. L. 324; Boyle *v.* Lindsley, 2 N. J. L. 234.

2. Richardson *v.* Northrup, 66 Barb. (N. Y.) 85.

3. Smith *v.* McFall, 1 Ind. 127.

4. Voorheis *v.* Perrine, 16 N. J. L. 359.

5. Jean *v.* Sandiford, 39 Ala. 317.

6. Atkinson *v.* Mott, 102 Ind. 431, 26 N. E. 217; Cook *v.* Morea, 33 Ind. 497.

7. Nichols *v.* Dobbin, 2 Mont. 540; Campbell *v.* Bridwell, 5 Oreg. 311.

8. Beckett *v.* Beckett, 48 Mo. 396.

9. Atkinson *v.* Mott, 102 Ind. 431, 26 N. E. 217.

10. Sturman *v.* Colon, 48 Ill. 463.

11. McCormick *v.* Tate, 20 Ill. 334.

12. Harrison *v.* Brown, 5 Wis. 27.

13. Enders *v.* McDonald, 5 Ind. App. 297, 31 N. E. 1056.

ting domestic animals to run at large; this fact must be shown like any other fact, and, unless proven, it will be assumed that no such order has been made.[14]

(2) Burden of Proof. When the board of commissioners makes an order permitting stock to run at large, if stock so running at large enters upon inclosed lands, the burden rests upon the landowner to show that the fence through which the stock entered was such as good husbandmen generally keep;[15] but, though no right of action exists unless the entry was through a lawful fence, it is not incumbent on plaintiff to show that the entire fence inclosing the field was a lawful fence, but only that the part where the entry was made was lawful.[16] Where cattle are not allowed to run at large, if it is admitted that defendant's animals were upon plaintiff's land, the burden is upon defendant to show some justification or excuse.[17]

(3) Admissibility — (a) To Show Amount of Damage. Plaintiff may prove, by the ordinary character of evidence, the damage sustained by him;[18] he may properly testify as to the proportion of his crops destroyed, and their probable production, if not injured,[19] but he cannot state the money value of the damage done.[20] So, too, testimony showing that, by reason of the injury, plaintiff's stock had to be fed with hay is admissible,[21] as is evidence of the good condition of the feed in defendant's pasture during the time in question.[22]

(b) To Show Manner of Entry. Where a part of the division fence, between plaintiff's and defendant's lands, was sufficient, which part it was plaintiff's duty to maintain, and defendant's horse, having jumped in over some part of the fence, was found in plaintiff's inclosure, evidence that the horse jumped back over a part of the fence that was of lawful height is admissible to show that at the time of the injury he was unruly, and not to be restrained by an ordinary fence;[23] and, where defendant claims that the injury was through plaintiff's insufficient fence, plaintiff may offer evidence that defendant's cattle were unruly, for the purpose of rebutting this defense.[24]

(c) To Show Sufficiency and Character of Fences. Where there is no statute making fence-viewers the sole judges of the sufficiency of a fence, its sufficiency may be proved like any other fact,[25] and parol proof of usage in the maintenance and repair of separate portions of a partition fence is admissible to show a prescription.[26]

(d) To Show Title of Crops Injured in Third Person. Evidence offered to show title or an interest in the damaged crops in a third person is properly excluded, where it appears that plaintiff was in the exclusive possession of the premises and property damaged, bare possession being sufficient to maintain trespass against a wrong-doer.[27]

(4) Sufficiency — (a) In General. Proof that defendant's swine, while running at large, trespassed upon the cultivated fields of plaintiff, and destroyed his grain, does not, by itself alone, establish a liability upon defendant, but plaintiff

14. Atkinson *v.* Mott, 102 Ind. 431, 26 N. E. 217.

15. Crum *v.* Conover, 14 Ind. App. 264, 40 N. E. 644, 42 N. E. 1029.

16. Cram *v.* Ellis, 31 Iowa 510.

17. Hodson *v.* Kilgore, 77 Me. 155.

It is matter of defense, to be shown by defendant, that a fence which plaintiff was bound to keep in repair was defective. Colden *v.* Eldred, 15 Johns. (N. Y.) 220.

18. Quinton *v.* Van Tuyl, 30 Iowa 554, holding that the statute making the fence-viewers appraisers to find and certify the damages applied only in cases where plaintiff elects to distrain the animal.

19. Seamans *v.* Smith, 46 Barb. (N. Y.) 320.

20. Richardson *v.* Northrup, 66 Barb. (N. Y.) 85.

21. Faber *v.* Cathrin, (Cal. 1884) 2 Pac. 879.

22. Watkins *v.* Rist, 68 Vt. 486, 35 Atl. 431, 67 Vt. 284, 31 Atl. 413.

23. Hine *v.* Wooding, 37 Conn. 123.

24. Barnum *v.* Vandusen, 16 Conn. 200.

25. Noble *v.* Chase, 60 Iowa 261, 14 N. W. 299.

Evidence to show existence of legal fence should be received when offered by plaintiff, even though the burden of showing that fact is not, in the first instance, upon him. Taylor *v.* Young, 61 Wis. 314, 21 N. W. 408.

26. Heath *v.* Ricker, 2 Me. 72.

27. Sickles *v.* Gould, 51 How. Pr. (N. Y.) 22.

must show, in addition, that the fields were in a township in which the hog law was in force, or show some other matter of equal effect.[28]

(b) As to Character of Fences. Proof that a fence, at the place of breach, was of lawful height and strength is insufficient where the law requires the entire inclosure to be surrounded by a lawful fence.[29] A certificate of appraisers is *prima facie* evidence as to the sufficiency of a fence.[30]

(f) *Trial*—(1) Dismissal. Where the evidence discloses that a third person had an interest in the crops injured, it is error for the court to summarily dismiss the action because of the non-joinder of such third person, for his interest might be consistent with plaintiff's right to recover for the trespass; at most, it could operate only as a partial failure of proof.[31]

(2) Instructions. Where the court has instructed the jury that a fence was good and sufficient if it would prevent the breaking in of stock not breachy, it is not error to refuse an instruction that the fence is sufficient if it would turn ordinary stock;[32] nor is it error to refuse instructions that, if other cattle than defendant's were in the habit of trespassing on plaintiff's premises, the jury could not find that defendant's animals did all the damage, or that the jury must be satisfied what amount of damage defendant's animals had done before they could find for plaintiff.[33] It is error to instruct the jury that, where one man's stock trespassed upon another's land, the law implies a promise on the part of the stock-owner to pay all damage done.[34] Where a third person has testified that he was the owner of an undivided interest in the injured crop, it is not error for the court to refer, in its instructions, to the ownership claimed by the witness.[35]

(3) Questions of Law and Fact. What is a sufficient fence, or what kind of navigable stream or deep water is to be deemed sufficient instead of a fence, is a question of law for the court;[36] whether plaintiff's fence was good and sufficient,[37] what was the amount of damage sustained by plaintiff,[38] and whether plaintiff exercised ordinary care to prevent the damage,[39] are all questions of fact for the jury.

28. Scott *v.* Lingren, 21 Kan. 184.

Where there is a general usage in a neighborhood to let cattle run at large upon the highway and uninclosed lands adjoining such highways, if any one adopts the usage, this is evidence of a license on his part to let the cattle of others run at large on his lands so situated. Wheeler *v.* Rowell, 7 N. H. 515.

There is sufficient evidence to be submitted to the jury when plaintiff and defendant lived on, and cultivated, adjoining plantations, surrounded by a common inclosure, and cattle belonging to, or in charge of, defendant were turned into the inclosure and destroyed plaintiff's cotton, and on several occasions defendant's cattle were driven out of plaintiff's cotton-field, and had been driven home by him (Knott *v.* Brewster, (Miss. 1900) 27 So. 758); or where it appeared that defendant resided upon a farm with his father, of which defendant had a deed and his father a life-lease, and plaintiff's evidence tended to show that the cows kept upon the farm had trespassed upon plaintiff's premises, but that defendant owned but one cow, which was also kept upon the farm (Cram *v.* Dudley, 28 N. H. 537).

29. Stovall *v.* Emerson, 20 Mo. App. 322.

30. Shaver *v.* Catrin, 2 Overt. (Tenn.) 323.

31. Washburn *v.* Case, 1 Wash. Terr. 253.

32. Scott *v.* Wirshing, 64 Ill. 102.

Where defendant does not defend on the ground of defects in plaintiff's fence, it is not incumbent on plaintiff to show that his fence was legal in order to make out his right of recovery; and hence a charge "that, there being no evidence tending to show that the plaintiff's fence was not a legal fence, or satisfactory to the defendant, or that the defendant's cattle ever went on to the plaintiff's land by reason of the plaintiff not having a legal fence, the presumption is that the plaintiff's fence was legal," could work no detriment to defendant, and was not subject to exception. Sorenberger *v.* Houghton, 40 Vt. 150.

"Discretion" for "judgment."—Where the court, having defined specifically what constituted a lawful fence, told the jury that such matter was entirely in their discretion, the fair meaning of the word "discretion," as used by the court, was "judgment," and the instruction was not erroneous. McManus *v.* Finan, 4 Iowa 283.

33. McManus *v.* Finan, 4 Iowa 283.

34. Van Valkenburg *v.* McCauley, 53 Cal. 706.

35. Hinshaw *v.* Gilpin, 64 Ind. 116.

36. State *v.* Lamb, 30 N. C. 229.

37. Scott *v.* Wirshing, 64 Ill. 102; Erdman *v.* Gottshall, 9 Pa. Super. Ct. 295, 43 Wkly. Notes Cas. (Pa.) 405.

38. Richardson *v.* Northrup, 66 Barb. (N. Y.) 85.

39. Little *v.* McGuire, 38 Iowa 560, 43 Iowa 560.

(G) *Amount Recoverable* — (1) In General. Plaintiff can recover only the actual damages for the trespass,[40] not exceeding the amount claimed,[41] the measure of damages being the value of his crops at the time of their destruction.[42] Judgment for damages will not bar a subsequent action for other damages, resulting from the same trespass, which had not accrued at the time of, and were not included in, the former judgment.[43]

(2) Exemplary Damages. Exemplary damages cannot be allowed in an action for trespass by animals, where the declaration claims no such damages, even though defendant has by force recovered the animals from plaintiff's keeping.[44]

(3) Apportionment of. Where crops are destroyed by trespassing cattle belonging to two parties under such circumstances that it is impossible to distinguish between the trespass of one lot of cattle and that of the other, or to determine the actual amount of damage done by either separately, if the damages are apportioned according to the number of cattle belonging to the respective parties, and the owner of the crops is allowed to recover in an action against one party only the proportion of damages given by such apportionment, plaintiff cannot complain of the amount of the judgment.[45]

XII. Injuries to Animals.

A. Civil Liability — 1. In General — a. Domestic Animals — (I) *Generally* — (A) *Trespassing Animals* — (1) In General. While a landowner, by the exercise of necessary force, may drive from his premises trespassing animals,[46] he will be liable to the owner for any injury which is the natural or proximate consequence of a wrongful act on his part;[47] and, unless otherwise provided, it

40. North *v.* McDonald, 47 Barb. (N. Y.) 528, holding that he cannot shut up the animals and, in the same action, recover pay for their keeping. See also Hickox *v.* Thurstin, 7 Lans. (N. Y.) 421, wherein plaintiff sued for trespass done by cattle, with a claim for taking the cattle from plaintiff's possession after he had them in custody as permitted by statute, and it was held error to instruct that the jury might allow as damages, if they found for plaintiff, a certain sum per head for the animals retaken, besides the injury to crops.

41. Thus, where plaintiff sued for damages to his growing wheat, and the justice decided that plaintiff was not entitled to recover for damage thereto, it was held erroneous to enter judgment for damage to his grass. Hassa *v.* Junger, 15 Wis. 598.

Recovery of less than claimed.— Where the action was for damages for several alleged trespasses by cattle of defendant, the jury rendered a verdict for plaintiff, but for a less sum than claimed. On exceptions by plaintiff to the charge of the lower court, defendant urged that, as the jury found for plaintiff, they must have found the fence through which the cattle entered sufficient, and that plaintiff had suffered nothing for which he could bring error; but it was held that, as successive trespasses were complained of, the court could not say that the jury did not find the fence sufficient at one time, and insufficient at another. Aylesworth *v.* Herrington, 17 Mich. 417.

42. Gresham *v.* Taylor, 51 Ala. 505; Gripton *v.* Thompson, 32 Kan. 367, 4 Pac. 698; Richardson *v.* Northrup, 66 Barb. (N. Y.) 85.

43. Thus, where the damages recovered in the former action were for injuries to the close itself on account of defendant's stallion breaking into it, this will not bar a subsequent action for damages resulting to plaintiff in consequence of his mare, running in said close, having been gotten with foal by said stallion, the fact of her being with foal not being known, and the damage to plaintiff therefrom not having accrued when the former action was tried. Hagan *v.* Casey, 30 Wis. 553.

44. Sherman *v.* Kilpatrick, 58 Mich. 310, 25 N. W. 298.

Exemplary damages are not justified where there is no evidence as to any damages sustained by plaintiff except that he "was all tore up about it," and that he would not have consented to defendant's live stock being in his pasture for two hundred dollars. Claunch *v.* Osborn, (Tex. Civ. App. 1893) 23 S. W. 937.

45. Powers *v.* Kindt, 13 Kan. 74.

46. See *supra*, XI, B, 2, b.

47. *Alabama.*— Wilhite *v.* Speakman, 79 Ala. 400.

Delaware.— Richardson *v.* Carr, 1 Harr. (Del.) 142, 25 Am. Dec. 65.

Georgia.—Cantrell *v.* Adderholt, 28 Ga. 239.

Illinois.— Painter *v.* Baker, 16 Ill. 103; Reis *v.* Stratton, 23 Ill. App. 314.

Indiana.—Amick *v.* O'Hara, 6 Blackf. (Ind.) 258.

Massachusetts.—Clark *v.* Keliher, 107 Mass. 406.

Missouri.— Totten *v.* Cole, 33 Mo. 138, 82 Am. Dec. 157.

New Hampshire.— McIntire *v.* Plaisted, 57 N. H. 606.

is immaterial whether the lands are inclosed or not, or whether the animals are doing or have done damage.[48] There are decisions, however, to the effect that the right to defend and preserve property will authorize the killing of trespassing animals engaged in damaging or destroying property;[49] but this right must be exercised in a reasonable manner.[50]

(2) By Use of Dogs. While a dog may be used in driving off trespassing animals,[51] if there is anything in the size, character, or habits of the dog, or in the mode of setting him on, or of his pursuit, which negatives the idea of the exercise of ordinary care or prudence, the person so using such dog will be liable for the injuries sustained by the trespassing animals.[52]

(3) While in Custody of Taker-Up. One who, in the exercise of the right to impound trespassing animals, injures them while taking or confining them,[53] or by the mode of their confinement,[54] or kills them while in his possession, or so injures them that they afterward die,[55] is liable as a trespasser.

(B) *Vicious Animals.* One may kill a vicious animal in the necessary defense of himself or the members of his household,[56] or under circumstances which indicate danger that property will be injured or destroyed unless the aggressor is killed,[57]

New York.— Carney *v.* Brome, 77 Hun (N. Y.) 583, 28 N. Y. Suppl. 1019; 60 N. Y. St. 453; Matthews *v.* Fiestel, 2 E. D. Smith (N. Y.) 90.

North Carolina.—Bost *v.* Mingues, 64 N. C. 44.

Pennsylvania.— Palmer *v.* Silverthorn, 32 Pa. St. 65.

Texas.— Champion *v.* Vincent, 20 Tex. 811.

The injury must be wilful or wanton, or there can be no recovery. Union Pac. R. Co. *v.* Rollins, 5 Kan. 167.

48. Wilhite *v.* Speakman, 79 Ala. 400; Thompson *v.* State, 67 Ala. 106, 42 Am. Rep. 101; Bost *v.* Mingues, 64 N. C. 44; Morse *v.* Nixon, 51 N. C. 293; Hobson *v.* Perry, 1 Hill (S. C.) 277; Ford *v.* Taggart, 4 Tex. 492.

Under the Mississippi code one who is a joint owner of a partition fence failing to keep his part in repair, by reason of which his animals get upon the land of the co-owner of the fence, loses his right to recover damages for injuries inflicted by the latter upon the trespassing animals. McCain *v.* White, 67 Miss. 243, 7 So. 222.

An agreement to dispense with a partition fence is not such equivalent of a legal fence as to justify the killing of stock escaping by the negligence of one of the parties and depredating on the premises of the other. Tumlin *v.* Parrott, 82 Ga. 732, 9 S. E. 718.

That a fence was sufficient to exclude other animals of the kind killed is not a justification of the killing. Hamilton *v.* Howard, 68 Ga. 288.

Statutory provisions defining as an offense the killing of stock on cultivated lands inclosed by an insufficient fence are not applicable in counties which have prohibited the running at large of such stock, and made it unnecessary to fence against the animals named. McCampbell *v.* State, (Tex. Crim. 1898) 45 S. W. 711.

49. Anderson *v.* Smith, 7 Ill. App. 354; Morse *v.* Nixon, 53 N. C. 35.

Pigeons.— At common law, a man may kill pigeons coming on his land (Dewell *v.* Saunders, Cro. Jac. 490), and under a statute protecting them it is a defense to a charge for unlawfully killing pigeons doing damage that the person charged had notified their owner, requesting their destruction, or that he prevent them doing further injury to the crops of defendant, which the owner failed to do (Taylor *v.* Newman, 4 B. & S. 89, 116 E. C. L. 89).

50. Trivial damage.— A landowner is not justified in killing a valuable animal found destroying property of comparatively little value. Anderson *v.* Smith, 7 Ill. App. 354.

Use of poison.— Although a landowner has notified an owner of trespassing fowls that he would place poisoned meal on his premises, the defendant is not justified in the use of such deadly means. Johnson *v.* Patterson, 14 Conn. 1, 35 Am. Dec. 96.

51. See *supra*, XI, B, 2, b.

52. *Alabama.*— Thompson *v.* State, 67 Ala. 106, 42 Am. Rep. 101.

Delaware.— Richardson *v.* Carr, 1 Harr. (Del.) 142, 25 Am. Dec. 65.

Indiana.—Amick *v.* O'Hara, 6 Blackf. (Ind.) 258.

Iowa.— Aspegren *v.* Kotas, 91 Iowa 497, 59 N. W. 273.

Michigan.— Wood *v.* La Rue, 9 Mich. 158.

New Hampshire.— McIntire *v.* Plaisted, 57 N. H. 606.

Vermont.— Davis *v.* Campbell, 23 Vt. 236; Clark *v.* Adams, 18 Vt. 425, 46 Am. Dec. 161.

But see Smith *v.* Waldorf, 13 Hun (N. Y.) 127, holding that there could be no recovery for injuries sustained by a cow, in consequence of her jumping a fence to escape a pursuing dog which did not touch her.

53. Harris *v.* Brummell, 74 Mo. App. 433.

54. Wilhite *v.* Speakman, 79 Ala. 400.

55. Cannon *v.* Horsey, 1 Houst. (Del.) 440.

56. As an enraged bull. Russell *v.* Barrow, 7 Port. (Ala.) 106.

57. Anderson *v.* Smith, 7 Ill. App. 354.

A wild and vicious buffalo bull, which has broken into a close, may be killed. Canefox *v.* Crenshaw, 24 Mo. 199, 69 Am. Dec. 427.

An ass, permitted to run at large by its

but it seems that such a killing is justified only where the animal is actually doing injury.[58]

(II) *Dogs*— (A) *In General*— (1) Intentional Injury or Killing[59]— (a) In General. A dog may not be wantonly destroyed,[60] nor killed on mere suspicion of wrongdoing, unless there is statutory authority for such killing.[61] Neither may a dog be destroyed merely because he is trespassing,[62] although, in the opinion of his slayer, he is about to injure or destroy such person's property.[63] Nor may a person wilfully kill a dog which is not vicious or dangerous in its disposition and habits, and is not engaged in doing damage, although he may have been guilty of trivial offenses.[64]

(b) In Protection of Property — aa. *Stock.* Every person has a natural right to defend and protect his animate property — as cattle, stock, and fowls — from injury or destruction by dogs, and in pursuance of that object may kill dogs engaged in doing injury to such animals owned by him;[65] but there must exist

owner, who is aware of its vicious habits, may be killed when it is found in the act of injuring a cow which it has thrown down. Williams *v.* Dixon, 65 N. C. 416.

A sow addicted to eating fowls may be killed. Morse *v.* Nixon, 53 N. C. 35.

Knowledge of owner.— The castration of a troublesome mule, whose habits were unknown to his owner, is not justified by the fact that he was permitted to run at large. Norris *v.* Banta, 21 Tex. 427 [*distinguishing* Custard *v.* Burdett, 15 Tex. 456, wherein the owner of the stallion castrated had knowledge].

58. Ulery *v.* Jones, 81 Ill. 403.

59. **Mad dogs.**— Right to kill, see *supra*, VI, C, 2, a.

60. Brill *v.* Flagler, 23 Wend. (N. Y.) 354.

Except a dog is discovered in the act of killing, wounding, or chasing sheep or other animals, or under such circumstances as to satisfactorily show that he has been recently so engaged, being the cases provided for by the statute, or where he has been recently bitten by another dog which is mad, or may be reasonably supposed to be so, or where a dog is ferocious and attacks persons, no one besides the master has a right to kill it. Hinckley *v.* Emerson, 4 Cow. (N. Y.) 351, 15 Am. Dec. 383.

61. Brent *v.* Kimball, 60 Ill. 211, 14 Am. Rep. 35; Anderson *v.* Smith, 7 Ill. App. 354; Marshall *v.* Blackshire, 44 Iowa 475.

Association with dogs which may be killed does not, it seems, justify the killing of an innocent dog. Barret *v.* Utley, 12 Bush (Ky.) 399.

62. Brent *v.* Kimball, 60 Ill. 211, 14 Am. Rep. 35; Marshall *v.* Blackshire, 44 Iowa 475; Fenton *v.* Bisel, 80 Mo. App. 135; Harris *v.* Eaton, 20 R. I. 81, 37 Atl. 308. See also Tyner *v.* Cory, 5 Ind. 216.

63. Ten Hopen *v.* Walker, 96 Mich. 236, 55 N. W. 657, 35 Am. St. Rep. 598.

Placing baited traps on one's own land so near to a highway or to the premises of another as to attract thereto dogs on the highway or on the adjoining premises is unlawful. Townsend *v.* Wathen, 9 East 277.

Setting poison.— A person has no right to place poisoned meat on his premises, with the intention of killing trespassing dogs which threaten his sheep. Gillum *v.* Sisson, 53 Mo. App. 516.

64. Jacquay *v.* Hartzell, 1 Ind. App. 500, 27 N. E. 1105 [*citing* Dinwiddie *v.* State, 103 Ind. 101, 2 N. E. 290; Lowell *v.* Gathright, 97 Ind. 313]; Dodson *v.* Mock, 20 N. C. 234, 32 Am. Dec. 677; Decker *v.* Holgate, 5 Lack. Leg. N. (Pa.) 56.

Facts insufficient to justify killing.— The killing of a valuable dog because he left tracks on a freshly painted porch, was found once in the hen-house, came about the house at night, chased cats, and barked (Bowers *v.* Horen, 93 Mich. 420, 53 N. W. 535, 32 Am. St. Rep. 513, 17 L. R. A. 773); or for stealing an egg, snapping at one man's heel and barking at another's horse, and the being suspected of having, years before, worried a sheep (Dodson *v.* Mock, 20 N. C. 234, 32 Am. Dec. 677), will not put a dog out of the pale of the law and justify any person in killing him.

65. *Connecticut.*— Woolf *v.* Chalker, 31 Conn. 121, 81 Am. Dec. 175.

Illinois.—Spray *v.* Ammerman, 66 Ill. 309; Lipe *v.* Blackwelder, 25 Ill. App. 119; Anderson *v.* Smith, 7 Ill. App. 354.

Iowa.— Marshall *v.* Blackshire, 44 Iowa 475.

Massachusetts.— Nesbett *v.* Wilbur, (Mass. 1900) 58 N. E. 586.

Missouri.— Brauer *v.* English, 21 Mo. App. 490.

New York.— Hinckley *v.* Emerson, 4 Cow. (N. Y.) 351, 15 Am. Dec. 383; Leonard *v.* Wilkins, 9 Johns. (N. Y.) 233.

North Carolina.— Morse *v.* Nixon, 53 N. C. 35; Parrott *v.* Hartsfield, 20 N. C. 203, 32 Am. Dec. 673.

Rhode Island.— Harris *v.* Eaton, (R. I. 1897) 37 Atl. 318.

Wisconsin.— Miller *v.* Spaulding, 41 Wis. 221.

England.— Janson *v.* Brown, 1 Campb. 41; Protheror *v.* Mathews, 5 C. & P. 581, 24 E. C. L. 718; Wells *v.* Head, 4 C. & P. 568, 19 E. C. L. 653; Vere *v.* Cawdor, 11 East 568; Wadhurst *v.* Dame, Cro. Jac. 45; Barrington *v.* Turner, 3 Lev. 25.

Right cumulative.— The right to an action against the owner of a dog for the injury done is merely cumulative to the prior right of making a reasonable defense to protect property from such assailants. Anderson *v.* Smith, 7 Ill. App. 354.

an apparent necessity for such a course, and the destruction of the dog must be reasonably necessary under the circumstances.[66]

bb. *Other Dogs.* It seems that, under some circumstances, a person is justified in killing a dog which has attacked and is wounding and injuring his dog, if such killing is necessary to save the latter from serious injury;[67] but not if the killing is done unnecessarily, or as an act of vengeance.[68]

cc. *Inanimate Property.* The right to kill dogs, in order to protect inanimate property, is based upon the same considerations.[69]

(c) Mischievous Dogs. A dog which habitually haunts a dwelling-house by day and night, and disturbs the peace and quiet of the inmates, by barking and howling, which annoyances cannot be otherwise prevented, may be killed.[70]

(d) Vicious Dogs. A ferocious and vicious dog roaming at large, which is accustomed to bite mankind and animals, or which is endangering the safety of persons and property, is a common enemy and a public nuisance, and may be lawfully killed.[71] It is also justifiable to kill a dog which, without provocation,

Common-law right as affected by statutes. — Statutes authorizing the killing of dogs found worrying certain designated animals do not take away the common-law right to kill a dog in defense of other property. Nesbett *v.* Wilbur (Mass. 1900) 58 N. E. 586.

Comparison of values.— Where the right to kill a trespassing animal is statutory, the right is not affected by the consideration of the animal's value as compared with the value of the property. Simmonds *v.* Holmes, 61 Conn. 1, 23 Atl. 702, 15 L. R. A. 253.

Manner of killing immaterial.— Under the Missouri statute allowing the killing of a sheep-killing dog, if it appears that the dog was guilty it is immaterial that he was killed by poison set out by defendant. Gillum *v.* Sisson, 53 Mo. App. 516.

66. Lipe *v.* Blackwelder, 25 Ill. App. 119; Anderson *v.* Smith, 7 Ill. App. 354; Hubbard *v.* Preston, 90 Mich. 221, 51 N. W. 209, 30 Am. St. Rep. 426, 15 L. R. A. 249; King *v.* Kline, 6 Pa. St. 318.

The fact that defendants' fowls were frightened at a dog's appearance, and ran from it, will not authorize the dog's destruction unless it was worrying or killing the fowls. Marshall *v.* Blackshire, 44 Iowa 475.

Driving off cattle.— An owner of cattle cannot kill a dog because it drove them from his owner's land, which they had entered because of a defect in the division fence, such defect being attributable to the fault of the owner of the land trespassed on. Spray *v.* Ammerman, 66 Ill. 309.

In Deane *v.* Clayton, 7 Taunt. 489, 2 E. C. L. 461, it appeared that defendant, the owner of woodland, divided from the woodland of another who had licensed plaintiff to hunt thereon, to preserve hares in his land fastened dog-spikes to trees therein, and that plaintiff's dog, pursuing a hare into and over such land, was impaled on a spike and killed. It also appeared that plaintiff had put up notices outside the land to the effect that spikes had been placed therein, and the court divided on the question of defendant's liability.

67. Boecher *v.* Lutz, 2 N. Y. City Ct. 205 note, wherein the dog killed attacked a muzzled dog, and, after being driven away once, made a second attack. And see Parrott *v.* Hartsfield, 20 N. C. 203, 32 Am. Dec. 673.

Inability to separate.— Where a mastiff falls on another dog, the owner of the latter dog cannot justify the killing of the mastiff unless there was no other way to save his dog, as that he could not take off the mastiff, etc. Wright *v.* Ramscot, 1 Saund. 84, 3 Salk. 139.

68. Boecher *v.* Lutz, 2 N. Y. City Ct. 205 note. And see Parrott *v.* Hartsfield, 20 N. C. 203, 32 Am. Dec. 673.

69. It is justifiable to kill a dog running through a wheat-field (Lipe *v.* Blackwelder, 25 Ill. App. 119), lying on a bed of young garden plants (Simmonds *v.* Holmes, 61 Conn. 1, 23 Atl. 702, 15 L. R. A. 253), or purloining provisions (Dunning *v.* Bird, 24 Ill. App. 270; King *v.* Kline, 6 Pa. St. 318).

Insecure premises.— The justification for killing a dog destroying property in defendant's building is not affected by the fact that the building was insecure. Dunning *v.* Bird, 24 Ill. App. 270.

70. Woolf *v.* Chalker, 31 Conn. 121, 81 Am. Dec. 175; Meneley *v.* Carson, 55 Ill. App. 74; Hubbard *v.* Preston, 90 Mich. 221, 51 N. W. 209, 30 Am. St. Rep. 426, 15 L. R. A. 249; Brill *v.* Flagler, 23 Wend. (N. Y.) 354. See also Hubbard *v.* Preston, 90 Mich. 221, 51 N. W. 209, 30 Am. St. Rep. 426, 15 L. R. A. 249, wherein defendant was absolved from liability where it appeared that, after suffering for a long time from dogs congregating on his lawn and there barking, quarreling, and fighting, he shot among them, but not at any particular dog, and killed plaintiff's animal.

71. *Alabama.*—Parker *v.* Mise, 27 Ala. 480, 62 Am. Dec. 776.

Connecticut.— Woolf *v.* Chalker, 31 Conn. 121, 81 Am. Dec. 175; Johnson *v.* Patterson, 14 Conn. 1, 35 Am. Dec. 96.

Illinois.— Brent *v.* Kimball, 60 Ill. 211, 14 Am. Rep. 35; Meneley *v.* Carson, 55 Ill. App. 74.

Indiana.— Jacquay *v.* Hartzell, 1 Ind. App. 500, 27 N. E. 1105.

Maine.— State *v.* Harriman, 75 Me. 562, 46 Am. Rep. 423.

New Hampshire.— Aldrich *v.* Wright, 53 N. H. 398, 16 Am. Rep. 339.

assails a person on a public highway,[72] although the dog previous to that time was not accustomed to attack persons and was not regarded as ferocious.[73] But previous acts of ferocity or injury to property will not justify killing a dog, if for a long time he has ceased to be dangerous,[74] nor is a killing justified when the danger is past and the dog is running away.[75]

(2) Inadvertent Injury or Killing of Dogs. The accidental killing of a dog,[76] or its destruction because of its resemblance to a wolf,[77] or the fact that the intent was merely to scare off the animal,[78] will not relieve the wrong-doer from liability.

(B) *Under Statutory or Municipal Authority* — (1) In General. In the exercise of its police power a legislative body may regulate the keeping of dogs, under the penalty of having them destroyed without prior adjudication,[79] and it may prescribe summary proceedings of the most stringent character for the destruction of dogs kept contrary to municipal regulations.[80]

(2) Dogs Running at Large. Statutes and ordinances permitting peace officers or private persons to kill dogs running at large will authorize the destruction of such dogs only where the prescribed state of facts exists.[81]

New York.— Dunlap *v.* Snyder, 17 Barb. (N. Y.) 561; Maxwell *v.* Palmerton, 21 Wend. (N. Y.) 407; Loomis *v.* Terry, 17 Wend. (N. Y.) 496, 31 Am. Dec. 306; Putnam *v.* Payne, 13 Johns. (N. Y.) 312; Hinckley *v.* Emerson, 4 Cow. (N. Y.) 351, 15 Am. Dec. 383; Boecher *v.* Lutz, 2 N. Y. City Ct. 205 note; Laverty *v.* Hogan, 2 N. Y. City Ct. 197.

North Carolina.—Perry *v.* Phipps, 32 N. C. 259, 51 Am. Dec. 387; Dodson *v.* Mock, 20 N. C. 234, 32 Am. Dec. 677.

Pennsylvania.— King *v.* Kline, 6 Pa. St. 318; Bowers *v.* Fitzrandolph, Add. (Pa.) 215; Decker *v.* Holgate, 5 Lack. Leg. N. (Pa.) 56.

Vermont.— Brown *v.* Carpenter, 26 Vt. 638, 62 Am. Dec. 603.

It is the duty of a police officer to kill a vicious dog. People *v.* Board of Metropolitan Police, 15 Abb. Pr. (N. Y.) 167, 24 How. Pr. (N. Y.) 481.

The fact that a dog is licensed will not defeat the right to kill it when the circumstances justify such a course. Simmonds *v.* Holmes, 61 Conn. 1, 23 Atl. 702, 15 L. R. A. 253.

72. Reynolds *v.* Phillips, 13 Ill. App. 557; Credit *v.* Brown, 10 Johns. (N. Y.) 365; Perry *v.* Phipps, 32 N. C. 259, 51 Am. Dec. 387.

Previous biting.— A man may kill as a nuisance a dog which has bitten him a few minutes before. Bowers *v.* Fitzrandolph, Add. (Pa.) 215. So, too, under R. I. Pub. Stat. c. 93, § 6, providing that "Any person may kill any dog that may suddenly assault him, or any person of his family or in his company, while the person so assaulted is out of the inclosure of the owner or keeper of such dog," the right to kill is not limited to the immediate time and place of the assault. Spaight *v.* McGovern, 16 R. I. 658, 19 Atl. 246, 7 L. R. A. 388.

Sudden assault.—One bitten while attempting to separate two fighting dogs is not suddenly assaulted within the meaning of a statute permitting any person to kill a dog which may suddenly assault him. Spaight *v.* McGovern, 16 R. I. 658, 19 Atl. 246, 7 L. R. A. 388.

73. Reynolds *v.* Phillips, 13 Ill. App. 557.

74. Boecher *v.* Lutz, 2 N. Y. City Ct. 205 note; Harris *v.* Eaton, 20 R. I. 81, 37 Atl. 308.

75. Perry *v.* Phipps, 32 N. C. 259, 51 Am. Dec. 387; Morris *v.* Nugent, 7 C. & P. 572, 32 E. C. L. 764.

76. Rawson *v.* Kitner, 31 Ill. App. 241.

77. Wright *v.* Clark, 50 Vt. 130, 28 Am. Rep. 496.

78. Harris *v.* Eaton, 20 R. I. 81, 37 Atl. 308.

79. Blair *v.* Forehand, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94, affirming the constitutionality of the Massachusetts act of 1867, c. 130, § 7, providing that any person may, and every police officer and constable shall, kill or cause to be killed all dogs, whenever or wherever found, which are not licensed and tagged according to other provisions of the act.

Constitutionality of New Hampshire act.— A statute exempting from liability any person killing a dog not wearing a collar inscribed with the name of its owner does not deprive the owner of his property without due process of law. Morey *v.* Brown, 42 N. H. 373.

80. Julienne *v.* Jackson, 69 Miss. 34, 10 So. 43, 30 Am. St. Rep. 526.

Under 34 & 35 Vict. c. 56, § 2, a court of summary jurisdiction may order a dangerous dog to be destroyed, without giving the owner the option of keeping it under proper control. Pickering *v.* Marsh, 43 L. J. M. C. 143, 22 Wkly. Rep. 798.

The corporation of the city of Toronto has power to pass by-laws for the destruction of dogs found running at large. McKenzie *v.* Campbell, 1 U. C. Q. B. 241.

For form of warrant authorizing a constable to kill a dog see Blair *v.* Forehand, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94.

81. Swann *v.* Bowie, 2 Cranch C. C. (U. S.) 221, 23 Fed. Cas. No. 13,672.

A dog is at large, within the meaning of an ordinance ordering all dogs to be confined, though it has escaped from its owner and is

(c) *Necessity of Acting at Time of Mischief.* Where, as at common law, or by force of statutes, a dog may be killed only when engaged in mischief, it is not enough that he has previously done damage, or that there is a belief or apprehension that he intends to so do; to justify his destruction he must be killed in the very act,[82] or immediately thereafter,[83] or under circumstances that satisfactorily show that the dog has recently been so engaged.[84] Under some circumstances, however, though a dog may not be actually engaged in doing mischief, if his conduct is such as to create a reasonable apprehension of serious injury, or a renewal of former attacks, he may be destroyed.[85]

(d) *Who May Kill*—(1) In General. A private person who sustains an injury from an unlicensed dog, which injury is not peculiar to himself and distinct from the injury to the public, cannot destroy a dog as a public nuisance;[86] nor will the mere fierceness of a dog and his attempts to bite, or even his actual biting, justify another person than the one chased or bitten in killing the dog at a different time.[87]

(2) Under Statutory or Municipal Authority. Statutes or ordinances providing for the killing by peace officers of unlicensed dogs, or dogs without collars or unmuzzled, impliedly forbid a killing by private persons;[88] but a statute

being pursued to return it to confinement. Julienne *v.* Jackson, 69 Miss. 34, 10 So. 43, 30 Am. St. Rep. 526.

A dog on a city street, and unattended, is within a statute authorizing the killing of dogs found roaming about the country unattended by the owner. Walker *v.* Towle, (Ind. 1901) 59 N. E. 20.

Roaming on another's premises.— By statute in Kentucky, if a dog is found roaming on the premises of another, unattended by his owner or keeper, he may be killed by the owner of the premises on which he is found, however innocent such dog may be. Bradford *v.* McKibben, 4 Bush (Ky.) 545.

A dog is not at large when called by an officer from its owner's premises, where it is playing with its master's son. McAneany *v.* Jewett, 10 Allen (Mass.) 151.

A dog kept for hunting is, when pursuing a fox, not running at large if followed by his master and a fellow huntsman, although out of his master's sight and hearing. Wright *v.* Clark, 50 Vt. 130, 28 Am. Rep. 496.

Validity of statute.— A proviso in a statute, that dogs taxed shall be property, is not inconsistent with another portion of the act authorizing any person to kill a dog "at large away from the premises occupied by the owner, and unaccompanied by any person" where "the proviso itself implies that there may be a lawful killing of such animal, and circumstances under which there may be such lawful killing are described in the general scope of the act." Griggs *v.* Dittoe, 52 Ohio St. 601, 602, 40 N. E. 891.

82. *California.*— Johnson *v.* McConnell, 80 Cal. 545, 22 Pac. 219.

Iowa.— Marshall *v.* Blackshire, 44 Iowa 475.

Maine.— Chapman *v.* Decrow, 93 Me. 378, 45 Atl. 295, 74 Am. St. Rep. 357.

Missouri.— Carpenter *v.* Lippitt, 77 Mo. 242; Brauer *v.* English, 21 Mo. App. 490.

New York.— Hinckley *v.* Emerson, 4 Cow. (N. Y.) 351, 15 Am. Dec. 383; Brown *v.* Hoburger, 52 Barb. (N. Y.) 15; Dunlap *v.* Snyder, 17 Barb. (N. Y.) 561.

North Carolina.— Parrott *v.* Hartsfield, 20 N. C. 203, 32 Am. Dec. 673.

England.— Janson *v.* Brown, 1 Campb. 41.

A dog that is chasing deer may be shot, although such shooting may not be absolutely necessary for the preservation of the deer, and although the dog may not have been chasing deer at the moment when it was shot, if the chasing and the shooting were one and the same transaction. Protheron *v.* Mathews, 5 C. & P. 581, 24 E. C. L. 718.

83. Thus, under the Missouri Revised Statutes, it is not necessary that the dog should be upon the premises of the owner of the sheep, or in the act of killing more than one such animal, or that the owner of the dog should have had notice that the dog had killed any sheep. Carpenter *v.* Lippitt, 77 Mo. 242. And in Johnson *v.* McConnell, 80 Cal. 545, 22 Pac. 219, it was said that though the statute only permits the killing at the time, "if it had been shown that the dogs were found by defendant worrying the sheep, and that he had immediately followed them up and killed them, without allowing them to escape or get out of his sight, we think the killing would have been justifiable."

84. Brent *v.* Kimball, 60 Ill. 211, 14 Am. Rep. 35. But see Wells *v.* Head, 4 C. & P. 568, 19 E. C. L. 653, wherein it was held that the shooting of a dog after he had left the sheep, and was in a third field from where he had worried them, could not be justified as a protection of property.

85. Marshall *v.* Blackshire, 44 Iowa 475; Chapman *v.* Decrow, 93 Me. 378, 45 Atl. 295, 74 Am. St. Rep. 357; Livermore *v.* Batchelder, 141 Mass. 179, 5 N. E. 275; Parrott *v.* Hartsfield, 20 N. C. 203, 32 Am. Dec. 673.

86. Chapman *v.* Decrow, 93 Me. 378, 45 Atl. 295, 74 Am. St. Rep. 357; Corthell *v.* Holmes, 87 Me. 24, 32 Atl. 715.

87. Perry *v.* Phipps, 32 N. C. 259, 51 Am. Dec. 387.

88. Lowell *v.* Gathright, 97 Ind. 313; Chapman *v.* Decrow, 93 Me. 378, 45 Atl. 295, 74 Am. St. Rep. 357; Smith *v.* St Paul City R. Co., 79 Minn. 254, 82 N. W. 577.

authorizing any person to kill dogs which are unlicensed and without a collar, whenever or wherever found, empowers the killing, without a warrant, of a licensed dog having no collar, provided a person can do so without trespassing.[89] Actual notice of the ownership of such a dog will not render liable a person authorized by law to kill it.[90]

(c) *Killing on Land of Owner or Another* — (1) In General. One has no right to go on the premises of the owner of a dog and there kill the animal,[91] though its killing might otherwise be justifiable;[92] but the owner of the dog cannot contend that the person assaulted had no right to go on the premises of a third person and kill it.[93]

(2) Unlicensed Dogs. Although a peace officer, acting under a warrant issued in pursuance of statutory authority, may kill unlicensed and untagged dogs, and, in accordance with the provisions of the statute, may go upon the premises of the owner for that purpose,[94] private citizens, although authorized to kill such dogs whenever and wherever found, are not authorized by the statute to hunt or pursue them into their owners' dwellings without leave of such owners.[95]

b. Protected Wild Animals. It is justifiable, in defense of, and to preserve, property, to kill wild fur-bearing animals protected by statute, when the killing is done under a reasonable necessity.[96]

2. Persons Liable — a. Claimant of Land. One who wounds cattle pasturing on an uninclosed range claimed by him, but as to which he has no title or right, is liable to the owner of the animals.[97]

b. Joint Owner of Land. Where land is owned by several, the owners who were the actual perpetrators of the act are alone liable.[98]

c. Occupant of Land. One who uses and controls premises is liable under a statute prescribing a penalty for the killing or wounding of animals by any person not having a lawful fence.[99]

d. Master for Act of Servant. For the voluntary killing or injury of an animal by a servant, in the ordinary prosecution and scope of his business, the master is ordinarily liable;[1] but a master is not liable for the wilful act of his

89. Morewood *v.* Wakefield, 133 Mass. 240.

Conversion.— Such a statute will not authorize a person to convert a collarless dog to his own use. Cummings *v.* Perham, 1 Metc. (Mass.) 555.

A killing by a dog is not a killing by "any person." Heisrodt *v.* Hackett, 34 Mich. 283, 22 Am. Rep. 529.

90. Morey *v.* Brown, 42 N. H. 373.

Dog at large with owner.—Under a statute empowering any person to kill a dog without a collar, a killing is justified if the dog is out of the inclosure of his owner, without a collar, although he be under the immediate care of the owner, and this is known to the person killing the dog. Tower *v.* Tower, 18 Pick. (Mass.) 262.

91. Uhlein *v.* Cromack, 100 Mass. 273; Kerr *v.* Seaver, 11 Allen (Mass.) 151; Perry *v.* Phipps, 32 N. C. 259, 51 Am. Dec. 387; Decker *v.* Holgate, 5 Lack. Leg. N. (Pa.) 56.

92. Gibbons *v.* Van Alstyne, 9 N. Y. Suppl. 156, 29 N. Y. St. 461.

93. Spaight *v.* McGovern, 16 R. I. 658, 19 Atl. 246, 7 L. R. A. 388.

94. Blair *v.* Forehand, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94. But see Cozzens *v.* Nason, 109 Mass. 275, holding that, unless the owner consent, a constable has no right to enter a dwelling-house for the purpose of executing a warrant under the Massachusetts act of 1867, c. 137, for the killing of an unlicensed dog.

95. Kerr *v.* Seaver, 11 Allen (Mass.) 151; Bishop *v.* Fahay, 15 Gray (Mass.) 61.

96. Aldrich *v.* Wright, 53 N. H. 398, 16 Am. Rep. 339.

97. McCoy *v.* Phillips, 4 Rich. (S. C.) 463.

98. McKay *v.* Woodle, 28 N. C. 352.

99. Jones *v.* Hood, 4 Bush (Ky.) 80.

One whose farm is inclosed with another by a common fence, and who uses a barn within the inclosure, but standing on the other farm, and who kills cattle trespassing in such barn, is within a statute making liable the owner of an inclosure not lawfully fenced who shall kill cattle breaking in, etc. Crawford *v.* Crawford, 88 Ga. 234, 14 S. E. 609.

1. Cantrell *v.* Adderholt, 28 Ga. 239; Schmidt *v.* Adams, 18 Mo. App. 432. See also Lee *v.* Nelms, 57 Ga. 253, in which it was said "care should be taken not to cast on him [the master] responsibility for torts of that class without sufficient evidence that the servant committed them in the prosecution and scope of such business; more especially where the measure of damages may go far beyond compensation for the actual injury, and operate as a penalty."

Mere negligence of a servant, acting in the ordinary business of his master, will not au-

servant[2] unless such servant has acted under the command or direction of his master.[3]

e. Parent for Act of Child. A parent is not liable for injury to a third person's animals by the act of his own child unless he expressly or impliedly directed or authorized the wrong.[4]

3. Actions — a. Who May Sue — (I) *Owner.* For the unjustifiable injury or killing of any animal which is the property of another, its owner may maintain an action and recover the damages sustained by him,[5] whether or not he was in the actual physical possession of the animal at the time of the killing or injury.[6] The liability depends upon whether or not the death or injury was the natural and proximate consequence of the wrongful act.[7]

(II) *Bailee or Person in Possession.* A mere bailee of animals may maintain an action for wrongfully killing or injuring them,[8] as likewise may one who has an actual and exclusive, though wrongful, possession.[9]

b. Form of Action — (I) *Trespass or Case.* There are two forms of action for injuring or killing animals: trespass or trespass *vi et armis*, where the act itself is immediately injurious to the animal and therefore necessarily accompanied with some degree of force;[10] and a special action on the case lies where the act is

thorize a recovery against the master, although the damage actually results from such negligence, where by statute it is necessary that the injury should have arisen out of some act done or commanded. Smith *v.* Causey, 22 Ala. 568.

2. Steele *v.* Smith, 3 E. D. Smith (N. Y.) 321.

3. The mere fact that the owner of a dog, set on by his servant, stood near, will not warrant a judgment against him without proof that the servant acted by his command or direction, especially where the owner, so soon as he saw the act, gave immediate orders to take off the dog. Steele *v.* Smith, 3 E. D. Smith (N. Y.) 321.

If one agrees that his servant may assist another to drive animals from the field of the latter, he is not liable for the wilful and wanton infliction of injury by his servant and such other, but otherwise if he knows or had reason to believe that such injury would be inflicted. Mardree *v.* Sutton, 47 N. C. 146.

4. Tifft *v.* Tifft, 4 Den. (N. Y.) 175; James *v.* Caldwell, 7 Yerg. (Tenn.) 37.

5. *Alabama.*— White *v.* Brantley, 37 Ala. 430.

Connecticut.— Woolf *v.* Chalker, 31 Conn. 121, 81 Am. Dec. 175.

Georgia.— Bailey *v.* State, 65 Ga. 410.

Illinois.— Spray *v.* Ammerman, 66 Ill. 309.

Indiana.—Amick *v.* O'Hara, 6 Blackf. (Ind.) 258.

Texas.— Heiligmann *v.* Rose, 81 Tex. 222, 16 S. W. 931, 26 Am. St. Rep. 804, 13 L. R. A. 272; Champion *v.* Vincent, 20 Tex. 811.

Feathered animals not *feræ naturæ* are protected to the same extent as other domestic animals. Reis *v.* Stratton, 23 Ill. App. 314.

24 & 25 Vict. c. 96, § 23, which denounces the unlawful killing or wounding of doves or pigeons under such circumstances as shall not amount to larceny at common law, is intended to forbid the killing of such birds, under such circumstances as that, but for the peculiar doctrine of the law relating to property in pigeons, etc., it would be larceny. Taylor *v.* Newman, 4 B. & S. 89, 116 E. C. L. 89.

Negligence.— When the liability prescribed is for acts done or caused to be done, there is no responsibility for mere negligent acts or omissions. Maltby *v.* Dihle, 5 Kan. 430.

Waiver of right.— One who takes and uses his hogs after they have been wrongfully killed does not waive his right to damages for the trespass, but only his claim for the value of the animals. Champion *v.* Vincent, 20 Tex. 811.

6. White *v.* Brantley, 37 Ala. 430, where, at the time of killing, plaintiff's dog was in possession of a person to whom he had loaned it.

7. Wilhite *v.* Speakman, 79 Ala. 400, wherein defendant tied a trespassing horse to a tree, and it was found dead thereafter, apparently having been choked to death.

8. Hare *v.* Fuller, 7 Ala. 717.

9. Criner *v.* Pike, 2 Head (Tenn.) 397.

Necessity of actual possession.— The fact that the animal was on its usual range, or had gone to defendant's, which was in the neighborhood, would not destroy the possession so as to defeat the right of action. Criner *v.* Pike, 2 Head (Tenn.) 397.

10. *Alabama.*— White *v.* Brantley, 37 Ala. 430.

Delaware.— Cannon *v.* Horsey, 1 Houst. (Del.) 440.

Illinois.— Painter *v.* Baker, 16 Ill. 103.

Indiana.— Amick *v.* O'Hara, 6 Blackf. (Ind.) 258.

New Jersey.— Dilts *v.* Kinney, 15 N. J. L. 130; Sinnickson *v.* Dungan, 8 N. J. L. 226.

Michigan.— Wood *v.* La Rue, 9 Mich. 158.

North Carolina.—Dodson *v.* Mock, 20 N. C. 234, 32 Am. Dec. 677.

South Carolina.—McCoy *v.* Phillips, 4 Rich. (S. C.) 463.

Tennessee.— James *v.* Caldwell, 7 Yerg. (Tenn.) 37.

Vermont.— Waterman *v.* Hall, 17 Vt. 128, 42 Am. Dec. 484.

See also 3 Bl. Comm. 153.

in itself indifferent and the injury only consequential and therefore arising without a breach of the peace.[11] If the injury is forcible and was effected by means flowing from the act of defendant, but not operating by the very force and impulse of that act, either trespass or case will lie.[12]

(II) *Trover.* If a person having impounded animals *damage feasant* kill them while so in his possession, or injure them so that they afterward die when set at large, the act amounts to a conversion in law of the property, and trover will lie.[13]

c. Defenses — (I) *Contributory Negligence.* Contributory negligence is a bar to a recovery.[14]

(II) *Notice* — (A) *Posted Notices.* Posting notices that trespassing dogs will be destroyed will not justify their destruction.[15]

(B) *To Owner.* Where the statute provides that if a dog has killed or worried sheep, and its owner has had notice of the fact for twenty-four hours, any person may kill the dog if thereafter found out of the inclosure or immediate care of its owner or keeper, a written notice to the owner is not required to justify such killing.[16] And notice to restrain a trespassing dog, although not a complete defense justifying his destruction, may be considered in determining the reasonableness of or necessity for destroying him.[17]

(III) *Permission to Kill.* Permission, by the owner, to kill a troublesome or vicious animal is a complete defense.[18]

d. Set-Off. If the injury or killing was illegal, the wrong-doer cannot set off the injury sustained by the trespass of the animal.[19]

e. Pleading — (I) *Complaint, Declaration, or Petition*[20] — (A) *In General.* Faulty language in the declaration will not render it defective, if the wrongful act is sufficiently charged.[21] However, to authorize the recovery of a statutory penalty for injuring or killing cattle or stock within an inclosure not having a lawful fence, the declaration or complaint must be framed on the statute;[22] it must state not only the circumstances necessary to bring the case within the statute and specially count thereon,[23] but it must also substantially negative

11. *Alabama.*— Smith *v.* Causey, 22 Ala. 568.

New Jersey.— Dilts *v.* Kinney, 15 N. J. L. 130; Wales *v.* Ford, 8 N. J. L. 267.

North Carolina.— Dodson *v.* Mock, 20 N. C. 234, 32 Am. Dec. 677.

Pennsylvania.— Leary *v.* Harter, 1 Leg. Gaz. (Pa.) 20.

Tennessee.— Childress *v.* Yourie, Meigs (Tenn.) 561.

Vermont.— Waterman *v.* Hall, 17 Vt. 128, 42 Am. Dec. 484.

England.— Townsend *v.* Wathen, 9 East 277.

See also 3 Bl. Comm. 153.

12. Ridge *v.* Featherston, 15 Ark. 159; Waterman *v.* Hall, 17 Vt. 128, 42 Am. Dec. 484.

13. Cannon *v.* Horsey, 1 Houst. (Del.) 440.

If one is chasing a beast with a little dog, out of his land, and another kill the dog, an action of trover lies; because there is an election to chase the beast out, or to restrain it *damage feasant*: but if the chasing is with a mastiff dog and the dog is killed this action does not lie, because the chasing with such a dog is not lawful. Bacon Abr. tit. Trover (D).

14. Cook *v.* Pickrel, 20 Nebr. 433, 30 N. W. 421.

15. Corner *v.* Champneys, 2 Marsh. 584.

16. Miller *v.* Spaulding, 41 Wis. 221.

17. Hodges *v.* Causey, 77 Miss. 353, 26 So. 945, 78 Am. St. Rep. 525, 48 L. R. A. 95.

18. Meneley *v.* Carson, 55 Ill. App. 74.

Killing long subsequent to permission.— A statement made in a heated discussion by the owner of an animal, to one complaining of trespasses, and in reply to a threat to kill it: "Go and kill him if you want to!" will not authorize a killing four or five months thereafter. Ulery *v.* Jones, 81 Ill. 403.

19. Hamilton *v.* Howard, 68 Ga. 288.

20. For forms of complaints, declarations, or petitions for injuring or killing: Dogs, see Townsend *v.* Wathen, 9 East 277; Deane *v.* Clayton, 7 Taunt. 489, 491, 2 E. C. L. 461. Horses, see Totten *v.* Cole, 33 Mo. 138, 82 Am. Dec. 157; James *v.* Caldwell, 7 Yerg. (Tenn.) 37; Waterman *v.* Hall, 17 Vt. 128, 132, 42 Am. Dec. 484.

21. Dorr *v.* Loucks, 2 Mich. N. P. 182, where the language was that defendants, with their dogs, "drove, chased, and hurried" plaintiff's sheep, and it was held that the words were equivalent to a charge in the statutory language of "worrying."

In a justice's court an informal pleading will be sufficient, if the record shows the demand to be "for stock killed." Early *v.* Fleming, 16 Mo. 154, wherein plaintiff's statement was "for three hogs."

22. Tankersly *v.* Wedgworth, 22 Ala. 677.

23. Lee *v.* Nelms, 57 Ga. 253; McKay *v.* Woodle, 28 N. C. 352.

the performance by defendant of the duties required of him by the act[24] — as, for example, that defendant's inclosure was not protected as required by law.[25] But this rule is not applicable where the statute is simply remedial, and gives an easier or cumulative remedy for a loss for which there was a common-law remedy.[26] A count in trespass in common-law form may be amended by the insertion of allegations bringing the case within the terms of the statute;[27] although a declaration, under a statute giving triple damages for the killing of cattle in an inclosure not protected by a lawful fence cannot be amended by the addition of a count for exemplary damages independent of the statute.[28]

(B) *Negativing Circumstances which Make Killing Lawful.* An averment that the animal was unlawfully killed is sufficient, without negativing the circumstances under which the killing might have been lawful.[29]

(C) *Wilfulness or Malice.* Where, to impose a liability, the act must have been wilful or malicious, plaintiff must aver that the killing or injury was of that character.[30]

(II) *Answer or Plea*[31] — (A) *In General.* Distinct allegations in an answer that a dog was doing mischief when killed, and that he was a stray dog running at large, separately state no defense, and though, if considered together, facts are stated which by statute permit the destruction of a dog, yet the pleading is defective; but the defect is waived by failure to except.[32]

(B) *Necessity of Killing.* The plea must set forth the necessity for the killing.[33]

(C) *Plaintiff's Knowledge of Animal's Character.* In an action for the killing of a ferocious dog, defendant need not allege, and consequently need not prove, *scienter* of the owner.[34]

f. Evidence — (I) *Burden of Proof.* Where animals are killed on plaintiff's land, he need not show property in them;[35] nor need he, in the first instance, prove that a dog killed had been assessed and the tax paid on him.[36] Where defendant seeks to justify under a statute permitting the killing of a dog found

24. Sinnickson *v.* Dungan, 8 N. J. L. 226.

25. Lee *v.* Nelms, 57 Ga. 253.

26. McKay *v.* Woodle, 28 N. C. 352, wherein, in an action for worrying, maiming, and killing plaintiff's hogs while trespassing on inclosed grounds not having a sufficient fence, as required by N. C. Rev. Stat. c. 48, an objection, that the declaration did not refer to the statute, was held to be unavailable, for the reason that plaintiff had a remedy at common law.

If a case is not made out under the statute, there may be a recovery for the common-law trespass. Stewart *v.* Jewell, 7 T. B. Mon. (Ky.) 110.

27. Hurd *v.* Chesley, 55 N. H. 21.

28. Tumlin *v.* Parrott, 82 Ga. 732, 9 S. E. 718.

29. Lowell *v.* Gathright, 97 Ind. 313.

30. Ridge *v.* Featherston, 15 Ark. 159; Tifft *v.* Tifft, 4 Den. (N. Y.) 175, wherein the declaration charged the wrong to have been done by defendant or his family, nothing being stated to show defendant's liability for acts of the family, and there was no proof of defendant's presence at, or approval of the act by a member of his family.

31. For forms of pleas justifying the killing of a dog see Prothenor *v.* Mathews, 5 C. & P. 581, 24 E. C. L. 718; Barrington *v.* Turner, 3 Lev. 25.

32. Simmonds *v.* Holmes, 61 Conn. 1, 23 Atl. 702, 15 L. R. A. 253.

33. Vere *v.* Cawdor, 11 East 568 (wherein a plea that a dog was killed while running hares, in a close for the preservation of hares, was held insufficient because not setting forth the necessity of killing the dog to preserve the hares); Wright *v.* Ramscot, 1 Saund. 84, 1 Sid. 336, 1 Lev. 216, 2 Keb. 333 (an action for killing a mastiff, wherein it was held insufficient to state that the dog killed "ran violently upon defendant's dog and bit him," without stating further that defendant could not otherwise separate the mastiff from his dog).

Nuisance. — A plea that "the hogs were an intolerable nuisance," both to defendants and the public, sets up no defense. Ussery *v.* Pearce, 1 Tex. App. Civ. Cas. § 54.

34. Woolf *v.* Chalker, 31 Conn. 121, 81 Am. Dec. 175; Maxwell *v.* Palmerton, 21 Wend. (N. Y.) 407; Parrott *v.* Hartsfield, 20 N. C. 203, 32 Am. Dec. 673.

Amendment. — Where evidence as to the owner's knowledge of his dog's viciousness has been received without objection, though the question is not properly raised by the pleadings, the defect therein may be remedied by amendment before or after judgment, and will be disregarded on appeal. Miller *v.* Spaulding, 41 Wis. 221.

35. Leonard *v.* Wilkins, 9 Johns. (N. Y.) 233.

36. Jordan *v.* McGill, 43 N. Y. App. Div. 264, 60 N. Y. Suppl. 33.

chasing or worrying sheep, the burden is on him to show that the dog was so engaged when killed.[37] The defendant need not, however, prove plaintiff's knowledge of the mischievous disposition of the dog killed, nor need defendant prove that he had no other mode of protecting his property than by the killing charged.[38]

(II) *Admissibility*—(A) *Acquittal of Criminal Charge.* The record of defendant's acquittal of a charge of malicious mischief in killing cattle is inadmissible in a civil action to recover triple damages for the same killing.[39]

(B) *Apprehension of Injury.* Where the killing is unjustifiable, evidence of defendant's apprehension that the animal was about to destroy property is inadmissible to mitigate the actual damages to which the animal's owner is entitled.[40]

(C) *Character of Animal.* Evidence of the former objectionable conduct of a dog, or previous acts of ferocity, is competent,[41] and evidence of bad habits, other than those relied on to justify the killing, is admissible, not in bar, but in mitigation, of damages.[42] But evidence that, at a prior time, defendant's animals were worried by dogs is not competent, unless the dog in question is connected therewith,[43] nor may a witness be asked whether, from his knowledge of a dog, he did or did not consider him a nuisance.[44] Where defendant has justified by showing that the dog attacked him, and that he was accustomed to attack and bite mankind, plaintiff may prove the general quietness of the dog.[45]

(D) *Damages Sustained by Defendant.* In mitigation of damages, defendant may show damages wrongfully sustained by him, immediately connected with the transaction for which he is sued, but not for injury sustained which was reasonably necessary.[46]

(E) *Special Damages.* It is improper to admit evidence of consequential and special damages under a complaint seeking to recover merely the value of an animal killed.[47]

(F) *Statements and Admissions.* Statements by a servant, accompanying or explanatory of the acts done,[48] or of past wrongful acts,[49] are inadmissible to charge the master. And, where it is sought to charge the defendant with acts of his servant in driving off animals, he will be permitted to prove that he directed the latter not to kill or injure the animals.[50]

(G) *Tender of Compensation.* A tender of compensation may be proved in mitigation of damages.[51]

(H) *Value of Animal.* If dogs of a particular breed or class have any fixed or general market value, opinion evidence is admissible to fix such value;[52] but opinions as to the value of dogs which have no standard or market value, and which value is founded on mere taste or fancy, are incompetent.[53] If there is no

37. Cole *v.* Van Syckle, 7 Northampt. Co. Rep. (Pa.) 45, 8 Pa. Dist. 362, 13 York Leg. Rec. (Pa.) 105.

So, too, allegations in a plea to an action for shooting a dog, that he attacked defendant, and was accustomed to attack and bite mankind, are material, and must be proved. Clark *v.* Webster, 1 C. & P. 104, 12 E. C. L. 71.

38. Parrott *v.* Hartsfield, 20 N. C. 203, 32 Am. Dec. 673.

39. Yumlin *v.* Parrott, 82 Ga. 732, 9 S. E. 718. See also Irvin *v.* State, 7 Tex. App. 78.

40. Ten Hopen *v.* Walker, 96 Mich. 236, 55 N. W. 657, 35 Am. St. Rep. 598.

41. Meneley *v.* Carson, 55 Ill. App. 74; Boecher *v.* Lutz, 2 N. Y. City Ct. 205 note.

42. Reynolds *v.* Phillips, 13 Ill. App. 557; Dunlap *v.* Snyder, 17 Barb. (N. Y.) 561; Lentz *v.* Stroh, 6 Serg. & R. (Pa.) 34.

43. Gibbons *v.* Van Alstyne, 9 N. Y. Suppl. 156, 29 N. Y. St. 461.

44. Parker *v.* Mise, 27 Ala. 480, 62 Am. Dec. 776.

45. Clark *v.* Webster, 1 C. & P. 104, 12 E. C. L. 71.

46. Spray *v.* Ammerman, 66 Ill. 309.

47. Teagarden *v.* Hetfield, 11 Ind. 522, where, under a complaint to recover the value of a mare, plaintiff was erroneously permitted to prove damages for trouble and expense in caring for two colts she was suckling, and also for care and expense in caring for the wounded animal until her death.

48. Ridge *v.* Featherston, 15 Ark. 159.

49. Lee *v.* Nelms, 57 Ga. 253.

50. Mardree *v.* Sutton, 47 N. C. 146.

51. Cole *v.* Tucker, 6 Tex. 266.

52. Brown *v.* Hoburger, 52 Barb. (N. Y.) 15.

53. Smith *v.* Griswold, 15 Hun (N. Y.) 273; Brown *v.* Hoburger, 52 Barb. (N. Y.) 15.

Opinion evidence, not based on any facts as to market value or use, is insufficient. Heil-

market value, the special value of a dog may be shown by proof of his characteristics, qualities, and special ability.[54] Where plaintiff gives evidence of the qualities and value of a dog killed, ordinarily defendant may show in reduction of damages that the animal was of little or no value.[55]

(III) *Sufficiency*—(A) *As to Ownership.* The fact that a collar on a dog killed bears plaintiff's name is not conclusive of such dog's ownership, but is only evidence which the jury may consider in determining that fact.[56]

(B) *As to Value.* The pecuniary value of a dog need not be proved to sustain an action for its destruction. The injury imports damages.[57]

(C) *As to Wrongful Act.* The evidence must show such conduct on the part of defendant as will amount to a positive wrongdoing,[58] and must connect him with the wrong charged.[59]

(D) *As to Justification.* Where a statute is relied on as a justification by the alleged wrong-doer, he must bring himself exactly within its protection.[60] Where, under the statute, the killing of a dog can be justified only when he is actually wounding, worrying, or killing sheep, evidence that the sheep were running about the field in a greatly agitated and frightened manner, pursued by the dog, which was apparently worrying and injuring them, and that the effect of chasing was to greatly worry and injure them, is not sufficient.[61]

(IV) *Variance.* The declaration or complaint must be supported by appropriate proof. Thus, the venue of the offense must be proved as alleged,[62] and an allegation of injury to cattle is not supported by proof of injury to mules.[63] Nor when the averment is that defendant or his family killed a hog by setting on a dog, and the proof is that the wrong was done by defendant's daughter in his absence, will a judgment against defendant be justified.[64]

g. Trial—(I) *Instructions*—(A) *As to Liability.* It is erroneous to base instructions on facts not in evidence, as, for example, to instruct that defendant would not be liable if he acted prudently, when the statute imposes a liability for killing in any mode, and the testimony shows a lack of prudence,[65] or to leave to the jury the question whether or not the animal killed was a public nuisance, having informed them that if so its destruction was justified, where the evidence fails to show any liability.[66] But an erroneous instruction as to defendant's liability under stated circumstances is immaterial if the evidence warrant the conviction.[67]

igmann *v.* Rose, 81 Tex. 222, 16 S. W. 931, 26 Am. St. Rep. 804, 13 L. R. A. 272.

54. Anson *v.* Dwight, 18 Iowa 241, Hodges *v.* Causey, 77 Miss. 353, 26 So. 945, 78 Am. St. Rep. 525, 48 L. R. A. 95; Brill *v.* Flagler, 23 Wend. (N. Y.) 354.

Where the dog killed was chiefly valuable for his ability to herd cattle and horses, farmers who have knowledge of his characteristics and qualities, and of the value of such an animal, may testify to his value. Bowers *v.* Horen, 93 Mich. 420, 53 N. W. 535, 32 Am. St. Rep. 513, 17 L. R. A. 773.

55. Lentz *v.* Stroh, 6 Serg. & R. (Pa.) 34.

56. Leonard *v.* Wilkins, 9 Johns. (N. Y.) 233.

57. Brent *v.* Kimball, 60 Ill. 211, 14 Am. Rep. 35; Dodson *v.* Mock, 20 N. C. 234, 32 Am. Dec. 677. *Contra*, Parker *v.* Mise, 27 Ala. 480, 62 Am. Dec. 776; Heiligmann *v.* Rose, 81 Tex. 222, 16 S. W. 931, 26 Am. St. Rep. 804, 13 L. R. A. 272.

58. Carney *v.* Brome, 77 Hun (N. Y.) 583, 28 N. Y. Suppl. 1019, 60 N. Y. St. 453.

59. Evidence that a trespassing hog was uninjured when first seen, that she was then shot, and that about an hour afterward another shot was heard, that the animal squealed, that the smoke of the gun was seen, and also defendant, with the gun pointed toward where the hog lay, is sufficient to authorize the jury to infer that he fired the first shot. Landell *v.* Hotchkiss, 1 Thomps. & C. (N. Y.) 580. But a habit of a colt to trespass in neighboring corn-fields, unaccompanied by other evidence, would not tend to show that the person or persons so trespassed on killed the animal; hence, evidence of such facts is properly excluded. Dean *v.* Blackwell, 18 Ill. 336.

Approval of wrongful act.—Where the wrongful act was committed in the presence of defendant, but the evidence shows neither assent or dissent from the act on his part, a verdict against him will not be disturbed. James *v.* Caldwell, 7 Yerg. (Tenn.) 37.

60. Early *v.* Fleming, 16 Mo. 154.

61. Johnson *v.* McConnell, 80 Cal. 545, 22 Pac. 219, three judges dissenting.

62. Woods *v.* State, 27 Tex. App. 586, 11 S. W. 723.

63. Brown *v.* Bailey, 4 Ala. 413.

64. Tifft *v.* Tifft, 4 Den. (N. Y.) 175.

65. Jones *v.* Hood, 4 Bush (Ky.) 80.

66. Morse *v.* Nixon, 51 N. C. 293.

67. Amick *v.* O'Hara, 6 Blackf. (Ind.) 258.

(B) *As to Value.* An instruction that the value of a dog should be found from the evidence of his qualities rather than from the opinions of witnesses, is erroneous, because the jury have the right to consider both kinds of evidence, and, furthermore, because it excludes from their consideration any question of commercial value and loss of services.[68] Likewise, it is erroneous to assume that dogs have no established commercial value in a particular county,[69] or to require that plaintiff must have shown by a preponderance of evidence that the dog killed had some pecuniary value.[70]

(C) *As to Justification.* Instructions are erroneous where too high a degree of proof as to justification is imposed,[71] or which refer, too broadly and in a manner calculated to mislead, to matters of justification which were not proven.[72] Where facts amounting to a justification are shown, it is error to take the consideration of such facts from the jury.[73] But the refusal of a proper instruction as to the right to eject trespassing cattle in such a manner as to cause their drowning will not be deemed prejudicial error where a more favorable instruction on the same subject is given.[74]

(II) *Province of Jury.* The necessity for the injury or killing, or the reasonableness of the means or measures resorted to, are questions for the jury,[75] so likewise is the character of the animal killed — that is, as to whether he was or was not a nuisance.[76]

(III) *Verdict.*[77] In a common-law action for injury to a trespassing animal a verdict which is warranted only in an action based on a statute is erroneous,[78] and, where defendant attempts to justify, a verdict finding the damages to be equal and dividing the costs is irresponsive and will not sustain a judgment.[79] But a general verdict for plaintiff is not inconsistent with a special finding that the dog killed was in the habit of annoying persons and animals on the highway.[80]

h. Amount Recoverable — (I) *Damages* — (A) *In General.* For a wrongful injury to, or destruction of, an animal the owner may recover the amount of damage to which he shows himself entitled;[81] and, if the right of property in the

68. Spray *v.* Ammerman, 66 Ill. 309.

69. Spray *v.* Ammerman, 66 Ill. 309.

70. Brent *v.* Kimball, 60 Ill. 211, 14 Am. Rep. 35.

71. Reynolds *v.* Phillips, 13 Ill. App. 557.

72. Spray *v.* Ammerman, 66 Ill. 309.

73. King *v.* Kline, 6 Pa. St. 318.

74. Jobe *v.* Houston, (Tex. Civ. App. 1893) 23 S. W. 408.

75. *Illinois.*— Lipe *v.* Blackwelder, 25 Ill. App. 119.

Michigan.— Hubbard *v.* Preston, 90 Mich. 221, 51 N. W. 209, 30 Am. St. Rep. 426, 15 L. R. A. 249.

New Hampshire.— Aldrich *v.* Wright, 53 N. H. 398, 16 Am. Rep. 339.

New York.— Leonard *v.* Wilkins, 9 Johns. (N. Y.) 233.

Pennsylvania.— King *v.* Kline, 6 Pa. St. 318; Cole *v.* Van Syckle, 7 Northampt. Co. Rep. (Pa.) 45, 8 Pa. Dist. 362, 13 York Leg. Rec. (Pa.) 105.

England.— Hanway *v.* Boultbee, 4 C. & P. 350, 19 E. C. L. 549.

Matters to be considered.— In determining these questions the value of the animal, the mischief likely to be wrought, the probability of the success of less severe measures, and the necessity of immediate action, are elements to be considered. Lipe *v.* Blackwelder, 25 Ill. App. 119.

The mode of securing an impounded animal, by tying and other circumstances, may be considered in determining whether its death, by choking, was the natural and proximate consequence of securing and leaving it tied. Wilhite *v.* Speakman, 79 Ala. 400.

That defendant notified plaintiff to restrain his dog may be considered by the jury in determining the reasonableness or necessity of a killing. Hodges *v.* Causey, 77 Miss. 353, 26 So. 945, 78 Am. St. Rep. 525, 48 L. R. A. 95.

76. King *v.* Kline, 6 Pa. St. 318.

Mitigation.— The habits of a dog may be considered in mitigation of damages. Wells *v.* Head, 4 C. & P. 568, 19 E. C. L. 653.

77. For form of special verdict in an action to recover for the killing of a dog see Deane *v.* Clayton, 7 Taunt. 489.

78. Lee *v.* Nelms, 57 Ga. 253.

A verdict based on an improper amendment to a count of a declaration for triple damages under a statute, praying for exemplary damages independently of the statute, will not be disturbed when it awards much less than would have been proper under the original declaration and proofs. Yumlin *v.* Parrott, 82 Ga. 732, 9 S. E. 718.

79. Ford *v.* Taggart, 4 Tex. 492.

80. Jacquay *v.* Hartzell, 1 Ind. App. 500, 27 N. E. 1105.

81. The fair (Jacquay *v.* Hartzell, 1 Ind. App. 500, 27 N. E. 1105) or market value (Uhlein *v.* Cromack, 109 Mass. 273).

The measure of damages for causing mares to lose their foals is the reduced value of the

animal is recognized, the law implies a right in the owner to damages — nominal, at least — for its destruction.[82]

(B) *Exemplary Damages.* Where the killing is done or the injurious act committed wilfully and under circumstances of aggravation, showing a violent, reckless, and lawless spirit, the law, in some jurisdictions, allows exemplary damages,[83] although the animal had no pecuniary value.[84]

(C) *Statutory Damages.* In some of the states double damages, or penal damages, based on the value of the animal, are permitted for injury to stock within an inclosure.[85] But such statutes, when highly penal, must be strictly construed.[86]

(II) *Costs.* A tender of compensation to the owner of the animal will not affect the right to the costs of a subsequent action for the injury.[87]

4. Special Proceedings. A special statutory proceeding, before a justice and freeholders, for an award of damages for the abuse or killing of trespassing cattle, is a remedy which must be strictly pursued.[88]

B. Criminal Prosecution for Causing Injury to Animals — 1. Nature and Elements of Offense — a. Domestic Animals Generally — (I) *At Common Law.* Whether or not the killing or wounding of a domestic animal constitutes an offense at common law is by no means clear. There are decisions to the effect that such acts are indictable because of their tendency to provoke a breach of the peace,[89] and that maiming or wounding is a common-law offense;[90] there are *dicta* to the same effect, and cases wherein the right to indict for killing an animal has not been questioned.[91] On the other hand, it is denied in some cases that the destruction of an animal is a criminal offense, unless made so by statute,[92] and still other cases, while apparently conceding that the killing of an animal may be punished, even though not prohibited by statute, refuse to extend the doctrine to instances of wounding or maiming.[93]

animals. Baker *v.* Mims, 14 Tex. Civ. App. 413, 37 S. W. 190.

82. Brent *v.* Kimball, 60 Ill. 211, 14 Am. Rep. 35.

A dog which is a nuisance cannot be said to have a value. Dunlap *v.* Snyder, 17 Barb. (N. Y.) 561.

83. Champion *v.* Vincent, 20 Tex. 811.

The Texas act of 1840 [Hartley's Dig. p. 436] giving to the injured party "full satisfaction for all damages sustained," does not limit the recovery to mere compensation, but permits exemplary damages when warranted by the circumstances. Cole *v.* Tucker, 6 Tex. 266.

Liability to a criminal prosecution will not relieve from exemplary damages. Cole *v.* Tucker, 6 Tex. 266.

84. Parker *v.* Mise, 27 Ala. 480, 62 Am. Dec. 776.

85. Wilhite *v.* Speakman, 79 Ala. 400; Thompson *v.* State, 67 Ala. 106, 42 Am. Rep. 101.

To authorize such damages, under the Kentucky act, the animal must have been injured within the defendant's inclosure. Stewart *v.* Jewell, 7 T. B. Mon. (Ky.) 110.

86. Smith *v.* Causey, 22 Ala. 568.

87. Cole *v.* Tucker, 6 Tex. 266.

88. Bailey *v.* Bryan, 48 N. C. 357, 67 Am. Dec. 246.

A report of freeholders, in statutory proceedings to assess damages for the abuse and killing of cattle, is erroneous if it awards damages for injuries of which no complaint is made, and in such a case the judgment can be no more than for the damages claimed. Bailey *v.* Bryan, 48 N. C. 357, 67 Am. Dec. 246.

89. *New Hampshire.*— State *v.* McDuffie, 34 N. H. 523, 69 Am. Dec. 516.

New York.—People *v.* Smith, 5 Cow. (N. Y.) 258.

North Carolina.—State *v.* Manuel, 72 N. C. 201, 21 Am. Rep. 455.

Pennsylvania.— Respublica *v.* Teischer, 1 Dall. (Pa.) 335.

Tennessee.— State *v.* Council, 1 Overt. (Tenn.) 305.

90. State *v.* Briggs, 1 Aik. (Vt.) 226.

91. Com. *v.* Leach, 1 Mass. 59; State v. Latham, 35 N. C. 33; State *v.* Scott, 19 N. C. 35.

92. Bailey *v.* State, 65 Ga. 410; State *v.* Mease, 69 Mo. App. 581; State *v.* Beekman, 27 N. J. L. 124, 72 Am. Dec. 352; State *v.* Wheeler, 3 Vt. 344, 23 Am. Dec. 212.

The use of the words "wilfully, maliciously," etc., in an indictment to describe the act, will not have the effect of making such act a public offense. State *v.* Wheeler, 3 Vt. 344, 23 Am. Dec. 212.

93. State *v.* Beekman, 27 N. J. L. 124, 72 Am. Dec. 352; State *v.* Manuel, 72 N. C. 201, 21 Am. Rep. 455.

No case can be found in England "where, independent of statute, it has been held to be a public offense to maim cattle, whether with or without malice toward the owner. Both the elementary writers and the decisions hold

(II) *Under Statutes* — (A) *In General.* The killing or wounding of animals which are the property of another is now generally an offense by statutes.[94] These are designed to protect the owners rather than the animals themselves.[95] To constitute the offense, the particular form of injury must have been inflicted, or the circumstances of the killing or injury must have been such as are contemplated by the statute,[96] and the animal wounded or killed must belong to the designated kind or class.[97]

(B) *Malice, Wilfulness, and Intent* — (1) In General. The statutes generally, in denouncing this offense, require that malice, wilfulness, or an unlawful intent to injure or kill should exist, and such a requirement imports a criminal motive, intent, or purpose,[98] as distinguished from accident or inadvertence,[99] action in good faith,[1] or acts done to protect property,[2] and the existence of such first-mentioned conditions is absolutely necessary to constitute the offense.[3] It is not

that such offense is not indictable, but is a civil trespass only (4 Bl. Comm. 244; 2 East P. C. c. 21, § 16; 2 Russell Crimes 479; Reg. *v.* Wallace, Cr. & Dix Abr. Cas. 403); and no precedent of such a form of indictment, at common law, or independent of statute, is to be found." State *v.* Manuel, 72 N. C. 201, 202, 21 Am. Rep. 455.

94. Bailey *v.* State, 65 Ga. 410; State *v.* Grimes, 101 Mo. 188, 13 S. W. 956.

Repeal of statute.— The first section of the South Carolina act of 1857, making it an indictable offense "wilfully, unlawfully, and maliciously" to "cut, shoot," etc., "any horse," etc., was not repealed by the twenty-first section of the act of 1865, declaring "every wilful trespass" to be a misdemeanor. State *v.* Alexander, 14 Rich. (S. C.) 247.

The South Carolina act of 1789, in the clause imposing a penalty for the second offense created by the act, obviously uses the word "kill" by mistake instead of the word "marked," and the killing of cattle is not an indictable offense under this act. Frierson *v.* Hewitt, 2 Hill (S. C.) 499.

95. State *v.* Brocker, 32 Tex. 611; Daniel *v.* Janes, 2 C. P. D. 351.

96. **Cutting off the mane and docking the tail of a horse** has been held to be within a statute prohibiting malicious injury (Oviatt *v.* State, 19 Ohio St. 573) or disfigurement of designated animals (Boyd *v.* State, 2 Humphr. (Tenn.) 39); but not within a statute denouncing the marking, branding, or disfigurement of horses, where the evident intent of the act is directed against the obliteration or disfigurement of brands and marks (State *v.* Smith, Cheves (S. C.) 157).

Maiming.— The statutory offense of maiming is not committed by shooting an animal. Patton *v.* State, 93 Ga. 111, 19 S. E. 734, 24 L. R. A. 732; Bailey *v.* State, 65 Ga. 410.

Poisoning.— The scattering of poison accessible to the cattle of another, with intent that it shall be taken by them, is the offense of poisoning animals denounced by N. Y. Pen. Code, § 600, and not that of the malicious destruction of property denounced by section 654. People *v.* Knatt, 156 N. Y. 302, 50 N. E. 835 [*reversing* 19 N. Y. App. Div. 628, 46 N. Y. Suppl. 1098].

The placing of poisoned flesh in an inclosed garden, for the purpose of destroying a dog which is in the habit of straying there, is not an offense punishable under 24 & 25 Vict. c. 97, § 41. But *semble*, that it is within 27 & 28 Vict. c. 115, § 2. Daniel *v.* Janes, 2 C. P. D. 351.

The word "land" in section 2 of the poisoned flesh act of 1864 applies to inclosed gardens, buildings, and dwelling-houses. Rogers *v.* Hull, 60 J. P. 584.

Injuring and secreting horse.— Where one section of a statute makes it a criminal offense to destroy, injure, or secrete goods of another, an indictment will lie for injuring and secreting a horse, though other sections forbid the "killing, maiming, and disfiguring of horses," and the "tormenting, beating, mutilating, or overdriving animals." State *v.* Phipps, 95 Iowa 491, 64 N. W. 411.

In insufficient inclosure.—In Texas, a prosecution for killing hogs within an inclosure cannot be maintained where the hog law is in force, since the hog law requires no fence against such stock, and furnishes a remedy to the owner of the premises by the impounding of stock. Gerdes *v.* State, (Tex. Crim. 1896) 34 S. W. 268.

97. **Cattle.**— Horses or mares are "cattle" within a statute inhibiting injury thereto (State *v.* Clifton, 24 Mo. 376; State *v.* Hambleton, 22 Mo. 452), and so are pigs (Rex *v.* Chapple, R. & R. 57); but a domesticated buffalo bull is not (State *v.* Crenshaw, 22 Mo. 457). In the North Carolina statutes, however, "cattle" embraces the bovine species only, other animals being specifically designated. State *v.* Credle, 91 N. C. 640.

Dumb animal.— A dog which has an owner is a "dumb animal" within the Texas statute forbidding the killing of "dumb animals." McDaniel *v.* State, 5 Tex. App. 475.

98. Com. *v.* Brooks, 9 Gray (Mass.) 299.

99. Lane *v.* State, 16 Tex. App. 172.

1. Taylor *v.* Newman, 4 B. & S. 89, 116 E. C. L. 89.

2. Thomas *v.* State, 30 Ark. 433. And see State *v.* Landreth, 4 N. C. 331, where the injury was inflicted to prevent a repetition of the mischief.

3. Johnson *v.* State, 37 Ala. 457; State *v.* Toney, 15 S. C. 409; Farmer *v.* State, 21 Tex. App. 423. 2 S. W. 767.

An animal is killed unlawfully if a trespass on the part of the slayer is also in-

enough that the act was prompted by passion excited against the animal, or by the sudden resentment of an injury.[4]

(2) Toward Owner. At common law it was necessary that the malice involved in the commission of the offense should be against the owner of the animal, and not against it or another person.[5] Whether or not malice toward the owner is an element of the statutory offense is by no means agreed. Thus, in some jurisdictions, either by force of the statute creating the offense, or because the statute is regarded as declaratory of the common law, malice of this character must exist;[6] while in others it is held that, if the object of the statute is to denounce as unlawful acts intentionally or wantonly done, malice against the owner is not an ingredient, though there may have been a deliberate intent to kill, disable, or injure the animal.[7]

b. Dogs. At common law, and in the absence of statute, it is not an offense to kill a dog,[8] and in many cases it is made lawful to kill a dog,[9] as where he has become a public nuisance,[10] is running at large,[11] or is trespassing and doing damage;[12]

volved in the killing. Thompson *v.* State, 67 Ala. 106, 42 Am. Rep. 101.

Intent to convert.— That the animal was killed openly is immaterial, if the motive was to feloniously convert it. State *v.* Credle, 91 N. C. 640.

4. U. S. *v.* Gideon, 1 Minn. 292; State *v.* Latham, 35 N. C. 33; State *v.* Landreth, 4 N. C. 331.

5. See Bishop New Crim. L. § 996; and *supra*, XII, B, 1, a, (I).

6. *Alabama.*— Hobson *v.* State, 44 Ala. 380; Burgess *v.* State, 44 Ala. 190; Northcot *v.* State, 43 Ala. 330.

Arkansas.— Chappell *v.* State, 35 Ark. 345.

Iowa.— State *v.* Phipps, 95 Iowa 491, 64 N. W. 411.

Minnesota.— U. S. *v.* Gideon, 1 Minn. 292.

North Carolina.— State *v.* Newby, 64 N. C. 23.

Tennessee.—Stone *v.* State, 3 Heisk. (Tenn.) 457.

Texas.—State *v.* Rector, 34 Tex. 565; Dover *v.* State, 32 Tex. 84. See also Turman *v.* State, 4 Tex. App. 586.

Toward bailee.— It is enough if the malice is toward the bailee of the animal, though there be no malice toward the general owner. Stone *v.* State, 3 Heisk. (Tenn.) 457.

Toward owner's son.— Malice toward the owner's son is insufficient. Northcot *v.* State, 43 Ala. 330.

If the injury is inflicted without malice to the owner it is a mere trespass. Northcot *v.* State, 43 Ala. 330.

Killing trespassing animal.— The infliction of injury on a hog in an inclosed field of growing corn belonging to defendant, and to protect his crops, is not the unlawful infliction of injury with intent to injure the owner, within the terms or spirit of a statute denouncing the infliction of injury under such circumstances. State *v.* Waters, 51 N. C. 276.

7. *Alabama.*— Roe *v.* State, 82 Ala. 68, 3 So. 2; Tatum *v.* State, 66 Ala. 465.

Dakota.— Territory *v.* Crozier, 6 Dak. 8, 50 N. W. 124.

Georgia.— Mosely *v.* State, 28 Ga. 190.

Missouri.— State *v.* Hambleton, 22 Mo. 452.

Ohio.— Brown *v.* State, 26 Ohio St. 176.

South Carolina.— State *v.* Toney, 15 S. C. 409; State *v.* Doig, 2 Rich. (S. C.) 179.

Tennessee.— State *v.* Council, 1 Overt. (Tenn.) 305.

Texas.— Manes *v.* State, 20 Tex. 38; Nutt *v.* State, 19 Tex. 340.

England.— Reg. *v.* Tivey, 1 Den. C. C. 63.

Ignorance of the ownership of the animal is immaterial if the maiming was intentional. Bromage *v.* Prosser, 4 B. & C. 247, 10 E. C. L. 563.

8. State *v.* Sumner, 2 Ind. 377; State *v.* Mease, 69 Mo. App. 581.

A dog is not within a statute making it an offense to injure or kill "beasts" (U. S. *v.* Gideon, 1 Minn. 292), "domestic animals" (State *v.* Harriman, 75 Me. 562, 46 Am. Rep. 423), "inanimate property" (Patton *v.* State, 93 Ga. 111, 19 S. E. 734, 24 L. R. A. 732), "other property" (State *v.* Marshall, 13 Tex. 55), or "personal property" (Com. *v.* Maclin, 3 Leigh (Va.) 809; Davis *v.* Com., 17 Gratt. (Va.) 617).

9. See also *supra*, XII, A, 1, a, (II)

10. State *v.* Harriman, 75 Me. 562, 46 Am. Rep. 423; Nehr *v.* State, 35 Nebr. 638, 53 N. W. 589, 17 L. R. A. 771.

11. The words "running at large," in a statute authorizing the killing of a dog running at large without a collar, mean running on the public road, or off from the owner's premises, without the attendance of any person claiming an interest in the dog. Nehr *v.* State, 35 Nebr. 638, 53 N. W. 589, 17 L. R. A. 771.

Dog wearing collar.— A statutory declaration that no person shall be liable for killing any dog unprovided with a collar as prescribed by law is equivalent to forbidding the killing of dogs having the required collar. State *v.* McDuffie, 34 N. H. 523, 69 Am. Dec. 516.

Statute repealed.— Ind. Rev. Stat. (1881), § 2646, permitting the killing of all dogs at large, was repealed by the act of 1881, p. 395, and was not revived by the repeal of the latter act by the act of 1883. Dinwiddie *v.* State, 103 Ind. 101, 2 N. E. 290.

12. A dog listed for taxation cannot be lawfully killed in Indiana unless while en-

but if dogs are regarded as property, or their killing is forbidden, their destruction will constitute an offense.[13]

2. JURISDICTION. Jurisdiction to try prosecutions for this offense exists in all courts, and justices who have jurisdiction of criminal offenses generally have jurisdiction,[14] provided the punishment does not exceed that which the statute empowers them to inflict.[15]

3. INDICTMENT, INFORMATION, OR COMPLAINT[16] — a. Charging Offense — (1) *IN GENERAL.* It is ordinarily sufficient to describe the offense in the words of the statute,[17] and if this is done it is immaterial that the language is slightly inaccurate,[18] or somewhat confused.[19]

gaged in damaging property of another than his owner, or where he is known to be a sheep-killing dog. Dinwiddie *v.* State, 103 Ind. 101, 2 N. E. 290.

The fact that a dog has previously trespassed in company with other dogs gives no right to kill it, whether doing damage or not. Sosat *v.* State, 2 Ind. App. 586, 28 N. E. 1017.

13. Tottleben *v.* Blankenship, 58 Ill. App. 47; State *v.* Latham, 35 N. C. 33; Dodson *v.* Mock, 20 N. C. 234, 32 Am. Dec. 677.

Unlisted dogs — Repeal.— The Indiana act of 1883 forbidding the malicious injury or killing of any dog listed for taxation, did not render inapplicable Ind. Rev. Stat. (1881), § 1955, punishing the malicious killing of an unlicensed dog. Sosat *v.* State, 2 Ind. App. 586, 28 N. E. 1017.

14. Proceedings in the criminal court of Pike county, Alabama, are governed by the statute regulating proceedings in the county court. Therefore a warrant of arrest, returnable before such criminal court, may be issued by a justice of the peace. Walker *v.* State, 89 Ala. 74, 8 So. 144.

An indictment for poisoning cattle is within the jurisdiction of a court of sessions which has exercised the authority for so long a time as to afford a strong presumption that the English statutes on that point were adopted as a part of the criminal law. Com. *v.* Leach, 1 Mass. 59.

15. State *v.* Towle, 48 N. H. 97; Uecker *v.* State, 4 Tex. App. 234.

16. **For forms** of indictments, informations, or complaints for injuring or killing animals see the following cases:

Alabama.— Caldwell *v.* State, 49 Ala. 34.

Indiana.— Sample *v.* State, 104 Ind. 289, 4 N. E. 40; Kinsman *v.* State, 77 Ind. 132; State *v.* Slocum, 8 Blackf. (Ind.) 315; State *v.* Merrill, 3 Blackf. (Ind.) 346.

Iowa.— State *v.* Phipps, 95 Iowa 492, 64 N. W. 411; State *v.* Enslow, 10 Iowa 115.

Kansas.— State *v.* Lowe, 56 Kan. 594, 44 Pac. 20.

Maine.— State *v.* Bucknam, (Me. 1886) 5 Atl. 529.

Massachusetts.— Com. *v.* Sowle, 9 Gray (Mass.) 304, 69 Am. Dec. 289; Com. *v.* Brooks, 9 Gray (Mass.) 299; Com. *v.* Walden, 3 Cush. (Mass.) 558.

Minnesota.— U. S. *v.* Gideon, 1 Minn. 292.

Mississippi.— Thompson *v.* State, 51 Miss. 353; Duncan *v.* State, 49 Miss. 331.

Missouri.— State *v.* Woodward, 95 Mo. 129, 8 S. W. 220; State *v.* Hambleton, 22 Mo. 452, 454.

New Hampshire.— State *v.* Towle, 48 N. H. 97; State *v.* McDuffie, 34 N. H. 523, 69 Am. Dec. 516.

North Carolina.— State *v.* Credle, 91 N. C. 640; State *v.* Painter, 70 N. C. 70; State *v.* Allen, 69 N. C. 23; State *v.* Scott, 19 N. C. 35.

Ohio.— Brown *v.* State, 26 Ohio St. 176; Oviatt *v.* State, 19 Ohio St. 573.

South Carolina.— State *v.* Cantrell, 2 Hill (S. C.) 389.

Tennessee.— Taylor *v.* State, 6 Humphr. (Tenn.) 284; Boyd *v.* State, 2 Humphr. (Tenn.) 39.

Texas.— State *v.* Brocker, 32 Tex. 611; Lane *v.* State, 16 Tex. App. 172; McDaniel *v.* State, 5 Tex. App. 475.

Vermont.— State *v.* Labounty, 63 Vt. 374, 21 Atl. 730; State *v.* Abbott, 20 Vt. 537.

Wisconsin.—State *v.* Delue, 2 Pinn. (Wis.) 204, 1 Chandl. (Wis.) 166.

17. *Arkansas.*— Lemon *v.* State, 19 Ark. 171.

California.— People *v.* Kelley, 81 Cal. 210, 22 Pac. 593.

Massachusetts.— Com. *v.* Sowle, 9 Gray (Mass.) 304, 69 Am. Dec. 289.

North Carolina.— State *v.* Credle, 91 N. C. 640; State *v.* Staton, 66 N. C. 640.

South Carolina.— State *v.* Cantrell, 2 Hill (S. C.) 389.

When insufficient.— In State *v.* Hill, 79 N. C. 656, it was said that it is not always sufficient to follow the words of the statute, but that the charge should be as specific as the proof adduced in its support must be. And see State *v.* Jackson, 7 Ind. 270, holding that the nature of the offense should be stated specifically.

Negativing exceptions.—An indictment under Ill. Crim. Code, § 205, for injuring horses, need not aver that the animals were not injured by poison put out to destroy sheep-killing dogs, which averment might be necessary in an indictment for injuring dogs. Swartzbaugh *v.* People, 85 Ill. 457.

18. Thus an affidavit charging that defendant "kill one cow," instead of "killed," or "did kill," is sufficient foundation for a warrant of arrest. Walker *v.* State, 89 Ala. 74, 8 So. 144.

19. Semple *v.* State, 104 Ind. 289, 4 N. E. 40.

So, an indictment framed on a statute providing that "every person who shall mali-

(II) *Time of Injury.* The day and month of the commission of the offense should be alleged.[20]

(III) *Place of Injury.* The place where the offense was committed should be alleged with reasonable particularity,[21] and where the statutory offense consists of injuring or killing within an inclosure, it must be alleged that such injury or killing was so committed;[22] but the ownership of the land need not be averred,[23] nor, unless it is a part of the statutory offense, that the place was inclosed with a lawful fence.[24]

(IV) *Describing Animal* — (A) *In General.* The animal injured or killed should be so described as to reasonably inform defendant of the charge against him;[25] but a specific designation of the animal will be sufficient if it is apparent that the animal is included in the kind or class whose injury the statute forbids.[26]

(B) *Value.* Unless the act requires it or unless the punishment depends on the value of the animal, its value need not be averred;[27] but otherwise, if the punishment is based upon the value.[28] If more than one animal has been destroyed, their collective value may be stated.[29]

(C) *Ownership.* If the offense consists in injuring or killing an animal which is the property of another, the name of the owner must be disclosed,[30] or it

ciously or mischievously destroy or injure, or cause to be destroyed or injured, any property of another," etc., shall be deemed guilty, etc., and which charges that defendant did destroy and injure, or cause to be destroyed and injured, a certain mare, is not multifarious or uncertain. State *v.* Slocum, 8 Blackf. (Ind.) 315.

20. Bailey *v.* State, 65 Ga. 410.

21. **Reference to the venue** of the indictment will be sufficient. State *v.* Slocum, 8 Blackf. (Ind.) 315; Taylor *v.* State, 6 Humphr. (Tenn.) 284.

Particular grounds.—It need not be averred that the killing was in any particular grounds. Dean *v.* State, 37 Ark. 57.

Deposit of poison.— Where it was made an offense to deposit poison within two hundred rods of a field or improved land, an indictment charging a deposit in a certain field, without stating its distance from any other field or improved land, etc., was held good. State *v.* Bucknam, (Me. 1886) 5 Atl. 529.

22. **Charging stock to have been injured in "the field"** of a person named is insufficient. State *v.* Staton, 66 N. C. 640.

23. State *v.* Painter, 70 N. C. 70; State *v.* Allen, 69 N. C. 23, wherein it is said, however, that the better practice requires such an averment as a part of the description of the offense, and as a defense to a second conviction.

24. Dean *v.* State, 37 Ark. 57.

25. State *v.* Credle, 91 N. C. 640; State *v.* Hill, 79 N. C. 656.

26. **"Cattle beast."**— A charge of killing a "cattle beast" is sufficient under the North Carolina statute. State *v.* Credle, 91 N. C. 640.

"Certain cattle."— Charging the killing of "certain cattle" is not sufficient without stating the kind of cattle. Rex *v.* Chalkley, R. & R. 193.

"Cow."— An indictment for maliciously killing a "cow" is good, without adding that the animal killed was a beast. Taylor *v.* State, 6 Humphr. (Tenn.) 284.

"Mare."— A charge of killing "a certain horse beast, to wit, one mare," sufficiently charges the killing of "cattle." State *v.* Hambleton, 22 Mo. 452. And see State *v.* Clifton, 24 Mo. 376. And such an indictment need not aver that the mare was a "domestic animal." Swartzbaugh *v.* People, 85 Ill. 457.

"Sow."— To charge the killing of a "sow" is a sufficient charge of killing "cattle" or other domestic beasts (State *v.* Enslow, 10 Iowa 115), and is a sufficient charge of shooting "any hog" (Shubrick *v.* State, 2 Rich. (S. C.) 21).

"Steer."—A charge of injuring a "steer" is a sufficient charge of injuring "neat cattle" (State *v.* Lange, 22 Tex. 591), or "cattle or other beast" (State *v.* Abbott, 20 Vt. 537).

Listed dog.—An averment that a dog, killed in March, 1887, was duly listed for taxation in the year 1886 shows that he was listed at the time he was killed, where it further appears that he could not be again listed until April, 1887. Hewitt *v.* State, 121 Ind. 245, 23 N. E. 83.

27. Caldwell *v.* State, 49 Ala. 34; Sample *v.* State, 104 Ind. 289, 4 N. E. 40; Dinwiddie *v.* State, 103 Ind. 101, 2 N. E. 290; Manes *v.* State, 20 Tex. 38. *Contra*, U. S. *v.* Gideon, 1 Minn. 292.

28. Caldwell *v.* State, 49 Ala. 34; State *v.* Garner, 8 Port. (Ala.) 447.

29. Com. *v.* Falvey, 108 Mass. 304.

30. State *v.* Pierce, 7 Ala. 728; State *v.* Jackson, 7 Ind. 270.

Reasons for requirement.— The ownership should be averred to identify the animal and because, on conviction, the defendant would become liable to the owner for the value of the animal killed. Stone *v.* State, 3 Heisk. (Tenn.) 457.

Mortgaged animal.—Though a debt, secured by a mortgage on a cow, is past due, the ownership is properly laid in the mortgagor. Walker *v.* State, 89 Ala. 74, 8 So. 144.

Laying ownership in different persons.— If the identity of the owner is known, but there is a doubt as to his true name, it may be averred in different forms in separate counts,

must at least be stated that the animal was the property of some one whose name is unknown.[31]

(v) *Malice, Wilfulness, and Intent*—(a) *In General.* If the unlawful, wilful, malicious, or mischievous intent with which the injury or killing was done is a necessary ingredient of the offense, it must be averred either in the words of the statute, or by equivalent language.[32] So, too, if the statute requires that, to constitute the offense, the act be wilfully and maliciously committed, it must be so charged, and the omission of either word will be fatal.[33] If the injury or killing is made a felony, it should be charged that it was "feloniously" done.[34]

(b) *Toward Owner.* Where malice toward the owner, or an intent to injure him, is an element of the offense, it must be charged that the defendant was so actuated,[35] or the offense must be fully described;[36] but otherwise if malice or intent of this character is not an element.[37]

(vi) *Means of Injury*—(a) *In General.* It is not necessary to describe the means or manner of inflicting the injury or killing.[38]

(b) *Use of Poison.* Where it is charged that poison was used, it will be sufficient to aver, in the statutory language, the use of a poisonous substance, without specifying the substance; an averment that the substance would kill, or was sufficient to kill, is unnecessary.[39]

(vii) *Amount of Injury to Owner.* If the amount of damage done to the owner is an element in fixing the punishment, it must be distinctly alleged, and an allegation of the value of the animal injured or killed is not sufficient.[40] It is

though this is, probably, unnecessary. But where the ownership is laid in more than one, and in separate counts, and the evidence discloses two or more distinct offenses, one applicable to each count, a case of election is presented, and there can be a conviction of only one offense. Bass *v.* State, 63 Ala. 108.

31. State *v.* Pierce, 7 Ala. 728, holding that, under the Alabama statute, if there is no known proprietor the killing will not constitute malicious mischief.

32. *Iowa.*— State *v.* Lightfoot, 107 Iowa 344, 78 N. W. 41.

Massachusetts.— Com. *v.* Brooks, 9 Gray (Mass.) 299.

Mississippi.— Thompson *v.* State, 51 Miss. 353.

North Carolina.— State *v.* Tweedy, 115 N. C. 704, 20 S. E. 183; State *v.* Parker, 81 N. C. 548; State *v.* Hill, 79 N. C. 656.

Tennessee.— Boyd *v.* State, 2 Humphr. (Tenn.) 39.

Texas.— State *v.* Rector, 34 Tex. 565; Uecker *v.* State, 4 Tex. App. 234.

Guilty knowledge.— It is not necessary to supplement the statutory language with a specific charge of guilty knowledge. Com. *v.* Falvey, 108 Mass. 304.

Sufficient charge.— An indictment framed under Mass. Gen. Stat. c. 161, § 80, and c. 168, § 8, charging that defendant attempted "unlawfully, wilfully, and maliciously to administer" poison, "and in such attempt" did an overt act, charges an unlawful, wilful, and malicious attempt and intent. Com. *v.* McLaughlin, 105 Mass. 460.

33. State *v.* Delue, 2 Pinn. (Wis.) 204, wherein a charge that the killing was "felonious, unlawful, and malicious" was held to be defective.

Intent to convert animal.—Though the statute in defining the offense uses the word "wilful," if the averments of the information show that the killing was with the intent and purpose of stealing the carcass, a wilful killing is sufficiently charged. State *v.* Lowe, 56 Kan. 594, 44 Pac. 20.

34. State *v.* Deffenbacher, 51 Mo. 26. But see People *v.* Keeley, 81 Cal. 210, 22 Pac. 593, holding that poisoning, though it may be punished by imprisonment in the state prison, need not be averred to have been done feloniously.

35. State *v.* Hill, 79 N. C. 656; State *v.* Jackson, 34 N. C. 329; State *v.* Rector, 34 Tex. 565.

36. State *v.* Jackson, 34 N. C. 329.

37. State *v.* Hambleton, 22 Mo. 452; State *v.* Scott, 19 N. C. 35; State *v.* Simpson, 9 N. C. 460; Manes *v.* State, 20 Tex. 38.

38. *Indiana.*— State *v.* Merrill, 3 Blackf. (Ind.) 346.

Massachusetts.— Com. *v.* Falvey, 108 Mass. 304; Com. *v.* Sowle, 9 Gray (Mass.) 304, 69 Am. Dec. 289.

Missouri.—State *v.* Hambleton, 22 Mo. 452.

South Carolina.— State *v.* Cantrell, 2 Hill (S. C.) 389.

Wyoming.— Fein *v.* Territory, 1 Wyo. 376.

England.— Rex *v.* Whitney, 1 Moody 3.

"Force and arms."— The omission of the words "with force and arms" is not a fatal defect. Taylor *v.* State, 6 Humphr. (Tenn.) 284.

39. People *v.* Keeley, 81 Cal. 210, 22 Pac. 593; State *v.* Labounty, 63 Vt. 374, 21 Atl. 730.

The words "Paris green" import a poisonous substance. State *v.* Labounty, 63 Vt. 374, 21 Atl. 730.

40. Harness *v.* State, 27 Ind. 425; Uecker *v.* State, 4 Tex. App. 234; Nicholson *v.* State, 3 Tex. App. 31.

only necessary, however, to state the amount of damage to the animal or to its owner.[41]

b Separate Counts. Where injury to different animals is charged, such injuries should be set out in separate counts, though they may be charged in the alternative in one count;[42] but where the killing of different animals is charged in one count, and the evidence shows that the killing was at different times, the indictment is defective.[43]

c. Conclusion. An indictment for maliciously killing an animal may conclude as at common law;[44] but an indictment based on a statute should conclude *contra formam statuti.*[45]

d. Indorsement of Prosecutor's Name. Although the statute declares that no indictment shall be found for injuring or killing certain animals except upon complaint of the owner thereof or his lawful agent, an indictment will not be struck from the files on motion because the name of the owner is not indorsed on it as prosecutor.[46]

4. Defenses — a. Animal Running at Large. It is no defense that the injured animal was at large in contravention of a statute making it unlawful to permit stock to run at large.[47]

b. Animal Trespassing. The mere fact that animals are trespassing gives no right to the landowner to injure or destroy them;[48] but, by some statutes, the accused may defend on the ground that the animal killed was trespassing on land inclosed by a lawful fence;[49] but defendant will not be exempted from statutory penalties for killing trespassing stock unless the fence is such as the law requires.[50] It has been held, however, that the injury or destruction of an animal which is damaging property is justifiable.[51]

c. Delivery of Dead Animal to Owner. It is no defense that the accused, after killing the animal, delivered it to its owner.[52]

d. License to Kill. The accused may defend by showing that the killing was under a license or authority from the owner;[53] but it is no defense that a third person authorized the killing, unless his authority can be traced to the owner; nor is it a defense[54] that defendant, a minor, was directed to kill the animal by his father, with whom he resided, and that the animal had previously done mischief while trespassing.[55]

e. Tender of Compensation. Where, by statute, a tender of full compensation to the owner before commencement of prosecution, followed by the refusal of

41. Sample *v.* State, 104 Ind. 289, 4 N. E. 40.

It is immaterial whether the injury is charged to be to the damage of the property, or of its owner. Kinsman *v.* State, 77 Ind. 132.

Lessening of value.— It need not be shown how much the value of the animal was lessened. State *v.* Merrill, 3 Blackf. (Ind.) 346.

42. Burgess *v.* State, 44 Ala. 190.

43. **Election as remedy of defect.**— The election of the prosecuting attorney to prosecute for the killing of one animal will not remedy the defect. Thomas *v.* State, 111 Ala. 51, 20 So. 617.

44. State *v.* Scott, 19 N. C. 35; State *v.* Simpson, 9 N. C. 460.

45. State *v.* Hill, 79 N. C. 656.

46. Ashworth *v.* State, 63 Ala. 120.

47. State *v.* Rivers, 90 N. C. 738.

48. Snap *v.* People, 19 Ill. 80, 68 Am. Dec. 582; State *v.* Rivers, 90 N. C. 738; Com. *v.* Fourteen Hogs, 10 Serg. & R. (Pa.) 393.

Trespassing dog.— A requested instruction which assumes that the mere fact that a dog had previously trespassed in company with other dogs gives the right to kill it, whether it was doing damage or not, is properly refused. Sosat *v.* State, 2 Ind. App. 586, 28 N. E. 1017.

49. Dean *v.* State, 37 Ark. 57. And see Bass *v.* State, 63 Ala. 108, holding that, under a statute providing that one injuring cattle engaged in damaging growing crops within a lawfully inclosed field may show the facts in extenuation or justification, the jury may reduce the statutory fine prescribed for the injury to the minimum, and, further, that to avail of this defense it is unnecessary to show that the fence was removed and the stock turned in by their owner.

50. Chappell *v.* State, 35 Ark. 345; State *v.* Council, 1 Overt. (Tenn.) 305; Jones *v.* State, 3 Tex. App. 228.

51. Rex *v.* Wansey, 8 Hawaii 115; Farmer *v.* State, 21 Tex. App. 423, 2 S. W. 767.

52. Wallace *v.* State, 30 Tex. 758.

53. See Ashworth *v.* State, 63 Ala. 120.

54. Wallace *v.* State, 30 Tex. 758.

55. McDaniel *v.* State, 5 Tex. App. 475.

such compensation by him, is a bar, defendant must tender a sufficient sum, and he must determine the amount at his own risk.[56] An actual tender must be shown, or a sufficient excuse given for not making a tender, and the money must be brought into court;[57] but the actual production of the money may be waived by a declaration that it will not be accepted.[58]

5. Witnesses — Competency — a. Prosecutor. While it has been held that, when the fine imposed is for the benefit of the party injured, the latter cannot be examined on behalf of the state,[59] it has also been held that his interest, because of his right to damages on a conviction, goes to his credit only, and not to his competency.[60]

b. To Show Extent of Injury. A witness, acquainted with an animal both before and after the injury, may state his opinion as to the extent of the damage, though he is not shown to possess any medical or veterinary skill.[61]

6. Evidence — a. Burden of Proof and Presumptions — (I) *As to Malice, Wilfulness, and Intent.* Where malice, wilfulness, or intent is an element of the offense charged it must be proved by the state.[62] Such malice or wrongful intent will be presumed from wanton or reckless acts, or from attendant circumstances which show a disposition to do mischief, and there are no circumstances to repel such presumption,[63] as where the means employed will ordinarily cause death,[64] or the act itself is illegal.[65] The mere perpetration of the act may authorize a presumption of intent to injure the owner.[66] Such a presumption will not arise, however, where the act is indifferent.[67] As in other cases, the presumption may be rebutted,[68] and, under certain circumstances, the presumption of malice may shift the burden of proof from the prosecution to the defense upon that particular question.[69] However, if the intention cannot be inferred from the act itself, other circumstances must be proved from which the jury may reasonably infer that the act was done wantonly.[70]

(II) *As to Value.* In the absence of proof, the court will not infer that the dog killed was of no value.[71]

b. Admissibility — (I) *To Show Listing for Taxation.* Parol evidence is admissible to show the listing of a dog for taxation.[72]

(II) *To Show Motive.* On trial of a veterinary surgeon, for injuring a horse in a peculiar manner, so that he might be called to treat it professionally,

56. Ashworth *v.* State, 63 Ala. 120, holding, further, that the fact that the owner demanded more than defendant claimed to be full compensation, or refused to say what he would accept, will not excuse the failure to make a tender.

57. Ashworth *v.* State, 63 Ala. 120.

58. Roe *v.* State, 82 Ala. 68, 3 So. 2.

59. Northcot *v.* State, 43 Ala. 330.

60. Lemon *v.* State, 19 Ark. 171.

61. Johnson *v.* State, 37 Ala. 457.

62. Dover *v.* State, 32 Tex. 84; Hoak *v.* State, (Tex. Crim. 1894) 26 S. W. 508; Farmer *v.* State, 21 Tex. App. 423, 2 S. W. 767.

Malice toward special owner.— That the animal is described as the property of the general owner will not restrict the state to proof of malice toward him, but will admit proof that the malice was toward the special owner. Stone *v.* State, 3 Heisk. (Tenn.) 457.

63. Hobson *v.* State, 44 Ala. 380; Chappell *v.* State, 35 Ark. 345; Mosely *v.* State, 28 Ga. 190; Wallace *v.* State, 30 Tex. 758.

But if there be such circumstances, as if the injury be done while the animal is trespassing in the field and destroying the crop of the accused, express malice must be proved; and this though the fence around the field be not such as the statute requires. Chappell *v.* State, 35 Ark. 345.

64. Hobson *v.* State, 44 Ala. 380; Hill *v.* State, 43 Ala. 335; Com. *v.* Walden, 3 Cush. (Mass.) 558.

65. State *v.* Council, 1 Overt. (Tenn.) 305.

66. Lane *v.* State, 16 Tex. App. 172.

67. State *v.* Council, 1 Overt. (Tenn.) 305.

The carelessness with which an act was done may supply the place of criminal intent, as where defendant recklessly shot at cattle in his field, to frighten them out, and unwittingly killed the prosecutor's mule, which he did not see. State *v.* Barnard, 88 N. C. 661.

68. As by showing that a gun used was so loaded that it was not likely to kill or do great bodily harm. Com. *v.* Walden, 3 Cush. (Mass.) 558.

69. Fein *v.* Territory, 1 Wyo. 376.

70. As where a trespassing animal is killed to protect property. Branch *v.* State, 41 Tex. 622; Jones *v.* State, 3 Tex. App. 228.

71. Harness *v.* State, 27 Ind. 425.

72. Hewitt *v.* State, 121 Ind. 245, 23 N. E. 83.

evidence of similar injuries at the same time to other horses in the same locality is admissible and is competent to show motive. It is not to be excluded because it may tend to prove the commission of other and distinct offenses.[73]

(III) *To Show Ownership.* A conviction will not be disturbed because of the erroneous admission, under objection, of incompetent testimony to show ownership, where that fact is otherwise sufficiently proved.[74]

(IV) *To Show Value and Amount of Damage.* Evidence of the value of an animal at the time and in its immediate neighborhood is competent and admissible, and so is evidence of its value at other near and accessible markets.[75] Where the accused, if convicted, is liable for the damages sustained by the owner, and to imprisonment in addition, it is competent to prove expenses incurred by the owner, as well as the value of the animal.[76]

c. Sufficiency. While guilt may be sufficiently established by circumstantial evidence,[77] a statement by defendant, in answer to an inquiry why he shot a mare, that he "did not shoot her with shot," is not sufficient to establish a confession, nor is it inconsistent with innocence.[78]

d. Variance. If the gist of the offense is properly proved, an immaterial variance will be disregarded;[79] but it has been held that a charge of injury to one kind of an animal is not sustained by proof of injury to another kind of the same species;[80] and an indictment laying the ownership in more than one is not sustained by proof of exclusive ownership in one.[81] So, too, if a single offense is charged in one count, evidence of two separate and distinct offenses is a fatal variance,[82] and if injury to two or more animals at different times is charged in a single count in the conjunctive, or is charged to have been inflicted at the same time and by one act, the charge must be proved as laid, or the variance is fatal.[83]

7. Trial — a. Instructions — (I) *In General.* The court must charge the jury in accordance with the facts proven, and the law applicable thereto.[84] It may define the offense substantially in the words of the statute,[85] and should correctly interpret the language thereof.[86]

73. Brown *v.* State, 26 Ohio St. 176.

74. Nutt *v.* State, 19 Tex. 340, wherein a witness was permitted to prove the brand of an animal by repeating the declarations of the alleged owner.

75. Walker *v.* State, 89 Ala. 74, 8 So. 144.

Exclusion of unnecessary proof.— The exclusion of evidence as to the value of a dog killed is immaterial when the statute upon which the prosecution is based does not require such proof. Dinwiddie *v.* State, 103 Ind. 101, 2 N. E. 290.

76. Lemon *v.* State, 19 Ark. 171.

77. **Causing fowls to eat poison.**— Evidence that fowls ate poison, placed by defendant with the intent that they should find and eat it, will sustain an averment that he caused them to eat it. Com. *v.* Falvey, 108 Mass. 304.

Proof of threats to shoot plaintiff's stock, the firing of two shots in defendant's field, the fact that the animals were shot, the finding of a recently discharged gun, and shot in a pouch corresponding to that found in the animals, and evasive and unsatisfactory answers by defendant when interrogated, is sufficient to warrant a conviction. State *v.* Wholeham, 22 Iowa 297.

78. Dover *v.* State, 32 Tex. 84.

79. Com. *v.* McLaughlin, 105 Mass. 460 (where, to sustain a charge of filling and saturating a potato with poison, with intent to give it to a horse, evidence was introduced that a hole was made in the potato and filled with bran saturated with the poison, without the potato itself being saturated); State *v.* Briggs, 1 Aik. (Vt.) 226 (wherein the proof of the terminus of a way into which injured animals were driven differed from the averment in the indictment).

80. Thus a charge of injuring a cow is not sustained by proof of injuring an ox (State *v.* Hill, 79 N. C. 656), nor a charge of killing a horse by proof of killing a gelding (Gholston *v.* State, 33 Tex. 342), or a charge of killing a mare by proof of killing a colt whose sex is not shown (Rex *v.* Chalkley, R. & R. 193).

Contra, Fein *v.* Territory, 1 Wyo. 376.

81. State *v.* Hill, 79 N. C. 656.

82. Thomas *v.* State, 111 Ala. 51, 20 So. 617.

83. Thomas *v.* State, 111 Ala. 51, 20 So. 617; Burgess *v.* State, 44 Ala. 190.

84. On trial of an indictment charging in one count injuries to two animals, which injuries the evidence showed were committed at different times, it is error to refuse a request to charge that "if the state had failed to prove that the mare and ox were injured at the same time, or so near each other as to constitute the same offense, then the defendant is not guilty, as charged in the indictment." Burgess *v.* State, 44 Ala. 190.

85. State *v.* Allen, 69 N. C. 23.

86. As the meaning of the word "maliciously." Com. *v.* Walden, 3 Cush. (Mass.) 558.

(II) *As to Malice.* The jury should be informed of their right to infer malice from the means used.[87]

(III) *As to Mode of Death.* The court may not instruct that the jury must find beyond a reasonable doubt that death was caused in one of two ways possible, in the absence of any evidence to prove or disprove one of the modes of death.[88]

(IV) *As to Justification.* Where the use of unnecessary force in protecting property is only important to determine the wilfulness of the act, it is error to permit the jury to determine the guilt or innocence of the accused on the issue as to whether or not such force was used.[89]

b. Province of Court and Jury. The court cannot assume that authority to kill the animal was given by its owner when the language of the authority relied on is doubtful and ambiguous, but should leave that question to the jury.[90] The fact of the killing, the value of the animal, the sufficiency of a fence to protect crops, and the questions of malice[91] or good faith of defendant,[92] as well as the capacity of a minor under fourteen years of age to commit the offense,[93] are also proper questions for the jury.

c. Verdict. A verdict finding the accused guilty of a wilful and unlawful killing, not done in a spirit of mischief, revenge, or wanton cruelty, is an acquittal of a charge of an unlawful, wilful, and malicious killing, out of wanton cruelty.[94]

8. Punishment. On conviction the accused may be punished in the mode prescribed by statute.[95]

XIII. Purchasing Animals without Bill of Sale.

By statute in Texas, for a sale of live stock not running at large on the range, a bill of sale is required as evidence of title, and in default thereof the *prima facie* presumption obtains that the possession by one claiming to be a purchaser is illegal;[96] but this presumption may be rebutted by proof that the possession is fair and legal.[97] If the live stock consists of cattle running on the range a bill of sale and record thereof are absolutely prerequisite to the acquisition of title; and if the instrument be not recorded it does not take effect in favor of any one for any purpose.[98] This statute is constitutional.[99] The venue of the offense of purchasing and receiving cattle without taking a bill of sale is the county in which

87. Com. *v.* Walden, 3 Cush. (Mass.) 558.

88. Irvin *v.* State, 7 Tex. App. 109, wherein defendant shot but did not instantly kill a hog which was afterward found dead in an overflow of water.

89. Farmer *v.* State, 21 Tex. App. 423, 2 S. W. 767.

90. Ashworth *v.* State, 63 Ala. 120.

91. Dean *v.* State, 37 Ark. 57.

92. State *v.* Credle, 91 N. C. 640.

93. State *v.* Toney, 15 S. C. 409.

94. Duncan *v.* State, 49 Miss. 331.

95. **The California Penal Code,** § 596, punishes the offense of administering poison to an animal, or maliciously exposing any poisonous substance with the intent that the same shall be taken or swallowed by any such animal, by imprisonment in the state prison or the county jail; therefore, on a conviction of placing a poisonous substance in a watering-trough with an intent that it shall be taken and swallowed by horses, a judgment of imprisonment in the state prison is warranted. People *v.* Keeley, 81 Cal. 210, 22 Pac. 593.

Where the person injured is entitled to one half the fine, the judgment should be in favor of the state, for the use of the county, for the full amount, and should be collected as fines on convictions for misdemeanors. The judgment cannot be severed, nor can there be an execution as in a civil action. Bass *v.* State, 63 Ala. 108.

96. Black *v.* Vaughan, 70 Tex. 47, 7 S. W. 604.

A retroactive operation cannot be given to this rule of evidence, for such an application of the rule would be *ex post facto*, and if warranted by the act would make it unconstitutional. Espy *v.* State, 32 Tex. 375.

Time of taking bill of sale.—The section of the penal code requiring the purchaser of cattle to obtain a bill of sale therefor has been construed to require the execution of the bill of sale at the time of delivery of the cattle. Houston *v.* State, 13 Tex. App. 595.

97. Black *v.* Vaughan, 70 Tex. 47, 7 S. W. 604; Wells *v.* Littlefield, 59 Tex. 556; Flore *v.* State, 13 Tex. App. 665.

98. Black *v.* Vaughan, 70 Tex. 47, 7 S. W. 604.

99. Faith *v.* State, 32 Tex. 373.

the cattle were purchased,[1] and the indictment should allege in whom the ownership of the cattle existed.[2] Where the animals were purchased and received by an agent, and the indictment is against the principal it must be shown that the agent acted under his direction, and, also by his direction, purchased and received the animals without taking a bill of sale; otherwise there can be no conviction.[3]

XIV. ANIMALS RUNNING AT LARGE.[4]

A. Legislative and Municipal Control — 1. In General. The legislature may enact laws, or may confer upon local authorities the power to enact ordinances or by-laws for the restraint of animals, for taking them up and impounding them, and for the imposition of fines and penalties upon the owners thereof for suffering them to go at large;[5] but unless the power is conferred the local authorities have no power to make such provisions.[6]

2. Municipal Regulations — a. Concerning Animals Generally — (I) *In General.* In pursuance of a general power to abate nuisances or to provide for the general welfare of the territory within their jurisdiction, municipal and quasi-municipal corporations may authorize the taking up of animals at large, and may impose fines and penalties on their owners or others for permitting the animals to go at large.[7]

(II) *Suspension of General by Local Law.* Where a political division of the state adopts resolutions or by-laws prohibiting cattle and other animals from running at large, such action excludes from that territory the operation of a general law on the subject.[8]

(III) *Validity of Ordinances* — (A) *In General.* Ordinances or by-laws

1. Brockman *v.* State, 16 Tex. App. 54.

2. Houston *v.* State, 13 Tex. App. 595.

For form of indictment for buying cattle without bill of sale see Long *v.* State, 6 Tex. App. 643.

3. Brockman *v.* State, 16 Tex. App. 54; Houston *v.* State, 13 Tex. App. 595.

4. **For injuries by animals running at large** see *supra*, XI, A, 1, d.

5. *Alabama.*— Dillard *v.* Webb, 55 Ala. 468.

Connecticut.— Whitlock *v.* West, 26 Conn. 406.

Illinois.— Roberts *v.* Ogle, 30 Ill. 459, 83 Am. Dec. 201.

Iowa.— Gosselink *v.* Campbell, 4 Iowa 296.

Kentucky.— McKee *v.* McKee, 8 B. Mon. (Ky.) 433.

Missouri.— Spitler *v.* Young, 63 Mo. 42.

New York.— Campbell *v.* Evans, 54 Barb. (N. Y.) 566 [*affirmed* in 45 N. Y. 356].

North Carolina.— Hogan *v.* Brown, 125 N. C. 251, 34 S. E. 411.

Repeal of statute.— Ind. Rev. Stat. (1881) § 2639, providing that domestic animals running at large, in the absence of an order of the county commissioners authorizing them to be pastured on the uninclosed lands of the township, may be taken up and impounded by any resident of the township, is not inconsistent with, or repealed by, the act of March 7, 1887, p. 38, making it the duty of the road supervisors, upon view or information, to cause certain specified animals running at large, which are not authorized to run at large by order of the county commissioners, to be impounded. Frazier *v.* Goar, 1 Ind. App. 38, 27 N. E. 442.

6. Slessman *v.* Crozier, 80 Ind. 487; Miles *v.* Chamberlain, 17 Wis. 446.

Repeal.— An act which regulates the going at large of all cattle and stock, and which is evidently intended as a substitute for a former statute relating to the restraint of one particular species of animal, operates to repeal it. Berkshire *v.* Missouri Pac. R. Co., 28 Mo. App. 225.

7. *Illinois.*— Roberts *v.* Ogle, 30 Ill. 459, 83 Am. Dec. 201; Quincy *v.* O'Brien, 24 Ill. App. 591.

Indiana.— Slessman *v.* Crozier, 80 Ind. 487.

Massachusetts.— Com. *v.* Curtis, 9 Allen (Mass.) 266.

South Carolina.—Crosby *v.* Warren, 1 Rich. (S. C.) 385; Kennedy *v.* Sowden, 1 McMull. (S. C.) 323.

Tennessee.—Moore *v.* State, 11 Lea (Tenn.) 35.

Wisconsin.— Miles *v.* Chamberlain, 17 Wis. 446.

Under 4 Wm. IV, c. 26, incorporating the town of Port Hope, the corporation had power to enforce regulations preventing cattle, swine, and other animals from running at large, by impounding and selling them, as well to liquidate damage occasioned by their so doing, as a fine imposed. Smith *v.* Riordan, 5 U. C. Q. B. O. S. 647.

Effect of specifying particular animals.— It seems that a by-law enacting that certain animals shall not run at large does not impliedly allow other animals not named to do so, contrary to the common law. Jack *v.* Ontario, etc., R. Union Co., 14 U. C. Q. B. 328.

8. Swander *v.* Wakefield, 84 Ill. App. 426.

respecting the impounding of animals, and their subsequent disposition or sale, are invalid unless they accord to the owner all his substantial rights, and furnish him adequate means of relief by his payment of proper charges.[9]

(B) *Authorizing Sale without Adjudication* — (1) FOR EXPENSES. The impounding of animals running at large, and their sale for expenses without judicial inquiry or determination, are within the authority conferred by a municipal charter. Such matters are the proper subject of municipal enactment in the exercise of the police power, to afford due protection to the public at large in the use and enjoyment of the public streets. They are not unconstitutional because authorizing the taking of property without due process of law.[10]

(2) FOR PENALTY. Ordinances or by-laws forfeiting animals, or authorizing their sale as a penalty for the violation of such ordinances or by-laws, are invalid unless such powers are especially granted by the legislature.[11] Where such powers have been granted, ordinances or by-laws authorizing the imposition of fines and penalties for permitting animals to go at large, their seizure, impounding, and sale without personal notice, judicial inquiry, or determination, have in some cases been held to be not unconstitutional, because authorizing a forfeiture or confiscation of property without due process of law or without compensation;[12] while in others the imposition of a penalty by way of fine on the owner, and making it a charge on the animal, to be deducted out of the proceeds of the sale or exacted before the surrender of the animal before sale, without a prior adjudication as to the violation of the enactment, have been held to be in conflict with constitutional provisions for the protection of property.[13] It has also been held that failure to provide for a judicial inquiry and determination does not deprive the owner of his day in court, where he has remedies — as replevin — by which the regularity of the impounding and the proceedings subsequent thereto may be ascertained.[14]

(IV) *PROVISIONS FOR NOTICE.* Ordinances or by-laws of this character must provide for such reasonable notice to the owner of the animal, or public notice of

9. Dillard *v.* Webb, 55 Ala. 468.

10. *Alabama.*— Dillard *v.* Webb, 55 Ala. 468.

Kansas.— Gilchrist *v.* Schmidling, 12 Kan. 263.

Michigan.— Campau *v.* Langley, 39 Mich. 451, 33 Am. Rep. 414; Grover *v.* Huckins, 26 Mich. 476.

North Carolina.— Whitfield *v.* Longest, 28 N. C. 268.

Wisconsin.— Wilcox *v.* Hemming, 58 Wis. 144, 15 N. W. 435, 46 Am. Rep. 625.

Necessity of imposition of penalty.— The power to provide for a sale for costs of impounding and keeping having been superadded to the power to sell for a penalty, it is not necessary to the valid exercise of the former that a penalty should be imposed also, and punishment inflicted to the full extent of the law. Grover *v.* Huckins, 26 Mich. 476.

Deprivation of right to jury trial.— An ordinance providing that if the owner of impounded animals fail to reclaim them within a certain time, "and pay all costs of impounding, and the damages which the stock may have done, the damages to be assessed by three disinterested men, citizens of said town," they should be sold to satisfy such costs and damages, is unconstitutional and void, because depriving the owner of a trial by jury. Bullock *v.* Geomble, 45 Ill. 218.

11. Varden *v.* Mount, 78 Ky. 86, 39 Am. Rep. 208; Johnson *v.* Daw, 53 Mo. App. 372; White *v.* Tallman, 26 N. J. L. 67; Rosebaugh *v.* Saffin, 10 Ohio 31.

12. *Colorado.*— Brophy *v.* Hyatt, 10 Colo. 223, 15 Pac. 399.

Iowa.— Gosselink *v.* Campbell, 4 Iowa 296.

New York.— Campbell *v.* Evans, 45 N. Y. 356 [*affirming* 54 Barb. (N. Y.) 566].

North Carolina.— Rose *v.* Hardie, 98 N. C. 44, 4 S. E. 41; Hellen *v.* Noe, 25 N. C. 493.

Pennsylvania.—Conier *v.* Whitney, 9 Phila. (Pa.) 184, 31 Leg. Int. (Pa.) 98.

South Carolina.—Crosby *v.* Warren, 1 Rich. (S. C.) 385.

Tennessee.—Knoxville *v.* King, 7 Lea (Tenn.) 441.

Texas.— Paris *v.* Hale, (Tex. Civ. App. 1896) 35 S. W. 333.

West Virginia.—Burdett *v.* Allen, 35 W. Va. 347, 13 S. E. 1012, 14 L. R. A. 337.

Canada.— Smith *v.* Riordan, 5 U. C. Q. B. O. S. 647.

13. *Illinois.*— Willis *v.* Legris, 45 Ill. 289; Poppen *v.* Holmes, 44 Ill. 360, 92 Am. Dec. 186.

Kentucky.— Armstrong *v.* Brown, 20 Ky. L. Rep. 1766, 50 S. W. 17; Varden *v.* Mount, 78 Ky. 86, 39 Am. Rep. 208.

North Carolina.—Shaw *v.* Kennedy, 4 N. C. 591.

Ohio.— Rosebaugh *v.* Saffin, 10 Ohio 31.

Wisconsin.— Wilcox *v.* Hemming, 58 Wis. 144, 15 N. W. 435, 46 Am. Rep. 625.

14. Gilchrist *v.* Schmidling, 12 Kan. 263.

its sale, as will afford him or others interested an opportunity to be heard, and to take such measures as may be advisable.[15]

b. Concerning Dogs. Ordinances and by-laws which require the owners of dogs to restrain them, or which authorize them to be killed if found at large, are a valid exercise of the police power conferred upon municipal or other local authorities.[16]

3. Stock Laws — a. In General. Generally, it may be said that statutes which authorize local courts or bodies to establish districts in which, in accordance with the wishes of a majority of the electors, stock may be restrained, or to direct what animals may be restrained or permitted to run at large within certain political subdivisions of the state,[17] or which provide for the submission to the people of a county, or subdivision thereof, of the question whether or not stock shall be permitted to run at large,[18] or for fencing districts from the rest of a county, and for a special tax within the district to defray the expense thereof,[19] are within the general scope of legislative authority. It has been held, however, that statutes designed to prohibit the running at large of domestic animals in a designated county, if the majority of the voters therein shall so decide,[20] or to prohibit the

15. Gilchrist *v.* Schmidling, 12 Kan. 263; Varden *v.* Mount, 78 Ky. 86, 39 Am. Rep. 208; Hellen *v.* Noe, 25 N. C. 493.

Constructive notice to unknown owners by posting for five days, with another five days before sale in which the owner may redeem, is reasonable. Armstrong *v.* Brown, 20 Ky. L. Rep. 1766, 50 S. W. 17.

Three days' advertisement is reasonable (Hellen *v.* Noe, 25 N. C. 493), but advertisement for two days is unreasonable (Mincey *v.* Bradburn, 103 Tenn. 407, 56 S. W. 273).

A sale on the day of its advertisement is not sufficient notice to the owner. Conier *v.* Whitney, 9 Phila. (Pa.) 184, 31 Leg. Int. (Pa.) 98.

Burden of proving notice.— In an action against a city to recover the value of an animal sold under an ordinance providing that stock found at large shall be impounded and sold after a prescribed notice, the burden is upon defendant to prove that the notice required by the ordinance was given. Ft. Smith *v.* Dodson, 51 Ark. 447, 11 S. W. 687, 14 Am. St. Rep. 62, 4 L. R. A. 252.

16. Haller *v.* Sheridan, 27 Ind. 494; Com. *v.* Markham, 7 Bush (Ky.) 486; Com. *v.* Chase, 6 Cush. (Mass.) 248; Com. *v.* Dow, 10 Metc. (Mass.) 382.

Validity of by-law.— A by-law imposing a penalty on any person permitting his dog to go at large, unless the dog should be licensed, and wear a collar having thereon the name of his owner or keeper, and the word "licensed;" and also a further penalty for permitting an unlicensed dog to wear a collar, is valid as to the first-mentioned penalty, though possibly the provision as to the second penalty is repugnant to a statutory provision requiring keepers or owners of dogs to provide them with suitably inscribed collars. Com. *v.* Dow, 10 Metc. (Mass.) 382.

Applicable only to dogs owned in town.— A by-law respecting dogs going at large will be construed to apply only to dogs owned or kept in the town, although, in its terms, it applies to "any person permitting his dog to go at large within the town." Com. *v.* Dow, 10 Metc. (Mass.) 382.

17. Edmondson *v.* Ledbetter, 114 Ala. 477, 21 So. 989; McGraw *v.* Greene County, 89 Ala. 407, 8 So. 852; Keyes *v.* Snyder, 15 Kan. 143; Noffzigger *v.* McAllister, 12 Kan. 315; Ratcliffe *v.* Teters, 27 Ohio St. 66; Fox *v.* Fox, 24 Ohio St. 335.

18. Erlinger *v.* Boneau, 51 Ill. 94; Dalby *v.* Wolf, 14 Iowa 228; Smalley *v.* Rutherford County, 122 N. C. 607, 29 S. E. 904.

An act which affects certain designated counties, and which, although rejected by the electors of any county, may be adopted by one or more of the precincts therein as a law operative within its territorial limits, is within the scope of legislative action. Erlinger *v.* Boneau, 51 Ill. 94.

Such statutes are not violative of the principle of local self-government, because the electors of subdivisions which have adopted the law may petition and vote for its extension so as to include the county limits. Smalley *v.* Rutherford County, 122 N. C. 607, 29 S. E. 904.

Embracing portions of other statutes.— A portion of an act regulating the running of animals at large which refers to, and adopts part of, an act concerning estrays with respect to notice and the reclamation of animals, is a mere adoption of a mode effectuating the purposes of the act, which need not be embraced in its title, and will not be deemed an amendment of the estray laws. Erlinger *v.* Boneau, 51 Ill. 94.

19. Spigener *v.* Rives, 104 Ala. 437, 16 So. 74.

Inoperative unless fences erected in certain time.— Such an act will not be deemed objectionable, unreasonable, or contrary to public policy because further providing that the law, though adopted, shall not become operative unless the fence shall be erected within a prescribed time. Puckett *v.* Young, 112 Ga. 578, 37 S. E. 880.

20. Lammert *v.* Lidwell, 62 Mo. 188, 21 Am. Rep. 411.

running at large of animals in such counties of the state as may by majority vote agree to make the law applicable thereto,[21] are unconstitutional because a delegation of the law-making power. Likewise it has been held that an act denouncing as an offense the wilful permitting of stock to run at large in local-option territory is invalid and inoperative as to counties which previously had adopted a stock law providing a civil remedy for its violation.[22]

b. Adoption by Election — (I) *In General.* There is no power to unite several adjoining districts into one territory, provide for the construction of one boundary fence, and assess a uniform tax to meet the expense of the fence, unless that power is conferred by the legislature,[23] nor can a subdivision which has adopted the law be made a part of a larger subdivision of a county, for the purpose of an election.[24] An act which is intended to regulate the whole subject of restraining domestic animals in the state has the effect of repealing a law adopted by the people of a particular county and hence applicable thereto.[25]

(II) *Application for.* An application for an election, to determine whether or not stock shall be permitted to run at large in particular localities, should accurately designate the locality to be affected.[26]

(III) *Necessity of Submitting Precise Question.* An election is a nullity if the order directing it submits a different question for determination than that presented by the petition;[27] but where it is competent to submit the question as to different kinds of animals in a divided form, the submission need not be joint, but may be for the restraint of one to the exclusion of the other.[28]

(IV) *The Election*[29] — (A) *When Held.* Where the statute provides that the election may be held at any general election,[30] and thereafter a general law is passed repealing such act in respect to the manner of conducting elections, the vote must be in pursuance of the mode prescribed by the repealing act.[31]

(B) *Managers.* A statutory provision that one of two managers appointed to hold an election shall be for the law, and the other against it, is directory, and not mandatory.[32]

(C) *What Constitutes Majority.* A majority of the votes cast, and not a majority of the votes of those eligible to vote, will determine the adoption or rejection of the proposed law in any particular locality of the state.[33]

(V) *Effect of Adoption.* In some jurisdictions, if a county as a whole vote to adopt an act to prevent certain animals from running at large, the act will be

21. Weir *v.* Cram, 37 Iowa 649; Lammert *v.* Lidwell, 62 Mo. 188, 21 Am. Rep. 411.

If such an act is complete without an invalid section making the operation of the law depend upon a vote of the people of the different counties, it is not amenable to this objection. Weir *v.* Cram, 37 Iowa 649.

22. McElroy *v.* State, 39 Tex. Crim. 529, 47 S. W. 359.

23. Bradshaw *v.* Guilford County, 92 N. C. 278, where commissioners so acted under a statute providing that, upon the application of a specified proportion of the qualified voters of any district or territory in certain counties, it should be their duty to submit the question of stock law or no stock law, and to build a fence if the stock law was voted for.

24. Gilley *v.* Haddox, (Tex. App. 1891) 15 S. W. 714.

25. Crumley *v.* Kansas City, etc., R. Co., 32 Mo. App. 505.

26. An application describing the boundaries of the district in which the election was to be held as "well defined" is too indefinite to admit of proof to locate the boundaries; but, if the beginning is stated to be "at a certain tract of land," the uncertainty is overcome where there are calls for other definite boundaries. Newsom *v.* Earnheart, 86 N. C. 391.

27. McElroy *v.* State, 39 Tex. Crim. 529, 47 S. W. 359, wherein the petition was to determine whether "hogs, sheep, and goats" should be prohibited from running at large, and the order directing the election was to determine whether "hogs, sheep, or goats" should be so prohibited.

28. Cowl *v.* Ritchey, 23 Iowa 583.

29. Expense of election — To whom chargeable. — Under the North Carolina code the expense of township or territorial adoption of the stock law is not a county charge. Smalley *v.* Rutherford County, 122 N. C. 607, 29 S. E. 904.

30. Vogt *v.* Dunley, 97 Ill. 424.

31. Thus, where the form of the ballot is prescribed, the election under the stock law must be had by the use of such ballots. Union County *v.* Ussery, 147 Ill. 204, 35 N. E. 618.

32. Hawthorn *v.* State, 116 Ala. 487, 22 So. 894.

33. Holcomb *v.* Davis, 56 Ill. 413.

operative throughout the county;[34] but if, by a majority of the votes, the county refuses to adopt the act, it will then become a law in such townships, precincts, or subdivisions of the county as may have voted for its adoption.[35] Although a county vote in favor of stock running at large, a municipality within the county, having authority under its charter, may adopt an ordinance prohibiting the running at large within its limits of certain specified animals.[36]

(VI) *Resubmission.* Statutes of this character usually provide that there may be a resubmission of the question within prescribed periods, and provide for the effect of a previous adoption or rejection on the right to vote at a new election.[37]

c. Adoption by Order — (I) *In General.* A statute authorizing the establishment of a stock-law district, consisting of a part or parts of a county separated by natural boundaries, will not authorize the establishment of a district irregular in shape, without natural boundaries, and so formed as to include persons who favor the law and exclude those who oppose its operation.[38]

(II) *Petition.*[39] The petition for an order directed to the board of county commissioners should conform substantially to the requirements of the statute,[40]

34. Erlinger *v.* Boneau, 51 Ill. 94.

35. Bach *v.* Ammons, 106 Ill. 406; Erlinger *v.* Boneau, 51 Ill. 94.

36. Quincy *v.* O'Brien, 24 Ill. App. 591.

37. Bach *v.* Ammons, 106 Ill. 406; Jacobs *v.* Hayes, 65 Ill. 87.

In Georgia, where the system requiring landowners to fence to exclude the stock of their neighbors is abrogated by vote, a further election to restore the preëxisting statutes as to fences cannot be had. Newton *v.* Ferrill, 98 Ga. 216, 25 S. E. 422.

In Illinois, two kinds of elections are provided for — one by counties, and the other by certain subdivisions thereof. A county vote in favor of the law is binding on it and each integral part thereof for five years regardless of the vote of such parts, and the question cannot be reconsidered for five years. If the county rejects the law any township or precinct may call an election for the purpose of again submitting the question, without regard to the vote of the town or precinct at the county election; and if the law is again rejected the question may be again submitted to the voters of such town or precinct until the law is adopted, after which the question cannot be submitted for five years. After the adoption of township organization, the county as such may vote upon the question of adoption, although some of the towns therein have adopted it, and such towns, within five years from their prior vote, may again vote on the question. Bach *v.* Ammons, 106 Ill. 406.

Under the Illinois stock law of 1874 an election might be had at every general election until the result should be against cattle running at large; but, after a vote requiring domestic animals to be kept up by their owners, no other vote upon that subject could be had until five years had expired. Vogt *v.* Dunley, 97 Ill. 424.

A statute empowering county courts to resubmit the questions confers no authority to order a new election on a board of supervisors of a county which has adopted township organizations. Jacobs *v.* Hayes, 65 Ill. 87.

In Oklahoma, where a proposition to permit the free range of cattle has been defeated at an election held under the herd law of 1893, c. 2, art. 2, § 4, a second election is not a resubmission of the proposition within that section so that a majority of the votes will suffice to carry it. Washita County *v.* Haines, 4 Okla. 701, 46 Pac. 561.

In Texas, under Rev. Stat. art 5001*c*, authorizing the extension of the stock law to territory wherein there are no freeholders, to a subdivision of a county which has adopted the law, and article 4997, providing that no new election shall be had in a subdivision of a county in which the stock law has been defeated within twelve months from the time of such defeat, the fact that the territory to which it is proposed to extend the law constituted a part of a subdivision which had rejected the law within twelve months will not prevent such extension, and the annexation of the territory to an adjoining subdivision which has adopted the law. Stokes *v.* Winfree, 23 Tex. Civ. App. 690, 57 S. W. 918.

38. Gore *v.* Doolittle, 77 Miss. 620, 27 So. 997, holding that, under the Mississippi statute, a stock-law district which is less than a county should compose a compact body formed of complete sections, and embracing at least thirty-six square miles.

39. For form of petition to the probate court for the establishment of stock-law district see Edmondson *v.* Ledbetter, 114 Ala. 477, 21 So. 989.

40. A petition simply "praying for the night-herd law to be enforced in said township" is insufficient. Noffzigger *v.* McAllister, 12 Kan. 315.

Presumption as to signatures.— In the absence of any showing to the contrary, it will be presumed that the names on the petition were in fact the names and the genuine signatures of legal voters. St. Louis, etc., R. Co. *v.* Mossman, 30 Kan. 336, 2 Pac. 146.

Insufficient showing as to signers.— An affidavit stating that the "affiant . . . presented the within petition to the legal voters of Mission township, Shawnee county, Kansas, and that each of those who signed the same are legal voters and electors," etc., is insufficient to show that the petitioners are

and such petition must be duly presented to the said board of county commissioners.[41]

(III) *Hearing.* The hearing must be so conducted as to ascertain the sense or wishes of those entitled to be heard, and the propriety of granting the change prayed for.[42]

(IV) *The Order*—(A) *In General.* If the proceedings are regular and accord with statutory requirements, it is the duty of the court or body by which the proceedings are entertained to make such an order as the facts warrant or to issue or refuse to issue a permit;[43] but the court cannot act if, by failure to observe the terms of the statute, no jurisdiction is conferred upon it.[44]

(B) *By Whom Made.* Where power to make an order or grant a permit is conferred on a board, the action of a majority will be sufficient.[45]

(C) *Sufficiency.* The order or permit must be authorized by the statute, and must be in the form prescribed or contemplated, or it will be a nullity;[46] but mere irregularities of a ministerial nature will not affect the validity of a permit otherwise unobjectionable.[47]

(V) *Publication of Order.* Where the law becomes operative only after publication for the time prescribed by statute of the order made, the publication must be complete before the law will take effect.[48] The proof of publication must show that it was made in the mode and for the time prescribed;[49] but if publication is complete, the order will not be invalidated, nor its operation postponed, by delay in filing and recording such proof.[50]

"qualified electors" of the township, by whom a petition may be presented. Kungle *v.* Fasnacht, 29 Kan. 559.

41. Noffzigger *v.* McAllister, 12 Kan. 315, also holding that a recital in the order that a petition was presented is not sufficient evidence of that fact.

42. In ascertaining the sense or wishes of the resident landowners and freeholders in the proposed district, the court may refuse to count or consider persons to whom, after the filing of the petition, small fractions of land were conveyed solely to enable them to join in the contest. McGraw *v.* Greene County, 89 Ala. 407, 8 So. 852.

The petition is admissible, when shown to have been signed by those whose names it bears, to show that they favor the establishment of a stock-law district. Edmondson *v.* Ledbetter, 114 Ala. 477, 21 So. 989.

43. Stanfill *v.* Dallas County, 80 Ala. 287; Lauer *v.* Livings, 24 Kan. 273.

44. Noffzigger *v.* McAllister, 12 Kan. 315.

45. Tinkham *v.* Greer, 11 Kan. 299; Fox *v.* Fox, 24 Ohio St. 335.

Permit to member of board.—A special permit may be granted by two township trustees, at a special meeting, although the person to whom the permit is directed is a member of the board. Fox *v.* Fox, 24 Ohio St. 335.

46. **Under the Kansas statute,** there is no authority to make an order prohibiting stock from running at large in a portion of a county, that is, in certain townships. Keyes *v.* Snyder, 15 Kan. 143.

In Michigan, where the prohibition is not intended to reach all classes of animals, a special resolution, designating particularly and prohibiting the particular class or classes designed to be restrained, is necessary; but is not necessary where all classes alike are to be restrained from running at large. Cook *v.* Bassett, 23 Mich. 113.

In Ohio it is not necessary that the permit should particularly describe each animal licensed to run at large, or state the number of such animals; but it will be enough if the class or classes of animals are described, and a statement made that they are owned by, or are under the charge of, the person to whom permission is granted. Ratcliff *v.* Teters, 27 Ohio St. 66.

47. Ratcliff *v.* Teters, 27 Ohio St. 66, where a permit was officially granted, but, by neglect of the township clerk, was not immediately recorded.

Relation back of order.—A permit, based upon a preëxisting order when issued, but signed at a subsequent time, will relate back to the time of the grant, and rights acquired under it will not be divested or affected by delay in recording its allowance. Ratcliff *v.* Teters, 27 Ohio St. 66.

48. Pond *v.* Treathart, 43 Kan. 41, 22 Pac. 1014; Reed *v.* Sexton, 20 Kan. 195.

When the order is published in a weekly newspaper it is not necessary that it should be inserted five times. Four insertions are all that are necessary. The law will go into operation on the beginning of the twenty-ninth day after the first publication. Reed *v.* Sexton, 20 Kan. 195.

49. An affidavit, stating that the order had been published in a weekly newspaper for four weeks, giving the date of the first publication, but failing to state when the other publications were made, or that there was a publication for four consecutive weeks, is insufficient. Pond *v.* Treathart, 43 Kan. 41, 22 Pac. 1014.

50. Hoover *v.* Mear, 16 Kan. 11, wherein the publication of the order for four successive weeks was not completed until after the time

(vi) *Effect.* A resolution that a designated township shall be exempted from the operation of the act in effect makes it unlawful to permit the animals designated to run at large in other townships of the county.[51]

(vii) *Review.* If no mode of review is provided by the statute authorizing the establishment of districts, certiorari is the proper remedy.[52] If there is no proof of the existence of an order which by implication is necessary, the reviewing court will determine the matter submitted by the general rules of law.[53]

B. What Constitutes Running at Large — 1. In General. Going at large, when predicated of animals, has been held to mean the being without restraint or confinement.[54]

2. Escaping from Owner. By the weight of authority, if the owner of animals exercise ordinary care and diligence in restraining them, but, without fault on his part, they escape, and he makes diligent search for them, they cannot be said to be running at large.[55] It is otherwise if animals are at large through the negligence of the owner, or of his servants, or are permitted to go at large after knowledge of their escape.[56] The fact that an animal is at large is *prima facie* evidence that it is at large contrary to the terms of the statute.[57]

3. On Highway. When upon a public highway an animal is not at large, unless, by some statute, the presence of an animal there constitutes a going at large;[58] in this case the animal may be taken up for that reason.[59]

4. On Land of Owner or Another. An animal on the land of its owner,[60] or on the land of another, with[61] or without[62] the permission of the latter, is not at large unless the statute so provides.

specified in it as the time it was to take effect, but no affidavit was made and recorded until a month thereafter, and it was held that the order went into effect upon the completion of the publication, and was not invalidated by the fact that the publication was not and could not be completed prior to the time fixed by the commissioners as the time at which it was to take effect.

51. Cook *v.* Bassett, 23 Mich. 113.

52. Stanfill *v.* Dallas County, 80 Ala. 287.

53. Indianapolis, etc., R. Co., *v.* Caldwell, 9 Ind. 397.

54. Goener *v.* Woll, 26 Minn. 154, 2 N. W. 163.

55. *Illinois.*— Kinder *v.* Gillespie, 63 Ill. 88.

Indiana.—McBride *v.* Hicklin, 124 Ind. 499, 24 N. E. 755; Stephenson *v.* Ferguson, 4 Ind. App. 230, 30 N. E. 714; Wolf *v.* Nicholson, 1 Ind. App. 222, 27 N. E. 505.

Kansas.— Leavenworth, etc., R. Co. *v.* Forbes, 37 Kan. 445, 15 Pac. 595; Kansas Pac. R. Co. *v.* Wiggins, 24 Kan. 588.

New York.— Tonawanda R. Co. *v.* Munger, 5 Den. (N. Y.) 255, 49 Am. Dec. 239.

Ohio.— Rudi *v.* Lang, 12 Ohio Cir. Ct. 529, 1 Ohio Cir. Dec. 482; Holtzkemper *v.* Langloth, 8 Ohio Cir. Ct. 520.

Pennsylvania.— Com. *v.* Fourteen Hogs, 10 Serg. & R. (Pa.) 393.

Vermont.— Adams *v.* Nichols, 1 Aik. (Vt.) 316.

Wisconsin.— Montgomery *v.* Breed, 34 Wis. 649.

Contra, Darling *v.* Boston, etc., R. Co., 121 Mass. 118; Paris *v.* Hale, (Tex. Civ. App. 1896) 35 S. W. 333.

The degree of care required is not such as will amount to an obligation to restrain the animal at all events, nor greater care than is usually taken by careful and prudent persons under like circumstances. Selleck *v.* Selleck, 19 Conn. 501.

56. Selleck *v.* Selleck, 19 Conn. 501; Schlachter *v.* Wachter, 78 Ill. App. 67; Conway *v.* Jordan, 110 Iowa 462, 81 N. W. 703; Adams *v.* Nichols, 1 Aik. (Vt.) 316.

Animals trespassing on the premises of another, and not under the immediate control of their owner, are "running at large," within Okla. Stat. (1893), c. 2, art. 2. Gilbert *v.* Stephens, 6 Okla. 673, 55 Pac. 1070.

57. Holtzkemper *v.* Langloth, 8 Ohio Cir. Ct. 520.

58. McManaway *v.* Crispen, 22 Ind. App. 368, 53 N. E. 840; Beeson *v.* Tice, 17 Ind. App. 78, 45 N. E. 612, 46 N. E. 154; Kanakanui *v.* Manini, 8 Hawaii 710.

59. A turnpike is a public highway within Mass. Rev. Stat. c. 19, § 22, authorizing the taking up and impounding of cattle going at large in the public highways. Pickard *v.* Howe, 12 Metc. (Mass.) 198; Gilmore *v.* Holt, 4 Pick. (Mass.) 258.

60. McAneany *v.* Jewett, 10 Allen (Mass.) 151; Shepherd *v.* Hees, 12 Johns. (N. Y.) 433.

An animal pasturing on a highway, which, to the center, is the property of its owner, is not at large. Parker *v.* Jones, 1 Allen (Mass.) 270.

61. Missouri Pac. R. Co. *v.* Shumaker, 46 Kan. 769, 27 Pac. 126; Martin *v.* Reed, 10 Pa. Co. Ct. 614.

Permission.— A bull which has broken into the pasture of an adjoining owner, who permits its owner to allow it to remain there over night, is running at large in the nighttime within Nebr. Comp. Stats. c. 2, art. 3, § 14. Duggan *v.* Hansen, 43 Nebr. 277, 61 N. W. 622.

62. Gooding *v.* Atchison, etc., R. Co., 32 Kan. 150, 4 Pac. 136; Atchison, etc., R. Co. *v.* Riggs, 31 Kan. 622, 3 Pac. 305.

5. Suffering Animal to Go at Large. Suffering or permitting an animal to go at large implies knowledge, consent, or willingness on the part of the owner,[63] or such negligent conduct as is equivalent thereto;[64] but does not comprehend a case where, through some untoward circumstance, the owner is unable to watch and care for it in a particular instance.[65]

6. Without a Keeper. Animals are not at large without a keeper or person in charge, if they are under the control of a person having the right of control,[66] or possessing the means by which a person of ordinary intelligence and judgment could control the actions of the animals.[67] The animals must, however, be efficiently controlled.[68]

C. Enforcement of Regulations against Running at Large — 1. By Action — a. In General. Under some statutes and ordinances penalties for allowing animals to run at large,[69] or for keeping unlicensed dogs,[70] are recoverable in a civil action and not by a criminal prosecution.

b. Persons Liable. When several male animals, owned by different persons, escape together, the owner of each is liable to a penalty for the escape of his own, and the payment by one of his penalty is no discharge of the liability of the others.[71]

c. Who May Sue. Under a statute designed to preserve the breeds of animals,

A horse which goes upon adjoining inclosed land, and thence, through a gap in the fence, to the land of another, is not running at large within Ohio Rev. Stat. § 4202. Rutter *v.* Henry, 46 Ohio St. 272, 20 N. E. 334.

Trespassing animals, which have not come from a public place, are not running at large "in any public street, . . . place, or highway." Bates *v.* Nelson, 49 Mich. 459, 13 N. W. 817.

63. Selleck *v.* Selleck, 19 Conn. 501; Ohio etc., R. Co. *v.* Jones, 63 Ill. 472; Case *v.* Hall, 21 Ill. 632; Com. *v.* Fourteen Hogs, 10 Serg. & R. (Pa.) 393; Adams *v.* Nichols, 1 Aik. (Vt.) 316.

Grazing on public street.— A mere incidental act of grazing, as if an animal were to snatch a mouthful of grass when being led, is not grazing on a public street within a statutory inhibition thereof. But while there must be something substantial, it is not necessary that there should be a design or intention. Petersburg *v.* Whitnack, 48 Ill. App. 663.

64. Collinsville *v.* Scanland, 58 Ill. 221; Leavenworth, etc., R. Co. *v.* Forbes, 37 Kan. 445, 15 Pac. 595. See also Sloan *v.* Hubbard, 34 Ohio St. 583, wherein it was held that animals are at large, with or without the consent or default of the owner, when they are going at large without the permission of the local authorities, which, under the statute, may be given by them under certain circumstances.

A horse which is turned loose near the confines of a city and strays therein is "permitted" to run at large. Moore *v.* Crenshaw, 1 Tex. App. Civ. Cas. § 264.

65. Collinsville *v.* Scanland, 58 Ill. 221, where the owner, being called to the bedside of a dying brother, failed to prevent from straying animals which he had watched and cared for daily.

66. Beeson *v.* Tice, 17 Ind. App. 78, 45 N. E. 612, 46 N. E. 154; Bertwhistle *v.* Goodrich, 53 Mich. 457, 19 N. W. 143; Ibbottson *v.* Henry, 8 Ont. 625.

A frightened horse which escapes from its owner is not running at large. Presnall *v.* Raley, (Tex. Civ. App. 1894) 27 S. W. 200.

Colt running with dam.— A colt three months old, running along directly in front and by the side of its dam, while the latter is being driven to a wagon through the streets, is not "running at large." Elliott *v.* Kitchens, 111 Ala. 546, 20 So. 366, 56 Am. St. Rep. 69, 33 L. R. A. 364.

Cattle, attended by a herder who accidentally falls asleep, are not running at large when they casually eat grass along the roadside. Thompson *v.* Corpstein, 52 Cal. 653.

A person who finds cattle at large, and drives them along the highway until he finds a field-driver, is not a keeper, within the meaning of Mass. Rev. Stat. c. 19, § 22. Bruce *v.* White, 4 Gray (Mass.) 345.

67. Jennings *v.* Wayne, 63 Me. 468, wherein it was held that having charge of an animal does not necessarily imply physical power of control, but includes the human voice, gestures, and similar methods of guiding animals, regard being had to their nature, age, and dispositions.

68. Bruce *v.* White, 4 Gray (Mass.) 345, where cattle, intrusted by their owner to a servant, to be driven to pasture, with other cattle, left the drove a mile before reaching the pasture, and turned into a different road, also leading to the pasture, over which they had sometimes been driven, and there remained feeding, and the servant returned in less than an hour to the place where he lost them.

A dog, following a person on a public street at such a distance that he cannot be controlled, is "going at large." Com. *v.* Dow, 10 Metc. (Mass.) 382.

69. Willis *v.* Legris, 45 Ill. 289; Cotton *v.* Maurer, 5 Thomps. & C. (N. Y.) 575.

70. Ives *v.* Jefferson County, 18 Wis. 166; Carter *v.* Dow, 16 Wis. 298.

71. Town *v.* Lamphire, 37 Vt. 52.

the keeper of a herd or flock, though not the owner of them all, may sue the owner of a male animal which, while running at large, has become mingled with such herd or flock.[72]

d. Defenses. In an action to recover a penalty for allowing animals to run at large, the defense must show that there was some positive wrongful act of the prosecutor himself,[73] or an act which could not be prevented by the utmost care and diligence of the owner or keeper.[74]

e. Evidence. In an action to recover the penalty under a statute providing for the restraint of rams, evidence respecting the fence through which the ram escaped, or respecting that between the land where the ram was pastured and the land to which he escaped, is not admissible.[75]

2. By Castration. There are certain statutes intended to enable owners to protect their blooded stock from contact with males which may adulterate the strain. Under these statutes it is lawful for one who finds a male animal running at large to castrate the animal in a careful way, doing no more harm than is necessary, such person having previously given notice to the owner.[76]

3. By Criminal Prosecution — a. For Driving out of Lawful District to Impound. Under a statute making it an offense to drive cattle out of a district where they may lawfully run at large into a district where they may not, for the purpose of there impounding them, it is essential that the animals must have been running at large in a district where it is lawful for them so to do; they must be driven or carried into another district where it is not lawful for them so to do; and the person who so drives or carries such animals must do so knowingly and wilfully, with the intention that such animals shall be impounded. Unless all these elements concur the statutory offense is not committed.[77]

b. For Keeping Unlicensed Dog — (i) *Persons Liable.* The keeper,[78] and not the owner,[79] is liable to the penalty for keeping an unlicensed and unregistered dog.

(ii) *What Constitutes Keeping.* If the owner of a dog takes it to a town other than that in which it is registered and licensed, and keeps it there for four months, although the owner goes there with the intention of remaining temporarily, the dog is "kept" in the town to which it is so taken within the meaning of a statute requiring the owner to transfer the license to the city or town to which the keeping of the dog is transferred.[80]

(iii) *Jurisdiction.* The penalties in relation to dogs, imposed by the by-laws of a town, may be recovered by complaint before the police court of that town.[81]

(iv) *The Complaint.*[82] A complaint for keeping or owning an unlicensed dog

72. Hall *v.* Adams, 1 Aik. (Vt.) 166, 2 Aik. (Vt.) 130.

73. Town *v.* Lamphire, 37 Vt. 52, holding that the owner or keeper of a ram is bound to restrain him, at all events, during the season prescribed, and that he cannot rely for a defense upon the promise of an adjoining owner to keep up a legal fence.

74. Cotton *v.* Maurer, 1 Thomps. & C. (N. Y.) 481; Town *v.* Lamphire, 36 Vt. 101; Hall *v.* Adams, 1 Aik. (Vt.) 166, 2 Aik. (Vt.) 130.

75. Town *v.* Lamphire, 37 Vt. 52.

76. Owens *v.* Hannibal, etc., R. Co., 58 Mo. 386, Schwarz *v.* Hannibal, etc., R. Co., 58 Mo. 207.

77. Ghent *v.* State, 96 Ala. 17, 11 So. 130, holding that it is not a violation of the statute (Ala. Code, § 3868), to drive or carry an animal, with the intention of impounding it, from one place in a district in which it is unlawful for it to run at large to another place in the same district.

78. Jones *v.* Com., 15 Gray (Mass.) 193.

79. Com. *v.* Canada, 107 Mass. 405.

One who purchases an unlicensed dog after the thirtieth day of April in any year is not subject to a penalty, under Mass. Gen. Stat. c. 88, §§ 52, 55, 56, for the omission to cause him to be registered, numbered, described, and licensed, until the thirtieth day of April of the next year. Com. *v.* Brimblecom, 4 Allen (Mass.) 584.

80. Com. *v.* Palmer, 134 Mass. 537.

81. Com. *v.* Dow, 10 Metc. (Mass.) 382.

Prior to the taking effect of the Massachusetts General Statutes, a magistrate had no jurisdiction to try a defendant charged with keeping an unregistered dog, in violation of Mass. Stat. (1859), c. 225, § 9, in the town in which the magistrate lived. Hush *v.* Sherman, 2 Allen (Mass.) 596.

82. For forms of complaints: For keeping unlicensed dog see Com. *v.* Palmer, 134 Mass. 537; Com. *v.* Thompson, 2 Allen (Mass.) 507; Com. *v.* Gorman, 16 Gray (Mass.) 601.

may allege that the unlawful act extended over many successive days, and be sustained by proof applying to any part of the period;[83] and an averment that defendant "did keep a certain dog, without said dog being then and there licensed according to law," is sufficient without alleging that the dog was not "registered, numbered, and described," or that he was not licensed in any other town than that named in the complaint.[84]

(v) *Evidence.* The fact that a man applied for a license to keep a dog is competent evidence that he was the owner or keeper of the dog, on the trial of a complaint against him for keeping a dog without a license.[85]

c. For Permitting Animals on City Sidewalks.[86] Where a city ordinance forbids animals being driven through its streets to go upon any sidewalk, or otherwise to occupy, obstruct, injure, or encumber such sidewalks so as to interfere with the use of the same by passengers, one who voluntarily drives animals through the streets must prevent them at all hazards from doing the acts forbidden; and, if he fails to do so, he may be convicted of violating the ordinance.[87]

4. By Impounding — a. The Right — (i) *In General.* If the right to impound is purely statutory animals at large may not be legally taken up unless some law or ordinance in force confers that right.[88] But the right, when conferred, is unaffected by the fact that no place has been provided for their confinement,[89] or by the fact that the impounder may have a remedy against the owner.[90]

(ii) *On Sunday.* While it has been held that animals may be taken up and impounded on Sunday,[91] the contrary has also been held.[92]

b. Who May Impound. When the right to take up and impound animals at large is conferred only on particular officials,[93] or upon a class of persons as householders[94] or residents of the district in which the law exists,[95] the action of others in this respect is illegal. Authority conferred on a particular official cannot be delegated;[96] but the mere fact that the taking up by an officer was, in its

For allowing dog to go at large when unlicensed see Com. *v.* Dow, 10 Metc. (Mass.) 382.

83. Com. *v.* Canada, 107 Mass. 405.

84. Com. *v.* Thompson, 2 Allen (Mass.) 507.

85. Com. *v.* Gorman, 16 Gray (Mass.) 601.

86. For form of complaint for permitting swine to go at large upon the sidewalks of a city see Com. *v.* Curtis, 9 Allen (Mass.) 266.

87. Com. *v.* Curtis, 9 Allen (Mass.) 266.

Evidence.— Where a complaint for such offense is sought to be supported by proof that defendant hired and paid some of the drivers who had the immediate charge of the cattle, and who permitted them to go upon the sidewalks, defendant may, in reply, introduce evidence of a conversation between himself and the owner of some of the cattle, in which such owner requested him to employ and pay such drivers; but the way-bills of the cattle, on a railroad, are not admissible to show that defendant did not own them. Com. *v.* Leavitt, 12 Allen (Mass.) 179.

88. Kanakanui *v.* Manini, 8 Hawaii 710; Miles *v.* Chamberlain, 17 Wis. 446.

Where an ordinance prohibiting animals from running at large within city limits was repealed by an amendatory ordinance prohibiting them from running at large within such limits "as may from time to time be designated," it was held that there was no authority to take up and sell a horse found running at large after the amendatory ordinance took effect, and before there had been a designation of the limits to which it should apply. Lenz *v.* Sherrott, 26 Mich. 139.

An impounding is not justified by an ordinance merely subjecting the owner to a fine for permitting an animal to go at large. Oil *v.* Rowley, 69 Ill. 469.

89. Sloan *v.* Hubbard, 34 Ohio St. 583.

90. Conway *v.* Jordan, 110 Iowa 462, 81 N. W. 703.

91. Wild *v.* Skinner, 23 Pick. (Mass.) 251.

92. Frost *v.* Hull, 4 N. H. 153.

93. McManaway *v.* Crispen, 22 Ind. App. 368, 53 N. E. 840.

An ordinance authorizing a street inspector to take up and impound animals, and to employ necessary assistants, will not authorize any person to act except the inspector and his assistants, acting under his immediate directions, though the inspector had given public notice that any person who should drive animals to pound would be paid therefor. Jackson *v.* Morris, 1 Den. (N. Y.) 199.

94. Holcomb *v.* Davis, 56 Ill. 413; Erlinger *v.* Boneau, 51 Ill. 94.

95. Frazier *v.* Goar, 1 Ind. App. 38, 27 N. E. 442, wherein it is also held that an answer seeking to justify a taking up must show that defendant was a resident at the time of the taking.

96. McManaway *v.* Crispen, 22 Ind. App. 368, 53 N. E. 840, in which it is further held that, conceding the power of the officer to delegate his authority, he alone has the right to replevy animals, impounded by a person on whom he has attempted to confer author-

inception, through the agency of another, will not render the action of the officer illegal.[97]

c. What Animals May Be Impounded — (I) *In General.* A statute requiring the restraint of specified animals will not justify the impounding of other animals of the same species running at large, if they are not within the terms or spirit of the statute,[98] and any animal, to be lawfully impounded, must be running at large at the time [99] and in a place [1] contemplated by the statute which prohibits such act.

(II) *Animals Exempt from Execution.* The exemption of an animal from seizure or sale on execution will not exempt it from being taken up, impounded, and sold.[2]

(III) *Animals of Non-Residents.* Statutes, ordinances, or by-laws, designed to restrain animals from running at large, or providing for taking them up or impounding them, are applicable to the animals of persons residing without the territory in which the law is in force,[3] notwithstanding a statute prohibiting the charging of fines and poundage in the case of stray animals belonging to non-residents.[4]

d. Impounding for Different Causes. It has been held that animals may not be taken up and impounded at the same time under two different statutory provisions,[5] one intended for the benefit of the public and the person who has sustained damage, and the other for the benefit of the owner of the animal.[6]

ity, which had escaped and returned to their owner.

97. O'Mally *v.* McGinn, 53 Wis. 353, 10 N. W. 515.

In Friday *v.* Floyd, 63 Ill. 50, a constable, empowered to impound, met persons driving animals to the pound, and assisted them in so doing. The persons were acting under general instructions, at an agreed compensation, but not under any directions of the officer as to the particular animals in question. It was held that as the officer found the animals at large before they were impounded, his detention of them was lawful.

98. Breeding animals.— Thus an act making it unlawful for the owners of animals of the "species bull" to allow such animals to run at large, will not extend to cows, heifers, or steers (Oil *v.* Rowley, 69 Ill. 469); and a statute designed to restrain stallions from running at large is inapplicable to young colts which are too young to be dangerous or troublesome (Aylesworth *v.* Chicago, etc., R. Co., 30 Iowa 459).

99. Clark *v.* Lewis, 35 Ill. 417.

An ordinance requiring animals to be restrained "on and after" May 1, and making it the duty of an officer to impound them if found at large "after the above date," will not authorize him to impound on May 1. Frazier *v.* Draper, 51 Mo. App. 163.

1. Nafe *v.* Leiter, 103 Ind. 138, 2 N. E. 317; Blanck *v.* Hirth, 56 Mich. 330, 23 N. W. 31.

2. Wilcox *v.* Hemming, 58 Wis. 144, 15 N. W. 435, 46 Am. Rep. 625.

3. *Alabama.*— Hawthorn *v.* State, 116 Ala. 487, 22 So. 894.

Illinois.— Friday *v.* Floyd, 63 Ill. 50.

Indiana.— Horney *v.* Sloan, 1 Ind. 266.

Iowa.— Gosselink *v.* Campbell, 4 Iowa 296.

Massachusetts.— Gilmore *v.* Holt, 4 Pick. (Mass.) 258.

Missouri.— See Spitler *v.* Young, 63 Mo. 42.

North Carolina.— State *v.* Tweedy, 115 N. C. 704, 20 S. E. 183; Rose *v.* Hardie, 98 N. C. 44, 4 S. E. 41; Whitfield *v.* Longest, 28 N. C. 268.

South Carolina.— Kennedy *v.* Sowden, 1 McMull. (S. C.) 323.

Texas.— Moore *v.* Crenshaw, 1 Tex. App. Civ. Cas. § 264.

But, in Plymouth *v.* Pettijohn, 15 N. C. 591, it was held that an ordinance requiring cattle to be penned up at night was not applicable to non-residents whose cattle strayed within the limits of the corporation.

In Ohio, by statute, the operation of town ordinances affecting animals was limited to animals owned by citizens of the town. See Dodge *v.* Gridley, 10 Ohio 173; Marietta *v.* Fearing, 4 Ohio 427.

Where, by its charter, the ordinances of a municipality are not obligatory on non-resident citizens of the state, unless such ordinances are intentionally violated, an ordinance will become operative against the animals of any person who, with knowledge of the ordinance, has good reason to believe that his animals will stray into the city when turned loose on his premises, although it is not shown that he had the specific intent that they should so stray. Knoxville *v.* King, 7 Lea (Tenn.) 441.

4. Aydlett *v.* Elizabeth City, 121 N. C. 4, 27 S. E. 1002, holding, also, that such a prohibition does not prevent a town from impounding stray cattle of non-residents, and selling them for the cost of feeding while they were impounded.

5. As for going at large in the highway without a keeper, and for doing damage on private lands. Phillips *v.* Bristol, 131 Mass. 426.

6. Varney *v.* Bowker, 63 Me. 154.

e. Duties of Impounder — (I) *In General.* It is the duty of a person who takes up stock or cattle to drive them to pound in the most direct way, and to care for them while in his charge so that they shall not suffer or be unnecessarily distressed;[7] he should feed and water them as often as is required by the usage of the country and of good husbandry.[8]

(II) *Notice* — (A) *In General* — (1) Necessity and Effect of. If the taker-up fail to give notice of the impounding, he loses his right to retain the animal, or to receive his fees or the expenses of the impounding;[9] but the right to notice may be waived by the act or conduct of the party entitled thereto.[10] The effect of a notice, stating that animals were impounded for going at large, is to place on the owner the burden of disproving that fact.[11]

(2) Sufficiency of.[12] When the statute requires, the notice must name the owner, or state that he is unknown,[13] and the cause for which the animal was impounded;[14] but in stating the time of the impounding the hour of the day need not be specified.[15] The notice must be given, within the prescribed time,[16] to the person entitled thereto,[17] and it may be signed by another at the impounder's request.[18] A defective notice is not cured by the fact that a correct notice was unnecessarily given to the pound-keeper.[19]

7. A field-driver does not necessarily act unlawfully by taking an animal upon the owner's premises before taking it to the pound (Parker *v.* Jones, 1 Allen (Mass.) 270); and the fact that the pound to which an animal was taken was some four or five miles from the residence of the impounder, or that the road by which he took the horse was a few rods longer than another road which he might have taken, does not of itself show want of care (Goodsell *v.* Dunning, 34 Conn. 251).

See also Dean *v.* Lindsey, 16 Gray (Mass.) 264, wherein defendant, before driving animals to the pound, took them to his own yard and went a third of a mile to find the owner, to whom he said: "I have taken two of your oxen and put them in my yard, and, if you don't come after them, I shall drive them to the pound," and defendant was held not liable for a conversion.

8. Where, in warm weather, a field-driver took up milch cows, drove them to a pound, and there restrained them from seven o'clock in the morning until five o'clock in the afternoon, without food or water, it was held that he was a trespasser *ab initio.* Adams *v.* Adams, 13 Pick. (Mass.) 384.

9. Spruance *v.* Truax, 9 Houst. (Del.) 129, 31 Atl. 589; Wyman *v.* Turner, 14 Ind. App. 118, 42 N. E. 652; Shy *v.* Richards, 79 Mo. App. 661.

"Forthwith," in Ohio Rev. Stat. § 4207, respecting notice, means "forthwith give notice," although the punctuation might convey a different idea. Albright *v.* Payne, 43 Ohio St. 8, 1 N. E. 16.

10. As the commencement of an action before the expiration of the time within which the notice may be given (Field *v.* Jacobs, 12 Metc. (Mass.) 118; Wild *v.* Skinner, 23 Pick. (Mass.) 251); but actual knowledge of the impounding (Coffin *v.* Field, 7 Cush. (Mass.) 355), or an appearance and demand of the return of the animals (Wyman *v.* Turner, 14 Ind. App. 118, 42 N. E. 652), will not waive the required notice.

11. Pickard *v.* Howe, 12 Metc. (Mass.) 198.

12. **For forms** of field-driver's notice of the impounding of cows see Field *v.* Jacobs, 12 Metc. (Mass.) 118; horses, Cleverly *v.* Towle, 3 Allen (Mass.) 39; oxen, Pickard *v.* Howe, 12 Metc. (Mass.) 198.

13. Forsyth *v.* Walsh, 4 Ind. App. 182, 30 N. E. 720.

14. Phillips *v.* Bristol, 131 Mass. 426; Sanderson *v.* Lawrence, 2 Gray (Mass.) 178.

Sufficient notice.— A written notice, posted up and published, that the animals in question were "going at large, and without a keeper," sets forth a sufficient cause of impounding under Mass. Rev. Stat. c. 113, § 9 (Cleverly *v.* Towle, 3 Allen (Mass.) 39), and notice, before the cattle are impounded, of that fact and the cause of their being taken, and, after the impounding, of the place where they are impounded, is a legal notice (Gilmore *v.* Holt, 4 Pick. (Mass.) 258).

15. Pickard *v.* Howe, 12 Metc. (Mass.) 198.

16. Kila *v.* Kahuhu, 8 Hawaii 212, holding that a delay of three days would not satisfy a statutory requirement that notice should be given "as soon as possible." But see Sweeney *v.* Sweet, 14 R. I. 195, wherein the pound-keeper neglected to give the statutory notice, but did give verbal notice of the impounding immediately after it had taken place, and it was held that the owner could not recover for an illegal detention.

17. Wyman *v.* Turner, 14 Ind. App. 118, 42 N. E. 652, wherein notice was given to the son of the owner.

Proof that notice was left with one of owner's family, at his dwelling-house, is sufficient to authorize a jury to find that it was left at his place of abode. Pickard *v.* Howe, 12 Metc. (Mass.) 198.

18. Pickard *v.* Howe, 12 Metc. (Mass.) 198.

19. Sanderson *v.* Lawrence, 2 Gray (Mass.) 178.

(B) *To Pound-Keeper.* Where the statute requires that the impounder of animals shall leave with the pound-keeper a certificate or memorandum, describing the animal and containing a statement of the sum demanded for damages or forfeitures, and the unpaid charges for impounding, a certificate which fails to comply with all the requirements of the statute is insufficient;[20] but a field-driver, impounding cattle at large, is not required to make or leave a memorandum stating the cause of impounding and the damage demanded, when such notice is requisite only where the cattle are impounded *damage feasant.*[21]

(III) *APPRAISAL OF ANIMALS.* An application for a warrant of appraisement of cattle need not be in writing where the statute does not so require; and where, on appraisal of impounded animals for the benefit of the impounder, the appraisers are required to take and subscribe an oath, a substantial compliance with the form of the oath prescribed by statute will be sufficient.[22]

f. Sale of Impounded Animals — (I) *IN GENERAL.* To constitute a legal sale of an impounded animal, and to divest the owner of his title, the requirements of the law must be rigidly observed.[23] Animals which are the property of different owners cannot be offered for sale together.[24]

(II) *NOTICE* — (A) *Necessity of.* If a notice of sale is required by law, the omission to give it will invalidate the sale, and a purchaser thereat will acquire no title as against the owner.[25]

(B) *Sufficiency of.* The notice should be given at the time,[26] and for the

20. Palmer *v.* Spaulding, 17 Me. 239.

Duty to make certificate.— Where a field-driver impounds beasts for being at large in the highway, it is his duty to leave with the pound-keeper a memorandum or certificate of the cause of impounding, and of his fees and expenses. Such certificate is an official act, which is *prima facie* evidence in his favor of the facts stated in it. Bruce *v.* Holden, 21 Pick. (Mass.) 187.

Statement of demand.— A statement that "the owner or owners are requested to pay the forfeiture and costs," is not a compliance with a statute requiring the notice to state the sum demanded "for damages or forfeiture, and the unpaid charges," etc. Palmer *v.* Spaulding, 17 Me. 239.

But unless so required, the amount "legally and justly demandable" need not be expressed in dollars and cents. Palmer *v.* Spaulding, 17 Me. 239.

Description of animal.— The fact that the owner of the impounded beasts saw them placed in the pound will not excuse the omission to describe the beasts in the certificate. Palmer *v.* Spaulding, 17 Me. 239.

Excessive claim — Unauthorized taking up. — A field-driver's certificate is defective for claiming a forfeiture to which there is no right, or if it show that the animal was taken up under circumstances which gave no right to impound. Varney *v.* Bowker, 63 Me. 154.

21. Pickard *v.* Howe, 12 Metc. (Mass.) 198; Wild *v.* Skinner, 23 Pick. (Mass.) 251.

22. Gilmore *v.* Holt, 4 Pick. (Mass.) 258, holding that an oath by appraisers to "faithfully appraise the creatures named in the warrant, according to their best skill and judgment," was sufficient under a statute requiring them "to appraise so many of the creatures impounded as shall be sufficient to answer the demand and all charges."

23. Bullock *v.* Geomble, 45 Ill. 218; Clark *v.* Lewis, 35 Ill. 417; Nafe *v.* Leiter, 103 Ind. 138, 2 N. E. 317; Strauser *v.* Kosier, 58 Pa. St. 496; McLain *v.* Warren, 14 Pa. Co. Ct. 397, 3 Pa. Dist. 585, 24 Pittsb. Leg. Jur. (Pa.) 303; Altland *v.* Swine, 13 Pa. Co. Ct. 383; Com. *v.* A Hog, 4 Pa. Co. Ct. 76.

It is incumbent upon a party, claiming title to an animal under a poundmaster's sale, to show that the animal was liable to be impounded, and that the proceedings are authorized by law, in order to divest the owner's title. Johnston *v.* Kirchoff, 31 Minn. 451, 18 N. W. 315.

A sale of an animal unlawfully in custody, such sale being made by a constable at the request of a pound-keeper, will constitute the constable a trespasser. Collins *v.* Fox, 48 Conn. 490.

24. Clark *v.* Lewis, 35 Ill. 417.

25. Where an unauthorized sale is made by town officers the town is not liable to a purchaser, even though it received the purchase money, for he is charged with notice of all defects of title and such gross irregularities as amount to a lack of authority to sell. Aydlett *v.* Elizabeth City, 121 N. C. 4, 27 S. E. 1002.

Collateral attack.— The judgment of a justice cannot be collaterally attacked, though the order of sale has been made without the required notice to the owners of the animals, and though the justice, in violation of statute, acted as counsel for the defendants. McKeen *v.* Converse, 68 N. H. 173, 39 Atl. 435.

26. But a delay of five days, in order to discover the owner of the animals, is not so unreasonable as to invalidate a sale under an advertisement which an ordinance requires to be made immediately. Mincey *v.* Bradburn, 103 Tenn. 407, 56 S. W. 273.

length of time prescribed.[27] If the time fixed by law to intervene between such notice and sale has not elapsed the sale is invalid.[28] If the notice fails to mention the place of sale, as the statute requires, the sale is illegal.[29]

(III) *Presumption of Regularity.* The authority of an officer to make a sale will not be presumed,[30] nor will it be presumed that, in making the sale, the officer complied with the legal requirements.[31]

g. Remedies for Unlawful Impounding — (I) *In General.* To test the legality of an impounding the owner of the animals may bring replevin for them, and is sometimes especially authorized by statute to do so.[32] Sometimes the statute makes a demand or tender necessary before bringing suit.[33] The statutory right to bring replevin does not exclude all other remedies. Trespass will lie, and the right to bring trespass is not waived or lost by paying the fees of a field-driver and pound-keeper, or by statements made by plaintiff after the commencement of the action.[34]

(II) *Persons Liable.* Replevin cannot be maintained against the impounder where the pound-keeper alone is guilty of wrongdoing;[35] nor can an action be maintained by the owner against a field-driver on the ground that the latter's proceedings were void because of his failure to tender the surplus of the appraised value of animals, such tender having been prevented by the owner's act.[36]

(III) *Pleading* — (A) *Avowry.* If defendant seeks to justify on the ground that he acted in an official capacity he must aver that fact;[37] and an allegation that the animal impounded was unlawfully running at large, with no further state-

27. **When time begins to run.**— Under a statute requiring a notice to be posted for three days, and the sale of the animal to be in ten days after the notice has been given, giving forty-eight hours' notice of the time and place and cause of sale, it was held that the "ten days" did not begin to run until the "three days" have fully expired; and that the time and place of sale could not be fixed, and notice thereof given, until the ten days have expired. Rounds *v.* Stetson, 45 Me. 596. So, too, under an ordinance authorizing the sale of animals which have been impounded for eight days, such sale to take place on six days' notice, the notice cannot be given until the expiration of the eight days, and fourteen days must elapse from the time of impounding to the time of sale (Barrett *v.* Rowe, 78 Mich. 648, 44 N. W. 335); and an ordinance permitting the owner to redeem within five days, and authorizing a sale on three days' notice, contemplates that the notice shall commence to run after the expiration of the five days (White *v.* Haworth, 21 Mo. App. 439).

Notice posted June 25th for a sale on July 25th is not a notice of "not less than thirty nor more than sixty days" (Cameron *v.* Adams, 1 Mich. N. P. 188), nor is a sale on the twenty-eighth day of a month, made under a notice given on the twenty-second day of the month, a sale after notice for six successive days (Montgomery *v.* Adams, 51 Ala. 449).

28. Clark *v.* Lewis, 35 Ill. 417; Smith *v.* Gates, 21 Pick. (Mass.) 35.

29. Sutton *v.* Beach, 2 Vt. 42.

30. Clark *v.* Lewis, 35 Ill. 417.

Written authority is not necessary to authorize an officer to sell. Dalby *v.* Wolf, 14 Iowa 228.

31. Ft. Smith *v.* Dodson, 51 Ark. 447, 11 S. W. 687, 14 Am. St. Rep. 62, 4 L. R. A. 252.

32. Marx *v.* Labadie, 51 Mich. 605, 17 N. W. 76; Coffin *v.* Field, 7 Cush. (Mass.) 355.

Commencement of action.— If a writ is filled up within twenty-four hours after cattle are impounded, with the intent of plaintiff, at all events, to have it served, whether defendant shall give him notice of the impounding within twenty-four hours or not, the action is commenced when the writ is filled up, although it is not served, nor given to an officer for service, and no replevin bond is executed, until after the expiration of twenty-four hours from the time of the impounding. Field *v.* Jacobs, 12 Metc. (Mass.) 118.

33. Holcomb *v.* Davis, 56 Ill. 413.

No demand is necessary before bringing replevin against the purchaser of an animal at an unauthorized sale, as the possession of defendant in such case is wrongful. Clark *v.* Lewis, 35 Ill. 417.

34. Coffin *v.* Field, 7 Cush. (Mass.) 355, where plaintiff stated that he would require defendants to prove that the place where they took the beasts was a public highway.

35. As where the pound-keeper removes the animal from the pound without the field-driver's knowledge or consent (Byron *v.* Crippen, 4 Gray (Mass.) 312), or unlawfully detains an animal after a tender of the pound-age fees (Hall *v.* Hall, 24 Conn. 358), or where a field-driver who lawfully impounds sheep fails either to restore the sheep, or sell them according to law, through the default of the pound-keeper or other person, or from the insufficiency of the pound, the animals being lawfully in the pound-keeper's custody (Coffin *v.* Vincent, 12 Cush. (Mass.) 98).

36. Gilmore *v.* Holt, 4 Pick. (Mass.) 258.

37. Case *v.* Hall, 21 Ill. 632.

ment of the facts, is not a sufficient averment that it was running at large in violation of a statute;[38] nor is an allegation that it was running at large *contra formam statuti* sufficient as an averment that it was suffered to run at large.[39]

(B) *Plea.* A plea to an avowry, by which plaintiff seeks to charge defendant for the failure to provide impounded animals with food and water, should show the necessity of such provision by appropriate averment; and, where such a plea charges a failure to place the animals where they could be so relieved, the plea is insufficient if it fails to show that there was some other place than that selected in which the animals might have been more conveniently restrained.[40]

(IV) *Evidence.* In an action against an impounder plaintiff cannot show that the animals were not suitably provided for in the pound, or were there ill-treated;[41] but, where he claims that the animal was not placed in a lawful pound, he may show by parol evidence that there was a pound in fact, and what steps were taken toward its establishment.[42] It is incumbent on defendant to show the sufficiency of the notice of impounding,[43] and he may prove the contents of the posted notice, the original of which was lost, by parol evidence;[44] he may also show the giving of other notice than that required by law.[45] On the issue as to the right of defendant to take the animals in question, or, where he seeks to otherwise justify, he may show his appointment as an officer, or such other facts relied on in exoneration;[46] but the evidence relied on in justification must be sufficient to support the contention.[47]

(V) *Measure of Damage.* Where plaintiff's animals are entirely lost by reason of defendant's wrongful act the measure of damage is their value.[48]

XV. Slaughtering Animals.

A. Unmarked Cattle.[49] Under the Texas statute prohibiting the slaughter of unmarked or unbranded cattle for market, or purchasing and killing any animal without a written transfer from the vendor, a defendant is guilty who kills for market and afterward purchases, without a written transfer or bill of sale, from a stranger claiming to be the owner, the unmarked and unbranded animals so killed by defendant.[50]

B. Without Reporting Animals Slaughtered. By statute in Texas any butcher who fails to report the animals he slaughters is subject to a fine. This statute defines a substantive offense not limited by, or dependent on, any other enactment, and it is a general law throughout the state.[51] It is not com-

38. Rutter *v.* Henry, 46 Ohio St. 272, 20 N. E. 334.

39. Adams *v.* Nichols, 1 Aik. (Vt.) 316, wherein it was queried whether the avowant must prove the averment, or whether the animals being at large would be *prima facie* sufficient to throw the onus upon plaintiff of proving facts to exempt such animals from the liability to be impounded.

40. Adams *v.* Adams, 13 Pick. (Mass.) 384.

41. Pickard *v.* Howe, 12 Metc. (Mass.) 198.

42. Albright *v.* Payne, 43 Ohio St. 8, 1 N. E. 16.

43. Coffin *v.* Vincent, 12 Cush. (Mass.) 98.

44. Coffin *v.* Vincent, 12 Cush. (Mass.) 98.

45. Pickard *v.* Howe, 12 Metc. (Mass.) 198.

46. **A defendant claiming to have been chosen as field-driver** at an annual town-meeting need not produce a record of the town vote prescribing the time and manner of giving notice of town-meetings, but the notification will be presumed to be legal, unless shown to be otherwise. Gilmore *v.* Holt, 4 Pick. (Mass.) 258.

47. **Sufficiency of evidence of selection of animal for forfeiture.**— Evidence that defendants secretly removed the animal in question several miles off; that they afterward brought it back in the night, kept it privately, and afterward killed it, and that before this they had kept the animal privately confined in a barn, in a cellar, and in the office of one of defendants, does not show a selection of the animal, or an intent to select it, from others, as the subject of forfeiture under a statute permitting such a selection. Watson *v.* Watson, 14 Conn. 188.

48. Frazier *v.* Draper, 51 Mo. App. 163.

49. **Branding hides after skinning** see *supra*, IV, E.

50. Hunt *v.* State, 33 Tex. Crim. 93, 25 S. W. 127.

51. Dreyer *v.* State, 10 Tex. App. 97.

Exemption of certain counties.— The fact that a law of this character exempts certain counties from its operation does not make it a "local law," making it necessary to sub-

plied with by making a report ostensibly for one term, but not sworn to or filed until a subsequent term.[52] An indictment charging substantially a failure to return lists of cattle slaughtered as required by law negatives such a compliance as would exonerate defendant;[53] but charging defendant with failing to make report "of all animals purchased and slaughtered by him" does not charge an offense under a statute requiring a report of all animals slaughtered, whether purchased or raised by the butcher.[54] The indictment should further allege that animals have been slaughtered by defendant, and that defendant was a butcher and so required to make a report.[55]

XVI. POUNDS AND POUND-KEEPERS.

A. Pounds — 1. Definition. A pound has been defined to be a place where animals which may be impounded are confined, kept, and fed.[56]

2. Establishment by Legislative and Municipal Authority. The legislature may pass statutes relative to the impounding of cattle or other animals, or may delegate to municipal or like authorities the right to make such enactments, and to provide pounds and keepers therefor; and ordinances or by-laws passed within such authority are valid.[57]

3. Liability of Local Authorities — a. For Failure to Provide Pound. In some jurisdictions the failure of a town to provide a sufficient pound will subject it to a penalty yearly until it complies with the duty imposed upon it in this respect.[58]

mit the act for the approval of the freeholders of any section. Lastro *v.* State, 3 Tex. App. 363.

Repeal of statutes.— The Texas act of March 4, 1863, relating to failure to return lists of the marks and brands of all cattle slaughtered, was not repealed by the act of Nov. 13, 1866, upon the same subject. Gill *v.* State, 30 Tex. 514. But this latter act was repealed by the acts of May 22, 1871, and March 23, 1874. Monroe *v.* State, 3 Tex. App. 341.

52. Bruns *v.* State, 33 Tex. Crim. 415, 26 S. W. 722.

53. Schutze *v.* State, 30 Tex. 508.

54. Kinney *v.* State, 21 Tex. App. 348, 17 S. W. 423.

55. Braun *v.* State, 40 Tex. Crim. 236, 49 S. W. 620.

56. Harriman *v.* Fifield, 36 Vt. 341.

A shed used with the pound building, and as an entrance thereto, is a part of the pound, Wilcox *v.* Hemming, 58 Wis. 144, 15 N. W. 435, 46 Am. Rep. 625.

Place in common use.— Though no pound has been formally established, animals may be confined in a place used as a town pound, where no other place has been furnished and used for pound purposes, and although its establishment has never been voted for. Anthony *v.* Anthony, 6 Allen (Mass.) 408.

A pound located by the county authorities will continue to be the proper place to impound stock until the pound is changed. Colp *v.* Halstead, 63 Ill. App. 116.

The new pound contemplated by Conn. Gen. Stats. tit. 16, c. 10, § 2, authorizing the establishment of new pounds by selectmen, means a pound established in some part of the town where there was none before, and for which no pound-keeper was appointed at the last annual meeting. Bosworth *v.* Trowbridge, 45 Conn. 161.

Private pound.— At common law the distrainer might put the distress into a common pound, but he was not obliged to do so. He might put it into a private pound, into his own close, or other inclosure where he pleased, which for this purpose was a pound (Collins *v.* Larkin, 1 R. I. 219); and, in Massachusetts, an inhabitant of a town, taking up cattle found going at large within the town contrary to a vote of the inhabitants, may impound them in his private close (Gilmore *v.* Holt, 4 Pick. (Mass.) 258).

57. *Alabama.*— Dillard *v.* Webb, 55 Ala. 468.

Connecticut.— Whitlock *v.* West, 26 Conn. 406.

Kentucky.—Armstrong *v.* Brown, 20 Ky. L. Rep. 1766, 50 S. W. 17.

Michigan.— Grover *v.* Huckins, 26 Mich. 476.

Missouri.— Spitler *v.* Young, 63 Mo. 42.

North Carolina.— Whitfield *v.* Longest, 28 N. C. 268; Hellen *v.* Noe, 25 N. C. 493.

South Carolina.—Crosby *v.* Warren, 1 Rich. (S. C.) 385.

Purchase or hire of existing inclosure.— Town or municipal authorities, vested with power to establish, erect, and maintain pounds, may purchase or hire suitable inclosures already erected. Whitlock *v.* West. 26 Conn. 406.

The Connecticut statutes which provide for the establishment and maintenance of pounds, the confinement of animals therein, their disposition, and prescribes the remedies of the owners of animals unlawfully impounded, apply to the impounding of animals pursuant to by-laws passed by town authorities, as well as to impounding under the authority of the general statutes. Whitlock *v.* West, 26 Conn. 406.

58. Pike *v.* Madbury, 12 N. H. 262, holding that a statutory requirement, that an ac-

b. For Negligent Construction or Maintenance of Pound. For the negligent construction of a pound by its agents, or for their negligence in any purely ministerial duty under a pound ordinance, a municipality is liable to the same extent as a private person. There is no liability, however, for injuries to an animal, caused by its wild and vicious effort to escape from a pound sufficient to restrain any ordinary animal of its kind.[59] A complaint in an action against a municipality, for injury to an animal because of the negligent construction and maintenance of a pound, must allege facts sufficient to show a cause of action,[60] and must be supported by competent evidence.[61] In such an action an instruction that a pound ordinance is penal in its nature is a slight and harmless inaccuracy.[62]

c. For Conversion of Impounded Animals. A municipality is not liable, as for the conversion of an impounded animal, in the absence of evidence of wrongful conduct on the part of its agents.[63]

B. Pound-Keepers — 1. Appointment and Nature of Office. A pound-keeper is a public officer, whose appointment is not warranted in the absence of legislative authority therefor.[64] The appointment, where authority to make it is conferred, must be in the mode prescribed;[65] but unless so required, it is unnecessary to require him to take or subscribe an oath.[66]

tion upon a penal statute must be brought within one year from the time the right of action accrued, was applicable to an action against a town, under a statute imposing penalties for the failure to provide a sufficient pound, for each year it should neglect its duty in this respect, so that no more than one penalty could be recovered in any one suit. It was also held in this case that the declaration should specify the precise year for which the penalty was claimed.

59. Greencastle *v.* Martin, 74 Ind. 449, 39 Am. Rep. 93.

60. Sufficiency of complaint.—A complaint alleging that the fence of a pound, constructed and maintained by a city, was not high enough, that an animal impounded therein by the city was improperly tied, and that, in consequence thereof, and without plaintiff's fault, the animal sustained injuries, states a good cause of action. Greencastle *v.* Martin, 74 Ind. 449, 39 Am. Rep. 93.

61. Sufficiency of fence.— When a pound fence is proved to be sufficient by competent and credible witnesses, and no testimony to the contrary is introduced, the sufficiency of the fence is established, and the mere fact that an animal confined in the pound kills itself by rushing against such fence, or by kicking against it, or by trying to leap over it, has no tendency to prove its insufficiency. Greencastle *v.* Martin, 74 Ind. 449, 39 Am. Rep. 93.

Improper confinement.—A complaint charging negligence in building a pound fence too low; in tying the animal with a rope too long; in failing to post a notice of impounding; and in failing to offer the animal for sale at a proper time, is not sustained in the absence of evidence that the fence was too low, that the animal was improperly tied, or that the failure to post notices or to sell produced or tended to produce the injury complained of. Greencastle *v.* Martin, 74 Ind. 449, 39 Am. Rep. 93.

62. Greencastle *v.* Martin, 74 Ind. 449, 39 Am. Rep. 93.

63. Failure of proof.— A charge of conversion by the city is not sustained so as to justify a finding against the city, where there is no evidence of a wrongful appropriation, or of an intent to make an appropriation, of an animal impounded by a city marshal under an ordinance. Greencastle *v.* Martin, 74 Ind. 449, 39 Am. Rep. 93.

64. A municipal corporation has no power to appoint such officer unless the authority for that purpose is expressly given by its charter. White *v.* Tallman, 26 N. J. L. 67.

65. Delegation of power to appoint.— A charter provision that a board of commissioners shall "appoint suitable persons to take charge of and keep up said pounds" requires the action of the board of commissioners. The power to appoint cannot be delegated to one of their number. Dillard *v.* Webb, 55 Ala. 468.

Keeper of new pound.— Under a statute providing that, when selectmen establish a new pound, they shall appoint a pound-keeper for it, to hold office until a regular appointment is made, it was held, in a case where a pound had been rendered unfit for use, and another was made about fifty rods distant, that the latter was not a new pound, and that the keeper of the abandoned pound became the keeper of the substituted pound under his previous appointment, and, furthermore, that it was immaterial that the old pound had been repaired and was in a condition to be used. Bosworth *v.* Trowbridge, 45 Conn. 161.

66. A poundmaster, appointed "from time to time," does not hold an "office or place of trust" within the meaning of a city charter requiring "every person chosen or appointed to any office or place of trust" to "take and subscribe an oath." Wilcox *v.* Hemming, 58 Wis. 144, 145, 15 N. W. 435, 46 Am. Rep. 625.

2. Duties — a. In General. It is the duty of a pound-keeper to comply with all the requirements imposed by law; otherwise he is a trespasser, and as such has no right to the possession of animals, or to fees or expenses for caring for them,[67] and his duties are the same whether the taking and impounding were lawful or not.[68]

b. To Place and Keep Animal in Established Pound. Unless the law otherwise provides, a pound-keeper has no authority to remove from the pound animals delivered to him, or to confine them elsewhere than in the legally constituted pound. If he is derelict in either of these respects the animals are not regarded as under legal restraint.[69] A pound-keeper may remove an animal from the pound, however, where the removal is necessary to preserve it from injury.[70]

c. To Care for Animals in Pound. At common law animals within the pound were required to be supplied with food by their owner;[71] but where the statute imposes this requirement on a pound-keeper, it charges him with a duty the neglect of which will subject him to liability.[72] In the absence of any provision of law or express contract, a pound-keeper has no remedy against the impounder for the expense of keeping and feeding animals placed in his charge.[73]

3. Right to Fees and Charges — a. In General. For the fees and charges to which the pound-keeper is entitled by law, he has a lien on the impounded animal,[74] which he may detain until his demand is satisfied,[75] and where the fees of the impounder,[76] or the damages assessed,[77] are a charge against the animal, he may retain the latter until such charges and damages are paid.

b. Waiver of Right. This right of lien may be lost by the failure of the pound-keeper to properly perform the duties imposed upon him.[78]

67. Marshall *v.* Yoos, 20 Ill. App. 608; Bills *v.* Kinson, 21 N. H. 448.

In Minnesota, Gen. Stat. (1878), c. 10, § 87, respecting the duties and fees of poundmasters, is applicable to the case of animals impounded under township regulations, in pursuance of section 16 of the same chapter, and is not inconsistent with other provisions respecting estrays, or respecting the impounding of animals found doing damage. Johnston *v.* Kirchoff, 31 Minn. 451, 18 N. W. 315.

Duty to give notice.— Hurd's Stat. Ind. (1898), p. 801, requiring persons taking up estrays to notify the town clerk, has no application to poundmasters impounding cattle as provided on page 147 and page 1507, article 4, section 3. Schlachter *v.* Wachter, 78 Ill. App. 67.

68. Mattison *v.* Turner, 70 Vt. 113, 39 Atl. 635. See Clark *v.* Lewis, 35 Ill. 417, holding that if an animal delivered to a pound-keeper was illegally taken up, the latter becomes a trespasser by detaining it.

69. Collins *v.* Fox, 48 Conn. 490; Collins *v.* Larkin, 1 R. I. 219.

Where a keeper removes an impounded animal from the lawful pound and puts it in a private inclosure, the animal can be no longer held under the impounding. Collins *v.* Fox, 48 Conn. 490.

Removal to feed and water.— If a pound-keeper drive from the pound to his barn or pasture creatures which have been legally impounded, for the purpose of more conveniently furnishing them with food and drink, he thereby loses his legal control over them. Bills *v.* Kinson, 21 N. H. 448.

70. Collins *v.* Fox, 48 Conn. 490.

71. Riker *v.* Hooper, 35 Vt. 457, 82 Am. Dec. 646.

In England, by statute, a person impounding an animal, or causing it to be impounded, and not the pound-keeper, is required to furnish it with sufficient food and water. Dargan *v.* Davies, 2 Q. B. D. 118.

72. Riker *v.* Hooper, 35 Vt. 457, 82 Am. Dec. 646.

73. If animals are impounded without authority of law, so that the impounder committed a trespass in taking them, it will not enable the pound-keeper, in an action upon book account, to recover of the impounder the expense of keeping and feeding them. Williams *v.* Willard, 23 Vt. 369.

74. The lien is limited to the fees specified by law (Martin *v.* Foltz, 54 Nebr. 162, 74 N. W. 418), and, where the fees are required to be fixed by county commissioners, the poundmaster is entitled to such fees only as the commissioners provide for by order (Colp *v.* Halstead, 63 Ill. App. 116).

75. Schlachter *v.* Wachter, 78 Ill. App. 67; Folger *v.* Hinckley, 5 Cush. (Mass.) 263; Mellen *v.* Moody, 23 Vt. 674. See also Harriman *v.* Fifield, 36 Vt. 341, where the property was confined in a private close, as authorized by statute.

76. Folger *v.* Hinckley, 5 Cush. (Mass.) 263.

77. Mellen *v.* Moody, 23 Vt. 674.

78. If a pound-keeper has not followed the statute in the acts required of him up to and including the sale, the owner of the legally impounded animal, illegally sold, can recover its full value of the pound-keeper, without allowance of pound fees and expenses. Kila *v.* Kahuhu, 8 Hawaii 212.

c. Action to Enforce. In some cases the pound-keeper is required to sue for the penalty, and the expense of keeping the animal.[79]

4. Liability for Acts of Impounder. A pound-keeper is not liable for the wrongful act of the person taking and impounding an animal.[80]

C. Rescue and Pound-Breach — 1. Definitions — a. Rescue. Rescue, by the common law and within statutes declaratory thereof, consists of the taking away and setting at liberty of cattle or other animals from the actual possession of one who has taken them up or distrained them, and who is driving or conveying them to a pound.[81] The rescue will be deemed a violent taking, though there was no positive violence, nor use of menacing or threatening words.[82] To constitute a rescue under a statute, the animal must be of the kind which the possessor was entitled to retain possession of under the statute.[83]

b. Pound-Breach. Pound-breach is the act or offense of breaking a pound, and conveying away or setting at large cattle or other animals therein confined.[84]

2. Persons Liable. Any person who directly or indirectly liberates, or who aids and assists in liberating, animals from their lawful custodian is liable to the party sustaining damage.[85]

3. Civil Action — a. In General. At common law, for the taking back by force of animals distrained, the distrainer had a remedy in damages, either by a writ of rescous, in case they were going to the pound, or by writ de parco fracto,

79. Riker *v.* Hooper, 35 Vt. 457, 82 Am. Dec. 646.

80. Mattison *v.* Turner, 70 Vt. 113, 39 Atl. 635; Badkin *v.* Powell, Cowp. 476.

A statute providing that a pound-keeper may require security of the impounder under certain circumstances will not import that the keeper shall be liable for the wrongful act of the impounder in taking the property. Mattison *v.* Turner, 70 Vt. 113, 39 Atl. 635.

81. Vinton *v.* Vinton, 17 Mass. 342; Hamlin *v.* Mack, 33 Mich. 103; Collins *v.* Larkin, 1 R. I. 219.

It is immaterial that the cattle taken were never out of the view of the field-driver, and that they were finally yielded to him and impounded. Vinton *v.* Vinton, 17 Mass. 342.

82. Hamlin *v.* Mack, 33 Mich. 103.

83. Berry *v.* Ripley, 1 Mass. 167.

"Stock" in the Iowa statute, making it an offense to release distrained stock, includes swine. State *v.* Clark, 65 Iowa 336, 21 N. W. 666.

Neat cattle.— The penalties of Mass. Stat. (1788), c. 65, § 6, for pound-breach or otherwise delivering creatures from a pound, are by Mass. Stat. (1799), c. 61, extended to neat cattle. Com. *v.* Beale, 5 Pick. (Mass.) 514.

84. Com. *v.* Beale, 5 Pick. (Mass.) 514; 3 Bl. Comm. 12, 146. See also State *v.* Young, 18 N. H. 543, 545 [*quoting* Gilbert Law Distresses, 75], to the effect that, "By the common law, if a man break the pound or the lock of it, or part of it, he greatly offendeth against the peace and doth a trespass to the king, and to the lord of the fee," etc., "in breach of the peace, and to the party and delay of justice; and therefore hue and cry is to be levied against him as against those who break the peace. And the party who distrained may take the goods again, whersoever he shall find them, and impound them again."

The driving or conveying away or setting at large is an essential part of the offense of pound-breach. The mere breaking of a pound in which nothing is impounded is not a private injury, entitling any one to an action, and no difference exists in the definition of the civil injury and in that of the public offense. State *v.* Young, 18 N. H. 543; 2 Chitty Crim. L. 205.

Pound-breach not an opposition of marshal in execution of duty.— Breaking a pound and liberating a cow confined therein is not opposing and interrupting a city marshal in the execution of an ordinance requiring him to take up and impound cattle. Rome *v.* Omburg, 22 Ga. 67.

85. Pierce *v.* Josselyn, 17 Pick. (Mass.) 415, wherein, after a cow legally impounded had been rescued, the owner met the persons by whom she had been released and, with full knowledge of the facts, aided them in driving her to his house, and it was held that he was liable.

But where impounded animals, let out by persons unknown, without complicity on the part of the owner, returned to the owner's inclosure, and the pound-keeper notified him of the fact, but did not demand them or go for them, but brought replevin, it was held that the owner was not liable until a demand and a refusal by him to give up the cattle, or to allow the keeper to take them from his inclosure. Bosworth *v.* Trowbridge, 45 Conn. 161.

Evidence — Declarations of agents.— To prove that one aided in a rescue it is not necessary to show that he was personally at the pound, or that he broke down the inclosure and drove the cattle away, but it is enough if he indirectly participated; hence the declaration of his agents while pursuing a common plan, and, in furtherance of it, after the animals had been distrained and impounded, are his declarations, and are evidence against him. Hanbest *v.* Heerman, 2 Walk. (Pa.) 471.

or pound-breach, in case they were actually impounded.[86] The remedy under the statutes, unless specially prescribed, seems to be trespass, or some kindred form of action.[87] If the pound is broken the pound-keeper cannot bring an action, but it must be brought by the person who distrained the animals there impounded.[88]

b. Declaration. In a penal statutory action for a rescue, an allegation that the wrongful act was contrary to a statute is equivalent to charging that it was committed contrary to the form of the statute.[89]

c. Defenses. At common law, if a distress was unlawfully made, the animals might be taken back by their owner, even on the way to the pound;[90] and the illegality of the distress might be shown by the owner in an action against him for rescuing them after they were distrained and before they were impounded;[91] but once the distress was within the pound inclosure, if the owner took the cattle by force, he became liable to an action for pound-breach, and could not justify by any illegality in the original taking, however wrongful it might have been, for the reason that the distress was in the custody of the law, as distinguished from the custody of a party, and no one could be justified in taking it from the custody of the law.[92] In Massachusetts the common-law rule has been changed by statute so as to preclude the rescuer from showing in either case that the original taking was such as to render the impounding illegal.[93]

4. Criminal Prosecution[94]— a. In General. Pound-breach is an offense at common law,[95] and also has been made so by statute.[96] To authorize the infliction of punishment for the offense of rescue or pound-breaking, the liability of the accused must be clearly made out.[97]

b. Defenses. Upon trial of an indictment for pound-breach the illegality of the distress cannot be shown in defense.[98]

ANIMO. With the intention or design.[1]
ANIMUS. Intention; disposition; will.[2]

86. Collins *v.* Larkin, 1 R. I. 219; 3 Bl. Comm. 146; Coke Litt. 47*b*.

87. The lawful custodian of impounded animals may maintain trespass against a person who unlawfully takes them from his possession. Sheridan *v.* Spare, 2 Kulp (Pa.) 271, 12 Luz. Leg. Reg. (Pa.) 43.

Treble damages.— In a proceeding to recover treble damages for a rescue, the additional costs and expenses caused by the rescue constitute a part of the damages which may be trebled. Hanbest *v.* Heerman, 2 Walk. (Pa.) 471.

88. Aston, J., in Badkin *v.* Powell, Cowp. 476.

89. Cleaves *v.* Jordan, 35 Me. 429.

Pleading and proof.— In an action to recover a penalty for the rescue of animals, an allegation in the writ that they were found in the highway is a material averment, which must be proved as laid. Cleaves *v.* Jordan, 34 Me. 9, wherein proof that the animals were found on a townway was held insufficient.

90. Collins *v.* Larkin, 1 R. I. 219.

91. 3 Bl. Comm. 12.

92. Collins *v.* Larkin, 1 R. I. 219; 3 Bl. Comm. 12.

93. Field *v.* Coleman, 5 Cush. (Mass.) 267, an action on the case for rescuing sheep distrained for going at large, and not under the care of a keeper, on the common and undivided lands of the island of Nantucket, wherein it was held to be no defense that the place where the sheep were taken and the place where they were rescued were uninclosed lands, held in severalty; that, between the taking and the rescue, the sheep were continuously on said lands; and that defendants were the proprietors of such lands, and the owners of the sheep rescued.

94. **For form** of an indictment for pound-breach see State *v.* Young, 18 N. H. 543.

95. Pound-breach is among the offenses cognizable in the sheriff's court, as being common grievances, in direct contempt of the authority of the law by which pounds are provided for the legal detainment of distresses, etc. 3 Hawkins P. C. 144.

96. A prosecution under Ill. Rev. Stat. c. 54, § 21, for rescuing cattle after they had been impounded, is a criminal prosecution — that is, a misdemeanor. Anderson *v.* People, 28 Ill. App. 317.

97. Where the prosecutor drove hogs into an inclosure while defendant was in pursuit of them and in his view, and after a message to him not to imprison them, as she was trying to catch them, it was held that defendant was not guilty, within a statute denouncing the offense, of the offense of releasing impounded stock. State *v.* Hunter, 118 N. C. 1196, 24 S. E. 708.

98. Com. *v.* Beale, 5 Pick. (Mass.) 514.

1. Burrill L. Dict.

Used in various combinations in this sense in place of Animus, *q. v.*

2. Burrill L. Dict.

Animus adimendi.—The intention of adeeming. Adams Gloss.

Animus cancellandi.—The intention of can-

ANIMUS HOMINIS EST ANIMA SCRIPTI. A maxim meaning "The intent of a man is the soul of his writing."[3]

ANN. In Scotch law, one-half a year's stipend over and above what is owing for the incumbency, due to a minister's relict, child, or nearest of kin, after his decease.[4]

ANNALES or **ANNI ET TEMPORA.** Titles formerly given to the Year Books.[5]

ANNEXATION. The union of one thing to another.[6] (Annexation: Of Account Sued on to Pleading, see ACCOUNTS AND ACCOUNTING. Of Affidavit to Chattel Mortgage, see CHATTEL MORTGAGES. Of Appraisement to Execution, see EXECUTIONS. Of Certificate — Of Acknowledgment to Written Instrument, see ACKNOWLEDGMENTS; Of Officer to Deposition, see DEPOSITIONS. Of Collector's Warrant to Tax-Book, see TAXATION. Of Deposition to Commission or Interrogatories, see DEPOSITIONS. Of Exhibits — To Deposition, see DEPOSITIONS; To Pleading, see PLEADING. Of Fixtures to Realty, see FIXTURES. Of Process to Pleading, see PROCESS. Of Territory, see COUNTIES; MUNICIPAL CORPORATIONS; SCHOOLS AND SCHOOL DISTRICTS; TOWNS.)

ANNEXED. Fastened to; connected with.[7]

ANNIENTED. Abrogated; frustrated; brought to nothing.[8]

ANNI ET TEMPORA. See ANNALES.

ANNIHILATED. Extinguished.[9]

ANNO DOMINI. See A. D.

ANNOUNCE. To give public notice of; to proclaim; to declare; to publish; to pronounce; to declare by judicial sentence.[10]

ANNOYANCE. Any hurt done to a place, public or private, by placing anything thereon that may breed infection, or by encroachment, or such like means.[11]

ANNUAL. Yearly; every twelve months.[12]

ANNUALLY. Year by year;[13] every year.[14]

ANNUA PENSIONE. An ancient writ to provide the king's chaplain with a pension if he had no preferment.[15]

celing. Burrill L. Dict. [*citing* Perrott *v.* Perrott, 14 East 423, 439].

Animus capiendi.— The intention of taking. Bouvier L. Dict.

Animus dedicandi.— The intention of dedicating. Adams Gloss.

Animus delinquendi.— The intention of abandoning. Adams Gloss.

Animus donandi.— The intention of giving. Burrill L. Dict.

Animus furandi.— The intention of stealing. Bouvier L. Dict.

Animus lucrandi.— The intention of gaining. Burrill L. Dict.

Animus manendi.— The intention of remaining. Berry *v.* Wilcox, 44 Nebr. 82, 84, 62 N. W. 249, 48 Am. St. Rep. 706.

Animus recipiendi.— The intention of receiving. Burrill L. Dict.

Animus restituendi.— The intention of restoring. Bouvier L. Dict.

Animus revertendi.— The intention of returning. Adams Gloss.

Animus revocandi.— The intention of revoking. Burrill L. Dict.

Animus testandi.— The intention of making a will. Burrill L. Dict.

3. Morgan Leg. Max.

Applied in Olmsted *v.* Olmsted, 38 Conn. 309, 334.

4. Jacob L. Dict.

5. Burrill L. Dict. [*citing* 9 Lond. Leg. Obs. 323].

6. Bouvier L. Dict.

7. Merritt *v.* Judd, 14 Cal. 59, 64.

8. Wharton L. Lex.

9. Robinson *v.* Lane, 19 Ga. 337, 397.

10. Walker *v.* Heller, 56 Ind. 298, 300 [*citing* Worcester Dict.].

11. Wharton L. Lex.

Distinguished from "nuisance."— In Tod-Heatly *v.* Benham, 40 Ch. D. 80, 84, Kekewich, J., said: "I think it would be against the sound canons of construction to give the same meaning to the two words standing side by side, and I rather follow the suggestion that annoyance is a popular word for nuisance, 'nuisance' being the legal technical word, while annoyance means something which, though frequently called a nuisance, is not a nuisance legally and technically, and therefore is popularly, but not technically, a nuisance."

12. State *v.* McCullough, 3 Nev. 202, 224.

13. Juker *v.* Com., 20 Pa. St. 484, 494.

14. Sparhawk *v.* Wills, 6 Gray (Mass.) 163, 164; Union Iron Co. *v.* Pierce, 4 Biss. (U. S.) 327, 24 Fed. Cas. No. 14,367.

15. Wharton L. Lex.

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I. DEFINITION.

An annuity, in its strict sense, is a yearly payment of a certain sum of money, granted to another in fee, or for life, or for years,[1] and chargeable only on the person of the grantor.[2]

II. CREATION AND NATURE.

A. In General. An annuity may be created by deed[3] or by will.[4]

1. *Alabama.*— Turrentine *v.* Perkins, 46 Ala. 631.

Connecticut.— Bartlett *v.* Slater, 53 Conn. 102, 22 Atl. 678, 55 Am. Rep. 73.

New Jersey.— Welsh *v.* Brown, 43 N. J. L. 37.

New York.— Kearney *v.* Cruikshank, 117 N. Y. 95, 22 N. E. 580; Wagstaff *v.* Lowerre, 23 Barb. (N. Y.) 209; Booth *v.* Ammerman, 4 Bradf. Surr. (N. Y.) 129; Matter of Williams, 12 N. Y. Leg. Obs. 179.

Pennsylvania.— Horton *v.* Cook, 10 Watts (Pa.) 124, 36 Am. Dec. 151; Eyre *v.* Golding, 5 Binn. (Pa.) 472.

Rhode Island.— Pearson *v.* Chace, 10 R. I. 455.

Tennessee.— Morgan *v.* Pope, 7 Coldw. (Tenn.) 541.

England.— Bacon Abr. tit. Annuity; Coke Litt. 144*b*; Rolle Abr. 226.

See 2 Cent. Dig. tit. "Annuities," § 1.

An annuity is a bequest of certain specified sums periodically. Apple's Estate, 66 Cal. 432, 6 Pac. 7; Cal. Civ. Code, § 1357, subd. 3.

Distinguished from income of fund.— There is a distinction between the income of a fund and an annuity. The former embraces only the net profits, after deducting all necessary expenses. The latter is a fixed amount directed to be paid absolutely, without contingency. Whitson *v.* Whitson, 53 N. Y. 479; Stubbs *v.* Stubbs, 4 Redf. Surr. (N. Y.) 170; *Ex p.* McComb, 4 Bradf. Surr. (N. Y.) 151; Booth *v.* Ammerman, 4 Bradf. Surr. (N. Y.) 129; Pearson *v.* Chace, 10 R. I. 455. *Compare* Ritter's Estate, 148 Pa. St. 577, 24 Atl. 120; Flickwir's Estate, 136 Pa. St. 374, 20 Atl. 518, wherein it was held that in legal aspect there is no substantial difference between the gift of an annuity for life and of the interest or income of a fund for life.

Distinguished from rent-charge.— An annuity is different from a rent-charge in that a rent-charge is a burden imposed upon and issuing out of lands, whereas an annuity is chargeable only upon the person of the grantor. De Haven *v.* Sherman, 131 Ill. 115, 22 N. E. 711, 6 L. R. A. 745; Wagstaff *v.* Lowerre, 23 Barb. (N. Y.) 209; Horton *v.* Cook, 10 Watts (Pa.) 124, 36 Am. Dec. 151. But a bequest in the following words: "I give and bequeath to my daughter, Anne Maria Duncan, the sum of sixty dollars, current money, as an annuity, to be paid to her out of the profits of my real estate above mentioned, annually," is an annuity, and not a rent-charge. Robinson *v.* Townshend, 3 Gill. & J. (Md.) 413.

2. *Alabama.*— Turrentine *v.* Perkins, 46 Ala. 631.

Connecticut.— Bartlett *v.* Slater, 53 Conn. 102, 22 Atl. 678, 55 Am. Rep. 73.

Maryland.— Owings' Case, 1 Bland (Md.) 290.

New York.— Wagstaff *v.* Lowerre, 23 Barb. (N. Y.) 209.

Pennsylvania.— Mosser *v.* Lesher, 154 Pa. St. 84, 22 Atl. 1085; Rudolph's Appeal, 10 Pa. St. 34; Horton *v.* Cook, 10 Watts (Pa.) 124, 36 Am. Dec. 151.

England.— Coke Litt. 144*b*; Viner Abr. tit. Annuity.

3. As to necessity of instrument under seal see *infra*, III, E.

4. See, generally, WILLS.

Illustrations.— A bequest of the interest of a certain sum, not setting apart any fund for its payment, is a gift of an annuity equal to the interest of such sum. Brimblecom *v.* Haven, 12 Cush. (Mass.) 511; Swett *v.* Boston, 18 Pick. (Mass.) 123. A provision in a will for the payment of "five hundred dollars per year for ten years" to B, in equal quarterly instalments, is an annuity contingent on B's life, and not a legacy of five thousand dollars, payable in instalments. Bates *v.* Barry, 125 Mass. 83, 28 Am. Rep. 207. A gift of the sum of one hundred and seventy dollars, to be allowed and paid to a son until he shall arrive at the age of twenty-one years, is an annuity, and not a gross sum to be paid in distributive portions. Berry *v.* Headington, 3 J. J. Marsh. (Ky.) 315. A bequest of "an annuity or yearly sum of three hundred dollars to be paid yearly and every year, for fifteen years from and after my decease," is an annuity for years. Stephens *v.* Milnor, 24 N. J. Eq. 358. The devise of a yearly sum, to be paid by a trustee to whom lands are devised upon uses and out of the net rents that may accrue from the lands in his possession, and which sum is contingent upon the exigencies of the trust, is in the nature of an annuity. De Haven *v.* Sherman, 131 Ill. 115, 22 N. E. 711, 6 L. R. A. 745. But a bequest of "the sum of five hundred dollars, payable in sums of one hundred dollars yearly," is not an annuity. Stephens *v.* Milnor, 24 N. J. Eq. 358.

Covenant for support or annuity.— Where one conveyed land in consideration of a covenant that the grantee should pay him two hundred dollars in each and every year during his natural life, the covenant is for an annuity, and not merely a covenant for support. Gallaher *v.* Herbert, 117 Ill. 160, 7 N. E. 511.

Income or annuity.— Where a testatrix directs her trustees, who are also her executors,

B. Assignability. A person entitled to an annuity may, it has been held, assign the same.[5]

C. Estate Created. A perpetual annuity granted to a person and his heirs, though descendible to the heirs, is personal, and not real, estate.[6]

III. REQUISITES AND VALIDITY.[7]

A. Conditions against Public Policy. A condition against public policy, imposed on an annuity by the donor or grantor thereof, is not binding on the annuitant.[8]

B. Consideration. The grant of an annuity, to be valid, must be supported by a sufficient consideration.[9]

to set apart and hold from her personal estate a sum of money sufficient to yield an annual income of two hundred and fifty dollars, and to pay said income over to a sister, and provides that on the decease of such sister the principal sum and all accumulations thereon shall go to, and form part of, the residuary estate (Matter of Von Keller, 28 Misc. (N. Y.) 600, 59 N. Y. Suppl. 1079); and where A devised to his wife the dividends and income of certain shares of bank-stock during her natural life or so long as she remained his widow, in lieu of dower, the reversionary right being in the three daughters, who were also made his residuary legatees and devisees, the gift was one of income, and not an annuity (Pearson *v.* Chace, 10 R. I. 455). A gift of the interest of two thousand five hundred dollars, "to be paid annually," does not create an annuity, but merely requires payment of the income of a specific amount. Welsh *v.* Brown, 43 N. J. L. 37.

Legacy or annuity.— An annuity springing alone from a will, and given by it, is a legacy. Heatherington *v.* Lewenberg, 61 Miss. 372.

5. Frazier *v.* Barnum, 19 N. J. Eq. 316, 97 Am. Dec. 666; Erwin *v.* Erwin, 115 N. C. 366, 20 S. E. 520; Key *v.* Craig, 21 Tex. 491; Hunt-Foulston *v.* Furber, 3 Ch. D. 285. See also Matter of Tilford, 5 Dem. Surr. (N. Y.) 524, wherein it was held that an annuity, or a provision in the nature of an annuity, for the payment of which resort may be had to the income of a fund, but which is not directed to be discharged from such income exclusively, is an alienable interest. To the same effect see Hunter *v.* Hunter, 17 Barb. (N. Y.) 25.

See 2 Cent. Dig. tit. "Annuities," § 2.

6. Radburn *v.* Jervis, 3 Beav. 450, 43 Eng. Ch. 450; Aubin *v.* Daly, 4 B. & Ald. 59, 6 E. C. L. 389. See also Taylor *v.* Martindale, 12 Sim. 158, 35 Eng. Ch. 134, wherein it appeared that a testator gave his real and personal estate to his wife, subject to an annuity to A forever. It was held that on A's death, intestate, the annuity passed his personal representative, and not to his heir.

7. Sufficiency of promise.— A testator during his life received a letter from his niece, who was his companion and nurse, in which, after alluding to "the subject of my salary," she proposed that he should give her for her services during his life a certain sum "a year during my life" from a future date named, the same "to be paid to me in instalments as I may desire by your faithful attorney." He assented to this proposition, and she rendered the services as stipulated during the rest of his life. It was held that there was a valid promise on his part to pay an annuity to her for life, enforceable against his executors. Cox *v.* Maxwell, 151 Mass. 336, 24 N. E. 50.

8. Parsons *v.* Winslow, 6 Mass. 169, 4 Am. Dec. 107; Nicholl *v.* Jones, 36 L. J. Ch. 554. See, generally, CONTRACTS.

Conditions in restraint of marriage.— A devise to the testator's wife of an annuity "during her widowhood and life" ceases upon her second marriage, by the testator's intention; but such intention, being against the policy of the law as in restraint of marriage, cannot take effect, and the wife is entitled to the annuity during her life, notwithstanding her second marriage. Parsons *v.* Winslow, 6 Mass. 169, 4 Am. Dec. 107; Hoopes *v.* Dundas, 10 Pa. St. 75; Stroud *v.* Bailey, 3 Grant (Pa.) 310; McIlvaine *v.* Gethen, 3 Whart. (Pa.) 575. *Contra*, Mahar *v.* O'Hara, 9 Ill. 424; 1 Story Eq. Jur. § 285, note 4; Scott *v.* Tyler, 2 Bro. Ch. 431; Lloyd *v.* Lloyd, 10 Eng. L. & Eq. 139. See also Cornell *v.* Lovett, 35 Pa. St. 100.

Limitation over upon indefinite failure of issue.— A limitation over of an annuity upon an indefinite failure of issue is void as depending upon too remote a contingency. Seale *v.* Seale, Prec. Ch. 421; Bodens *v.* Watson, Ambl. 398; Robinson *v.* Fitzherbert, 2 Bro. Ch. 127. But if the failure of issue is confined to the death of the annuitant the limitation over is good as being in the nature of an executory devise. Bradhurst *v.* Bradhurst, 1 Paige (N. Y.) 331; Sheppard *v.* Lessingham, Ambl. 122.

9. Kearney *v.* Kearney, 17 N. J. Eq. 59; Stiles *v.* Atty.-Gen., 2 Atk. 152; Keenan *v.* Handley, 2 De G. J. & S. 283, 67 Eng. Ch. 283; *Ex p.* Draycott, 2 Glyn & J. 283; Howell *v.* Price, 1 Jur. N. S. 494; Annandale *v.* Harris, 2 P. Wms. 432; Beaumont *v.* Reeve, 8 Q. B. 483, 55 E. C. L. 483; Kelfe *v.* Ambrosse, 7 T. R. 551. See, generally, CONTRACTS.

Illustrations.— Money lent and paid at different times for the education and advancement of defendant is a good consideration for the grant of an annuity. Kelfe *v.* Ambrosse, 7 T. R. 551. A covenant by a husband to secure to his wife an annuity during her life, in case she should survive him, is a sufficient consideration for the grant of an annuity from her father. *Ex p.* Draycott, 2 Glyn & J. 283. Giving up a pecuniary advantage at the time an annuity is granted amounts to a valuable consideration. Stiles *v.* Atty.-Gen., 2 Atk. 152. In a deed executed, upon a separation between

C. Enrolment. The enrolment of a memorial in annuity transactions is not necessary at common law, and is only rendered requisite by statutory provisions.[10]

D. Infancy of One Grantor. The several covenant of one grantor of an annuity is not avoided by the infancy of another who grants in the same deed.[11]

E. Instrument under Seal. A contract for a life annuity, not issuing out of or charged upon land, but by which the grantor, in consideration of a sum certain, agrees to pay the annuitant specified sums annually, during life, is a mere chose in action for the payment of money which need not be made in the form of a deed, or be under seal.[12]

F. Usury. If a bargain is really for an annuity there is no usury, though the terms may be exorbitant;[13] but if it is only a cover for the advancement of money by way of loan it will not exempt the lender from the penalty of the statute relating to usury.[14]

IV. Duration and Termination.

A. In General. An annuity may be perpetual, or for life, or for a period of years, or subject to such specific limitations as to its duration as the grantor or donor may impose.[15]

husband and wife, by them and the trustees of their marriage settlement, the wife charged her separate property comprised in the settlement with the payment of an annuity to the husband, and the husband released his marital rights in respect to all future property acquired by the wife. It was held that the release by the husband was a good consideration for the grant of the annuity by the wife. Logan *v.* Birkett, 1 Myl. & K. 220, 7 Eng. Ch. 220. An annuity for which there is no consideration save natural love and affection, and which the testator was under no legal obligation to pay, creates no charge upon his estate. Kearney *v.* Kearney, 17 N. J. Eq. 59. An annuity granted to another in consideration that the public good is advanced by the encouragement of learning, and in consideration of the love the grantor bore the annuitant, is not a legal consideration, nor does it amount to a valuable one in the eyes of the law. Stiles *v.* Atty.-Gen., 2 Atk. 152. Past seduction and cohabitation are not a good consideration to support an annuity. Beaumont *v.* Reeve, 8 Q. B. 483, 55 E. C. L. 483; Binnington *v.* Wallis, 4 B. & Ald. 650, 6 E. C. L. 639. But a contract to grant an annuity in consideration of the discontinuance of cohabitation and of the release of an alleged promise of marriage is enforceable in equity. Keenan *v.* Handley, 2 De G. J. & S. 283, 67 Eng. Ch. 283. See also Howell *v.* Price, 1 Jur. N. S. 494. So equity will enforce the performance of a contract by which a man who had seduced a woman bound himself to grant her an annuity for the support of herself and the child begotten of the seduction. Annandale *v.* Harris, 2 P. Wms. 432; Jennings *v.* Brown, 9 M. & W. 496. See also Gibson *v.* Dickie, 3 M. & S. 463.

Bequest of unused portion of annuity.— An agreement to pay an annuity for the use of real estate during the life of the owner is a sufficient consideration for a contract to bequeath the unused portion of the annuity. Garard *v.* Yeager, 154 Ind. 253, 56 N. E. 237.

Forbearance to sue grantor.— A promise to pay an annuity, in consideration of forbearance to sue the executors of the grantor thereof, binds the promisor if the grantor was personally bound for the payment. Horton *v.* Cook, 10 Watts (Pa.) 124, 36 Am. Dec. 151.

10. Emmons *v.* Crooks, 1 Grant Ch. (U. C.) 159.

11. Haw *v.* Ogle, 4 Taunt. 10; Gillow *v.* Lillie, 1 Bing. N. Cas. 695, 27 E. C. L. 823. See, generally, Infants.

Purchase by lunatic.— A lunatic purchased of an insurance society, and paid for, two annuities for his life, the society at the time having no knowledge of his lunacy, and the purchase being a transaction in good faith on the part of the society, and in the usual course of its business. It was held that the purchase-money could not be recovered from the society by the personal representatives of the deceased lunatic. Molton *v.* Camroux, 4 Exch. 17.

12. Cahill *v.* Maryland L. Ins. Co., 90 Md. 333, 45 Atl. 180, 47 L. R. A. 614, holding, further, that a charter authorizing an insurance company to "grant, purchase, or dispose of annuities" does not limit the company to the grant of annuities by deed or contract under seal. But see Berry *v.* Doremus, 30 N. J. L. 399, wherein it was said *arguendo* that an annuity is an incorporeal hereditament, created by grant, which necessarily implies an instrument under seal. *Compare In re* Locke, 2 D. & R. 603, wherein it was held that an instrument reciting that it had been agreed to sell an annuity, secured upon property in possession of the grantor, but containing no words of present grant, cannot be sued upon in a court of law even though it should be enrolled. To the same effect see Nield *v.* Smith, 14 Ves. Jr. 491.

13. Turrentine *v.* Perkins, 46 Ala. 631; Lloyd *v.* Scott, 4 Pet. (U. S.) 205, 7 L. ed. 833; Low *v.* Barchard, 8 Ves. Jr. 133; Marsh *v.* Martindale, 3 B. & P. 154; Chesterfield *v.* Janssen, 1 Atk. 339. See, generally, Usury.

14. Lloyd *v.* Scott, 4 Pet. (U. S.) 205, 7 L. ed. 833; Marsh *v.* Martindale, 3 B. & P. 154; Symonds *v.* Cockerill, Noy 151; Richards *v.* Brown, Cowp. 770.

15. Anderson *v.* Hammond, 2 Lea (Tenn.) 281, 31 Am. Rep. 612; Morgan *v.* Pope, 7 Coldw. (Tenn.) 541; Blewitt *v.* Roberts, 1

B. Annuity Created without Words of Limitation. As a general rule the gift or grant of an annuity to a person, without words of limitation, is a gift or grant of the annuity during the life of such person.[16] It has also been held that the gift of an annuity to one person for life, with remainder to another person, only imports that such other person is to take for life.[17]

Cr. & Ph. 274, 18 Eng. Ch. 274. See also *supra*, I.

See 2 Cent. Dig. tit. "Annuities," § 7.

Attainment of majority.— A devise reading "I wish my aunt, Ellen M. Emlen, to take charge of my children, and to receive annually from my estate for her services five hundred dollars," ceases when the youngest child attains his majority. Hewson's Appeal, 102 Pa. St. 55. So, under a will by which the testator left her child to the charge of B, directing an annual payment to be made to B for her services, the annuity will cease upon the child's becoming of age. Cox's Estate, 15 Phila. (Pa.) 537, 39 Leg. Int. (Pa.) 129, 12 Wkly. Notes Cas. (Pa.) 160.

A testatrix devised lands to trustees to pay an annuity to her son and to next apply the rents to the maintenance, education, and bringing up of the son's three children during his life. The sole survivor of the three children attained twenty-one in the lifetime of the son. It was held that the interest of such surviving child in the surplus rents and profits did not cease on his attaining twenty-one, but that he continued entitled to them during the life of his father. Badham *v.* Mee, 1 R. & M. 631, 5 Eng. Ch. 631. See also Wilkins *v.* Jodrell, 13 Ch. D. 564.

Testator gave an annuity, payable half-yearly, to his son for his maintenance and education until he attained twenty-one, and another annuity, payable in like manner, to his daughter, who was an adult, during the son's minority. It was held that, as the son was entitled to a proportional part of his annuity from the last half-yearly day of payment up to his attaining twenty-one, the daughter was entitled to a like proportional part of her annuity. Weigall *v.* Brome, 6 Sim. 99, 9 Eng. Ch. 99.

"During their natural lives," when used to indicate the duration of an annuity, means so long as either of the persons named shall live.

Indiana.— Castor *v.* Jones, 86 Ind. 289.

Maine.— Merrill *v.* Bickford, 65 Me. 118.

Massachusetts.— Hayden *v.* Snell, 9 Gray (Mass.) 365, 69 Am. Dec. 294.

Ohio.— Douglas *v.* Parsons, 22 Ohio St. 526.

England.— Bryan *v.* Twigg, L. R. 3 Eq. 433.

So a bequest of an annuity to a mother and her children, for their joint maintenance, is a bequest of an annuity to the mother and her children as joint tenants for the life of the longest liver of them. Wilson *v.* Maddison, 2 Y. & C. Ch. 372. And under a will devising to "Samuel Eales, and Charlotte, his wife, an annuity of two hundred pounds a year each, for their lives and the life of the survivor," each of the legatees is entitled to an annuity of two hundred pounds during their joint lives, and the life of the survivor of them. Eales *v.* Cardigan, 9 Sim. 384, 16 Eng. Ch. 384. And where a testatrix gave an annuity to her sister and her sister's husband for their joint lives, and after their decease to her nephew, the husband, having survived the wife, is entitled to such annuity. Townley *v.* Bolton, 1 Myl. & K. 148, 7 Eng. Ch. 148. See also Brittain *v.* Fleming, 2 Myl. & K. 147, 7 Eng. Ch. 147.

Perpetual annuity.— An annuity to a man and his heirs constitutes a perpetual annuity. Smith *v.* Pybus, 9 Ves. Jr. 566; Mansergh *v.* Campbell, 3 De G. & J. 232, 60 Eng. Ch. 232; Hedges *v.* Harpur, 3 De G. & J. 129, 60 Eng. Ch. 129; Yates *v.* Maddan, 16 Sim. 613, 39 Eng. Ch. 613. And if an annuity is given to a man and his heirs in perpetuity he has an absolute interest therein, and the only way of satisfying it is by setting aside such a sum as will forever answer it. Huston *v.* Read, 32 N. J. Eq. 591; Bradhurst *v.* Bradhurst, 1 Paige (N. Y.) 331; Smith *v.* Pybus, 9 Ves. Jr. 566.

Until death of testator's widow.— A testator bequeathed to his son an annuity from the period of his majority to the death or second marriage of the testator's widow. The son attained twenty-one and died before the widow. It was held that the legal personal representative of the son was entitled to the annuity until the death or second marriage of the widow. *In re* Ord, 12 Ch. D. 22.

While holding office of trustee.— A gift of an annuity to a trustee, so long as he should continue to execute the office of trustee, determines on the cesser of active trusts by the payment of the whole of the trust property to a person entitled, without a devolution of the office of trustee on any other person. Hull *v.* Christian, L. R. 17 Eq. 546.

16. Weston *v.* Weston, 125 Mass. 268; Bates *v.* Barry, 125 Mass. 83, 28 Am. Rep. 207; Anderson *v.* Hammond, 2 Lea (Tenn.) 281, 31 Am. Rep. 612; Blight *v.* Hartnoll, 19 Ch. D. 294; *In re* Morgan, [1893] 3 Ch. 222; Yates *v.* Maddan, 3 Macn. & G. 532; Lett *v.* Randall, 2 De G. F. & J. 388, 63 Eng. Ch. 388; Kerr *v.* Middlesex Hospital, 2 De G. M. & G. 576, 51 Eng. Ch. 576; Nichols *v.* Hawkes, 10 Hare 342, 44 Eng. Ch. 331; Blewitt *v.* Roberts, 1 Cr. & Ph. 274, 18 Eng. Ch. 274; *Re* Grove's Trusts, 1 Giff. 74; Savery *v.* Dyer, Ambl. 139, Dick. 162. But see *In re* Morgan, [1893] 3 Ch. 222, wherein it was held that where a testator indicates the existence of an annuity, without limit after the death of the person named, and therefore implies that it is to exist beyond the life of the annuitant, the annuity is presumed to be a perpetual annuity. To the same effect see Stokes *v.* Heron, 12 Cl. & F. 161.

17. Blight *v.* Hartnoll, 19 Ch. D. 294, wherein it appeared that a testatrix bequeathed an annuity, payable out of the rents of certain hereditaments, to her sister Christi-

C. Forfeiture. An annuity created on condition that it should cease on the annuitant's doing certain specified acts is, of course, forfeited by the doing of such acts.[18]

D. Merger. Where a person who has an annuity charged upon land inherits such land as the heir at law of the grantor of the annuity, such annuity becomes merged by the descent thus cast upon him.[19]

V. PAYMENT.[20]

A. Commencement. Where an annuity is given by will, and there is no direction therein as to the time when it shall commence, it commences at the testator's death; but the first payment is not due until the expiration of the first specified period, computed from such death.[21]

ana for life, with remainder for life to certain other persons, and on their deaths directed her executors to pay the annuity out of the said rents to the surviving children of Sarah Ann Boate. It was held that the children of Sarah Ann Boate took the annuity for their lives only; Blewitt *v.* Roberts, 1 Cr. & Ph. 274, 18 Eng. Ch. 274; Lett *v.* Randall, 3 Smale & G. 83.

18. Dormer *v.* Knight, 1 Taunt. 417, wherein a deed granting an annuity provided that it should cease if the annuitant should associate, continue to keep company with, or cohabit, or criminally correspond with a certain person. It was held that all intercourse whatever, though the most innocent, was within the terms of the deed.

As to forfeiture for violation of condition against public policy see *supra*, III, A.

Performance of condition.—A testator gave to his nephew an annuity of one thousand dollars during life, with a provision that it should be paid to him in person only, on his personal application, and that if he should not so apply in five years then such yearly sums uncalled for should fall into the residuary estate. The annuitant died just as he was starting on a voyage to claim his annuity, within the five years. It was held that the annuity was vested, and that the condition was a condition subsequent, made impossible by the act of God, and that the sums accrued should be awarded to the annuitant's administrator. Hutchins' Estate, 9 Phila. (Pa.) 300, 29 Leg. Int. (Pa.) 141.

Vesting annuity in other person.— An annuity grante to a *feme sole* until she should do any act whereby the same or any part thereof should be vested or become liable to be vested in any other person is not forfeited by the marriage of the annuitant. Bonfield *v.* Hassall, 32 Beav. 217.

19. Jenkins *v.* Van Schaak, 3 Paige (N. Y.) 242. See also McLarin *v.* Knox, 6 Rich. (S. C.) 23, wherein it appeared that the owner of property, held subject to an annuity to his sister for life, devised and bequeathed his whole estate to such sister for life, and appointed her executrix. She qualified as such, and took possession of and enjoyed the estate. It was held that the annuity merged in the devised and bequeathed estate.

See 2 Cent. Dig. tit. "Annuities," § 8.

Acceptance of bond.—In Thornton *v.* Spotswood, 1 Wash. (Va.) 142, it appeared that A. Spotswood settled an annuity on his wife, charged on land, with power of distress, and devised his lands to his son John, in tail, who gave his mother a bond and bills of exchange for what was then due on her annuity, and died indebted to her for part of the annuity subsequently due. The bills and bond were assigned and judgments recovered thereon against John's executor, and the executions were returned *nulla bona*. A bill was filed against the issue in tail to recover the amount of the bills of exchange and the residue of the annuity. It was held that the annuity was extinguished in equity by the bond and bills, and that plaintiff could not recover.

Annuitant as one heir.— Land charged with the payment of an annuity having descended to the heirs at law, of whom the annuitant was one, is not thereby wholly discharged from the payment of the annuity, but only *pro tanto* which the annuitant took as heir at law. Addams *v.* Heffernan, 9 Watts (Pa.) 529.

Marriage of annuitant to grantor.— A man by deed covenanted to pay a woman an annuity for her life, payable half-yearly, for her separate use and free from anticipation. The covenantor afterward married the annuitant and died, leaving her surviving. It was held that the annuity was not extinguished, but was only suspended, by the marriage, and that the widow was entitled to recover arrears accruing subsequent to the death of her husband. Fitzgerald *v.* Fitzgerald, L. R. 2 P. C. 83.

20. **Increase of amount.**— Where trustees were authorized to increase an annuity if the *cestui que trust* "should marry and have a family," and the *cestui que trust* married and became a housekeeper, but had no iss. e of the marriage, it was held that to authorize such increase of annuity it was necessary that the *cestui que trust* should have issue of the marriage. Spencer *v.* Spencer, 11 Paige (N. Y.) 159.

21. *Connecticut.*— Bartlett *v.* Slater, 53 Conn. 102, 22 Atl. 678, 55 Am. Rep. 73.

Maryland.— Owings' Case, 1 Bland (Md.) 296.

New Jersey.— Welsh *v.* Brown, 43 N. J. L. 37.

New York.— Kearney *v.* Cruickshank, 117 N. Y. 95, 22 N. E. 580; Cooke *v.* Meeker, 36 N. Y. 15; Bradner *v.* Faulkner, 12 N. Y. 472;

B. Computation of Value. In determining the present value of an annuity the computation should be varied according to the vigor or frailty of the constitution and health of the annuitant.[22]

C. Interest on Arrears. As a general rule interest will not be allowed on the arrears of an annuity.[23] The question is one that rests in the discretion of

Craig *v.* Craig, 3 Barb. Ch. (N. Y.) 76; Carr *v.* Bennett, 3 Dem. Surr. (N. Y.) 433; Kerrigan *v.* Kerrigan, 2 Redf. Surr. (N. Y.) 517; Griswold *v.* Griswold, 4 Bradf. Surr. (N. Y.) 216; Booth *v.* Ammerman, 4 Bradf. Surr. (N. Y.) 129; Lawrence *v.* Embree, 3 Bradf. Surr. (N. Y.) 364; Matter of Lynch, 52 How. Pr. (N. Y.) 367; Matter of Fish, 19 Abb. Pr. (N. Y.) 209.

Pennsylvania.— Flickwir's Estate, 136 Pa. St. 374, 20 Atl. 518; Eyre *v.* Golding, 5 Binn. (Pa.) 472.

South Carolina.— Hall *v.* Hall, 2 McCord Eq. (S. C.) 269.

Tennessee.— Morgan *v.* Pope, 7 Coldw. (Tenn.) 541.

England.— Trimmer *v.* Danby, 23 L. J. Ch. 979; Carter *v.* Taggart, 16 Sim. 447, 39 Eng. Ch. 447; Stamper *v.* Pickering, 9 Sim. 176, 16 Eng. Ch. 176; Houghton *v.* Franklin, 1 Sim. & St. 390, 1 Eng. Ch. 390; Fearns *v.* Young, 9 Ves. Jr. 549; Gibson *v.* Bott, 7 Ves. Jr. 89; Hawley *v.* Cutts, 1 Freem. Ch. 23; Irvin *v.* Ironmonger, 2 Russ. & M. 531, 11 Eng. Ch. 531.

See 2 Cent. Dig. tit. "Annuities," § 9.

See also Crew *v.* Pratt, 119 Cal. 131, 51 Pac. 44, wherein it was held that where a trust created under a will has but seven years to run, and the will provides that the beneficiaries should receive annuities from the trustees for seven years, and there appears no express intention to fix upon another time for the commencement of the annuities, they commence at the decease of the testator; and a clause in the will providing for payment of annuities as soon as the trustees should have sufficient funds available for that purpose is to be considered as relating only to the time of payment, and not to the date when the annuities begin to run.

Annuity charged on land.— Where an annuity is charged on real estate the rule is that it does not commence until the devisee of such estate is entitled to the possession thereof. Hayes *v.* Whitall, 13 N. J. Eq. 241; Ager *v.* Poole, 1 Dyer 371*b*; Turner *v.* Probyn, 1 Anstr. 66.

Direction as to first payment.— In Irvin *v.* Ironmonger, 2 Russ. & M. 531, 11 Eng. Ch. 531, the testator gave an annuity for life and directed that the first year's annuity should be paid within one month from his death. It was held that, though the first year's payment was to be made at the appointed time, the payment of the second year did not become due until the end of that year.

22. Alexander *v.* Bradley, 3 Bush (Ky.) 667. See also Rowley *v.* London, etc., R. Co., L. R. 8 Exch. 221, wherein it was held that an instruction authorizing the jury to find the term for which an annuity was to be purchased solely by reference to the average duration of life, without taking into account the state of health of the particular annuitant, was erroneous. *Compare* Ripley *v.* Severance, 6 Pick. (Mass.) 474, 17 Am. Dec. 397. See, generally, DAMAGES; EVIDENCE.

See 2 Cent. Dig. tit. "Annuities," § 12.

In Maryland the method of ascertaining the present value of an annuity for life is to apply, by analogy, the chancery rule for fixing the allowance to a woman in lieu of dower in lands sold under a decree. Peyton *v.* Ayres, 2 Md. Ch. 64.

In New York the "American Experience Table of Mortality" should be used. Atty.-Gen. *v.* North America L. Ins. Co., 82 N. Y. 172 [*distinguishing* People *v.* Security L. Ins., etc., Co., 78 N. Y. 114, 34 Am. Rep. 522].

"Northampton Mortality Tables."— In computing the present value of an annuity the "Northampton Mortality Tables" may be used, in the absence of any statute or rule of court. Schmieding *v.* Doellner, 13 Mo. App. 228; Peterson *v.* Oleson, 47 Wis. 122. *Compare* Berrinkott *v.* Traphagen, 39 Wis. 219.

Annuity in lieu of dower.— Where it is agreed that a yearly sum shall be allowed a widow, instead of having dower assigned to her according to law, the interest of one third of the value of the premises at the time of alienation is the proper measure of the annuity; subject, however, to a reasonable deduction as a compensation to the tenant, on account of necessary repairs and the risk of loss by fire, where a house and building constitute the principal part of the property. Hale *v.* James, 6 Johns. Ch. (N. Y.) 258, 10 Am. Dec. 328.

Arrears of annuity.— An administrator charged with the payment of annuities neglected to make payment. Action was brought against him and a fund raised by the sale of land, but the fund was insufficient to pay the arrears in full. It was held that a distribution founded on a computation of the cash value of the annuities was erroneous; that the distribution should be on arrears due at the time of such sale of the land. Bell's Estate, 1 Woodw. (Pa.) 336.

Perpetual annuity.— Where an annuitant, entitled to a perpetual annuity, adequately secured, is willing to receive a present payment of cash in lieu of his annuity, the amount of such cash payment ought to be such a sum as will in future produce the annuity. Hicks *v.* Ross, [1891] 3 Ch. 499.

23. *Alabama.*— Beavers *v.* Smith, 11 Ala. 20.

New York.— Isenhart *v.* Brown, 2 Edw. (N. Y.) 341.

Tennessee.— Laura Jane *v.* Hagen, 10 Humphr. (Tenn.) 332.

Virginia.— Adams *v.* Adams, 10 Leigh (Va.) 552.

England.—Anderson *v.* Dwyer, 1 Sch. & Lef. 301; Tew *v.* Winterton, 3 Bro. Ch. 489; Bignal

the court, however, and is dependent on the circumstances of the particular case.[24]

D. Persons and Property Chargeable — 1. In General. The very nature of an annuity suggests that, when those charged with the payment of it have in their hands a fund producing income sufficient to pay it, the payment should be made from the income, and not from the principal.[25] But if an annuity is charged on a particular fund both the principal and interest of the fund are applicable to its payment.[26] And it has been held that, where the dividends of a sum

v. Vrereton, Dick. 278; Bedford *v.* Coke, Dick. 178; Anonymous, 2 Ves. 661; Stapleton *v.* Conway, 1 Ves. 427; Mansfield *v.* Ogle, 4 De G. & J. 38, 61 Eng. Ch. 38; Matter of Powell, 10 Hare 134, 44 Eng. Ch. 130; Jenkins *v.* Briant, 16 Sim. 272, 39 Eng. Ch. 271; Booth *v.* Leycester, 1 Keen 247, 15 Eng. Ch. 247, 3 Myl. & C. 460, 14 Eng. Ch. 459; Martyn *v.* Blake, 3 Drury & Warr. 125; Blogg *v.* Johnson, L. R. 2 Ch. 225; Booth *v.* Coulton, 2 Giff. 514; Robinson *v.* Cumming, 2 Atk. 409.

Canada.— Crone *v.* Crone, 27 Grant Ch. (U. C.) 425; Goldsmith *v.* Goldsmith, 17 Grant Ch. (U. C.) 213; Snarr *v.* Badenach, 10 Ont. 131.

See 2 Cent. Dig. tit. "Annuities," § 18.

Thus interest will not be allowed on the arrears of an annuity which was to be paid in agricultural products in a particular place, the value of which was to be ascertained by testimony, and in the absence of any proof of a demand at the place where it was to be paid, or of an agreement to dispense with such demand, and to convert the same into money. Philips *v.* Williams, 5 Gratt. (Va.) 259.

Mutual misapprehension.— Interest is not demandable as of course where an annuity is not paid as it accrues by reason of a mutual misapprehension, or the *laches* of the creditor. Hoffman's Estate, 3 Pa. Dist. 663.

24. *Alabama.*— Beavers *v.* Smith, 11 Ala. 20.

Delaware.— Beeson *v.* Elliott, 1 Del. Ch. 368.

New York.— Cooke *v.* Meeker, 36 N. Y. 15; Isenhart *v.* Brown, 2 Edw. (N. Y.) 341.

Pennsylvania.— Brotzman's Estate, 133 Pa. St. 478, 19 Atl. 564; Addams *v.* Heffernan, 9 Watts (Pa.) 529; Hilyard's Estate, 5 Watts & S. (Pa.) 30; Stewart *v.* Martin, 2 Watts (Pa.) 200; Eyre *v.* Golding, 5 Binn. (Pa.) 472; Colwell's Estate, 4 Pa. Co. Ct. 381.

South Carolina.— Stephenson *v.* Axson, 1 Bailey Eq. (S. C.) 274; Irby *v.* McCrae, 4 Desauss. (S. C.) 422.

Tennessee.— Laura Jane *v.* Hagen, 10 Humphr. (Tenn.) 332.

England.— Newman *v.* Auling, 3 Atk. 579; Draper's Co. *v.* Davis, 2 Atk. 211; Crosse *v.* Bedingfield, 12 Sim. 35, 35 Eng. Ch. 35; Hyde *v.* Price, 8 Sim. 578, 8 Eng. Ch. 578; Morris *v.* Dillingham, 2 Ves. 170; Litton *v.* Litton, 1 P. Wms. 541.

Annuity in lieu of dower.— Interest may be recovered upon arrears of an annuity given in lieu of dower. Houston *v.* Jamison, 4 Harr. (Del.) 330; Elliott *v.* Beeson, 1 Harr. (Del.) 106; Beeson *v.* Elliott, 1 Del. Ch. 368; Cooke *v.* Meeker, 36 N. Y. 15; Townsend's Appeal, 106 Pa. St. 268, 51 Am. Rep. 523; Irby *v.* McCrae, 4 Desauss. (S. C.) 422.

25. Hammond *v.* Hammond, 169 Mass. 82, 47 N. E. 535; Cummings *v.* Cummings, 146 Mass. 501, 16 N. E. 401; Richardson *v.* Hall, 124 Mass. 228; Treadwell *v.* Cordis, 5 Gray (Mass.) 341; McIlvaine *v.* Gethen, 3 Whart. (Pa.) 575. See also Veazie *v.* Forsaith, 76 Me. 172, wherein it appeared that a trust deed provided that the trustees were to keep the principal safely invested, according to their best judgment, "and from the income thereof to pay me the sum of five thousand dollars each year." It was held that the annuity was to be derived from the income alone.

See 2 Cent. Dig. tit. "Annuities," § 10.

A direction in a will to pay an annuity out of the rents and profits of lands charges only the rents and profits and not the *corpus* of the estate, unless a contrary intenti n appears, and can only be enforced against the trustee, personally, so far as he has received such rents and profits. De Haven *v.* Sherman, 131 Ill. 115, 22 N. E. 711, 6 L. R. A. 745; Irwin *v.* Wollpert, 128 Ill. 527, 21 N. E. 501; Delaney *v.* Van Aulen, 84 N. Y. 16 [*reversing* 21 Hun (N. Y.) 274]; Sell's Estate, 4 Wkly. Notes Cas. (Pa.) 14; Forbes *v.* Richardson, 11 Hare 354, 45 Eng. Ch. 350; Baker *v.* Baker, 6 H. L. Cas. 616.

Forfeiture of lease.—A testator bequeathed an annuity, to be paid "out of the rents accruing under and from" a lease of land to the Wilkes-Barre Coal & Iron Company "so long as the said lease runs." After the testator's death, and on the application of the residuary legatees, the lease was forfeited for non-payment of rent and a new lease was executed to new grantees. It was held that the bequest was not extinguished by the forfeiture of the lease, but was charged upon and continued payable out of the rents or profits of the property then under lease, when such were received sufficient to pay it. Danforth's Appeal, 121 Pa. St. 359, 15 Atl. 635; Shupp *v.* Gaylord, 103 Pa. St. 319.

Produce of fund.— A married woman entitled to receive annually, for her sole and separate use, the interest of a trust fund, the *corpus* of which is secured to her children, may look to the actual produce of the fund for her annuity. Robert *v.* Tift, 60 Ga. 566.

26. *Michigan.*— Langrick *v.* Gospel, 48 Mich. 185, 12 N. W. 38.

New York.— Delaney *v.* Van Aulen, 21 Hun (N. Y.) 274; Gott *v.* Cook, 7 Paige (N. Y.) 521; Matter of Tilford, 5 Dem. Surr. (N. Y.) 524.

Pennsylvania.— Earp's Will, 1 Pars. Eq. Cas. (Pa.) 453.

set apart for the payment of an annuity prove insufficient for such purpose, the court may make an order for the sale, from time to time, of so much of the *corpus* as will, together with the dividends, be necessary for raising the amount of the annuity.[27] It has also been held that, where an annuity is by will expressly charged on the *corpus* of an estate, subsequent words tending to show that the testator contemplated that it should abate in the event of the income of the property being insufficient do not deprive the annuitant of the right to have the *corpus* applied toward making good any deficiency of income to meet the annuity.[28]

2. **Charge upon Land.** Where land is devised upon condition that the devisee shall pay a certain annuity the annuity becomes a charge upon the land devised,

Virginia.— Trent *v.* Trent, 1 Gilmer (Va.) 174, 9 Am. Dec. 594.

England.— Stamper *v.* Pickering, 9 Sim. 176, 16 Eng. Ch. 176.

See also *In re* Tucker, [1893] 2 Ch. 322, wherein it was held that where an annuity charged upon the *corpus* of land is in arrear the court has power to order the arrears to be raised by a sale or mortgage of the estate, though the making of such an order is a matter not of course, but of discretion. And see Davis' Appeal, 83 Pa. St. 348, wherein it was held that where a testator charged certain annuities upon his estate and, by the terms of his will, blended the realty and personalty together, it is to be concluded that it was his intention, upon a deficiency of the personal estate, to charge the real estate with the annuities.

Annuity in lieu of dower.— An annuity, provided under an antenuptial contract, to be received by a wife after the husband's death "as dower from the estate" of such husband, is chargeable upon the whole estate, both real and personal, and not exclusively upon the portion inherited by heirs other than the wife. Christy *v.* Marmon, 163 Ill. 225, 45 N. E. 150.

Penal sum of bond.— Where an annuity bond is in the penal sum of one thousand dollars, conditioned to pay one hundred dollars yearly during the obligee's life, the payment for ten years is no bar to the obligee's further claim during his life. Blackmer *v.* Blackmer, 5 Vt. 355. So, a contract binding the makers "to pay to Isabella Carns three hundred dollars, so as to secure to her sixteen dollars and sixty-six cents and two thirds of a cent annually during life," being an annuity payable to her by one of said makers, with a provision that in case of any default in payment of the annuity the whole sum of three hundred dollars shall be paid, is in the nature of a penal bond, and no more can be recovered upon it than the amount due on the annuity. Cairnes *v.* Knight, 17 Ohio St. 68.

Preference of creditors.— A conveyed property in consideration of a sum of money and of an annuity for her life from the death of the grantee, if she survived him. In the deed the grantee covenanted that the estate should pay to the grantor, if she survived him, the annuity. It was held that this did not create a charge upon the property conveyed so as to entitle the grantor to subject the same to the payment of the annuity, after the death of the grantee, in preference to other creditors of the grantee. McCandlish *v.* Keen, 13 Gratt. (Va.) 615.

27. Hodge *v.* Lewin, 1 Beav. 431, 17 Eng. Ch. 431; Swallow *v.* Swallow, 1 Beav. 432, note *a*, 17 Eng. Ch. 432, note *a*; May *v.* Bennett, 1 Russ. 370, 46 Eng. Ch. 370; Anderson *v.* Dougall, 15 Grant Ch. (U. C.) 405. See also Boomhower *v.* Babbitt, 67 Vt. 327, 31 Atl. 838, wherein it appeared that a testator bequeathed to his daughter an annuity of three hundred and sixty dollars, and, that the payment of the annuity might be "effectually secured," directed the investment of a sum which, at the legal rate of interest, would produce the amount of the annuity, and provided that this income should be used in the payment of the annuity. It was held that she was entitled to a yearly sum of three hundred and sixty dollars, to be made good out of the general estate upon a failure of this fund. And see Davies *v.* Wattier, 1 Sim. & St. 463, 1 Eng. Ch. 463, wherein it appeared that a testator having directed an annuity to be made out of his personal estate, a sum of five-per-cent stock was, by order of the court, set apart to answer the annuity. This fund having become insufficient for the purpose the deficiency was directed to be supplied out of another fund to which other persons interested in the residue had been declared to be entitled.

In California, if the fund or property out of which an annuity is payable fails, resort may be had to the general assets, as in case of a general legacy. Cal. Civ. Code, § 1357, subd. 3.

28. Pearson *v.* Helliwell, L. R. 18 Eq. 411. See also Pierrepont *v.* Edwards, 25 N. Y. 128, wherein it was held that where a testator bequeaths a life annuity in such a manner as to show a separate and independent intention that the money should be paid to the annuitant at all events, that intention will not be permitted to be overruled merely by a direction in the will that the money is to be raised in a particular way, or out of a particular fund. *Compare* Delaney *v.* Van Aulen, 84 N. Y. 16.

Effect of deed or mortgage.— An annuity having been charged by will on several parcels of real estate, devised to one person, the right of the annuitant to enforce the charge against any or all of the property devised can be waived only by agreement on the part of the annuitant, and is in no manner affected by deeds or mortgages to which the annuitant was not a party. Perkins *v.* Emory, 55 Md. 27.

and if the devisee accepts it he takes it subject to such charge.[29] It has also been held that the acceptance of such a devise creates a personal liability on the devisee upon which an action may be maintained at law, without any express promise.[30]

E. Setting aside Sum for Payment. It has been held that where an annuity is payable out of the residuary estate of a testator the court has jurisdiction to set apart a sum sufficient to answer the annuity.[31]

29. *Alabama.*— Taylor *v.* Forsey, 56 Ala. 426.

Illinois.— Mahar *v.* O'Hara, 9 Ill. 424.

Indiana.— Nash *v.* Taylor, 83 Ind. 347.

Maine.— Merritt *v.* Bucknam, 78 Me. 504, 7 Atl. 383; Merrill *v.* Bickford, 65 Me. 118.

Maryland.— Owings' Case, 1 Bland (Md.) 290.

Pennsylvania.—Phillips' Appeal, (Pa. 1887) 7 Atl. 918.

See also Philips *v.* Williams, 5 Gratt. (Va.) 259, wherein it was held that where land on which an annuity is a charge is sold during the pendency of a suit in equity to enforce the same the court may, without noticing the *pendente lite* purchaser, order the land sold to satisfy the arrears of the annuity.

See, generally, WILLS.

Lien to secure payment.— A agreed to purchase an estate from B, and, upon the estate being conveyed, to grant a life annuity to B, to be secured by bond. It was held that B had no lien on the estate for the payment of the annuity, but was entitled — the purchaser being dead and there having been no conveyance — to have the annuity secured by a valid bond before he could be called upon to convey the estate. Dixon *v.* Gayfere, 1 De G. & J. 655, 58 Eng. Ch. 655. Under a marriage settlement the woman was to have an annuity after her husband's death, he covenanting that it "is hereby made and constitutes a lien and charge upon all the property and estate, real and personal, of every name and nature, kind and description, which I may own, and to which I may be entitled at the time of my death." After his death the estate was insufficient to discharge his debts. It was held that as against his creditors there was no lien, the description not designating with sufficient certainty the property to be charged. Mundy *v.* Munson, 40 Hun (N. Y.) 304.

30. Felch *v.* Taylor, 13 Pick. (Mass.) 133, wherein it appeared that the obligor, in a bond to a husband conditioned to pay an annuity to the husband and wife during their lives and the life of the survivor, devised land upon condition that the devisee should pay whatever became due from year to year to the annuitants. It was held that the devisee, by accepting the devise, became personally liable for the annuity, and that the wife, who had survived the husband and had elected to look to the devisee instead of the general assets of the estate, might maintain assumpsit for the annuity against the devisee; Gridley *v.* Gridley, 24 N. Y. 130; Van Orden *v.* Van Orden, 10 Johns. (N. Y.) 30, 6 Am. Dec. 314; Mohler's Appeal, 8 Pa. St. 26. See also Mansell's Estate, 1 Pars. Eq. Cas. (Pa.) 367, wherein it was held that, though a widow has a specific lien on land for the payment of her annuity, if he who takes the land subject to such lien gives his bond and collateral mortgage for the same he makes it a personal debt, and the bond may be collected out of his personal estate. And see Anderson *v.* Hammond, 2 Lea (Tenn.) 281, 31 Am. Rep. 612, wherein it appeared that a testator, by his will, after making his wife residuary devisee and otherwise providing for her, added that it was his "will and desire" that she should pay his nephew, "for the purpose of educating him," a certain sum annually, commencing at a fixed day, until he came of age. It was held that the legacy was valid and a personal charge on the wife.

Foreclosure sale of land charged with annuity.— Where land is devised subject to the payment of an annuity by the devisee, and the devisee mortgages the land, covenanting that it was free from encumbrances, excepting such condition set forth in the will, a purchaser on foreclosure is liable for such proportion of the annuity as accrues after he takes possession. Felch *v.* Taylor, 13 Pick. (Mass.) 133.

31. Harbin *v.* Masterman, [1896] 1 Ch. 351; Slanning *v.* Style, 3 P. Wms. 334. But see *In re* Parry, 42 Ch. D. 570, wherein it was held that where a testator bequeaths an annuity, and then gives the residue of his property, the annuitants are not entitled, as a matter of right, to have the estate converted, and a sum sufficient to answer the annuity invested in such securities as the court may approve, but they are entitled to have the annuities sufficiently secured.

Duty of executor to set apart sum.—Where testator gives an annuity, without stating from what source it is to be paid, and then divides the rest of his estate among several persons, it is the duty of the executors, before distributing the capital, either to appropriate a sufficient amount of the capital to purchase an annuity, or to reserve enough of it to yield an income amply sufficient to meet the annuity, leaving such portion of the capital to be the subject of another distribution when the annuity has ceased. Cummings *v.* Cummings, 146 Mass. 501, 16 N. E. 401; Treadwell *v.* Cordis, 5 Gray (Mass.) 341; Gott *v.* Cook, 7 Paige (N. Y.) 521; Matter of Tilford, 5 Dem. Surr. (N. Y.) 524. See also Healey *v.* Toppan, 45 N. H. 243, 86 Am. Dec. 159, wherein it was held that where a residuary bequest is made to one, "subject to" the payment of a certain annuity to another for life, it is equivalent to charging that annuity upon the property bequeathed for the life of the annuitant; and before the property is delivered to the legatee enough should be set aside and invested by the executor so that its income will be sufficient to pay the annuity, or the legatee should give the executor other sufficient security for the payment of the annuity.

Sum required to produce annuity.— A sum

VI. APPORTIONMENT.

A. Rule at Common Law. It was the uniform and unbending rule of the common law, recognized both by courts of law and equity, that annuities, whether created *inter vivos* or by will, were not apportionable in respect of time.[32]

B. Exceptions to Rule. The rigor of the common-law rule has been to some extent ameliorated in modern times by the recognition of certain well-defined exceptions, as in cases where an annuity is given in lieu of dower,[33] or for the separate maintenance of married women, or for the support of children,[34] or where

required to be set apart to raise an annuity is such a sum as, being invested at the legal rate of interest, will produce the amount of the annuity (Perkins *v.* Emory, 55 Md. 27; Paterson *v.* McMaster, 11 Grant Ch. (U. C.) 337. See also Buchanan *v.* Deshon, 1 Harr. & G. (Md.) 280), and should be sufficiently large to make allowance for the fluctuation in values (Mullen's Estate, 14 Wkly. Notes Cas. (Pa.) 144. See also Rhodes' Estate, 11 Phila. (Pa.) 133, 33 Leg. Int. (Pa.) 168).

32. The rule proceeds upon the interpretation of the contract by which the grantor binds himself to pay a certain sum at fixed days during the life of the annuitant; and such day not having arrived when the latter dies, the former is discharged from his obligation.

Connecticut.— Tracy *v.* Strong, 2 Conn. 659.

Indiana.— Nading *v.* Elliott, 137 Ind. 261, 36 N. E. 695; Heizer *v.* Heizer, 71 Ind. 526, 36 Am. Rep. 202.

Massachusetts.— Dexter *v.* Phillips, 121 Mass. 178, 23 Am. Rep. 261; Wiggin *v.* Swett, 6 Metc. (Mass.) 194, 39 Am. Dec. 716.

Michigan.— Chase *v.* Darby, 110 Mich. 314, 68 N. W. 159, 64 Am. St. Rep. 347, holding that the rule obtained even where the annuitant was in debt at the time of his death.

New Jersey.— Matter of Lackawanna Iron, etc., Co., 37 N. J. Eq. 26; Manning *v.* Randolph, 4 N. J. L. 167.

New York.— Kearney *v.* Cruikshank, 117 N. Y. 95, 22 N. E. 580; Irving *v.* Rankine, 13 Hun (N. Y.) 147 [*affirmed* in 79 N. Y. 636]; Clapp *v.* Astor, 2 Edw. (N. Y.) 379.

Pennsylvania.— Wilson's Appeal, 108 Pa. St. 344, 56 Am. Rep. 214 Blight *v.* Blight, 51 Pa. St. 420; McKeen's Appeal, 42 Pa. St. 479; Dubbs *v.* Watson, 2 Pa. Dist. 115; Earp's Will, 1 Pars. Eq. Cas. (Pa.) 453; Stewart *v.* Swaim, 13 Phila. (Pa.) 185, 36 Leg. Int. (Pa.) 302, 7 Wkly. Notes Cas. (Pa.) 407.

South Carolina.— McLemore *v.* Blocker, Harp. Eq. (S. C.) 272.

England.— Reg. *v.* Treasury Com'rs, 16 Q. B. 357, 71 E. C. L. 357; Franks *v.* Noble, 12 Ves. Jr. 484; Leathley *v.* French, 8 Ir. Ch. 401; Sherrard *v.* Sherrard, 3 Atk. 502; Reynish *v.* Martin, 3 Atk. 330; Pearly *v.* Smith, 3 Atk. 260; Hay *v.* Palmer, 2 P. Wms. 501; Howell *v.* Hanforth, 2 W. Bl. 1016; *Ex p.* Smyth, 1 Swanst. 337 note; Anderson *v.* Dwyer, 1 Sch. & Lef. 301.

Canada.— Ausman *v.* Montgomery, 5 U. C. C. P. 364; Woodside *v.* Logan, 15 Grant Ch. (U. C.) 145.

See 2 Cent. Dig. tit. "Annuities," § 13.

But see Waring *v.* Purcell, 1 Hill Eq. (S. C.) 193, wherein it was held that where a testator bequeathed an annuity, to be paid on the first day of March in every year, and he died in September, the legatee, on the first day of March after the testator's death, should be paid a proportion of the annuity equal to the time which had run after such death.

Death pending suit to enforce.— Where an annuitant, who had the right to foreclose a mortgage which secured the annuity, and to retain from the proceeds its present cash value, died pending suit to foreclose this right, his administrator is entitled only to the unpaid arrears of the annuity. Moore *v.* Dunn, 92 N. C. 63.

33. The reason for the exception as to an annuity in lieu of dower is that, as dower lasts during the life of the widow, what is given in its place should last the same length of time. Parker *v.* Seeley, 56 N. J. Eq. 110, 38 Atl. 280; Matter of Lackawanna Iron, etc., Co., 37 N. J. Eq. 26; Blight *v* Blight, 51 Pa. St. 420; Gheen *v.* Osborn, 17 Serg. & R. (Pa.) 171; Sweigert *v.* Frey, 8 Serg. & R. (Pa.) 299; Stewart *v.* Swaim, 13 Phila. (Pa.) 185, 36 Leg. Int. (Pa.) 302, 7 Wkly. Notes Cas. (Pa.) 407; Smith *v.* Wistar, 5 Phila. (Pa.) 145, 20 Leg. Int. (Pa.) 68; Rhode Island Hospital Trust Co. *v.* Harris, 20 R. I. 160, 37 Atl. 701; *In re* Cushing, 58 Vt. 393, 5 Atl. 186. But see Tracy *v.* Strong, 2 Conn. 659, wherein it appeared that a sum of money was secured by bond to a widow in consideration of her relinquishing her right of dower, which sum was payable on a certain day, yearly, during her life. It was held that this was an annuity not subject to apportionment.

See 2 Cent. Dig. tit. "Annuities," § 14.

34. The reason for the exception as to infants and married women is based upon a supposed necessity growing out of their want of capacity to contract.

Massachusetts.— Dexter *v.* Phillips, 121 Mass. 178, 23 Am. Rep. 261.

Michigan.— Chase *v.* Darby, 110 Mich. 314, 68 N. W. 159, 64 Am. St. Rep. 347.

New Jersey.— Matter of Lackawanna Iron, etc., Co., 37 N. J. Eq. 26.

New York.— Kearney *v.* Cruikshank, 117 N. Y. 95, 22 N. E. 580; Irving *v.* Rankine, 13 Hun (N. Y.) 147; Clapp *v.* Astor, 2 Edw. (N. Y.) 379.

Pennsylvania.— Gheen *v.* Osborn, 17 Serg. & R. (Pa.) 171; Earp's Will, 1 Pars. Eq. Cas. (Pa.) 453; Stewart *v.* Swaim, 13 Phila. (Pa.) 185, 36 Leg. Int. (Pa.) 302, 7 Wkly. Notes Cas. (Pa.) 407; Fisher *v.* Fisher, 5 Pa. L. J. 178.

England.—Reg. *v.* Treasury Com'rs, 16 Q. B.

it consists of interest, or of other sums accruing, and therefore payable, *de die in diem*.[35]

C. Statutory Modification of Rule. In some jurisdictions annuities are made apportionable by statute.[36]

VII. Rights, Remedies, and Liabilities of Annuitants.

A. Right to Have Administration. It has been held that the legatee of an annuity charged upon the residue of testator's estate is entitled to have judgment for administration of the estate.[37]

B. Creation of Charge upon Fund. An annuitant cannot create a charge upon the trust fund so as to impair it.[38]

C. Remedies — 1. At Law. To enforce the payment of an annuity, a writ of annuity lay at common law.[39] This writ has long been out of use, however, and is superseded by an action of covenant or debt.[40]

2. In Equity. An annuity given by a will is for many purposes treated as a legacy, and, so considered, its payment may be enforced in equity.[41]

357, 71 E. C. L. 357; Franks *v.* Noble, 12 Ves. Jr. 484; Leathley *v.* French, 8 Ir. Ch. 401; Reynish *v.* Martin, 3 Atk. 330; Hay *v.* Palmer, 2 P. Wms. 501; Howell *v.* Hanforth, 2 W. Bl. 1016; *Ex p.* Smyth, 1 Swanst. 337.

35. Stewart *v.* Swaim, 13 Phila. (Pa.) 185, 36 Leg. Int. (Pa.) 302, 7 Wkly. Notes Cas. (Pa.) 407.

Interest on bonds.— The interest on municipal bonds and the bonds of private corporations is apportionable. Wilson's Appeal, 108 Pa. St. 344, 56 Am. Rep. 214 [*overruling* Earp's Will, 1 Pars. Eq. Cas. (Pa.) 453].

36. Adams *v.* Adams, 139 Mass. 449, 1 N. E. 746; Weston *v.* Weston, 125 Mass. 268; Bates *v.* Barry, 125 Mass. 83, 28 Am. Rep. 207; Dexter *v.* Phillips, 121 Mass. 178, 23 Am. Rep. 261; Sargent *v.* Sargent, 103 Mass. 297, construing Mass. Pub. Stat. c. 136, § 25; Kearney *v.* Cruikshank, 117 N. Y. 95, 22 N. E. 580, referring to N. Y. Laws (1875) c. 542; Matter of Young, 23 Misc. (N. Y.) 223, 50 N. Y. Suppl. 402; Carter *v.* Taggart, 16 Sim. 447, 39 Eng. Ch. 447; Trimmer *v.* Danby, 23 L. J. Ch. 979; Woodside *v.* Logan, 15 Grant Ch. (U. C.) 145.

In England, 4 & 5 Wm. IV, c. 22, was the first statute making annuities apportionable in respect of time. In construing this statute some of the courts held that the statute covered continuing annuities only, that is, annuities not terminating with the life of the first taker. Reg. *v.* Treasury Com'rs, 16 Q. B. 357, 71 E. C. L. 357; Lowndes *v.* Stamford, 18 Q. B. 425, 83 E. C. L. 425. This led to the enactment of 34 & 35 Vict. c. 35, which made all annuities apportionable and declared that annuities should, "like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of them accordingly."

37. Wollaston *v.* Wollaston, 7 Ch. D. 58.

38. Post *v.* Cavender, 12 Mo. App. 20, wherein it was held that a bill to charge a fund, the income of which was to be paid to certain beneficiaries during life, and, after their death without heirs, to vest in the heirs of the testator, which alleged that through plaintiffs' services, as attorneys, the estate was preserved from waste, that the annuity was insufficient to pay their fee, and that the annuitants consented to a payment thereof out of the principal of the fund, contained no equity.

39. Townshend *v.* Duncan, 2 Bland (Md.) 45; Owings' Case, 1 Bland (Md.) 290; 1 Tidd Pr. 3.

See 2 Cent. Dig. tit. "Annuities," § 19.

Remedy after death of grantor.— A writ of annuity being a remedy at law against the person of the grantor of the annuity, it follows that the devisee could not avail himself of it, as the devisor ceased to exist before the gift of the annuity took effect. Townshend *v.* Duncan, 2 Bland (Md.) 45.

40. Horton *v.* Cook, 10 Watts (Pa.) 124, 36 Am. Dec. 151; Davis *v.* Speed, 5 Mod. 143.

Exhausting security.—An annuitant whose claim is secured by bond and deed of trust cannot be compelled to enforce his lien before proceeding against the general estate of his deceased obligor. Schmieding *v.* Doellner, 13 Mo. App. 228. And an annuitant may have several securities, some of which may be partial and others entire, and one or more of which may be resorted to to obtain satisfaction. Shepherd's Appeal, 2 Grant (Pa.) 402.

Freehold interest.— At common law an action of debt will not lie for an annuity in fee, in tail, or for life while it continues a freehold interest. Webb *v.* Jiggs, 4 M. & S. 113; Kelly *v.* Clubbe, 6 Moore P. C. 336; Randall *v.* Rigby, 4 M. & W. 130; Davis *v.* Speed, 5 Mod. 143.

41. Mahar *v.* O'Hara, 9 Ill. 424; Townshend *v.* Duncan, 2 Bland (Md.) 45. See also Degraw *v.* Clason, 11 Paige (N. Y.) 136, wherein it was held that an annuity for life, given directly to the legatee, and charged by the testator in his will upon his real and personal estate, is not property held in trust for the legatee, but is an absolute legacy, the payment of which, out of the estate upon which it is a charge, the legatee may enforce by a bill in equity. And see Brandon *v.* Brandon, 46 Miss. 222, wherein it appeared that real and personal property were conveyed to B. as trustee, on condition that B should pay to the

3. LIMITATION OF ACTION. It has been held that though the statute of limitations will not run as to a legacy, the rule is otherwise as to an annuity.[42]

4. PARTIES. A bill to recover arrears of an annuity due an intestate should be filed by his personal representatives. It cannot be filed by the next of kin.[43]

5. PLEADINGS. A bill to enforce an annuity need not allege the enrolment of a memorial, as required by statute.[44]

grantor in the deed a certain sum annually. After payment by B for several years he ceased to pay, and became insolvent. No part of the subject of the conveyance but the land remained. It was held that a court of equity had jurisdiction of a bill by the grantor in such deed to obtain relief.

See 2 Cent. Dig. tit. "Annuities," § 17.

Foreclosure of mortgage.— A son gave a mortgage on land to secure performance of covenants by which he was bound to furnish to plaintiff, his mother, each year a certain quantity of grain, and every second year certain other chattels. On the failure to perform the covenants it was held that, as the condition of the mortgage was not the support and maintenance of plaintiff, but the payment of life annuities, in specific articles, the proper remedy was not the rescission of the contract, but a foreclosure of the mortgage and sale of the premises to make the amount of damages accrued for past breaches, together with the present value of the annuity which the mortgagor's covenants bound him to pay plaintiff for the remainder of her life. Peterson *v.* Oleson, 47 Wis. 122. *Compare* Bogie *v.* Bogie, 41 Wis. 209.

Remedy against each of several persons bound.— Where two persons agree to pay an equal annuity to a third person, each securing the payment of his moiety by mortgage of realty, with a stipulation that, at the death of the annuitant and the payment of funeral expenses, any part of the annuity remaining should be equally divided between them, the annuitant is entitled to the annuity from each and to enforce the mortgage against either, and it is no defense that the annuitant has failed to make the other party pay, the right to the surplus, if any, only accruing after the death of the annuitant. Smith *v.* Smith, 15 Lea (Tenn.) 93.

42. Smallman *v.* Hamilton, 2 Atk. 71; Hunter *v.* Nockolds, 1 Macn. & G. 640. But see Snow *v.* Booth, 8 De G. M. & G. 69, 57 Eng. Ch. 69, wherein it appeared that a reversioner in fee expectant on the death of the survivor of two tenants for life granted an annuity for ninety-nine years, determinable with lives, and with a surety covenanted for payment of the annuity. He also demised the reversion for five hundred years, in trust, if the annuity should be in arrear, to sell the reversion and raise the arrears and future payments of the annuity. The grantor and surety became bankrupts, and, when the annuity had been in arrear more than twenty years, the annuitant filed a bill to have the arrears raised. It was held that the statute of limitations did not apply. To the same effect see Knight *v.* Bowyer, 2 De G. & J. 421, 59 Eng. Ch. 421; Cox *v.* Dolman, 2 De G. M. & G. 592, 51 Eng. Ch. 592.

Presumption from lapse of time.— Lord Lucas gave Dorothy Potter an annuity for life. She died in 1718, and in 1740 a bill was brought by her representative for the arrears from 1708 to the death of Dorothy Potter. The court, from the length of time, presumed it to be paid. Smallman *v.* Hamilton, 2 Atk. 71. *Compare* Cornwall *v.* Hoyt, 7 Conn. 420.

Recovery of consideration.— The statute of limitations is no bar to an action to recover the consideration paid for an annuity, notwithstanding more than the statutory period has elapsed since the date of the grant, where the grantor has within such period elected to avoid the annuity by reason of a defective memorial. Cowper *v.* Godmond, 3 M. & S. 219. See also Huggins *v.* Coates, 5 Q. B. 432, 48 E. C. L. 432.

What statute applicable.— A bill seeking an account of an annuity created by deed charged on lands, and payable annually during the life of the annuitant, is not a bill on an open account within the three-years' statute of limitations. Taylor *v.* Forsey, 56 Ala. 426.

43. Clason *v.* Lawrence, 3 Edw. (N. Y.) 48.

See 2 Cent. Dig. tit. "Annuities," § 17.

Annuity in favor of husband and wife.— Where an annuity is created by deed, charged on land and secured by mortgage, in favor of a husband and wife during their joint lives, and to the survivor for life, and is made payable to the husband "for their mutual benefit," the husband does not take the entire interest during the joint lives of himself and wife, but he and his wife take by moieties, and she has such an interest as entitles her to maintain a bill in equity to foreclose the mortgage, and to redeem from an older mortgage on the land. Sloan *v.* Frothingham, 72 Ala. 589.

Foreclosure of subsequent mortgage.— Annuitants prior to a mortgage need not be made parties to a suit by the mortgagee against the mortgagor for a sale, but the estate must be sold subject to the annuities. Delabere *v.* Norwood, 3 Swanst. 144.

Revival on death of annuitant.— After a decree for the arrears of an annuity rendered in favor of a non-resident, upon a contract made in another state, if the annuitant die pending an appeal the suit may be revived by the personal representative of the annuitant, and such representative may be appointed by the county court of the county in which the decree was recovered. Smith *v.* Smith, 15 Lea (Tenn.) 93.

44. Emmons *v.* Crooks, 1 Grant Ch. (U. C.) 159, wherein it was held that the defendant, to entitle himself to take advantage of any defect in this respect, must set it up in his answer.

Prayer for foreclosure and sale.— In a suit

6. **Decree.** In a suit in equity for arrears of an annuity the decree should not only be for the sums already due, but should reserve liberty to apply to the court, from time to time, to extend its decree so as to embrace sums afterward becoming payable.[45]

D. Liability of Annuity for Debts of Annuitant. It has been held that an annuity may be reached by creditors, in equity, for the debts of the annuitant; and the fact that it is for support does not render it exempt.[46]

ANNUL. To make void; to dissolve.[1] (Annul: Actions to, see Cancellation of Instruments.)

ANNULMENT. The act of annulling; the act of making void retrospectively as well as prospectively.[2] (Annulment: Of Insurance Policy, see Insurance. Of Judgment, see Equity; Judgments. Of Marriage, see Marriage. Of Sale, see Executions; Executors and Administrators; Guardian and Ward;

by a grantor of land to enforce a lien thereon, reserved by the deed, for maintenance and the payment of an annuity, a prayer for foreclosure and sale is appropriate. Bentley *v.* Gardner, 45 N. Y. App. Div. 216, 60 N. Y. Suppl. 1056.

45. Marshall *v.* Thompson, 2 Munf. (Va.) 412.

See 2 Cent. Dig. tit. "Annuities," § 20.

Sale of land charged with annuity.— A decree against purchasers of a tract of land, encumbered by a mortgage to secure the payment of an annuity, ought to provide that so much of their lands respectively be sold as will be sufficient to pay their proportions of the sum remaining due and unsatisfied, by a sale of so much of the tract as was retained by the vendor and liable to be sold, except so far as they shall pay their respective proportions of such debt and agree to hold their land subject to the future decree of the court for their proportions of any sums growing due to the plaintiff thereafter. Mayo *v.* Tomkies, 6 Munf. (Va.) 520.

Scire facias for subsequent instalments.— In Owings' Case, 1 Bland (Md.) 290, it was held that, according to the common law, if a party brought his writ of annuity and obtained judgment, that judgment stood as a security as well for the amount then due as for that which should thereafter become due; and the payment of future instalments might be enforced by scire facias sued out within the year after every day of payment, though it might be many years after the judgment. But see Wood *v.* Wood, 3 Wend. (N. Y.) 454, wherein it was held that after judgment has been rendered in an action of debt on a bond to secure the payment of an annuity, a scire facias is not necessary to warrant an execution for subsequent arrears.

46. Gifford *v.* Rising, 51 Hun (N. Y.) 1, 3 N. Y. Suppl. 392; Bryan *v.* Knickerbacker, 1 Barb. Ch. (N. Y.) 409; Degraw *v.* Clason, 11 Paige (N. Y.) 136; British North America Bank *v.* Matthews, 8 Grant Ch. (U. C.) 486. See also Sillick *v.* Mason, 2 Barb. Ch. (N. Y.) 79 [*affirming* 4 Sandf. Ch. (N. Y.) 351], wherein it was held that where a person is entitled under a will to an annuity for life out of the income of real and personal estate in the hands of trustees, his interest in such annuity, beyond what is necessary for the support of himself and his family, may be reached by a creditor's bill and applied to the payment of his debts. To the same effect see Scott *v.* Nevins, 6 Duer (N. Y.) 672; Clute *v.* Bool, 8 Paige (N. Y.) 83. But see Frazier *v.* Barnum, 19 N. J. Eq. 316, 97 Am. Dec. 666, wherein it was held that, under the New Jersey statute, where a fund held in trust for the payment of an annuity has proceeded from some person other than the annuitant himself, such annuity cannot be reached for the payment of the annuitant's debts.

See 2 Cent. Dig. tit. "Annuities," § 16.

Creditor's bill.— The interest of an annuity may be reached by a creditor's bill for the payment of his debts. Gifford *v.* Rising, 51 Hun (N. Y.) 1, 3 N. Y. Suppl. 392; Sillick *v.* Mason, 2 Barb. Ch. (N. Y.) 79; Bryan *v.* Knickerbacker, 1 Barb. Ch. (N. Y.) 409; Degraw *v.* Clason, 11 Paige (N. Y.) 136.

Equitable attachment is a proper remedy to reach an annuity for the debts of the annuitant. British North America Bank *v.* Matthews, 8 Grant Ch. (U. C.) 486.

Debts of remainder-man.—Land was vested in a trustee by deed of marriage settlement, in trust to pay the wife an annuity out of the profits, and, subject to the annuity, in trust for a son of the grantor. During the life of the annuitant a creditor of the son recovered a judgment against him, and exhibited his bill in chancery to subject the son's equitable interest in the estate to the debt. It was held that as the annuitant was yet living, and was not compellable to take a gross sum in satisfaction of the annuity, and as the trustee was to hold it subject to and pay the annuity out of the profits, the court would not direct the sale of the debtor's entire equitable interest subject to the annuity, but would only direct the application of the surplus of profits as they accrued after paying the annuity. Coutts *v.* Walker, 2 Leigh (Va.) 268.

1. Wait *v.* Wait, 4 Barb. (N. Y.) 192, 208 [*citing* Webster Dict.].

Not a technical term.—"Annul is not a technical word. There is nothing which prevents the idea conveyed by it from being expressed in equivalent words." Woodson *v.* Skinner, 22 Mo. 13, 24.

2. Century Dict.

Judicial Sales; Taxation. Of Satisfaction — Of Judgment, see Judgments; Of Mortgage, see Mortgages. Of Tax Assessment, see Municipal Corporations; Taxation. Of Will, see Wills.)

ANNULUS ET BACULUS. Ring and staff. Symbols used in ecclesiastical investitures.[3]

ANNUS. A year.[4]

ANNUUS REDITUS. An annuity.[5]

A NON POSSE AD NON ESSE SEQUITUR ARGUMENTUM NECESSARIO NEGATIVE, LICET NON AFFIRMATIVE. A maxim meaning "From impossibility to non-existence, the influence follows necessarily in the negative, though not in the affirmative."[6]

ANONYMOUS. Without names. A term applied to the reported cases in which the names of the parties are not given, or which are without the usual title.[7] It is often abbreviated "Anon.,"[8] "An.," or "A."[9]

ANOTHER. A different or separate person or thing.[10] (Another: Action, see Abatement and Revival; Actions.)

ANSEMENT. Likewise; in like manner.[11]

ANSWER. In law, a counter-statement of facts in a course of pleading; a confutation of what the other party has alleged.[12] (Answer: Of Defendant — In Admiralty, see Admiralty; In Equity, see Equity; In Law, see Pleading. Of Garnishee, see Garnishment. Of Party on Examination before Trial, see Discovery. Of Witness, see Depositions; Trial. Operation and Effect of — As Answer, see Appearances; As Evidence, see Equity; As Waiver of Defects, see Equity; Parties; Pleading; Process.)

ANTE. Before.[13]

ANTEDATE. To date a document before the day of its execution.[14]

ANTEJURAMENTUM. An oath formerly taken before trial by both the accuser and accused.[15]

ANTE MERIDIEM. See A. M.

ANTENATI. Persons born before a particular period or event.[16]

ANTENUPTIAL. Before marriage.[17] (Antenuptial: Contracts, see Dower; Husband and Wife; Wills. Settlements, see Fraudulent Conveyances; Husband and Wife.)

ANTICHRESIS. See Mortgages; Pledges.

ANTICIPATION. The act of doing or taking a thing before the proper time.[18] (Anticipation: Of Intention, see Patents. Restraints on, of Income from Trust Fund, see Wills.)

ANTIGRAPHY. A copy or counterpart of a deed.[19]

ANTI-TRUST LAW. See Monopolies.

ANY. The word "any" may have one of several meanings, according to the subject which it qualifies.[20] Thus, under some circumstances, it may mean "all;"[21]

3. 1 Bl. Comm. 378.
4. Burrill L. Dict.
Annus deliberandi.— A year of deliberating. The year allowed by the Scotch law to the heir to deliberate whether he will enter and represent his ancestor. Bell Dict. [*cited* in Burrill L. Dict.].
5. Burrill L. Dict.
6. Adams Gloss.
7. Burrill L. Dict.
8. As in Anon., 1 Atk. 88.
9. Wharton L. Lex.
10. Moore *v.* Com., 92 Ky. 630, 633, 13 Ky. L. Rep. 738, 18 S. W. 833; Greenwood *v.* McGilvray, 120 Mass. 516, 521.
11. Kelham Dict.
12. Larrabee *v.* Larrabee, 33 Me. 100, 102 [*citing* Webster Dict.].
13. Burrill L. Dict.
Ante exhibitionem billæ.— Before the exhibition of the bill. Burrill L. Dict.
Ante litem motam.— Before litigation commenced. Wharton L. Lex.
14. Wharton L. Lex.
15. Jacob L. Dict.
16. Burrill L. Dict.
17. Abbott L. Dict.
18. Bouvier L. Dict.
19. Wharton L. Lex.
20. Stiles *v.* Board of Chosen Freeholders, 50 N. J. L. 9, 11, 11 Atl. 143.
21. *Iowa.*— State *v.* Haug, 95 Iowa 413, 64 N. W. 398, 29 L. R. A. 390; Dubuque County *v.* Dubuque, etc., R. Co., 4 Greene (Iowa) 1, 4.
Massachusetts.— Livermore *v.* Swasey, 7 Mass. 213, 227.
Nevada.— Virginia, etc., R. Co. *v.* Ormsby County, 5 Nev. 341, 348.

and, under others, "each;"[22] "every;"[23] "some;"[24] or one or more out of several.[25]

APART. Separate.[26]

APARTMENT. One or more rooms in a house, occupied by one or more persons, distinct from other occupants of the same house.[27]

APEX. In mining, the end or edge of a lode or vein nearest the surface of the earth.[28]

APEX JURIS. An extreme point or subtlety of law.[29]

APICES JURIS NON SUNT JURA. A maxim meaning "Mere niceties of law are not law."[30]

APICES LITIGANDI. Subtleties of litigation.[31]

A PIRATUS ET LATRONIBUS CAPTA DOMINIUM NON MUTANT. A maxim meaning "Things taken or captured by pirates and robbers do not change their ownership."[32]

APOSTACY. The total renunciation of Christianity by embracing either a false religion or no religion at all.[33]

APOSTATA CAPIENDO. A writ, addressed to the sheriff, commanding him to deliver a defendant into the possession of the abbot or prior, which was formerly issued against an apostate, or one who had violated the rules of his religious order.[34]

APOSTLES. In admiralty practice, the papers forming the record upon an appeal transmitted from the inferior to the appellate court for the purpose of showing what proceedings were had below.[35] (See, generally, ADMIRALTY.)

APOTHECARY. One who prepares and sells drugs for medical purposes for a business.[36] (See, generally, DRUGGISTS.)

APPARATUS. Implements;[37] an equipment of things provided and adapted as a means to some end; any complex instrument or appliance for a specific action or operation.[38]

APPARENT. That which seems to exist or which is indicated by appearances; manifest; beyond doubt; obvious.[39]

New Jersey.— Montclair Tp. *v.* New York, etc., R. Co., 45 N. J. Eq. 436, 442, 18 Atl. 242.

New York.— Heaton *v.* Wright, 10 How. Pr. (N. Y.) 79, 83.

Pennsylvania.— Buckwalter *v.* Black Rock Bridge Co., 38 Pa. St. 281, 287.

England.—Powell *v.* Howells, L. R. 3 Q. B. 654.

22. Galbraith *v.* Galbraith, 3 Serg. & R. (Pa.) 392, 393.

23. Davidson *v.* Dallas, 8 Cal. 227, 239; McComas *v.* Amos, 29 Md. 132, 141; Tillou *v.* Britton, 9 N. J. L. 120, 128; Hanson *v.* Eichstaedt, 69 Wis. 538, 545, 35 N. W. 30.

24. West Chicago Park Com'rs *v.* McMullen, 134 Ill. 170, 179, 25 N. E. 676, 10 L. R. A. 215 [*citing* Webster Dict.; Worcester Dict.]; Witherhead *v.* Allen, 28 Barb. (N. Y.) 661, 666.

Distinguished from "some."—"In synonyms it is distinguished from 'some.' Thus, it is said, '"some" applies to one particular part in distinction from the rest; "any," to every individual part without distinction. The former is altogether restrictive in its sense, the latter is altogether universal and indefinite.'" Stiles *v.* Board of Chosen Freeholders, 50 N. J. L. 9, 11, 11 Atl. 143 [*citing* Crabb Eng. Syn.]. See also Miller *v.* Munson, 34 Wis. 579, 17 Am. Rep. 461, wherein the word "any" was held not to be the equivalent of "some" in an affidavit for attachment.

25. New Haven Young Men's Institution *v.* New Haven, 60 Conn. 32, 39, 22 Atl. 447; State *v.* Antonio, 2 S. C. Const. Rep. 776, 783, S. C., 3 Wheel. Crim. (N. Y.) 508.

26. Belo *v.* Mayes, 79 Mo. 67, 69.

27. Burrill L. Dict.

28. Duggan *v.* Davey, 4 Dak. 110, 26 N. W. 887; Iron Silver Min. Co. *v.* Murphy, 2 McCrary (U. S.) 121, 3 Fed. 368; Stevens *v.* Williams, 1 McCrary (U. S.) 480, 23 Fed. Cas. No. 13,413.

29. Burrill L. Dict.

30. Burrill L. Dict.

Applied in Holmes *v.* Remsen, 20 Johns. (N. Y.) 229, 261, 11 Am. Dec. 269.

31. Burrill L. Dict.

Used by Lord Mansfield in Morris *v.* Pugh, 3 Burr. 1241, 1243, in the expression: "It is unconscionable in a defendant to take advantage of the *apices litigandi* to turn a plaintiff round, and make him pay costs where his demand is just."

32. Adams Gloss.

33. Burrill L. Dict.

34. Wharton L. Lex.

35. Abbott L. Dict.

36. Anderson *v.* Com., 9 Bush. (Ky.) 569, 571; Westmoreland *v.* Bragg, 2 Hill (S. C.) 414, 415.

37. Coolidge *v.* Choate, 11 Metc. (Mass.) 79, 83.

38. Board of Education *v.* Andrews, 51 Ohio St. 199, 203, 37 N. E. 260 [*citing* Century Dict.; Webster Dict.].

39. Johnson *v.* State, 5 Tex. App. 423, 433.

APPEAL AND ERROR

EDITED BY WALTER CLARK

Associate Justice of Supreme Court of North Carolina *

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* Author of Clark's Annotated Code of Civil Procedure of North Carolina, and of "Clark's Overruled Cases," "Laws for Business Men," etc., and Editor of "Annotated Reprints" of the North Carolina Supreme Court Reports.

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XIV. DISMISSAL, WITHDRAWAL, OR ABANDONMENT. [See 3 Cyc.]

XV. DOCKETS, CALENDARS, AND PROCEEDINGS PRELIMINARY TO HEARING. [See 3 Cyc.]

XVI. HEARING AND REHEARING. [See 3 Cyc.]

XVII. REVIEW. [See 3 Cyc.]

XVIII. DETERMINATION AND DISPOSITION OF CAUSE. [See 3 Cyc.]

CROSS-REFERENCES

For Appellate Jurisdiction of Particular Courts, see ADMIRALTY; AMBASSADORS AND CONSULS; COURTS.
Costs on Appeal or on Writ of Error, see COSTS.
Death of Party Pending Appeal, see ABATEMENT AND REVIVAL.
Effect of Appeal or Writ of Error in a Former Action, see ABATEMENT AND REVIVAL.
Injunction against Appeal, see INJUNCTIONS.
New Trial, see NEW TRIALS.
Opening Judgment, see JUDGMENTS.
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For Review:
By Audita Querela, see AUDITA QUERELA.
By Certiorari, see CERTIORARI.
In Admiralty Proceedings, see ADMIRALTY.
In Chancery Cases, see EQUITY.
In Criminal Cases, see CRIMINAL LAW.

For Review — (*continued*)

In Justices' Cases, see JUSTICES OF THE PEACE.

In Particular Actions or Proceedings, see the various particular titles, such as ADOPTION OF CHILDREN; ACCIDENT INSURANCE; and the like.

Otherwise Than by Appeal or Writ of Error, Generally, see AUDITA QUERELA; CERTIORARI; REVIEW.

I. NATURE AND FORM OF REMEDY.

A. Right to Appellate Review. While the law has usually considered it an essential right of a suitor to have his rights examined in tribunals superior to those in which he considers himself aggrieved,[1] the right pertains to the remedy, and, in the absence of some constitutional inhibition, it is within the power of the legislature to prescribe the cases in which and the courts to which parties shall be entitled to bring a cause for review.[2]

B. Modes of Appellate Review — 1. IN GENERAL. By the English common law the judgments of the court of common pleas and of all inferior courts were brought under the review of the court of king's bench, for revision and correction, by writ of error, writ of certiorari, or writ of false judgment.[3] The remedy by appeal, which was unknown to the common law, was employed for the review of causes in equity, ecclesiastical, and admiralty jurisdictions. Now, both in England and in the United States, the whole matter of appellate review is regulated almost entirely by the statute law.[4]

2. POWER OF LEGISLATURE TO REGULATE. In the absence of constitutional limitation,[5] the legislature may prescribe the mode and specify the manner in which

1. Ringgold's Case, 1 Bland (Md.) 5; Yates *v.* People, 6 Johns. (N. Y.) 337. See also *infra*, IV.

2. Dismukes *v.* Stokes, 41 Miss. 430.

See 2 Cent. Dig. tit. "Appeal and Error," § 3 *et seq.*; and *infra*, I, B, 2.

Legislative power as affected by constitutional provisions.— The legislative power is not limited by a constitutional provision which merely confers appellate jurisdiction in general terms upon a particular court. Dismukes *v.* Stokes, 41 Miss. 430, 431 [*criticising* Yalabusha County *v.* Carbry, 11 Miss. 529], construing Miss. Const. art. 4, par. 4, which confers upon the high court of errors and appeals "such jurisdiction as properly falls to a court of errors and appeals," but does not attempt to define the limits of that jurisdiction, nor prescribe the cases to which it extends, nor the mode or circumstances in which it may be exercised.

But *compare* Rhyne *v.* Lipscombe, 122 N. C. 650, 29 S. E. 57, wherein it was held that N. C. Const. art. 4, § 12, conferring upon the general assembly power to allot and distribute the powers and jurisdiction of courts below the supreme court, did not authorize the legislature to provide for appeals direct to the supreme court from any court other than the superior court.

Where the constitution creates a court of general appellate jurisdiction, and provides that appeals or writs of error may be taken thereto, the right of review is a constitutional right which cannot be taken away by the legislature. Simpson *v.* Simpson, 25 Ark. 487; *Ex p.* Anthony, 5 Ark. 358; Peak *v.* People, 76 Ill. 289; St. Louis, etc., R. Co. *v.* Linx, 63 Ill. 523; Schlattweiler *v.* St. Clair, 63 Ill. 449.

Under a constitution providing that "final judgments in the inferior courts may be brought by writ of error, or by appeal, into the supreme court, in such manner as may be prescribed by law," a statute which denies the right is unconstitutional. Norman *v.* Curry, 27 Ark. 440; Simpson *v.* Simpson, 25 Ark. 487, 489.

3. **Writ of error** was the remedy to review judgments of the common pleas and other inferior courts of record when the proceedings were according to the course of common law. *Ex p.* Henderson, 6 Fla. 279 [*citing* 4 Archbold Pr. 4]. See also *infra*, I, C.

Writ of certiorari was the remedy to review judgments of inferior courts when the proceedings were summary or different from the course established by the common law. *Ex p.* Henderson, 6 Fla. 279 [*citing* 4 Archbold Pr. 4]. See CERTIORARI.

Writ of false judgment was the remedy to review judgments of county courts, courts baron, and other inferior courts not of record. *Ex p.* Henderson, 6 Fla. 279 [*citing* 4 Archbold Pr. 4]: Coke Litt. 288.

4. **In the United States,** although there is a great diversity in the statutes, so that the statement will not be true of each of the states, but only of the United States as a whole, the above-mentioned remedies all exist in a modified form, and, in addition, there are a number of special statutory proceedings. See *infra*, I, C; also 2 Cent. Dig. tit. "Appeal and Error," § 8; AUDITA QUERELA; CERTIORARI; CRIMINAL LAW; EQUITY; HABEAS CORPUS; REVIEW.

5. **Effect of constitutional provisions.**— If the constitution prescribes a particular mode of review it is not within the legislative power to provide a different remedy. Memm-

a cause shall be brought up from the lower court to the appellate court for review.[6]

C. Origin, Nature, and Scope of Remedies[7] — **1. Writ of Error — a. Definition.** A writ of error is a writ issued out of a court of competent jurisdiction, directed to the judges of a court of record in which final judgment has been given, and commanding them to send the record, to the court of appellate jurisdiction therein named, to be examined, in order that some alleged error in the proceedings may be corrected.[8]

b. Origin and Existenee of the Writ — (I) *In General.* The writ of error had its origin at the common law and was adopted into the United States as a part of the common-law system.[9] Consequently, unless the writ has been abolished by statute,[10] it still remains as an available remedy.[11]

ler *v.* Roberts, 81 Ga. 351, 659, 8 S. E. 525; Maxwell *v.* Tumlin, 79 Ga. 570, 4 S. E. 858; Pope *v.* Jones, 79 Ga. 487, 4 S. E. 860. Where, however, the constitution gives to every party aggrieved the right of appeal, the right is to be exercised subject to the regulations of law and to the rules and practice of the court. Townsend *v.* Smith, 12 N. J. Eq. 350, 72 Am. Dec. 403, wherein it was held that a rule which denied the right of appeal to a party making default in the court below did not conflict with the constitutional guaranty. And a constitutional provision which gives the supreme court appellate jurisdiction, under such regulations and limitations as may be prescribed by law, does not have the effect of defining the class of cases in which a review may be had. McClain *v.* Williams, 10 S. D. 332, 73 N. W. 72, 43 L. R. A. 287, 289. So, where the constitution merely confers appellate jurisdiction upon a court (Widber *v.* Superior Ct., 94 Cal. 430, 29 Pac. 870; Sacramento, etc., R. Co. *v.* Harlan, 24 Cal. 334; Haight *v.* Gay, 8 Cal. 297, 68 Am. Dec. 323), or provides that "final judgments . . . may be brought by writ of error, or by appeal, into the supreme court in such manner as may be prescribed by law" (Norman *v.* Curry, 27 Ark. 440; Simpson *v.* Simpson, 25 Ark. 487, 489), the legislature may specify the mode and manner in which causes may be brought up for review.

6. Dismukes *v.* Stokes, 41 Miss. 430; 2 Cent. Dig. tit. "Appeal and Error," § 5; and *supra*, I, A.

7. See *infra*, I, C, 1–3; and 2 Cent. Dig. tit. "Appeal and Error," § 1.

8. MacLachlan *v.* McLaughlin, 126 Ill. 427, 18 N. E. 544. See also *infra*, I, C, 1, c, (I); and 2 Cent. Dig. tit. "Appeal and Error," § 8 *et seq.*

Distinguished from the writ of error coram nobis or coram vobis.— The usual writ of error, which has just been defined and to which the discussion in this title will be limited, must be distinguished from the writ of error coram nobis and the writ of error coram vobis. The distinction between an ordinary writ of error and the writ of error coram nobis or coram vobis is that the former is brought for a supposed error in law, apparent upon the record, and takes the case to a higher tribunal, where the question is to be decided, and the judgment, sentence, or decree is to be affirmed or reversed; while the latter is brought for an alleged error of fact, not appearing upon the record, and lies to the same court, in order that it may correct the error, which it is presumed would not have been committed had the fact in the first instance been brought to its notice. Teller *v.* Wetherell, 6 Mich. 46; Le Bourgeoise *v.* McNamara, 10 Mo. App. 116; Roughton *v.* Brown, 53 N. C. 393. See also 2 Cent. Dig. tit. "Appeal and Error," § 28; and Judgments.

9. Peak *v.* People, 76 Ill. 289; Langworthy *v.* Baker, 23 Ill. 484; Moore *v.* Harris, 1 Tex. 36; Reece *v.* Knott, 3 Utah 436, 24 Pac. 759.

Since the writ exists at the common law, which fully explains its office, where the organic law of one of the territories of the United States authorizes the issuance of the writ, no further action by the territorial legislature is necessary to carry the provisions into effect. Stebbins *v.* Anthony, 5 Colo. 273.

Since the writ did not exist under the civil law of Spain, the writ did not obtain in the territory of the United States where that law was formerly administered until the statutory adoption of the common law. Taylor *v.* Duncan, Dall. (Tex.) 250.

10. See *infra*, I, C, 1, b, (II).

11. Hall *v.* Thode, 75 Ill. 173; Langworthy *v.* Baker, 23 Ill. 484.

Applications of the rule.— Thus writ of error will lie in a proper case where no appeal or other reviewing remedy has been provided by statute. *Ex p.* Thistleton, 52 Cal. 220; Middleton *v.* Gould, 5 Cal. 190; Langworthy *v.* Baker, 23 Ill. 484; Bowers *v.* Green, 2 Ill. 42 [*overruling* Clark *v.* Ross, 1 Ill. 334], holding that, where a statute allows appeals from judgments exceeding a certain amount, a writ of error will nevertheless lie from a judgment for a smaller amount. See Haight *v.* Gay, 8 Cal. 297, 68 Am. Dec. 323; Willoughby *v.* George, 4 Colo. 22; and 2 Cent. Dig. tit. "Appeal and Error," § 20. And where the constitution confers appellate jurisdiction on a court and the legislature authorizes the court to issue all writs necessary to the exercise of its powers, but provides no remedy by appeal, the case may be brought up to the court by a writ of error (*Ex p.* Thistleton, 52 Cal. 220; Sacramento, etc., R. Co. *v.* Harlan, 24 Cal. 334; Middleton *v.* Gould, 5 Cal. 190; Adams *v.* Town, 3 Cal. 247); or, in some states by certiorari, as a

(II) *As Affected by Legislative Enactments*[12]—(A) *Power to Abolish.* While a writ of error is in most cases a writ of right at the common law, it may be limited or altogether abolished by statute,[13] unless the constitution forbids.[14]

(B) *Statutes Expressly Abolishing Writ.* The writ has sometimes been abolished by statute, in which case this remedy is not available.[15] The statute may abolish the writ in express terms,[16] or by necessary implication.[17]

(C) *Statutes Providing Different Remedy.* While the statutory remedy in the nature of an appeal has considerably limited the use of writs of error in the United States,[18] there is some conflict of opinion as to whether a statute which authorizes an appeal or other remedy has the effect of doing away with the writ of error. According to one line of cases the new remedy is merely cumulative, and the writ of error is still available.[19] But in some jurisdictions the courts have held that, considering the immeasurable advantages which the statutory remedy by appeal affords in comparison with the writ of error, a statute which gives the remedy by appeal, though it does not say that that shall be the only reviewing remedy,[20] must be deemed to have taken away by reasonable implication[21] the

substitute therefor (Rhyne *v.* Lipscombe, 122 N. C. 650, 29 S. E. 57; State *v.* Lawrence, 81 N. C. 522; Clark's Code Civ. Proc. N. C. (1900), § 545). Similarly, where the supreme court is by the constitution invested with appellate jurisdiction in all cases where the matter in dispute exceeds a certain amount, and is authorized to issue process necessary to the exercise of this jurisdiction, the writ of error — or certiorari, where used as a substitute — is a proper and necessary writ in every case where no other reviewing process has been authorized by statute to carry out the constitutional provision. Adams *v.* Town, 3 Cal. 247.

12. See *infra*, I, C, 1, b, (II), (A)–(D); and 2 Cent. Dig. tit. "Appeal and Error," § 3 *et seq.*

13. People *v.* Richmond, 16 Colo. 274, 26 Pac. 929; Willoughby *v.* George, 4 Colo. 22; Haines *v.* People, 97 Ill. 161.

14. **The writ cannot be abolished by the legislature** where the power to issue it is by the constitution vested in the court. Harrison *v.* Tradee, 27 Ark. 59; Martin *v.* Simpkins, 20 Colo. 438, 38 Pac. 1092 [but *compare* Jones *v.* Learned, 26 Colo. 324, 57 Pac. 705, holding that Colo. Const. art. 6, § 23, providing that "writs of error shall lie from the supreme court to every final judgment of the county court," has no application to a proceeding, originating in the county court, which is tried *de novo* in the district court, the judgment of the county court having been superseded by the one rendered by the district court]. Nor can it be abolished in the face of a constitutional provision to the effect that writs of error shall never be prohibited by law. Baier *v.* Schermerhorn, 96 Wis. 372, 71 N. W. 600; Buttrick *v.* Roy, 72 Wis. 164, 39 N. W. 345, both cases construing Wis. Const. art. 1, § 21.

But, where the constitution provides that appeals and writs of error shall be allowed from certain final determinations, as may be provided by law, whether the remedy is by appeal or by writ of error depends upon the legislature. Kingsbury *v.* Sperry, 119 Ill. 279, 10 N. E. 8. And where the constitution makes provision for a writ of error, but uses the term, not in its strict, technical, common-law sense, but to designate the process by which cases are brought up for appellate review, it does not have the effect of preserving the common-law writ. Gauldin *v.* Shehee, 20 Ga. 531.

15. Alford *v.* Rieves, 36 Tex. 105.

16. Dak. Comp. Laws (1887), § 5214; Kan. Gen. Stat. (1897), c. 83, § 5; Nebr. Comp. Stat. (1897), § 6194; Birdseye's Rev. Stat. N. Y. (1896), p. 72, § 1; p. 89, § 70; Clark's Code Civ. Proc. N. C. (1900), § 544; Bates' Anno. Stat. Ohio (1897), § 6731; Hill's Anno. Laws Oreg. (1892), §§ 535, 1426.

17. As where the statute regulating the mode of appellate review in certain cases expressly provides that the remedy so provided shall be the only remedy. Widber *v.* Superior Ct., 94 Cal. 430, 29 Pac. 870; Sacramento, etc., R. Co. *v.* Harlan, 24 Cal. 334; Haight *v.* Gay, 8 Cal. 297, 68 Am. Dec. 323; Willoughby *v.* George, 4 Colo. 22; Smith *v.* Cheek, 50 N. C. 213; Wike *v.* Lightner, 1 Rawle (Pa.) 289. But in Willoughby *v.* George, 4 Colo. 22, it is intimated that, if it is possible for a case to occur not falling within the cases described in the act as appealable, a different view might be taken as to such case.

18. North Missouri R. Co. *v.* Parks, 34 Mo. 159.

19. Haines *v.* People, 97 Ill. 161; Langworthy *v.* Baker, 23 Ill. 484; Bowers *v.* Green, 2 Ill. 42; Smith *v.* Gibson, 25 Nebr. 511, 41 N. W. 360; White *v.* Blum, 4 Nebr. 555; Doty *v.* Moore, 16 Tex. 591; Chrisman *v.* Miller, 15 Tex. 159; McFadden *v.* Lockhart, 7 Tex. 573.

20. See *supra*, I, C, b, (II), (B).

21. **The implication must be reasonable.**— Thus, while a statute which provides for an appeal in the broadest form, vacating the entire judgment and opening the case wholly for trial on its merits, may have the effect of doing away by reasonable implication with the common-law remedy by writ of error, it has been held that a statute which provides for an appeal for error in matter of law ap-

remedy by writ of error,[22] except in cases where the aggrieved party, without any laches on his part, could not avail himself of an appeal.[23] Where, however, the same statute provides both for the remedy by appeal and by writ of error, the remedies are concurrent.[24]

(D) *Statutes Changing Name of Remedy.* The writ of error is not abolished by a statute which merely changes the name of the remedy.[25]

c. Nature of Writ — (I) *In General.* The writ of error is an original writ, in the nature as well of a certiorari to remove a record from an inferior to a superior court as of a commission to the judges of such superior court to examine the record, and to affirm or reverse it.[26]

(II) *A Writ of Right.* A writ of error is of right, grantable *ex debito justitiæ*,[27] and may be obtained by any person entitled to it, in the same way as he may, upon compliance with the prescribed requirements, sue out a summons in an ordinary action.[28]

(III) *The Commencement of a New Suit* — (A) *General Rule.* The suing out of a writ of error is the commencement of a new suit to annul and set aside

parent on the record, since the remedy is limited in its purpose and extent, and is merely a more convenient and simple method of reserving questions of law in certain cases than by resorting to a bill of exceptions, does not have the effect of doing away with the remedy by writ of error, which is given by an earlier statute. Peck *v.* Hapgood, 10 Metc. (Mass.) 172; Day *v.* Laflin, 6 Metc. (Mass.) 280. See also Henderson *v.* Adams, 5 Cush. (Mass.) 610. And where a statute which secures the right of appeal in a particular case evidently uses the word "appeal" to denote the nature of appellate jurisdiction, without regard to the particular mode by which a case is transmitted from one tribunal to another, the statute does not have the effect of doing away with the remedy by writ of error. Magee *v.* Chadoin, 44 Tex. 488.

22. *Illinois.*— Hall *v.* Thode, 75 Ill. 173, construing a statute authorizing remedy by appeal in election contests.

Maine.— Lord *v.* Pierce, 33 Me. 350; Howard *v.* Hill, 31 Me. 420.

Maryland.— State *v.* Easton Social, etc., Club, 72 Md. 297, 20 Atl. 242, construing a statute authorizing remedy by appeal in proceedings to forfeit charter of corporation.

Massachusetts.— Monk *v.* Guild, 3 Metc. (Mass.) 372; Smith *v.* Rice, 11 Mass. 507; Champion *v.* Brooks, 9 Mass. 228; Jarvis *v.* Blanchard, 6 Mass. 4; Savage *v.* Gulliver, 4 Mass. 171.

New Hampshire.— Peebles *v.* Rand, 43 N. H. 337 (construing a statute establishing remedy by summary proceedings by exceptions); Medcalf *v.* Swett, 1 N. H. 338.

Pennsylvania.— See also Elliott *v.* Sanderson, 1 Penr. & W. (Pa.) 74.

Texas.— Livingston *v.* State, 70 Tex. 393, 11 S. W. 115, construing a statute providing remedy by appeal for review of quo warranto proceedings.

23. Jewell *v.* Brown, 33 Me. 250; Smith *v.* Rice, 11 Mass. 507; Putnam *v.* Churchill, 4 Mass. 516; State *v.* Lawrence, 81 N. C. 522; and 2 Cent. Dig. tit. "Appeal and Error," § 20. Thus a writ of error has been allowed from a judgment by default (Jewell *v.* Brown, 33 Me. 250; Skipwith *v.* Hill, 2 Mass. 35), and it has been held that, since an infant cannot appeal, where a judgment has been rendered against an infant a writ of error will lie (Valier *v.* Hart, 11 Mass. 300). So where a judgment has been rendered against a defendant who had not received due notice of the suit, and therefore had no opportunity to appeal, it has been held that he may maintain a writ of error (Gay *v.* Richardson, 18 Pick. (Mass.) 417; Arnold *v.* Tourtellot, 13 Pick. (Mass.) 172), or certiorari, as a substitute where the writ of error has been abolished (State *v.* Lawrence, 81 N. C. 522).

24. Clark *v.* Beach, 6 Conn. 142, holding that in such a case writ of error is not restricted in its application to cases in which an appeal does not lie.

25. Rand *v.* King, 134 Pa. St. 641, 19 Atl. 806.

26. Jacques *v.* Cesar, 2 Saund. 100.

The writ of error is "an original writ, issuing out of chancery; and lies where a party is aggrieved by any error in the foundation, proceeding, judgment, or execution of the suit, in a court of record; and is in the nature of a commission to the judges of the same or a superior court, by which they are authorized to examine the record, upon which judgment was given, and on such examination to affirm or reverse the same, according to law." 2 Tidd Pr. 1134. To the same effect see also Lynes *v.* State, 5 Port. (Ala.) 236, 30 Am. Dec. 557; Gauldin *v.* Shehee, 20 Ga. 531; Allen *v.* Savannah, 9 Ga. 286; Yates *v.* People, 6 Johns. (N. Y.) 337; Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257; Coke Litt. 288*b*; Bacon Abr. tit. Error. See *supra*, I, C, 1, a.

27. Hall *v.* Thode, 75 Ill. 173; McClay *v.* Norris, 9 Ill. 370; Burge *v.* Burns, Morr. (Iowa) 287; Drowne *v.* Stimpson, 2 Mass. 441; Pembroke *v.* Abington, 2 Mass. 142; Skipwith *v.* Hill, 2 Mass. 35; and 2 Cent. Dig. tit. "Appeal and Error," § 3.

28. Ridgely *v.* Bennett, 13 Lea (Tenn.) 206.

the judgment of the court below, and not a continuation of the suit below to which it relates.[29]

(B) *Consequences of Being a New Suit* — (1) In General. From this status of a writ of error as a new suit there result many important consequences.[30]

(2) Application of Statutes of Limitation. One of the resulting consequences is that the writ comes within the application of the statutes of limitation.[31]

(3) Application of Statutes Requiring Security for Costs. And the writ has been held to come within the provisions of a statute requiring a non-resident complainant to give security for costs.[32]

(4) Effect upon Rights of Parties and Strangers. The proceeding can affect only parties or strangers from the service of a citation.[33]

d. Scope and Purpose of Writ — (I) *General Rule.* While the writ of error has been very largely extended by statute, the object of the common-law writ is to review and correct any error of law committed in the proceedings, and which is not amendable or cured at common law, or by any of the statutes of jeofail.[34]

29. *California.*— Widber *v.* Superior Ct., 94 Cal. 430, 29 Pac. 870.

Colorado.— Haley *v.* Elliott, 20 Colo. 199, 37 Pac. 27; Stout *v.* Gully, 13 Colo. 604, 22 Pac. 954.

Florida.— U. S. Mutual Acc., etc., Assoc. *v.* Weller, 30 Fla. 210, 11 So. 786; State *v.* Mitchell, 29 Fla. 302, 10 So. 746.

Georgia.— Allen *v.* Savannah, 9 Ga. 286.

Illinois.— McIntyre *v.* Sholty, 139 Ill. 171, 29 N. E. 43; International Bank *v.* Jenkins, 107 Ill. 291; Life Assoc. of America *v.* Fassett, 102 Ill. 315.

Missouri.— Macklin *v.* Allenberg, 100 Mo. 337, 13 S. W. 350; Pierce *v.* Stinde, 11 Mo. App. 364, in which the doctrine is expressly applied to the writ of error given by statute in equity cases.

North Carolina.— Binford *v.* Alston, 15 N. C. 351, though now the writ of error has been abolished (Clark's Code Civ. Proc. N. C. (1900), § 545) and the remedy, when an appeal is not provided by statute or has been lost without laches, is by certiorari. See *supra*, note 23.

Ohio.— Taylor *v.* Boyd, 3 Ohio 337, 17 Am. Dec. 603; Thompson *v.* Gest St. Bldg. Assoc., 13 Ohio Cir. Ct. 250, 7 Ohio Dec. 68.

Tennessee.— Ridgely *v.* Bennett, 13 Lea (Tenn.) 206; Wooldridge *v.* Boyd, 13 Lea (Tenn.) 151.

Texas.— Gibbs *v.* Belcher, 30 Tex. 79.

United States.— Sharon *v.* Hill, 26 Fed. 337.

See 2 Cent. Dig. tit. "Appeal and Error," § 2.

But in Hinchman *v.* Rutan, 31 N. J. L. 496, 499, it was said that a writ of error is not, either in the popular or technical signification of the term, a writ or an original process by which a suit is commenced, and it was held that a writ of error is not such process as requires a revenue stamp under the act of congress providing that a stamp shall be put on "the writ or other original process by which any suit is commenced in any court of record, either law or equity."

Law by which right to the writ determined. — Since a writ of error is the commencement of a new action, the law in force at the time of its issuance determines the jurisdiction of the court to issue it. Lequatte *v.* Drury, 6 Ill. App. 389.

30. In Ames *v.* Ames, 148 Ill. 321, 36 N. E. 110, it was held that complainant is not bound to prosecute the writ by the person named as next friend in the court below, but a different person may be selected if thought proper. See also *infra*, I, C, 1, c, (III), (B), (2) *et seq.*

31. See Burnap *v.* Wight, 14 Ill. 303.

Suit against assignee in bankruptcy.—Thus it has been held that the writ comes within the United States statutes limiting the time within which a suit may be brought against an assignee in bankruptcy. Webster *v.* Gaff, 6 Colo. 475; International Bank *v.* Jenkins, 107 Ill. 291, 104 Ill. 143.

32. Western Union Tel. Co. *v.* Graham, 1 Colo. 182; Smith *v.* Robinson, 11 Ill. 119; Hickman *v.* Haines, 10 Ill. 20; Ripley *v.* Morris, 7 Ill. 381. See also, generally, Costs.

33. Widber *v.* Superior Ct., 94 Cal. 430, 29 Pac. 870; Taylor *v.* Boyd, 3 Ohio 337, 17 Am. Dec. 603.

Accordingly, if the successful party, in a suit involving the title to land, conveys to a *bona fide* purchaser for a valuable consideration after the rendition of the decree, but before the issuance of a writ of error, the title of the purchaser will not be affected by a subsequent reversal of the decree on a writ of error. Stout *v.* Gully, 13 Colo. 604, 22 Pac. 954; Cheever *v.* Minton, 12 Colo. 557, 21 Pac. 710, 13 Am. St. Rep. 258; Eldridge *v.* Walker, 80 Ill. 270; McCormick *v.* McClure, 6 Blackf. (Ind.) 466, 39 Am. Dec. 441; Macklin *v.* Allenberg, 100 Mo. 337, 13 S. W. 350; Pierce *v.* Stinde, 11 Mo. App. 364.

34. Allen *v.* Savannah, 9 Ga. 286. To the same effect see also 3 Bl. Comm. 405; Bacon Abr. tit. Error; Tidd Pr. c. 43; William *v.* Gwyn, 2 Saund. 45 note; Crawle *v.* Crawle, 1 Vern. 170.

Hence, it does not bring up questions of fact for appellate review in the absence of some statute extending its scope. Thurber *v.* Townsend, 22 N. Y. 517; McClemmons *v.* Graham, 3 Binn. (Pa.) 88; U. S. *v.* Good-

(II) *Limited to Errors Appearing of Record.* The writ brings up for review only those matters which are properly part of the record, or which are placed upon the record pursuant to the statutes which provide for bills of exceptions.[35]

(III) *Limited to Errors of the Court.* Errors of the court only can be corrected upon a writ of error.[36] Hence the writ will not lie to correct either the errors of the jury,[37] or the errors and irregularities of the clerk or other officers.[38]

e. Courts to Which Writ Lies. While it is usually within the legislative power to determine the courts to which the writ of error may lie,[39] it is well settled that, by the common law, and in the absence of some statute providing otherwise, the writ lies only to courts of record.[40]

f. Proceedings in Which Writ Lies — (I) *General Rule.* In the absence of a statute giving the writ a broader application, a writ of error lies only in proceedings which are according to the course of the common law.[41]

win, 7 Cranch (U. S.) 108, 2 L. ed. 284; Wiscart *v.* Dauchy, 3 Dall. (U. S.) 321, 1 L. ed. 619.

35. Goldschmid *v.* Meline, 86 Md. 370, 38 Atl. 783; Miller *v.* Rosier, 31 Mich. 475; Rand *v.* King, 134 Pa. St. 641, 19 Atl. 806; Wheeler *v.* Winn, 53 Pa. St. 122, 91 Am. Dec. 186; Springer *v.* Springer, 43 Pa. St. 518.

36. Hicks *v.* Murphy, Walk. (Miss.) 66; Thurber *v.* Townsend, 22 N. Y. 517.

37. Thurber *v.* Townsend, 22 N. Y. 517, wherein it is said that, prior to the adoption of N. Y. Code, § 323, authorizing appeals, the proper mode of correcting any error of the jury, in a case tried in the mayor's court, was by motion in that court to set aside the verdict and for a new trial, which motion that court was authorized to entertain and finally decide.

38. Hicks *v.* Murphy, Walk. (Miss.) 66, holding that the proper method to correct such errors is by motion to the court below, and by writ of audita querela. See, generally, Audita Querela.

Irregularities in issuing execution.—Where there has been no adjudication whatever by the court below as to the regularity of the execution, an irregularity in its issuance cannot be taken advantage of by writ of error. Johnson *v.* Harvey, 4 Mass. 483; Hicks *v.* Murphy, Walk. (Miss.) 66; Dumond *v.* Carpenter, 3 Johns. (N. Y.) 141. It has even been doubted whether a writ of error lies where a motion, made to the court below to quash an execution for irregularity, has been refused, and a bill of exceptions taken to the opinion of the court. Mountz *v.* Hodgson, 4 Cranch (U. S.) 324, 2 L. ed. 635. Probably the only cases in which this writ will lie to correct an irregularity in issuing an execution are where the execution is granted by the judgment of the court, as on a scire facias to revive against executors or administrators, against bail, or after a year and a day has elapsed, and the like cases. See Hicks *v.* Murphy, Walk. (Miss.) 66.

39. A constitutional provision that writs of error shall lie to review final judgments of the county court does not forbid a legislative enactment authorizing writs of error to the judgment of other inferior courts of record. People *v.* Richmond, 16 Colo. 274, 26 Pac. 929.

40. Coke Litt. 288; Gibson *v.* Rogers, 2 Ark. 334; *Ex p.* Thistleton, 52 Cal. 220; Rowland *v.* Hickman, 4 Harr. (Del.) 478; Cooke, Petitioner, 15 Pick. (Mass.) 234. See *supra*, I, B, 1.

41. *Arkansas.*— Gibson *v.* Rogers, 2 Ark. 334.

Maryland.— Savage Mfg. Co. *v.* Owings, 3 Gill (Md.) 497.

Massachusetts.—Cooke, Petitioner, 15 Pick. (Mass.) 234; Smith *v.* Rice, 11 Mass. 507.

Missouri.—North Missouri R. Co. *v.* Parks, 34 Mo. 159.

New Hampshire.— Huse *v.* Grimes, 2 N. H. 208.

New York.— Matter of Negus, 10 Wend. (N. Y.) 34.

Ohio.— Baxter *v.* Columbia Tp., 16 Ohio 56. *Contra*, Smith *v.* Pratt, 13 Ohio 548.

Pennsylvania.— Aurentz *v.* Porter, 48 Pa. St. 335.

Wyoming.— Wilson *v.* Territory, 1 Wyo. 114.

England.— Groenvelt *v.* Burwell, 1 Salk. 263, Carth. 494.

See 2 Cent. Dig. tit. "Appeal and Error," § 11.

In New Jersey this common-law rule has been abrogated by the decisions of the court of appeals. Evans *v.* Adams, 15 N. J. L. 373.

Extent of rule.— It is not enough that the proceedings are had in a court of record which ordinarily exercises common-law jurisdiction; where a proceeding is not within the ordinary jurisdiction of the court of record, but a special and summary jurisdiction to be exercised different from the course of the common law, the writ of error will not lie (Holbrook *v.* Cook, 5 Mich. 225; Beckwith *v.* Houghton, 11 Vt. 602; Groenvelt *v.* Burwell, 1 Salk. 263, and *infra*, I, C, 1, f, (v)); and in such cases the remedy usually is either by certiorari or mandamus (Beckwith *v.* Houghton, 11 Vt. 602; and see, generally, Certiorari; Mandamus).

Proceedings in new jurisdictions.—The rule is that, where the court is a court of record and proceeds according to the course of the common law, whether the court has existed from time immemorial or is created by statute, a writ of error lies upon its judgments. Haines *v.* People, 97 Ill. 161; Martin *v.* Com., 1 Mass. 347; 5 Dane Abr. 56. See also

(II) *Suits in Equity*—(A) *General Rule.* Since courts of chancery are not, technically, courts of record, and, moreover, do not proceed in their trials and adjudications according to the course of the common law,[42] the writ of error does not, in the absence of statutory provision enlarging its functions, lie in suits in equity.[43]

(B) *Statutes Extending Use of Writ.* In some jurisdictions the remedy by writ of error has been so amplified by statute as to be available, not merely in actions at law, but also in suits in equity.[44] But neither a statute which merely preserves the writ,[45] nor a statute which abolishes all distinctions between suits at law and in equity,[46] nor a constitutional provision that "writs of error shall never be prohibited by law," has the effect of extending the writ to suits in equity.[47]

(III) *Proceedings in Justice Courts.* Since the common-law writ of

Thayer *v.* Com. 12 Metc. (Mass.) 9. But, where a new jurisdiction is created by statutory provision authorizing a proceeding not known to the common law, the writ of error will not lie — the remedy is by certiorari. Haines *v.* People, 97 Ill. 161; Campbell *v.* Strong, Hempst. (U. S.) 195, 4 Fed. Cas. No. 2,367*b*. See, generally, CERTIORARI.

42. Colby *v.* Lawson, 5 Ark. 303; Gibson *v.* Rogers, 2 Ark. 334.

In Springer *v.* Springer, 43 Pa. St. 518, 519, it was said that "a writ of error cannot, without a change of its nature, become an adequate form of review of equitable remedies, because it brings up only what is properly record, in order to assign error in that, and never brings up the evidence except by bill of exceptions, which is a form not practised in equity."

43. *Alabama.*— Miller *v.* Goffe, 9 Port. (Ala.) 265.

Arkansas.— Colby *v.* Lawson, 5 Ark. 303; Gibson *v.* Rogers, 2 Ark. 334.

Florida.— Columbia County Com'rs *v.* Bryson, 13 Fla. 281; Harris *v.* Cole, 2 Fla. 400.

Indiana.— Cain *v.* Foote, 8 Blackf. (Ind.) 454.

Iowa.— McDaniel *v.* Plumbe, 3 Greene (Iowa) 331; McPoland *v.* Fitzpatrick, 1 Greene (Iowa) 543.

Massachusetts.— Evans *v.* Hamlin, 164 Mass. 239, 41 N. E. 267.

Missouri.— Anderson *v.* Biddle, 9 Mo. 580.

New Mexico.— Kidder *v.* Bennett, 2 N. M. 37.

Ohio.— Gilliland *v.* Sellers, 2 Ohio St. 223.

Pennsylvania.—Horton *v.* Miller, 44 Pa. St. 256; Springer *v* Springer, 43 Pa. St. 518.

Wisconsin.— Costello *v.* Buch, 25 Wis. 477; Howes *v.* Buckingham, 13 Wis. 442.

United States.—Hayes *v.* Fischer, 102 U. S. 121, 26 L. ed. 95; Brewster *v.* Wakefield, 22 How. (U. S.) 118, 16 L. ed. 301; McCollum *v.* Eager, 2 How. (U. S.) 61, 11 L. ed. 179; Doty *v.* Jewett, 19 Fed. 337.

See 2 Cent. Dig. tit. "Appeal and Error," § 10 *et seq.*

Applying this rule, generally, it has been held that a writ of error will not lie to review an order for dissolving an injunction (Miller *v.* Goffe, 9 Port. (Ala.) 265; Russell *v.* Peirce, 7 Port. (Ala.) 276; Cain *v.* Foote, 8 Blackf. (Ind.) 454); or proceedings for the violation of an injunction (Shannon *v.* State, 18 Wis. 604); or proceedings upon application to the equitable powers of the court to set off a judgment against another (Horton *v.* Miller, 44 Pa. St. 256); or proceedings to avoid an administrator's deed (Costello *v.* Buch, 25 Wis. 477); or a decree of subrogation (Springer *v.* Springer, 43 Pa. St. 518). In like manner the rule applies to proceedings for divorce (Miller *v.* Miller, 3 Binn. (Pa.) 30; and see DIVORCE), especially where it is expressly provided by statute that "in divorce cases, an appeal shall be the only mode of revising error" (Parmenter *v.* Parmenter, 3 Head (Tenn.) 224); but a statute which provides that divorce cases can be reviewed only by appeal has no application to decrees for alimony (McBee *v.* McBee, 1 Heisk. (Tenn.) 558).

Statutory substitute for creditors' bills.— In Wisconsin a proceeding by garnishment to reach non-leviable property, formerly reached by creditors' bills, is essentially equitable, and a writ of error will not lie to review the proceeding. Farmers F. Ins. Co. *v.* Conrad, 102 Wis. 387, 78 N. W. 582.

Issues raised by intervening petition.— In jurisdictions where the mode of review at law is by writ of error, and not by appeal, a determination of issues of fact raised by an intervening petition, filed in a chancery suit and setting up a cause of action exclusively cognizable at law, should be reviewed by writ of error — not by appeal. Rouse *v.* Hornsby, 67 Fed. 219, 32 U. S. App. 111, 14 C. C. A. 377.

44. Vance *v.* Rockwell, 3 Colo. 240; Kern *v.* Chalfant, 7 Minn. 487; Farish *v.* New Mexico Min. Co., 5 N. M. 234, 21 Pac. 82; Mann *v.* Young, 1 Wash. Terr. 454; and 2 Cent. Dig. tit. "Appeal and Error," § 9.

Unconstitutional statute.— Under a constitution making courts of chancery subject to appeal, it has been held that a statute, extending the remedy by writ of error to the decrees of chancery courts, is unconstitutional and void. Colby *v.* Lawson, 5 Ark. 303.

45. Costello *v.* Buch, 25 Wis. 477; Howes *v.* Buckingham, 13 Wis. 442.

46. Delaplaine *v.* Madison, 7 Wis. 407. *Compare* 2 Cent. Dig. tit. "Appeal and Error," § 9.

47. Farmers F. Ins. Co. *v.* Conrad, 102 Wis. 387, 78 N. W. 582; Delaplaine *v.* Madison, 7 Wis. 407.

error lies only where the proceedings are according to the course of common law, the writ does not lie to review the proceedings of courts of justices of the peace.[48]

(IV) *PROCEEDINGS OF PROBATE COURTS.* Unless authorized by statute,[49] a writ of error does not lie to review proceedings of a probate court.[50]

(V) *SPECIAL STATUTORY PROCEEDINGS.* The general rule is that, unless authorized by statute, writ of error does not lie to review special statutory proceedings which are not according to the course of the common-law proceedings.[51]

(VI) *SUMMARY PROCEEDINGS SUBSEQUENTLY ASSUMING COMMON-LAW FORM.* Though proceedings are not in their inception according to the course of the common law, yet if they subsequently assume that form, as where they are brought up to another court for trial *de novo* according to the course of the common law, they become subject to review by writ of error.[52] But, when the nature

48. See, generally, JUSTICES OF THE PEACE.

Thus it has been held that a writ of error does not lie in proceedings, under the militia law, before a justice of the peace. Ball *v.* Brigham, 5 Mass. 406; Pratt *v.* Hall, 4 Mass. 239.

Judgment entered on justice's transcript.— And, for the same reason, it has been held that the entry of judgment in the circuit court, upon the transcript of a justice of the peace, is not reviewable on writ of error. Townsend *v.* Tudor, 41 Mich. 263, 1 N. W. 1050.

Submission by justice of the peace to referees.— In Massachusetts and New Hampshire it has been held that the writ of error lies on a judgment of the common pleas, rendered on a report of referees under a submission upon rule entered before a justice of the peace, pursuant to statute. Short *v.* Pratt, 6 Mass. 496; Huse *v.* Grimes, 2 N. H. 208.

49. In Nebraska it is held that an order of the county court, allowing an account against an estate, may be reviewed on error in the district court. Rogers *v.* Redick, 10 Nebr. 332, 6 N. W. 413.

50. North Missouri R. Co. *v.* Parks, 34 Mo. 159. See 2 Cent. Dig. tit. "Appeal and Error," § 18.

Judgments of the district court in Texas in the exercise of its probate jurisdiction, under the constitution and laws in force in 1873, were not reviewable in the supreme court on writ of error. Swan *v.* House, 50 Tex. 650; Smith *v.* Robb, 42 Tex. 260.

The reason for this is that the proceedings of probate courts are not proceedings according to the course of the common law. Smith *v.* Rice, 11 Mass. 507.

Exceptions to the rule.— But, while a writ of error will not lie to a decree of a probate court in the exercise of its ordinary jurisdiction, it has been held that if, in a particular case, the proceedings are according to the course of the common law the writ will lie. Fitzgerald *v.* Com., 5 Allen (Mass.) 509. And, though proceedings in the probate court are not according to the course of the common law, if they assume that form when brought up to a reviewing court for trial *de novo*, the proceedings of the latter court may be reviewed on error. See *infra*, I, C, 1, f, (VI).

Proceedings for probate of a will in the District of Columbia is not a suit in equity, but is a case in which the parties have a right to jury trial, and in which there may be adversary parties, and hence may be brought to the supreme court from the district courts by writ of error, instead of by appeal. Campbell *v.* Porter, 162 U. S. 478, 16 S. Ct. 871, 40 L. ed. 1044; Ormsby *v.* Webb, 134 U. S. 47, 10 S. Ct. 478, 33 L. ed. 805.

51. Kingsbury *v.* Sperry, 119 Ill. 279, 10 N. E. 8, wherein it is said, however, that the writ may sometimes be allowed in such cases to prevent a failure of justice which would result from the fact that the party cannot avail himself of any other remedy.

Illustrations.— Thus it has been held that the writ does not lie in cases of contested elections (Moore *v.* Mayfield, 47 Ill. 167), in statutory proceedings relating to highways (Banks, Appellant, 29 Me. 288), in desertion proceedings given by statute when a husband neglects to support his wife (Barnes' Appeal, 2 Pennyp. (Pa.) 506), in statutory proceedings to compel a son to support his mother (Smith *v.* Superintendents of Poor, 34 Mich. 58), in statutory proceedings on an appeal to the circuit court from an assessment of taxes made by the auditor-general (Auditor-General *v.* Pullman Palace Car Co., 34 Mich. 59), in purely statutory proceedings in attachment (Wetherald *v.* Shupe, 109 Pa. St. 389, 2 Atl. 220), and in a statutory inquisition of lunacy (Crocker *v.* State, 60 Wis. 553, 19 N. W. 435).

52. Matter of Mower, 48 Mich. 441, 12 N. W. 646; American Baptist Missionary Union *v.* Peck, 9 Mich. 445; Parker *v.* Copland, 4 Mich. 528; Com. *v.* Beaumont, 4 Rawle (Pa.) 366.

This rule has been applied to proceedings for forcible entry and detainer, brought up to the circuit court and conducted according to the course of the common law (Parker *v.* Copland, 4 Mich. 528), and to proceedings of the probate court, brought up for retrial in the circuit, district, or other court of general jurisdiction, and tried according to the course of the common law (Peckham *v.* Hoag, 92 Mich. 423, 52 N. W. 734; Matter of Mower, 48 Mich. 441, 12 N. W. 646; Brunson *v.* Burnett, 2 Pinn. (Wis.) 79, 1 Chandl. (Wis.) 9 [but see *In re* Fisher, 4 Wis.

of the proceeding is not changed upon removal into a reviewing court, the proceedings of the latter court cannot be reviewed by writ of error.[53]

g. Judgments to Which Writ Will Lie. By the common law a writ of error can be brought only upon a final judgment, or an award in the nature of a final judgment.[54]

2. Appeal — a. Definitions. Owing to the diversity of the statutory provisions regulating appellate procedure, the word "appeal" is used in many different senses.[55] The term is sometimes used to denote the nature of the appellate jurisdiction, without regard to the particular mode by which a cause is transmitted from one tribunal to another;[56] but, in its original and strictly technical sense, an

254, 65 Am. Dec. 309]). Thus, in Brown *v.* Forsche, 43 Mich. 492, 5 N. W. 1011, it was held that, where an action was brought in the probate court for the allowance of a claim, and the administrator appealed to the circuit court, where the issue was *plene administravit*, and a trial was had as in an original action, a writ of error, rather than certiorari, is the proper remedy for removal to the supreme court. And in Owen *v.* Ward, (Mich. 1900) 83 N. W. 1003, it was held that, where a refusal to appoint an administrator *de bonis non* involved a determination of the question of fact whether there were assets still to be administered, such proceedings were analogous to proceedings at common law, and the order of the circuit court, affirming the order of the probate court refusing to appoint an administrator, was reviewable on writ of error. So, where an appeal was had from a decree of the probate court allowing a will, and a substantial issue was framed and tried on appeal in the circuit court, though no new common-law issue was made there, it was held that such proceedings were governed by the analogies of common-law trials, and that a writ of error would lie to bring the cause up to the supreme court, without regard to the precise form of the proceedings in the circuit court. American Baptist Missionary Union *v.* Peck, 9 Mich. 445.

53. This rule has been applied to proceedings in the probate court to remove an administrator, the proceedings not being according to the course of the common law, and their nature not being altered when removed by appeal into the circuit court, where the case is tried before a jury. Conrad *v.* Button, 28 Mich. 365; Holbrook *v.* Cook, 5 Mich. 225. So it has been held that a writ of error will not lie to review proceedings in the circuit court, upon an appeal from an order of a probate court denying a petition for the appointment of the mother as guardian of her minor children (Cameron *v.* Bentley, 28 Mich. 520); or to review the action of the circuit court in affirming the probate court in refusing to relieve an executor from giving bond on the sale of real estate (Fletcher *v.* Clark, 39 Mich. 374); or to review the refusal of the circuit court to affirm a probate order to an executor to advance, to the infant beneficiaries of a will, money bequeathed to them on coming of age (Knorr *v.* Millard, 52 Mich. 542, 18 N. W. 349).

54. *Connecticut.*— Tyler *v.* Hamersley, 44 Conn. 419, 26 Am. Rep. 479.

Massachusetts.— Drowne *v.* Stimpson, 2 Mass. 441.

Michigan.— Tompkins *v.* Bowen, 123 Mich. 377, 82 N. W. 51; Brady *v.* Toledo, etc., R. Co., 73 Mich. 457, 41 N. W. 503; Holbrook *v.* Cook, 5 Mich. 225.

Wisconsin.— Crilley *v.* State, 20 Wis. 231; Eaton *v.* Gillett, 16 Wis. 546; Jenks *v.* State, 16 Wis. 332; Paine *v.* Chase, 14 Wis. 653; Wheeler *v.* Scott, 3 Wis. 362; Dean *v.* Williams, 2 Pinn. (Wis.) 91; Merrill *v.* Rollin, 1 Pinn. (Wis.) 411; Hill *v.* Bloomer, 1 Pinn. (Wis.) 283.

England.— Samuel *v.* Judin, 6 East 333; Jacques *v.* Cesar, 2 Saund. 100; Rex *v.* Dublin, 1 Str. 536.

See *infra*, III.

Judgments by confession.— Since a writ of error is a writ of right, it lies from a judgment confessed. Burge *v.* Burns, Morr. (Iowa) 287.

See *infra*, IV, B, 2, d, (II).

55. Some of the proceedings to which the designation has been applied not coming within the scope of this article, will not be discussed here. Thus the term "appeal" has sometimes been used in statutes as signifying only a right of rehearing before the same court, with a different special jury. Pool *v.* Barnett, Dudley (Ga.) 8. So the term is also quite generally applied to the proceeding by which causes before justice courts and courts of probate are brought up for new trial before a court of record, variously designated as courts of common pleas, circuit courts, and district courts. See *Ex p.* Henderson, 6 Fla. 279; Crane *v.* Giles, 3 Kan. 54; and, generally, Executors and Administrators; Justices of the Peace; Wills.

56. Magee *v.* Chadoin, 44 Tex. 488; Republic *v.* Smith, Dall. (Tex.) 83.

Constitutional and statutory provisions sometimes make use of the term, in a broad and comprehensive sense, to signify the removal of a cause from an inferior to a superior court, and, when so used, it designates all kinds of proceedings to obtain a review by an appellate court, whether by the technical appeal, by writ of error, by certiorari, or otherwise. State *v.* Jacksonville Terminal Co., 41 Fla. 363, 377, 27 So. 221, 225; Lyles *v.* Barnes, 40 Miss. 608; State *v.* Anthony, 65 Mo. App. 543; Pollock *v.* School Dist. No. 42, 54 Nebr. 171, 74 N. W. 393; Nebraska L. &

appeal was a proceeding, introduced into equity practice from the civil law, by which the whole cause was removed from a lower to an appellate court, and there tried *de novo* upon evidence newly introduced, being subjected to a new and final determination as if it had not been tried before, and without any reference to the conclusion of the inferior court.[57] The statutory appeal differs so greatly in the various jurisdictions, in consequence of the dissimilarity of the statutes, that it is impossible to give a descriptive definition which will hold good in the various states; it is only possible to indicate in a general way the different forms which the remedy has assumed.[58] While the term "appeal" has sometimes been applied to a statutory proceeding almost identical with the remedy by writ of error,[59] and sometimes to a remedy very similar to the appeal in equity,[60] the appeal which has been established by statute in most of the states has some of the characteristics of both the equitable remedy and the writ of error.[61]

T. Co. *v.* Lincoln, etc., R. Co., 53 Nebr. 246, 73 N. W. 546.

57. Ketchum *v.* Thatcher, 12 Mo. App. 185; State *v.* Doane, 35 Nebr. 707, 53 N. W. 611; U. S. *v.* Wonson, 1 Gall. (U. S.) 5, 28 Fed. Cas. No. 16,750.

Distinguished from writ of error.—"An appeal is a process of civil-law origin, and removes a cause entirely; subjecting the facts, as well as the law, to a review and retrial; but a writ of error is a process of common-law origin, and it removes nothing for reëxamination but the law." Wiscart *v.* Dauchy, 3 Dall. (U. S.) 321, 327, 1 L. ed. 619, 622 [*quoted* in Western Cornice, etc., Works *v.* Leavenworth, 52 Nebr. 418, 72 N. W. 592; and U. S. *v.* Goodwin, 7 Cranch (U. S.) 108, 3 L. ed. 284]. See *supra*, I, C, 1; *infra*, I, C, 2, d, (II).

58. In Carnall *v.* Crawford County, 11 Ark. 604, 622, it was said that "appeals, in reference to actions at law, although expressed by a term originally derived from the civil law, are purely creatures of our statute law, and, consequently, our various statutes must be construed together in order to determine correctly the import of the term in any given statute."

59. Gormly *v.* McIntosh, 22 Barb. (N. Y.) 271.

The word "appeals," as used in the Connecticut act of 1882, designates the process which is a mere substitute for a writ of error, motion in error, or motion for a new trial, for the review of questions of law. White *v.* Howd, 66 Conn. 264, 33 Atl. 915; Styles *v.* Tyler, 64 Conn. 432, 30 Atl. 165; Schlesinger *v.* Chapman, 52 Conn. 271.

60. In an Ohio case it has been said that "while, in many of the states, and perhaps in all except in our own, an appeal from a court of general jurisdiction is in the nature of a writ of error, whereby the appellate court passes upon the record, as to facts as well as law, and does not hear additional or other evidence, but confines its adjudications to errors appearing upon the record, in Ohio the appeal itself vacates, without revisal, the whole proceeding, as to findings of fact as well as law, and the case is heard upon the same or other pleadings, and upon such competent testimony as may be offered in that court. It takes up the subject of the action *de novo*, in respect to pleadings, necessary parties, trial, and judgment, in like manner as if the cause had never been tried below." Mason *v.* Alexander, 44 Ohio St. 318, 328, 7 N. E. 435. See also Grant *v.* Ludlow, 8 Ohio St. 1, 28.

In Pennsylvania, where appeal is the proper mode of review, in equity cases and those following the equity forms (Rand *v.* King, 134 Pa. St. 641, 19 Atl. 806), it has been said that an appeal "brings up the whole case, and not merely the record of it." Springer *v.* Springer, 43 Pa. St. 518, 519.

61. It differs from appeal in equity and is in the nature of the writ of error in the respect that the appellate court, in revising the rulings and final judgment of the court below, does not try the cause *de novo*, and does not hear additional evidence. See State *v.* Doane, 35 Nebr. 707, 53 N. W. 611. Accordingly, it was said of the appeal established for the territory of Washington that it "is substantially a proceeding rather by writ of error than by technical appeal; for under it no evidence goes up, but only a statement of facts in the nature of a special verdict, and the rulings of the court on the admission or rejection of evidence when excepted to." Mann *v.* Young, 1 Wash. Terr. 454, 457.

It is like appeal in equity and differs from writ of error in the respect that it removes the whole cause to the appellate court. In People *v.* Justices of Marine Ct., 2 Abb. Pr. (N. Y.) 126, 127, 11 How. Pr. (N. Y.) 400, it is said an appeal is "the substitute for the writ of error; but it is more; it is the method by which all the mistakes in the judgment of an inferior jurisdiction are rectified, except when otherwise specially provided." In Nebraska L. & T. Co. *v.* Lincoln, etc., R. Co., 53 Nebr. 246, 248, 73 N. W. 546, it was said that appeal, in its special and technical sense, "designates the particular form of review, dependent upon statute for its existence, whereby a case is transferred, after decision, to a higher court for a reëxamination of the whole proceeding, and final judgment or decree in accordance with the result of such reëxamination."

In North Carolina, on appeal to the supreme court, errors assigned in matters of law only are reviewable except where the subject-matter was formerly cognizable in equity

b. Origin and Existence of Remedy — (I) *In General.* The proceeding is of civil-law origin, and was introduced therefrom into courts of equity[62] and admiralty. Consequently, the remedy by appeal in actions at law is purely of constitutional or statutory origin, and exists only when given by some constitutional or statutory provision.[63]

(II) *Power of Legislature Over Remedy.* Where the remedy by appeal is not secured by the constitution, but is purely statutory, it is subject to the control of the legislature, which may, in its discretion, grant or take away[64] the remedy, and prescribe in what cases, under what circumstances, and from what courts, appeals may be taken.[65]

c. Whether Remedy Is Exclusive. As has been shown above, there is some conflict of opinion as to whether a statute which provides for the remedy by appeal has the effect of doing away with the writ of error.[66] In line with the cases which hold that, in the absence of some provision making appeal the sole remedy, the writ of error is still available, it has been held that a statute which authorizes the remedy by appeal, but contains no provision making the remedy exclusive, does not have the effect of doing away with the writ of certiorari,[67] nor the statutory substitute of certiorari by the writ of review,[68] nor the right to move before judgment for a new trial.[69] But where a statute authorizing appeals

only, in which cases the findings of fact are also reviewable. Baker *v.* Belvin, 122 N. C. 190, 30 S. E. 337; Travers *v.* Deaton, 107 N. C. 500, 12 S. E. 373; *In re* Deaton, 105 N. C. 59, 11 S. E. 244; Coates *v.* Wilkes, 92 N. C. 376.

62. Prior to the fusion of common law with equity in 1875, nothing that was, or could properly be called, an appeal from court to court was known. 2 Pollock & M. Hist. Eng. L. (2d ed.) 664.

63. *Arkansas.*— Simpson *v.* Simpson, 25 Ark. 487.

Colorado.— People *v.* Richmond, 16 Colo. 274, 26 Pac. 929.

District of Columbia.— U. S. *v.* O'Neal, 10 App. Cas. (D. C.) 205.

Illinois.—Peak *v.* People, 76 Ill. 289; Union Nat. Bank *v.* Barth, 74 Ill. App. 383.

Michigan.—Waterman *v.* Bailey, 111 Mich. 571, 69 N. W. 1109; De Long *v.* Muskegon County, 111 Mich. 568, 69 N. W. 1115.

Minnesota.— Minneapolis. *v.* Wilkin, 30 Minn. 140, 14 N. W. 581; Tierney *v.* Dodge, 9 Minn. 166.

Missouri.— State *v.* Woodson, 128 Mo. 497, 31 S. W. 105.

Nebraska.— Pollock *v.* School Dist. No. 42, 54 Nebr. 171, 74 N. W. 393; State *v.* Bethea, 43 Nebr. 451, 61 N. W. 578.

New York.— State *v.* Kings County, 125 N. Y. 312, 26 N. E. 272, 34 N. Y. St. 782; Batterman *v.* Finn, 40 N. Y. 340.

Wisconsin.—Western Union R. Co. *v.* Dickson, 30 Wis. 389.

See 2 Cent. Dig. tit. "Appeal and Error," § 1 *et seq.*

64. A statute will not be construed to have the effect of taking away the right unless the language used shows that to have been the legislative intent. Catterlin *v.* Bush, (Oreg. 1900) 59 Pac. 706. Thus, where a statute permitted an appeal on matter of law only, but a subsequent act, which repealed all inconsistent laws, permitted an appeal "both as to matter of law and fact" in cases where the matter in dispute, exclusive of costs, was not less than twenty-five dollars, it was held that the right to appeal on matter of law only, in cases involving less than twenty-five dollars, still subsisted. Cook *v.* Grossarth, 61 N. J. L. 450, 39 Atl. 908.

65. U. S. *v.* O'Neal, 10 App. Cas. (D. C.) 205; Messenger *v.* Teagan, 106 Mich. 654, 64 N. W. 499; Sullivan *v.* Haug, 82 Mich. 548, 46 N. W. 795, 10 L. R. A. 263; and 2 Cent. Dig. tit. "Appeal and Error," § 3 *et seq.* See also *infra*, I, C, 2, g, (II).

The power of the legislature to limit appeals to a defined class of cases is not affected by a constitutional provision to the effect that appeals "may" be allowed from the circuit courts to the supreme court under such regulation as may be prescribed by law. McClain *v.* Williams, 10 S. D. 332, 73 N. W. 72, 43 L. R. A. 287, 289. And the power of the legislature to postpone the right of appeal until the final determination of the cause is not limited by a constitutional provision to the effect that the supreme court shall have jurisdiction to review by appeal any decision of the courts below "upon any matter of law or legal inference." Norfolk, etc., R. Co. *v.* Warren, 92 N. C. 620. So, under a constitutional provision to the effect that "appeals and writs of error shall be allowed from the final determination of county courts, as may be provided by law," it has been held that, while the remedy by appeal is a constitutional right, it can be exercised only under such conditions as may be imposed by the legislature. Andrews *v.* Rumsey, 75 Ill. 598, 600.

66. See *supra*, I, C, 1, b, (II).

67. Carnall *v.* Crawford County, 11 Ark. 604; People *v.* Perry, 16 Hun (N. Y.) 461; People *v.* Bigelow, 11 How. Pr. (N. Y.) 83.

68. Schirott *v.* Phillippi, 3 Oreg. 484.

69. It has been held that a statute, which allows an appeal upon the law to be taken from a judgment entered upon the direction of a single judge, does not have the effect of

provides that the mode so provided "shall be exclusive and shall supersede all other methods heretofore provided," the lower court cannot certify a question to the appellate court for its decision.[70]

d. Nature of Remedy — (I) *A Matter of Right.* An appeal in the cases mentioned, and upon the conditions prescribed by statute, is usually a matter of right,[71] and cannot be denied because it may be groundless.[72]

(II) *Not a New Suit.* Except where the statutory proceeding called an appeal is nothing more than a substitute for the common-law remedy by writ of error,[73] an appeal differs from the writ of error in that it is not a new suit, but a continuation of the suit below.[74]

e. Scope of Remedy — (I) *Errors Reviewable* — (A) *Errors of Law.* Probably there exists no form of appeal by which errors of law may not be reviewed.[75]

(B) *Errors of Fact.*[76] Where the remedy by appeal is nothing more than a substitute for the common-law writ of error the appeal does not bring up errors of fact for review.[77] But in many of the states the statutory appeal is so closely assimilated to the appeal in equity that it removes a case submitting entirely the facts as well as the law to review,[78] subject, however, to the rule that the appellate court, though reviewing the whole case, will not disturb the findings of the lower court on conflicting evidence unless those findings are clearly wrong.[79]

cutting off the right which previously existed of moving before judgment for a new trial for errors of law, and substituting in its place an appeal — the right to move for a new trial exists notwithstanding the statute. Molony *v.* Dows, 9 Abb. Pr. (N. Y.) 86, 18 How. Pr. (N. Y.) 27.

70. Munson *v.* Mudgett, 14 Wash. 662, 45 Pac. 306.

71. Forbes *v.* Hill, Dall. (Tex.) 206; and 2 Cent. Dig. tit. "Appeal and Error," § 3.

But it has been held that the Iowa Code, § 3173, declaring that no appeal shall be taken in any case involving less than one hundred dollars unless the court shall certify a law question upon which it is desirable to have the opinion of the appellate court, does not entitle a party to a certificate as a matter of right. Hager *v.* Adams, 70 Iowa 746, 30 N. W. 36; Fallon *v.* Johnson Dist. Tp., 51 Iowa 206, 1 N. W. 478.

See *infra*, V, B, 4, d.

72. McCreary *v.* Rogers, 35 Ark. 298; Ricketson *v.* Torres, 23 Cal. 636; State *v.* Judge of Superior Dist. Ct., 28 La. Ann. 547, 28 La. Ann. 880.

Good faith of the appellant in taking the appeal cannot be inquired into. People *v.* Knickerbocker, 114 Ill. 539, 2 N. E. 507, 55 Am. Rep. 879. In Ricketson *v.* Torres, 23 Cal. 636, it was held that while the fact that an appeal is sham and frivolous may be a good reason for a speedy submission and decision, it is no proper ground for a motion to dismiss.

Nor can any conditions except those prescribed by statute be annexed to an order granting an appeal. Emerson *v.* Clark, 3 Ill. 489, 2 Ill. 596.

73. In Pratt *v.* Allen, 19 How. Pr. (N. Y.) 450, it was held that an appeal is in the nature of an original or new action brought by the party appealing, and, like the writ of error, may be prosecuted by a new attorney without substitution. But formerly, in New York, the remedy by appeal in common-law actions was considered a mere substitute for a writ of error. Gormly *v.* McIntosh, 22 Barb. (N. Y.) 271.

74. Webster *v.* Gaff, 6 Colo. 475; Colorado Springs Co. *v.* Cowell, 6 Colo. 73; Connor *v.* Connor, 4 Colo. 74; Macklin *v.* Allenberg, 100 Mo. 337, 13 S. W. 350; Shuler *v.* Maxwell, 38 Hun (N. Y.) 240; Miller *v.* Shall, 67 Barb. (N. Y.) 446; Thompson *v.* Gest St. Building Assoc., 13 Ohio Cir. Ct. 250, 7 Ohio Dec. 68; and 2 Cent. Dig. tit. "Appeal and Error," § 2. See also *supra*, I, C, 1, c, (III).

75. In Ward *v.* Stewart, 2 Overt. (Tenn.) 70, it was held that, under the Tennessee act of Sept. 20, 1794, a party might appeal from the county to the superior court upon a determination of a mere matter of law, as well as if law and fact were mixed. See also *infra*, XI, XVII.

76. Whether errors of fact are reviewable upon appeal depends for its solution upon how closely the remedy has been assimilated to the appeal in equity. See *infra*, notes 77–79.

77. Thurber *v.* Townsend, 22 N. Y. 517. Thus, where a statute allows an appeal upon the law to be taken from a judgment, the appeal so authorized is merely a substitute for the former writ of error, which brought under review only questions of law. Molony *v.* Dows, 9 Abb. Pr. (N. Y.) 86, 18 How. Pr. (N. Y.) 27; Morgan *v.* Bruce, Code Rep. N. S. (N. Y.) 364.

78. *Florida.*—*Ex p.* Henderson, 6 Fla. 279.

Nebraska.—Western Cornice, etc., Works *v.* Leavenworth, 52 Nebr. 418, 72 N. W. 592; Wilcox *v.* Saunders, 4 Nebr. 569.

New York.— People *v.* Justices of Marine Ct., 2 Abb. Pr. (N. Y.) 126, 11 How. Pr. (N. Y.) 400.

Oregon.— Schirott *v.* Phillippi, 3 Oreg. 484.

Pennsylvania.— McClemmons *v.* Graham, 3 Binn. (Pa.) 88.

See also *infra*, XIII, XVII.

79. Western Cornice, etc., Works *v.* Leavenworth, 52 Nebr. 418, 72 N. W. 592.

(c) *Errors Appearing of Record.* While the remedy by appeal has sometimes assumed the form of an appeal in equity to the extent of bringing up the whole case for trial *de novo*, in like manner as if the action had not been tried below,[80] by the usual proceeding, although the whole cause is brought up for a review of errors, both of law and fact, the appellate court confines its review, as in the common-law proceeding by writ of error, to errors appearing upon the record of the court below.[81]

(II) *Relief Granted.* In addition to being less expensive and more convenient than a writ of error, further relief may be granted on the statutory appeal than on the writ of error.[82]

f. Proceedings in Which Appeals Lie — (I) *General Rule.* Since the right of appeal, in the absence of some constitutional authorization, is purely of statutory origin, it exists only where expressly given, and cannot be extended to cases which do not come within the statute.[83]

(II) *Suits in Equity.* In some of the states the legislature, in its authority so to do, has expressly provided that appeal shall be the proper remedy for the appellate review of suits in equity.[84] In these states the proper remedy for the review of actions which are essentially equitable in their nature is by appeal,[85]

80. See *supra*, I, C, 2, a.

81. Western Cornice, etc., Works *v.* Leavenworth, 52 Nebr. 418, 72 N. W. 592; Mann *v.* Young, 1 Wash. Terr. 454. See also *infra*, XIII, XVII.

82. Savage *v.* Gulliver, 4 Mass. 171, 178, wherein it was said: "On appeal, the cause of error may be removed by amendment; mistakes in fact on the merits may be corrected; neither of which can be done on error; and at the same time, an erroneous judgment below may be amended by the Court having appellate jurisdiction."

83. *Arkansas.*— *Ex p.* Couch, 14 Ark. 337.
California.— Blum *v.* Brownstone, 50 Cal. 293; Middleton *v.* Gould, 5 Cal. 190.
Colorado.— Gordon *v.* Gray, 19 Colo. 167, 34 Pac. 840.
Florida.— Taylor *v.* Kissimmee City, 37 Fla. 235, 19 So. 880.
Idaho.— General Custer Min. Co. *v.* Van Camp, 2 Ida. 44, 3 Pac. 22.
Illinois.— Edwards *v.* Vandemack, 13 Ill. 633; Lockman *v.* Morgan County, 32 Ill. App. 414.
Indiana.— Moffit *v.* State, 40 Ind. 217; Scott County *v.* Smith, 40 Ind. 61.
Maine.— English *v.* Sprague, 32 Me. 243.
Maryland.— Dillon *v.* Connecticut Mut. L. Ins. Co., 44 Md. 386; Barth *v.* Rosenfeld, 36 Md. 604.
Massachusetts.— Bassett *v.* Hutchinson, 9 Allen (Mass.) 199; Murdock, Appellant, 7 Pick. (Mass.) 303.
Michigan.— Harvey *v.* Pealer, 63 Mich. 572, 30 N. W. 188.
Minnesota.— Tierney *v.* Dodge, 9 Minn. 166.
Mississippi.— Steele *v.* Shirley, 9 Sm. & M. (Miss.) 382.
Missouri.— Snoddy *v.* Pettis County, 45 Mo. 361; Wilson *v.* School Tp. No. 6, 23 Mo. 416.
Nebraska.— Pollock *v.* School Dist. No. 42, 54 Nebr. 171, 74 N. W. 393; State *v.* Bethea, 43 Nebr. 451, 61 N. W. 578.
New York.— Brown *v.* Fargo, 1 N. Y. 429.
Ohio.— Dennison *v.* Talmage, 29 Ohio St. 433.
Pennsylvania.— Lower Augusta *v.* Selinsgrove, 64 Pa. St. 166; Podd *v.* Patterson, 17 Serg. & R. (Pa.) 345.
Utah.— Golding *v.* Jennings, 1 Utah 135.
Washington.— Puget Sound Agricultural Co. *v.* Pierce County, 1 Wash. Terr. 75.
Wisconsin.— Western Union R. Co. *v.* Dickson, 30 Wis. 389.
See 2 Cent. Dig. tit. "Appeal and Error," §§ 4 *et seq.*, 10 *et seq.*
Accordingly, where the statute authorizing appeals clearly relates only to proceedings according to the course of the common law, it does not lie in cases which are not so conducted. Masterson *v.* Beasley, 3 Ohio 301; Street *v.* Francis, 3 Ohio 277.
So, where there is no statute giving appellate jurisdiction to the supreme court, and its common-law jurisdiction, if it has any, could be exercised only on certiorari, an appeal will be quashed. Haines Tp. *v.* Penn Tp., 1 Am. L. J. N. S. (Pa.) 26.

84. **In Pennsylvania the act of May 9, 1889,** provides "that all appellate proceedings in the Supreme Court heretofore taken by writ of error, appeal, or certiorari shall hereafter be taken in a proceeding to be called an appeal." But this act does not have the effect of changing the nature and scope of these several proceedings; although all called by the same name, these proceedings remain as they existed before the enactment of the statute, and the real appeal is now, as it was before this change in nomenclature, the proper mode of review in all equity cases, as also in those following the equity forms. Rand *v.* King, 134 Pa. St. 641, 646, 19 Atl. 806; Laird's Appeal, 2 Pa. Super. Ct. 300.

85. Horton *v.* Miller, 44 Pa. St. 256; Springer *v.* Springer, 43 Pa. St. 518; and *supra*, I, C, 1, f, (II).
Hence it has been held that appeal is the proper remedy for the review of proceedings to determine the right of a removed assignee

even though the final recovery is purely legal, as in an action to foreclose a mechanic's lien and to have certain insurance policies assigned to plaintiff.[86]

(III) *Actions at Law.* Where the statute which authorizes appeals restricts the remedy to suits in equity, and gives a remedy by writ of error or petition in error in actions at law, an appeal will not lie to review a strictly law action.[87]

(IV) *Special Statutory Proceedings.* General statutes upon the subject of appeal do not embrace proceedings under special acts where the latter do not include a provision authorizing an appeal.[88]

g. Law by Which Appeals Are Governed — (I) *General Rule.* As a general rule the right of appeal is governed by the provisions of the law applicable thereto in force at the time when the judgment is rendered.[89]

(II) *Statutes Giving, Taking Away, or Modifying Remedy* — (A) *Taking Effect Before Judgment.* Except where it is provided that a statute which gives, takes away, or modifies the remedy by appeal shall not apply to actions which are pending,[90] the statute applies to cases commenced before, but in which judgment is not rendered until after, it goes into effect.[91]

(B) *Taking Effect After Judgment.* Unless it is evident from the terms of a

for creditors, on a claim for advances and expenses on account of the estate. Ingraham *v.* Caricabura, 5 Pa. St. 177. So, where the principal relief sought in a case is an injunction, and the injunction is granted, the action to that extent, at least, is one in equity, and appeal lies from a decree making the injunction perpetual. Crowell *v.* Horacek, 12 Nebr. 622, 12 N. W. 99.

86. Star Union Lumber Co. *v.* Finney, 35 Nebr. 214, 52 N. W. 1113.

87. Montgomery *v.* Thomas, 40 Fla. 450, 25 So. 62; Mauck *v.* Brown, 59 Nebr. 382, 81 N. W. 313; Cary *v.* Kearney Nat. Bank, 59 Nebr. 169, 80 N. W. 484; Hayden *v.* Ha'e, 57 Nebr. 349, 77 N. W. 773; Lowe *v.* Riley, 57 Nebr. 252, 77 N. W. 758; Collins *v.* Omaha, 55 Nebr. 208, 75 N. W. 557; Dixon Nat. Bank *v.* Omaha Nat. Bank, 54 Nebr. 796, 75 N. W. 55; Nebraska Wesleyan University *v.* Craig, 54 Nebr. 173, 74 N. W. 605; Nebraska L. & T. Co. *v.* Lincoln, etc., R. Co., 53 Nebr. 246, 73 N. W. 546; Campbell *v.* Farmers, etc., Bank, 49 Nebr. 143, 68 N. W. 344; Prentice Brownstone Co. *v.* King, 39 Nebr. 816, 58 N. W. 277; Robertson *v.* Hall, 2 Nebr. 17; U. S. *v.* Lesnet, (N. M. 1897) 50 Pac. 321; Atchison, etc., R. Co. *v.* Martin, 7 N. M. 158, 34 Pac. 536; Wilson *v.* Wald, 2 Wash. Terr. 376, 7 Pac. 857.

This rule has been applied to proceedings in garnishment after judgment (Fay *v.* Omaha Nat. Bank, (Nebr. 1898) 75 N. W. 55); to proceedings to condemn lands (Nebraska L. & T. Co. *v.* Lincoln, etc., R. Co., 53 Nebr. 246, 73 N. W. 546), and to a judgment assigning, to an intervener in an action at law, the homestead from lands which had been sold on execution under the original judgment (U. S. *v.* Lesnet, (N. M. 1897) 50 Pac. 321).

88. Allen *v.* Hostetter, 16 Ind. 15 (holding that appeal does not lie from the decision of a board of commissioners in a proceeding, authorized by a special statute, for the establishment of a new county); French *v.* Lighty, 9 Ind. 475 (holding that, in the absence of a provision authorizing an appeal, an appeal does not lie in proceedings under a special act relating to the mode of procedure in contesting elections).

89. Rivers *v.* Cole, 38 Iowa 677; Davenport *v.* Davenport, etc., R. Co., 37 Iowa 624. But see *infra*, I, C, 2, g, (II), (B).

90. Connor *v.* Connor, 4 Colo. 74. Since an appeal, unlike error, is a continuation of the action and not a new suit, it has been held that where a statute gives a right of appeal to a court to which it did not before belong, it does not apply, either expressly or by implication, to actions pending when it goes into effect. The statute cannot, in the face of another statutory provision that, where a repeal or amendment of a statute relates to the remedy, it shall not affect pending actions, be held to give a right of appeal in an action commenced before, and in which judgment was entered after, it went into effect. Thompson *v.* Gest St. Bldg. Assoc., 13 Ohio Cir. Ct. 250, 7 Ohio Dec. 68. See Blymer *v.* Meader, 9 Ohio Cir. Dec. 173.

91. Bernard *v.* Boggs, 4 Colo. 73; Willoughby *v.* George, 4 Colo. 22; Tilley *v.* Phillips, 1 N. Y. 610 [but see People *v.* Gilbert, 3 Code Rep. (N. Y.) 181]; Farmers' L. & T. Co. *v.* Carroll, 4 How. Pr. (N. Y.) 211, 2 N. Y. 188; Lake *v.* Gibson, 3 How. Pr. (N. Y.) 420; Tilley *v.* Phillips, 3 How. Pr. (N. Y.) 364; Grover *v.* Coon, 3 How. Pr. (N. Y.) 341; Selden *v.* Vermilya, 3 How. Pr. (N. Y.) 338; New York *v.* Schermerhorn, 3 How. Pr. (N. Y.) 334; Childs *v.* Ballou, 5 R. I. 370, wherein it is held that this construction does not make the statute retroactive.

Accordingly, it has been held that a statute which gives a right of appeal from a motion for a new trial without waiting for judgment, where the right had not existed before, applies not only to cases which are instituted before, but not tried until after, the statute takes effect (Lovell *v.* Davis, 52 Mo. App. 342), but also to cases in which a motion for a new trial was filed before, but not heard until after, that time (Sheehan *v.* Southern Ins. Co., 53 Mo. App. 351).

statute, which gives, takes away, or modifies the remedy by appeal, that it was intended to have a retroactive effect,[92] it applies only to cases pending and undetermined at the time when it goes into effect, and has no application to causes in which judgments have been entered prior to that time.[93]

(c) *Taking Effect After Appeal.* Ordinarily, a statute which alters the remedy by appeal has no application to, and does not affect the validity of, an appeal taken before the statute goes into effect.[94] If, however, an act altering the mode of appeal is expressly made retroactive, or if its language is so broad as to include pending appeals, it will be given effect as to appeals which are pending at the time when it goes into effect.[95] A statutory right to have cases reviewed on appeal may be taken away by a repeal of the statute as to causes in which judgment has been rendered,[96] and even as to causes which have been previously appealed.[97]

3. Special Statutory Remedies[98] — a. Bill of Exceptions — (1) *Statutory Authorization.* The bill of exceptions, as introduced by the Statute of West-

92. But since such statutes are remedial, they may, when the construction is called for, be given a retrospective effect, so as to apply to cases in which judgment has been rendered. Henderson, etc., R. Co. *v.* Dickerson, 17 B. Mon. (Ky.) 173, 66 Am. Dec. 148; Converse *v.* Burrows, 2 Minn. 229; Rouse *v.* Chappell, 26 Ohio St. 306; Mannypenny *v.* Johnson, 1 Ohio Dec. 450. Thus it has been held that the right to an appeal depends upon, and the appeal is to be governed by, the law in force at the time when the appeal is granted, and not to that in force at the time when the judgment was rendered. Alexander *v.* Warner, (Ky. 1900) 58 S. W. 700; Krom *v.* Levy, 60 N. Y. 126; but see *supra*, I, C, 2, g, (1). And in Smith *v.* Van Gilder, 26 Ark. 527, it was held that where a statute, which changes the practice on appeal, by its terms extends to all proceedings, it is applicable to cases which were tried in the court below before, as well as after, the enactment of the statute, if the appeal was taken after that time.

93. *California.*— Pignaz *v.* Burnett, 119 Cal. 157, 51 Pac. 48.

Colorado.— Lundin *v.* Kansas Pac. R. Co., 4 Colo. 24.

Florida.— Ropes *v.* Snyder-Harris-Bassett Co., 35 Fla. 537, 17 So. 651; Sedgwick *v.* Dawkins, 18 Fla. 335.

Illinois.— Carr *v.* Miner, 40 Ill. 33.

Iowa.— Rivers *v.* Cole, 38 Iowa 677; Davenport *v.* Davenport, etc., R. Co., 37 Iowa 624.

Kansas.— Barrett *v.* Johnson, 4 Kan. 327.

Kentucky.— Owensboro, etc., R. Co. *v.* Barclay, 102 Ky. 16, 19 Ky. L. Rep. 997, 43 S. W. 177.

Nebraska.— Wilcox *v.* Saunders, 4 Nebr. 569; White *v.* Blum, 4 Nebr. 555.

New York.— Ely *v.* Holton, 15 N. Y. 595; Dunlop *v.* Edwards, 3 N. Y. 341, 3 Code Rep. (N. Y.) 197; Rice *v.* Floyd, 1 N. Y. 608, 3 How. Pr. (N. Y.) 366; Spaulding *v.* Kingsland, 1 N. Y. 426, 3 How. Pr. (N. Y.) 337; New York *v.* Schermerhorn, 3 How. Pr. (N. Y.) 334.

Virginia.—Yarborough *v.* Deshazo, 7 Gratt. (Va.) 374.

94. The law in force at time of granting the appeal will govern. Cheek *v.* Berry, 27 Ark. 314; Donaldson *v.* Security Trust, etc., Co., 20 Ky. L. Rep. 857, 47 S. W. 763, 21 Ky. L. Rep. 1796, 56 S. W. 424; Butler *v.* Miller, 1 N. Y. 428, 1 Code Rep. (N. Y.) 110, 3 How. Pr. (N. Y.) 339. Thus it has been held that an act changing the minimum jurisdiction of the court of appeals does not apply to an appeal granted before the act took effect, though after the passage of the act. Terry *v.* Johnson, 20 Ky. L. Rep. 1562, 49 S. W. 767.

95. See Catterlin *v.* Bush, (Oreg. 1900) 59 Pac. 706, holding, however, that a construction which will make the statute apply to proceedings which are pending is not favored, and, unless it can be plainly gathered from the language employed that it was intended to make the act retrospective in its operation, it will be held to apply to future appeals only, and not to those already taken.

96. Ryan *v.* Waule, 63 N. Y. 57; Grover *v.* Coon, 1 N. Y. 536. See Clarke *v.* Crandall, 4 How. Pr. (N. Y.) 127; Iddings *v.* Bruen, 1 Code Rep. (N. Y.) 61.

97. *Ex p.* McCardle, 7 Wall. (U. S.) 506, 19 L. ed. 264.

Where an act which abolishes appeals contains no saving clause as to cases pending, the right to appeal is taken away, even where an appeal is pending at the time when the statute goes into effect, and the appeal must be dismissed. Harrison *v.* Smith, 2 Colo. 625; Gale *v.* Wells, 7 How. Pr. (N. Y.) 191; McClain *v.* Williams, 10 S. D. 332, 73 N. W. 72, 43 L. R. A. 287, 289. But, to effect this result, the repeal must, ordinarily, be in express terms, and not merely by implication. Callahan *v.* Jennings, 16 Colo. 471, 27 Pac. 1055. See Lusk *v.* Kershow, 17 Colo. 481, 30 Pac. 62.

98. While the two proceedings which have been discussed above — the writ of error (see *supra*, I, C, 1) and appeal (see *supra*, I, C, 2) — are the principal modes of bringing causes up for appellate review, there are a number of special statutory proceedings which deserve some consideration. See *infra*, I, C, 3. See also, generally, Audita Querela: Certiorari: Habeas Corpus: and 2 Cent. Dig. tit. "Appeal and Error," § 34 *et seq.*

minster II, the principles of which have been adopted in all the states of the Union,[99] served merely to place upon the record matters which would not otherwise appear there, and was not a substitute for, and did not usurp the functions of, a writ of error;[1] the writ still remaining necessary to remove the whole record to the appellate court,[2] except in cases where, by statute, this necessity has been done away with.[3]

(II) *Cases in Which Remedy Lies.* But this remedy is available only in the cases in which it is given by statute.[4]

b. Motion in Error. A motion in error, which is allowed by the statute in Connecticut, is in effect a writ of error.[5]

c. Reservation or Certification of Cases or Questions.[6] By the acts of congress of April 29, 1802, June 1, 1872, and March 3, 1891, provisions were made to the effect that, upon the failure of the judges to agree upon questions arising during the course of the trial,[7] such questions might be certified to the supreme

99. See, generally, *infra*, XIII, C, D; and 2 Cent. Dig. tit. "Appeal and Error," § 22.

1. **Distinguished from writ of error.**- While the remedy by exceptions, under the Massachusetts statute, reaches only errors of law, it is considerably more extensive than the writ of error in respect to the relief which may be granted. On a writ of error, if there be any error in the judgment, the court of error can review only the judgment in whole or in part. But, on exceptions allowed and the cause brought up under the statute allowing this mode of review, if the exceptions are extended and the judgment found to be erroneous, the judgment is not merely reversed, but the parties may then have a new trial in the appellate court, with all the benefits of amendment and other proceedings, as if the cause were brought up in the ordinary course of appeal. Sale *v.* Pratt, 19 Pick. (Mass.) 191. See also *supra*, I, C, 1.

2. Harris *v.* State, 2 Ga. 211.

3. **By statute in some states,** in certain cases, the necessity for a writ of error has been done away with by the establishment of a summary review upon the bill of exceptions alone. Warren *v.* Litchfield, 7 Me. 63; Sayward *v.* Emery, 1 Me. 291; Sale *v.* Pratt, 19 Pick. (Mass.) 191 (in which the substance of the Massachusetts statute of 1820 is stated); Peebles *v.* Rand, 43 N. H. 337 (quoting the New Hampshire statute of 1855); Buck *v.* Squiers, 23 Vt. 498. And in these states it has been held that the remedy so given must be pursued (English *v.* Sprague, 32 Me. 243; Frothingham *v.* Dutton, 2 Me. 255; Standish *v.* Old Colony R. Co., 129 Mass. 158), and that a writ of error does not lie (Bergeron *v.* Dartmouth Sav. Bank, 63 N. H. 195; Flanders *v.* White Mountains Bank, 43 N. H. 383; Peebles *v.* Rand, 43 N. H. 337).

4. Fletcher *v.* Clarke, 29 Me. 485; Mudget *v.* Kent, 18 Me. 349; Warren *v.* Litchfield, 7 Me. 63; Witham *v.* Pray, 2 Me. 198; Sayward *v.* Emery, 1 Me. 291; Davis *v.* Davis, 123 Mass. 590; Brooks *v.* Tarbell, 103 Mass. 496; Piper *v.* Willard, 10 Pick. (Mass.) 34; Stanley *v.* Webb, 21 Barb. (N. Y.) 148.

It has been held in Vermont that the statute extends only to cases in which the proceedings in the court below are according to the course of the common law. Courser *v.* Vermont Cent. R. Co., 25 Vt. 476. Where the county court allows exceptions to a charge, and spreads the charge on the records, the person against whom the case is decided can remove it to the supreme court on exceptions or by writ of error. Buck *v.* Squiers, 23 Vt. 498.

By the Massachusetts statute the remedy is not restricted to cases in which no other remedy is available. Thus it has been held that, where the statute allowing exceptions is broad and explicit enough to include the particular case, the remedy is available even though another statute has provided for the writ of error in the same case, if the statute providing for the writ of error does not make that remedy exclusive. Eaton *v.* Hall, 5 Metc. (Mass.) 287. And it has been held that the remedy is not restricted to cases in which the party has a right to appeal, unless there is something in the statute which makes the right to file exceptions conditional or dependent upon the fact that the remedy by appeal is not available; but the party who has a right of appeal may legally waive it, allege exceptions to the decisions of the lower court in matters of law, and, upon their allowance, enter his cause in the appellate court, to be heard on the exceptions. Sale *v.* Pratt, 19 Pick. (Mass.) 191.

5. Finch *v.* Ives, 24 Conn. 387 (wherein it is said that a motion in error is more convenient and less expensive than the writ of error, but that there is no distinction, except in the form of proceeding, between the writ and the motion); and 2 Cent. Dig. tit. "Appeal and Error," § 21.

6. See also *infra*, V, B, 4; and 2 Cent. Dig. tit. "Appeal and Error," § 24.

7. **That the reason for the provision for certification** of questions to the supreme court is to be found in the fact that the circuit court consisted of only two judges, in consequence of which, should they disagree, the division of opinion would remain and the question continue unsettled, is pointed out in New England Mar. Ins. Co. *v.* Dunham, 11 Wall. (U. S.) 1, 20 L. ed. 90; *Ex p.* Milligan, 4 Wall. (U. S.) 2, 18 L. ed. 281; U. S. *v.* Daniel, 6 Wheat. (U. S.) 542, 5 L. ed. 326.

court for its decision.[8] The act of congress of June 1, 1872, relating to civil cases,[9] has superseded the act of April 29, 1802, allowing questions to be certified up before judgment.[10] Proceedings somewhat similar to those of the federal courts have been adopted in some of the states.[11]

d. Writ of Review. There is, in some of the states, a peculiar statutory mode of appellate review by what is known as a writ of review.[12]

4. Writ of Mandamus. The remedy by mandamus is usually an exercise of original jurisdiction, but, where the mandamus issues to direct the action of a legal tribunal proceeding in the course of justice, it is an exercise of supervisory judicial control, and is in the nature of appellate action.[13]

D. Pendency of Another Proceeding[14] **— 1. In an Appellate Court — a. General Rule.** As a general rule a second proceeding, to obtain a review by an appellate court, cannot be taken while a prior valid proceeding is still pending.[15]

b. Application of Rule — (i) *In General.* Accordingly, a second appeal cannot be taken when the first appeal has not been dismissed, but is a valid, subsisting appeal.[16] And, where an appeal is pending, the cause cannot be brought up by writ of error,[17] by certiorari,[18] or by bill of exceptions.[19]

(ii) *Pending in Another Court.*[20] As a general rule, when an appellate review may be had in either of two different courts, if a cause has been brought before one of the courts it cannot, while such proceeding is pending, also be brought before the other court.[21] But where the right to appeal to two different courts is given, the courts have, in view of the uncertainty which sometimes

8. 2 U. S. Stat. at L. p. 159; and see also U. S. Rev. Stat. (1878), §§ 651, 697; and *infra*, V, B, 4, t.

9. 17 U. S. Stat. at L. p. 196; U. S. Rev. Stat. (1878), §§ 650, 652, 693. See also *infra*, V, B, 4, t.

10. Bartholow Banking House *v.* School Trustees, 105 U. S. 6, 26 L. ed. 937; Dow *v.* Johnson, 100 U. S. 158, 25 L. ed. 632; Bartholow Banking House *v.* School Trustees, 13 Fed. 304.

11. See *infra*, V, B, 4.

In Washington, while the territorial statutes permit questions to be certified by the superior courts to the supreme court (Murry *v.* Fay, 2 Wash. 352, 26 Pac. 533), it has been held that this proceeding has been abolished by the act of March 8, 1893. Munson *v.* Mudgett, 14 Wash. 662, 45 Pac. 306.

12. **This writ was unknown to the common law** and seems to have been borrowed from the courts of equity, though it is to be distinguished from the bill of review. See, generally, Review; and 2 Cent. Dig. tit. "Appeal and Error," § 36; and for bills of review see Equity.

13. People *v.* Bacon, 18 Mich. 247; *Ex p.* Crane, 5 Pet. (U. S.) 190, 8 L. ed. 92; and 2 Cent. Dig. tit. "Appeal and Error," § 34. As to when mandamus will, and when it will not, lie, see, generally, Mandamus.

14. As to the pendency of an appeal or writ of error in a prior action or proceeding see Abatement and Revival, II, E.

15. Brown *v.* Plummer, 70 Cal. 337, 11 Pac. 631; American Contract, etc., Co. *v.* Perrine, 40 Fla. 412, 24 So. 484; McCarty *v.* Wintler, 17 Oreg. 391, 21 Pac. 195; State *v.* King, 6 S. D. 297, 60 N. W. 75; Reichenbach *v.* Lewis, 5 Wash. 577, 32 Pac. 460, 998; and 2 Cent. Dig. tit. "Appeal and Error," § 47.

16. Brown *v.* Plummer, 70 Cal. 337, 11 Pac. 631; Hill *v.* Finnegan, 54 Cal. 311; Newbury *v.* Getchell, etc., Lumber, etc., Co., 106 Iowa 140, 76 N. W. 514; McCarty *v.* Wintler, 17 Oreg. 391, 21 Pac. 195; Reichenbach *v.* Lewis, 5 Wash. 577, 32 Pac. 460, 498, wherein it is held that a notice of appeal filed during the pendency of a motion to dismiss a prior appeal already perfected, for failure to file a transcript within the required time, has no effect.

17. Rice *v.* Reed, 29 Ark. 320; Loyd *v.* Welch, 35 Ga. 104; Jones *v.* Crawford, 18 Ga. 281; Johns *v.* Fuller, 13 Ga. 506; Carter *v.* Buchanan, 2 Ga. 337; Humphrey *v.* Havens, 9 Minn. 318; Field *v.* Esch, 18 Ohio Cir. Ct. 749, 4 Ohio Cir. Dec. 162; Ginn *v.* Logan County, 11 Ohio Cir. Ct. 396; Horner's, etc., Lateral R. Co., 37 Pa. St. 333.

18. White *v.* McCall, 1 N. J. L. 110.

19. Armstrong *v.* Hand, 36 Ga. 267.

After a garnishee defendant has sued out and served a common-law writ of certiorari, the main defendant in the garnishee action cannot appeal from the judgment against the garnishee. McCormick Harvesting Mach. Co. *v.* Reed, 85 Wis. 201, 55 N. W. 147.

20. See 2 Cent. Dig. tit. "Appeal and Error," § 46.

21. Thus a writ of error will not lie to a decision from which an appeal is still pending, even though the appeal may be pending in another court. Rice *v.* Reed, 29 Ark. 320 [*overruling* Clay *v.* Notrebe, 11 Ark. 631]. Accordingly, it has been held in Illinois that, while an appeal is pending in the circuit court from the county court, a writ of error in the same cause will not lie from the supreme court to the county court. Frank *v.* Moses, 118 Ill. 435, 8 N. E. 192. So it has been held, in construing 26 U. S. Stat. at L. p. 826, that, if a cause is pending in the circuit court of appeals on writ of error, a writ

attends the determination as to which is a proper appellate tribunal, shown a disposition to recognize a practice, which has been adopted in ambiguous cases, of taking, at the same time, orders of appeals to both appellate courts.[22] And, when there has been an appeal to two different courts, the court which has jurisdiction may ignore the appeal to the other court.[23]

2. In Court Below — a. Bill of Review. As a rule a party cannot appeal when he has a bill of review pending in the court below for the same errors of law which are sought to be reviewed on the appeal.[24]

b. Bill to Impeach Decree for Fraud. A bill to impeach a decree for fraud, as shown by matters outside the record, is no bar to the prosecution of a writ of error to the decree.[25]

c. Motion for New Trial. While, as a general rule, a writ of error or an appeal will be dismissed where a motion for a new trial is pending in the trial court,[26] a party who has moved for a new trial may, after the new trial is granted, waive his motion without prejudice to his right of appeal from the judgment thereafter entered in the action.[27]

of error to the supreme court will be dismissed. Columbus Constr. Co. *v.* Crane Co., 174 U. S. 600, 19 S. Ct. 721, 43 L. ed. 1102.

22. Pullman's Palace Car Co. *v.* Central Transp. Co., 171 U. S. 138, 18 S. Ct. 808, 43 L. ed. 108.

In Louisiana, where appeals had been taken both to the circuit court and to the supreme court, and the appeal to the circuit court had been dismissed for want of jurisdiction before the appeal to the supreme court had been filed, the supreme court declined to dismiss the latter appeal. Bennett *v.* Her Creditors, 45 La. Ann. 1019, 13 So. 402. But, since there cannot be two appeals by the same party from the same judgment pending at the same time in two different courts, an appeal to the supreme court, while the appeal to the circuit court, which had been lodged before the appeal to the supreme court and duly prosecuted, was still pending and undetermined, will be dismissed without prejudice to the appellant's right to take a new appeal in case the appeal pending in the circuit court shall be dismissed for want of jurisdiction. Frieberg *v.* Langfelder, 45 La. Ann. 983, 13 So. 404.

23. Henry *v.* Tricou, 36 La. Ann. 519.

24. Maxwell *v.* Martin, 35 W. Va. 384, 14 S. E. 7; and see 2 Cent. Dig. tit. "Appeal and Error," §§ 25–33.

But the supreme court of Vermont has refused to send a cause, before it for review, back to the chancellor, or continue it, on account of the pendency of a bill of review before the court of chancery. Lane *v.* Marshall, 15 Vt. 785.

Limits of the rule.— Since the reason for this rule is to permit the lower court to correct its errors of law in the first instance, and to avoid the confusion which would result from inconsistent decrees, it has been held that, where the bill of review was filed, not to correct errors of law, but solely because of after-discovered evidence, the questions presented to the two tribunals by the separate proceedings are entirely distinct, and no confusion can arise from their separate determination, and that, therefore, the pendency of the bill of review for this cause does not have the effect of preventing an appeal. Gillespie *v.* Allen, 37 W. Va. 675, 17 S. E. 184.

25. Stunz *v.* Stunz, 131 Ill. 210, 23 N. E. 407.

26. Williams *v.* Jones, 69 Ga. 757; and see 2 Cent. Dig. tit. "Appeal and Error," § 29; and *infra*, X, D.

But, under a statute providing that "the supreme court may review and reverse on appeal any judgment or order of the district court, although no motion for a new trial was made in such court," it has been held that the pendency of such a motion at the time an appeal is taken will in nowise invalidate the appeal. Hunt *v.* Iowa Cent. R. Co., 86 Iowa 15, 18, 52 N. W. 668, 41 Am. St. Rep. 473. And, under statutes providing for appeals from judgments and appeals from orders granting or denying new trials, it has been held that the two modes of appeal are independent of each other, and that an appeal from the judgment does not depend upon a motion for a new trial and may be taken without waiting for the determination of such a motion. Spanagel *v.* Dellinger, 38 Cal. 278; Carpentier *v.* Williamson, 25 Cal. 154; Brooks *v.* Nevada Nickel Syndicate, 24 Nev. 311, 53 Pac. 597.

Motion to alter decree.—So an appeal from a decree cannot be taken during the pendency of the motion to alter the decree in its material provisions, or until it has either been withdrawn or determined. Vincent *v.* Vincent, 3 Mackey (D. C.) 320, stating as a reason for this rule the fact that such a motion is in effect a motion for a rehearing.

Motion to vacate or suspend judgment.— It has been held in Nevada that, where an appeal does not vacate or suspend a judgment, it may be prosecuted by appellant while appellant is also prosecuting a motion in the district court to vacate the judgment. Brooks *v.* Nevada Nickel Syndicate, 24 Nev. 311, 53 Pac. 597; and see 2 Cent. Dig. tit. "Appeal and Error," § 26.

27. Gutwillig *v.* Stumes, 47 Wis. 428, 2 N. W. 774.

E. Election of Remedies[28] — **1. Necessity of.** A party who has more than one remedy for review in a particular case must elect the one under which he will proceed.[29] But, if it is questionable whether a case should be brought up by appeal or by writ of error, the case may, according to a practice sanctioned by some of the courts, be brought up by both modes.[30]

2. What Constitutes. Where both the remedy by appeal and writ of error are available, in order to show an election to proceed by error the procedure must have the essential elements of a proceeding by error.[31]

F. Successive Proceedings — 1. Where First Proceeding Has Been Determined — a. General Rule. Where a party has brought a proceeding for appellate review which has been prosecuted to a final determination by the appellate court, he cannot, unless there have been new proceedings in the case, again bring the same case up for review.[32]

28. See 2 Cent. Dig. tit. "Appeal and Error," §§ 39–47.

29. Lewis *v.* Few, 5 Johns. (N. Y.) 1; Sleght *v.* Rhinelander, 1 Johns. (N. Y.) 192 — the reason for this being that two separate and distinct proceedings for the review of the same questions cannot be prosecuted at the same time. See also *supra*, I, D, 1.

Applications of the rule.— Thus a party cannot proceed with a bill of review and an appeal at one and the same time. Kirk *v.* Reynolds, 12 Cal. 99; Field *v.* Williamson, 4 Sandf. Ch. (N. Y.) 613. And, where a plaintiff files a bill in equity to enjoin the collection of a judgment, and also sues out a writ of error to the appellate court, he will be compelled to elect which remedy he will pursue. Webb *v.* Williams, Walk. (Mich.) 452; Cockerell *v.* Cholmeley, 1 Russ. & M. 418, 5 Eng. Ch. 418. So, where both appeal and writ of error are available in a particular case, the party aggrieved must elect which remedy he will pursue. Smith *v.* Morrill, 11 Colo. App. 284, 52 Pac. 1110; Humphrey *v.* Havens, 9 Minn. 318; Moody *v.* Stephenson, 1 Minn. 401; State *v.* Thompson, 30 Mo. App. 503; Beatrice Paper Co. *v.* Beloit Iron Works, 46 Nebr. 900, 65 N. W. 1059; Monroe *v.* Reid, 46 Nebr. 316, 64 N. W. 983.

But it has been held in Pennsylvania that, when a definitive decree of distribution is made by the orphans' court, since errors in the trial of the issue cannot be reviewed on appeal alone, the party aggrieved may appeal, and at the same time bring error. Shiffer's Appeal, 4 Pennyp. (Pa.) 512.

30. Plymouth Consol. Gold Min. Co. *v.* Amador, etc., Canal Co., 118 U. S. 264, 6 S. Ct. 1034, 30 L. ed. 232; Hurst *v.* Hollinsworth, 94 U. S. 111, 24 L. ed. 31, 100 U. S. 100, 25 L. ed. 569; McFadden *v.* Mountain View Min., etc., Co., 97 Fed. 670, 38 C. C. A. 354 — holding that in such cases the appellate court, when it comes to examine the case, will determine whether it is properly brought up by appeal or writ of error, and proceed accordingly.

31. Chadron Banking Co. *v.* Mahoney, 43 Nebr. 214, 61 N. W. 594, holding that filing a transcript of a paper containing assignments of error may merely indicate the points relied on to reverse the case, and does not make the proceeding one in error in the absence of an instrument possessing the essential elements of a petition in error.

Filing a petition in error will raise the presumption that petitioner has elected to proceed by error, and not by appeal (Nebraska Land, etc., Co. *v.* McKinley-Lanning L. & T. Co., 52 Nebr. 410, 72 N. W. 357; Chicago, etc., R. Co. *v.* Cass County, 51 Nebr. 369, 70 N. W. 955; Shaw *v.* Robinson, etc., Co., 51 Nebr. 164, 70 N. W. 953; Thomas *v.* Churchill, 48 Nebr. 266, 67 N. W. 182; Beatrice Paper Co. *v.* Beloit Iron Works, 46 Nebr. 900, 65 N. W. 1059; Monroe *v.* Reid, 46 Nebr. 316, 64 N. W. 983; Woodard *v.* Baird, 43 Nebr. 310, 61 N. W. 612), even though the case is entitled as an appeal and is presented for review within the time allowed in which to perfect an appeal (Childerson *v.* Childerson, 47 Nebr. 162, 66 N. W. 281).

Effect of election.— Where a party has a right both of appeal and to file exceptions in matters of law, pursuant to the statute authorizing that procedure, the right of appeal is waived by the adoption of the latter mode; and, since the case is rightly brought up on exceptions, a dismissal of the proceedings will not reinstate the cause in the lower court so as to enable the party subsequently to take an appeal. Sale *v.* Pratt, 19 Pick. (Mass.) 191.

32. Masonic Temple Co. *v.* Com., 11 Ky. L. Rep. 383, 12 S. W. 143; Smith *v.* Shaffer, 50 Md. 132; Bridendolph *v.* Zeller, 5 Md. 58; Ford *v.* David, 13 How. Pr. (N. Y.) 193, wherein it was said that only one appeal is allowed in the same action unless a new trial is ordered upon appeal after final judgment has been rendered.

Application of the rule.— Thus, where a party has appealed or sued out a writ of error, and the appeal or writ of error has been determined, he cannot afterward again take the case up for review by appeal or writ of error.

Indiana.— Meikel *v.* German Sav. Fund Soc., 24 Ind. 78.

Iowa.—Davis *v.* Alexander, 1 Greene (Iowa) 86.

Kentucky.— Banton *v.* Campbell, 9 B. Mon. (Ky.) 587.

Maryland.— Bridendolph *v.* Zeller, 5 Md. 58.

Texas.— Harris *v.* Simmang, (Tex. Civ.

b. Where There Have Been New Proceedings. A second appellate proceeding may, of course, be prosecuted in the same case where there have been new proceedings in the case, but only as to points not passed upon in the first appeal.[33]

c. Where Second Proceeding Is Prosecuted by Adverse Party. Where a case has been brought up, by appeal or on writ of error, by one of the parties, and determined by the reviewing court, the other party cannot subsequently bring the case up by appeal or writ of error to obtain a review of a question which was determined in the first proceeding,[34] or which should have been presented by assignment of cross-error.[35] While it has been held that an appeal or writ of error by one party is no bar to a proceeding by the other party assigning different errors,[36] it has, on the other hand, been held that, where a writ of error has been brought by one party and has been finally adjudicated, the other party cannot sue out a writ of error in the same cause.[37]

App. 1895) 29 S. W. 668; Gainesville, etc., R. Co. *v.* Lacy, 7 Tex. Civ. App. 63, 26 S. W. 413.

Nor can he bring up the same point which was decided on appeal by a new appeal in the same cause (Shoaf *v.* Frost, 127 N. C. 306, 37 S. E. 271; Hendon *v.* North Carolina R. Co., 127 N. C. 110, 37 S. E. 155; Pretzfelder *v.* Merchants Ins. Co., 123 N. C. 164, 31 S. E. 470, 44 L. R. A. 424), even by stipulation of the parties (Southern Kansas R. Co. *v.* Loffoon, (Tex. Civ. App. 1895) 33 S. W. 584). So, where a judgment has been reversed on error, a second writ, sued out to correct alleged errors in the taxation of costs after rendition of judgment, which might have been incorporated in the same record, will be dismissed at the costs of plaintiff in error. St. Louis, etc., R. Co. *v.* McLelland, 62 Fed. 118, 27 U. S. App. 74, 10 C. C. A. 302.

Upon the same principle, after a party has prosecuted to final judgment a complaint for review, he cannot afterward appeal from the original judgment. Traders' Ins. Co. *v.* Carpenter, 85 Ind. 350.

Denial of motion for injunction against the collection of a judgment, it has been held, does not affect the right of the moving party to appeal from a judgment taken in another and distinct action over the same subject-matter. Roulhac *v.* Miller, 89 N. C. 190.

Proceedings in different courts.— The final determination of an appellate proceeding will bar another proceeding, in the same case, presenting the same questions for review, even though the proceedings are in different courts. San Miguel Consol. Gold Min. Co. *v.* Suffolk Gold Min., etc., Co., 24 Colo. 468, 52 Pac. 1027.

Rule where first proceeding was by case reserved.— In Connecticut, if a case has been reserved for the advice of the supreme court, and judgment rendered in accordance with the advice given, the supreme court will not afterward, upon proceedings in error, consider questions on which the party moving in error had an opportunity to be heard when the case was before the court upon the reservation. Fowler *v.* Bishop, 32 Conn. 199; Nichols *v.* Bridgeport, 27 Conn. 459; Smith *v.* Lewis, 26 Conn. 110. But where, in a case reserved, the validity of a statute, upon which the right of action depends, is drawn in question, on the ground that the statute violates the constitution of the United States, the supreme court will, notwithstanding the fact that the case had previously been reserved by the lower court for the advice of the supreme court, entertain a writ of error for the purpose of affirming the judgment, in order to enable the case to be carried to the supreme court. New Haven, etc., Co. *v.* State, 44 Conn. 376. *Compare* also *infra*, V, B, 4.

33. Johnson *v.* Von Kettler, 84 Ill. 315; Arnold *v.* Arnold, 11 B. Mon. (Ky.) 81; Smith *v.* Shaffer, 50 Md. 132; Young *v.* Frost, 1 Md. 377; Hendon *v.* North Carolina R. Co., 127 N. C. 110, 37 S. E. 155. As to the questions which may be presented by such proceedings see *infra*, XVII.

34. San Miguel Consol. Gold Min. Co. *v.* Suffolk Gold Min., etc., Co., 24 Colo. 468, 52 Pac. 1027. It has been held that where the same case which is brought into the supreme court by plaintiff in error has been brought into the court by defendant in error, and an opinion delivered reversing the judgment upon grounds which would, in any event, have been fatal to the successful prosecution of the present writ of error, the case will be dismissed, with costs. Mooney *v.* Brinkley, 9 Ark. 449.

Matter, assigned as a cross-error on appeal to the supreme court, upon which a decision is given against defendant in error, precludes him from prosecuting a writ of error assigning the same matter as error. Smith *v.* Wright, 71 Ill. 167.

35. See Page *v.* People, 99 Ill. 418; Horne *v.* Harness, 18 Ind. App. 214, 47 N. E. 688.

36. Poeyfarré *v.* Delor, 7 Mart. (La.) 1; Ormsby *v.* Ihmsen, 34 Pa. St. 462. It has been held that where the appellee is entitled to prosecute a cross-appeal, but fails to do so within the statutory time, his right is not barred, although the judgment may have been affirmed. McKay *v.* Mayes, 17 Ky. L. Rep. 827, 32 S. W. 606; Wickliffe *v.* Buckman, 12 B. Mon. (Ky.) 424.

37. McCabe *v.* Emerson, 18 Pa. St. 111, stating as a reason for this that the second writ would have the effect of calling in question a final judgment of the appellate court.

d. Where Second Proceeding Is by Party Not Joining in First. It has been held that an appeal by one does not preclude another co-party from appealing.[38] But where a surety appeals from a judgment rendered against him and his principal, which judgment has already been reversed on an appeal by the latter, the appeal will be dismissed.[39]

2. Where First Proceeding Has Been Dismissed — a. In General. While some of the authorities lay down the broad rule that if an appeal or writ of error has been dismissed it does not bar the seasonable prosecution of another appeal or writ of error,[40] the rule, as will be shown later on, is subject to numerous restrictions.[41]

b. For Irregularity in Proceedings. In the absence of some contravening statutory provision, it has been very generally held that, where an appeal or writ of error has been dismissed for failure to comply with some requirement of the law governing the proceeding rendering the appeal ineffective, a second appeal or writ of error is not barred if taken in due time.[42] This rule has been applied in cases of dismissal of premature writs of error or appeals,[43] to dismissals for

For the same reason, it has been held that, where a complainant obtains a decree, but not for all the relief prayed by his bill, and the respondent appeals, if complainant desires a more favorable decree he must enter a cross-appeal, so that, when the decree is considered by the appellate court, he may be heard (Caston *v.* Caston, 54 Miss. 512; Corning *v.* Troy Iron, etc., Factory, 15 How. (U. S.) 451, 14 L. ed. 768), although it is usually held that a statute which gives defendant in error or an appellee the right to file cross-errors is permissive only and the right itself cumulative, so that the failure of appellee to assign cross-errors does not deprive him of the right to a subsequent writ of error. Brennan *v.* State Bank, 10 Colo. App. 368, 50 Pac. 1076; Page *v.* People, 99 Ill. 418; Wickliffe *v.* Buckman, 12 B. Mon. (Ky.) 424. See *infra*, XI, M.

38. Bowman *v.* Kaufman, 30 La. Ann. 1021; Brown *v.* Richardson, 4 Rob. (N. Y.) 603. It has been held that where co-defendants answer separately, setting up different defenses, and judgment goes against all, an appeal by one defendant does not affect the rights of the others to subsequently appeal. State *v.* King, 6 S. D. 297, 60 N. W. 75.

39. Brashear *v.* Carlin, 19 La. 395.

40. Garrick *v.* Chamberlain, 97 Ill. 620; Beller *v.* Stevens, 40 Mich. 168 (wherein it is said that "dismissing a writ of error is equivalent to a nonsuit, and cannot prevent further proceedings, which are a matter of right until barred by statute"); Power *v.* Frick, 2 Grant (Pa.) 306 (wherein it was held that a plaintiff in error may have a second writ of error after a *non prosequitur* of the first, but it will not be a supersedeas).

See 2 Cent. Dig. tit. "Appeal and Error," § 49 *et seq.*

In Missouri it has been held that, when an appeal has once been granted, the power of the inferior court over the subject is exhausted and the party, having from any cause lost the benefit of his appeal, must resort to a writ of error. Brill *v.* Meek, 20 Mo. 358; and see 2 Cent. Dig. tit. "Appeal and Error," § 52.

Dismissal by agreement of the parties.— In Illinois it has been held that, if an appeal has been dismissed by agreement or for other reasons than the not perfecting the appeal in the proper form, the dismissal will be a bar to another appeal. Evans *v.* People, 27 Ill. App. 616.

41. See *infra*, I, F, 2, b–d.

42. *Arkansas.*— Turner *v.* Tapscott, 29 Ark. 318; Yell *v.* Outlaw, 14 Ark. 413.

California.— Karth *v.* Light, 15 Cal. 324.

Colorado.— Hax *v.* Leis, 1 Colo. 187; Western Union Tel. Co. *v.* Graham, 1 Colo. 182.

Florida.—Garrison *v.* Parsons, 41 Fla. 143, 25 So. 336; Glasser *v.* Hackett, 37 Fla. 358, 20 So. 532; Johnson *v.* Polk County, 24 Fla. 28, 3 So. 414; Harris *v.* Ferris, 18 Fla. 81.

Indian Territory.— State Nat. Bank *v.* Cardwell, Indian Terr. 311, 37 S. W. 103.

Kansas.— Weeks *v.* Medler, 20 Kan. 57.

Louisiana.— Hall *v.* Beggs, 17 La. Ann. 238; Dugas *v.* Truxillo, 15 La. Ann. 116; Smith *v.* Vanhille, 11 La. 380.

Missouri.— State *v.* Finn, 87 Mo. 310; State *v.* Silverstein, 77 Mo. App. 304.

Nebraska.— Omaha L. & T. Co. *v.* Ayer, 38 Nebr. 891, 57 N. W. 567.

New York.— Culliford *v.* Gadd, 135 N. Y. 632, 32 N. E. 136, 48 N. Y. St. 485.

Oklahoma.— Richmond *v.* Frazier, 7 Okla. 172, 54 Pac. 441.

Texas.— Mays *v.* Forbes, 9 Tex. 436.

United States.— U. S. *v.* Gomez, 3 Wall. (U. S.) 752, 18 L. ed. 212; Castro *v.* U. S., 3 Wall. (U. S.) 46, 18 L. ed. 163; U. S. *v.* De Pacheco, 20 How. (U. S.) 261, 15 L. ed. 820; The Steamer Virginia *v.* West, 19 How. (U. S.) 182, 15 L. ed. 594; U. S. *v.* Curry, 6 How. (U. S.) 106, 12 L. ed. 363; Yeaton *v.* Lenox, 8 Pet. (U. S.) 123, 8 L. ed. 889.

43. Hook *v.* Richeson, 106 Ill. 392; Stokes *v.* Shannon, 55 Miss. 583.

An appeal taken before judgment entered is nugatory, and in no way affects an appeal taken after the judgment is entered. Matter of Rose, 80 Cal. 166, 22 Pac. 86; Planters Consol. Assoc. *v.* Mason, 24 La. Ann. 518; Spokane Falls *v.* Browne, 3 Wash. 84, 27 Pac. 1077.

irregularity[44] or insufficiency in the steps taken to perfect the appeal or error proceedings,[45] as well as to dismissals for want of authority in appellant to maintain the proceeding.[46]

c. For Want of Prosecution. According to one view the dismissal of an appeal or writ of error for want of prosecution leaves the case in the court below in the same condition in which it was before the appeal was taken or the writ of error sued out, and does not bar the subsequent prosecution of another proceeding if begun in due time.[47] But, according to another line of cases, the dismissal of a writ of error or appeal which has been regularly taken operates as an affirmance of the judgment or order, and, unless the order of dismissal or some statutory provision otherwise provides, is a bar to a subsequent proceeding in the same case, and upon the same judgment or order.[48] If, however, the first appeal has been

44. As a dismissal for want of bond or of a sufficient bond. Martinez *v.* Gallardo, 5 Cal. 155; Gensler *v.* Florida R. Co., 14 Fla. 41; Merrill *v.* Hunt, 52 Miss. 774.

45. Weeks *v.* Medler, 20 Kan. 57 (wherein a petition in error was dismissed on the ground that the record attached to it was illegal and insufficient); Cooper *v.* Pacific Mut. L. Ins. Co., 7 Nev. 116, 8 Am. Rep. 705 (wherein it was held that where an appeal is dismissed, not for want of prosecution or upon the merits, but for some technical defect in the preparation of the appeal, and the order of dismissal expressly provides that it shall be without prejudice to another appeal, a second appeal is not barred); Good *v.* Daland, 119 N. Y. 153, 23 N. E. 474, 28 N. Y. St. 935 (wherein it was held that where an appeal from an interlocutory judgment was dismissed for want of a certificate, made necessary by statute, calling for the opinion of the court of appeals, a second appeal, after obtaining the proper certificate, was not barred).

46. Fletcher's Succession, 13 La. Ann. 29; Meacham *v.* Pinson, 60 Miss. 217.

47. *Arkansas.*— Sanders *v.* Moore, 52 Ark. 376, 12 S. W. 783.

Colorado.—Freas *v.* Engelbrecht, 3 Colo. 377.

Florida.— Harris *v.* Ferris, 18 Fla. 81.

Kentucky.— Helm *v.* Boone, 6 J. J. Marsh. (Ky.) 351, 22 Am. Dec. 75. *Compare* Harrison *v.* State Bank, 3 J. J. Marsh. (Ky.) 375, wherein it was held that the dismissal of an appeal is a virtual affirmance of the judgment below, so as to render the obligors in the appeal bond liable. See also Bowling Green *v.* Elrod, 14 Bush (Ky.) 216, wherein it was held that, where an appeal may be granted, by the court rendering the judgment, during the term at which it is rendered, or by the clerk of the court of appeals at any time within two years from the time the right to appeal accrued, upon filing in the office of the clerk a copy of the judgment from which the appeal is taken, the dismissal of an appeal granted below does not bar the right to obtain an appeal from the clerk of the court of appeals.

New York.—French *v.* Row, 77 Hun (N. Y.) 380, 28 N. Y. Suppl. 849, 60 N. Y. St. 396; Kelsey *v.* Campbell, 38 Barb. (N. Y.) 238. But see Sperling *v.* Boll, 26 N. Y. App. Div. 64, 50 N. Y. Suppl. 209, for the practice in the appellate division.

Wisconsin.— Marshall *v.* Milwaukee, etc., R. Co., 20 Wis. 644.

See 2 Cent. Dig. tit. "Appeal and Error," § 50.

This rule has been applied to dismissals for failure to file the transcript of the record within the prescribed time (Williams *v.* La Penotiere, 26 Fla. 333, 7 So. 869); for want of a transcript (Roberts *v.* Tucker, 1 Wash. Terr. 179), or for a failure to file brief (Texas, etc., R. Co. *v.* Hare, 4 Tex. Civ. App. 18, 23 S. W. 42).

48. *California.*— Rowland *v.* Kreyenhagen, 24 Cal. 52; Osborn *v.* Hendrickson, 6 Cal. 175.

Louisiana.— Dozer *v.* Sargent, 4 La. 41.

New Jersey.— Welsh *v.* Brown, 42 N. J. L. 323.

Ohio.—Railroad Co. *v.* Belt, 36 Ohio St. 93.

Oklahoma.— Richmond *v.* Frazier, 7 Okla. 172, 54 Pac. 441.

Virginia.—Sites *v.* Wieland, 5 Leigh (Va.) 80.

West Virginia.— Casanova *v.* Kreusch, 21 W. Va. 720.

In California, where, by statute, two appeals are allowed — one from the judgment and one from the order denying a new trial — the dismissal of an appeal from the judgment is not a bar to an appeal from an order afterward made refusing appellant's motion for a new trial. Fulton *v.* Hanna, 40 Cal. 278; Fulton *v.* Cox, 40 Cal. 101.

In Louisiana, while the dismissal of an appeal will not, in all cases, be the final confirmation of the judgment appealed from, as appellant may, under certain circumstances, be permitted to take another appeal (Johnson *v.* Jennison, 18 La. Ann. 190), it has been held that the dismissal of an appeal to the supreme court, on legal grounds, renders the judgment appealed from, so far as respects that particular case, as final as though it were affirmed, and precludes a subsequent appeal therefrom to the court of appeals. State *v.* Judges Ct. of Appeals, 33 La. Ann. 151.

In New Jersey, in Garr *v.* Paulmier, 21 N. J. L. 681, it was held that where a cause has been removed to the supreme court by a writ of error, and the writ has been dismissed for want of prosecution, the plaintiff in error cannot afterward remove the cause to the court of errors and appeals by writ of error.

Dismissal for failure to print record has

dismissed without prejudice, its prosecution will not bar a second appeal.[49] In some jurisdictions there are express statutory enactments providing that a second appeal or writ of error shall not be allowed after a dismissal of the first,[50] that the dismissal of the first proceeding shall operate as an affirmance of the judgment,[51] and that, on a failure to take a prescribed step in the appellate proceedings, the judgment shall be affirmed.[52]

3. Where First Proceeding Has Been Abandoned. An attempted appeal which is not perfected[53] may be abandoned, and, if the time for taking an appeal or suing out a writ of error has not expired, another appeal or writ of error may be prosecuted.[54] Thus it has been held in Texas that, where an appeal is taken in a

been held to be a bar to a second writ on the same record, assigning the same error. Railroad Co. *v.* Belt, 36 Ohio St. 93.

Third appeal.— Even though a statute provides that an appeal which has been dismissed for a particular cause may be renewed at any time within five years from the date of the judgment, it has been held that, while the statute authorizes the renewal of an appeal once after such dismissal, it does not authorize a third appeal. Perry *v.* Horn, 21 W. Va. 732.

49. Anthony *v.* Grand, 99 Cal. 602, 34 Pac. 325, holding this to be the proper rule, even though an order was inadvertently made absolutely dismissing the first appeal.

50. *Colorado.*— See McMichael *v.* Groves, 14 Colo. 540, 23 Pac. 1006, to the effect that, under a statute providing that "the dismissal of an appeal may, by order of the court, be made without prejudice to another appeal or writ of error," unless the order of dismissal expressly reserves the right, the judgment stands affirmed, and a further review, either by appeal or error, cannot be had.

Louisiana.— See Llula's Succession, 42 La. Ann. 475, 7 So. 585; World's Industrial, etc., Exposition *v.* Crescent City R. Co., 39 La. Ann. 355, 1 So. 791, to the effect that, under a code of practice which provides that, after an appeal has been abandoned, it cannot be renewed, the failure of a party who has taken an appeal to file the transcript in due time amounts to an abandonment, and the appeal cannot be renewed.

Maryland.— See Meloy *v.* Squires, 42 Md. 378, to the effect that, where a statute authorizes the striking out of the entry of an appeal, if the appellant fails to file the record within a prescribed time, and provides that no appeal or writ of error shall thereafter be allowed, the dismissal of an appeal for failure to file the record in due season will, of course, be a bar to a second appeal or writ of error.

Mississippi.— See Smith *v.* Union Bank, 13 Sm. & M. (Miss.) 240, 241, to the effect that, under a statute which provides that "after the dismission of an appeal, writ of error, or supersedeas, in the supreme court, no appeal, writ of error, or supersedeas shall be allowed," it has been held that, after an appeal has been dismissed because of the negligence of the appellant in filing his record, he cannot afterward sue out a writ of error. And this provision has been applied to a dismissal for defective record (Sherman *v.* Lovejoy, 30 Miss. 105), and to a dismissal for want of prosecution (Merrill *v.* Hunt, 52 Miss. 774). But it has been held that where the dismissal results, not from the fault of the party, but from some irregularity over which he had no control, such as the insufficiency of the appeal bond as prepared by the clerk, or by accident, or by death of the appellant, the statute does not apply, and the dismissal does not bar a writ of error. Bull *v.* Harrell, 7 How. (Miss.) 9.

Virginia.— See Sites *v.* Wieland, 5 Leigh (Va.) 80, to the effect that, under a statute which provides that after a dismissal of an appeal, writ of error, or supersedeas in the court of appeals, no appeal, writ of error, or supersedeas shall be allowed, a second appeal is, of course, barred by the dismissal of the first.

51. Owsley *v.* Warfield, 7 Mont. 264, 265, 17 Pac. 74 (where the order dismissing the appeal was in absolute terms); Fahey *v.* Belcher, (Ida. 1893) 32 Pac. 1135 (where the appeal was dismissed for failure to file the requisite papers) — both cases being decided under a statute providing that "the dismissal of an appeal is in effect an affirmation of the judgment or order appealed from, unless the dismissal is made without prejudice to another appeal."

52. Johns. *v.* Phœnix Nat. Bank, (Ariz. 1899) 56 Pac. 725. Thus, where the judgment below has been affirmed, pursuant to statute, for the failure to file the transcript of the record in due time, the judgment cannot thereafter be reviewed upon a writ of error. Brummel *v.* Phillips, 79 Mo. App. 116, 2 Mo. App. Rep. 361; Schnaider's Brewing Co. *v.* Tevvie, 41 Mo. App. 584. And where a judgment has been affirmed for want of prosecution of the appeal or writ of error, a second writ of error to bring up the same record cannot be obtained. Cowen *v.* Shepley, 9 Mo. App. 594.

53. In Oregon it has been held that, when a party perfects an appeal and then abandons it, his right of appeal is exhausted and cannot be exercised a second time. Schmeer *v.* Schmeer, 16 Oreg. 243, 17 Pac. 864.

54. Osborn *v.* Logus, 28 Oreg. 302, 37 Pac. 456, 38 Pac. 190, 42 Pac. 997; Van Auken *v.* Dammeier, 27 Oreg. 150, 40 Pac. 89; Holladay *v.* Elliott, 7 Oreg. 483; and 2 Cent. Dig. tit. "Appeal and Error," § 51.

case in which both the remedy by appeal and by writ of error are available, but the appeal does not in any way obstruct the enforcement of the judgment,[55] and is not prosecuted, it does not have the effect of precluding appellant from subsequently suing out a writ of error within the time limited by statute.[56]

4. Where First Proceeding Is Ineffectual. It has been held that, where the first proceeding is ineffectual and does not bring up the full merits of the case for review, a second proceeding may be brought even before there has been a formal dismissal of the first.[57]

5. Where First Proceeding Is Not Proper Remedy. A former proceeding in chancery to enjoin the collection of the judgment which has been dismissed for want of jurisdiction is not a bar to a writ of error, when that is the proper remedy in the action.[58]

6. Where First Proceeding Is Void Though Not Dismissed. Where an appeal has been taken but not duly prosecuted, as where the record is not filed within the proper time, so that the appeal is of no avail, a second appeal, it seems, may be taken just as it could if the appellee had docketed the first and had it dismissed.[59]

G. Cross-Appeals and Writs of Error.[60] Where a system of appellate procedure has been adopted which contemplates both the remedies by appeal and by writ of error, but makes no provision for the assignment of cross-errors, one party may appeal and the other prosecute a writ of error from the same judgment, and on the same record.[61] The statutes relating to appeals, however, often provide for cross-appeals. Under the provisions of these statutes it has been held that a cross-appeal will not be allowed from a judgment which is wholly distinct from that upon which the appeal is based;[62] or

In Maryland it has been held that, where an appeal is prayed and allowed and then withdrawn, the party is not precluded, if nothing more is done, from afterward prosecuting an appeal, provided he does so within the time allowed by law for appeals to be taken. Ward *v.* Hollins, 14 Md. 158. But where he withdraws or countermands his appeal, and then takes out execution bond on judgment, he cannot afterward appeal in the same case. Hay *v.* Jenkins, 28 Md. 564.

This rule has been applied where the appeal has been abandoned by reason of its not being perfected in time (Cahill *v.* Cantwell, 31 Nebr. 158, 47 N. W. 849; Steele *v.* Haynes, 20 Nebr. 316, 30 N. W. 63; Poag *v.* Rowe, 16 Tex. 590), as by failing to file the record at the proper time (Smith *v.* Morrill, 11 Colo. App. 284, 52 Pac. 1110), or failing to give the undertaking required by statute (Kelsey *v.* Campbell, 38 Barb. (N. Y.) 238).

55. If the appeal suspends the right to enforce the judgment, it seems that a writ of error, returnable to a term subsequent to that to which the appeal was returnable, should not be allowed. See Thompson *v.* Anderson, 82 Tex. 237, 18 S. W. 153.

56. Thompson *v.* Anderson, 82 Tex. 237, 18 S. W. 153; Eppstein *v.* Holmes, 64 Tex. 560.

Limits of the Texas rule.—It has been held that this privilege of abandoning an appeal and suing out a writ of error is subject to the right of the appellee to have the judgment affirmed on certificate. Scottish Union, etc., Ins. Co. *v.* Clancy, 91 Tex. 467, 44 S. W. 482; Hall *v.* La Salle County, (Tex. Civ. App. 1898) 40 S. W. 863; Morris *v.* Morgan, (Tex. Civ. App. 1898) 46 S. W. 667. An appeal duly perfected cannot be abandoned and a writ of error sued out after the lapse of time for filing the transcript, and thus prevent an affirmance on certificate. Blackman *v.* Harry, (Tex. Civ. App. 1898) 45 S. W. 610.

57. Quinebaug Bank *v.* Tarbox, 20 Conn. 510; Glasser *v.* Hackett, 37 Fla. 358, 20 So. 532, Mabry, C. J., dissenting, on the ground that the failure of the first writ of error to accomplish its purpose was attributable solely to the laches of plaintiff in error in failing to file his briefs within the time prescribed by the rules of court.

58. Breckinridge *v.* Coleman, 7 B. Mon. (Ky.) 331.

59. Evans *v.* State Nat. Bank, 134 U. S. 330, 10 S. Ct. 493, 33 L. ed. 917.

In Arkansas, however, it has been held that a party who has taken an appeal, with supersedeas, and failed to prosecute it, must docket the appeal in the supreme court, and dismiss it, before he can take a second appeal or writ of error (Kinner *v.* Dodds, 35 Ark. 29; Yell *v.* Outlaw, 14 Ark. 413); though it is not necessary that this should be done where the first proceeding does not operate as a supersedeas (Hanna *v.* Pitman, 25 Ark. 275, holding that, where an appeal has been prayed for and granted without the requisite affidavit having been filed or waived, a writ of error may be sued out to review the judgment appealed from).

60. See 2 Cent. Dig. tit. "Appeal and Error," §§ 48–58.

61. Harding *v.* Larkin, 41 Ill. 413.

62. Brown *v.* Vancleave, 86 Ky. 381, 9 Ky. L. Rep. 593, 6 S. W. 25.

in behalf of one appellee against the appellant, and not against his co-appellee or co-appellees.[63]

H. Double Appeals. A party will not be permitted to bring two appeals when he can obtain upon one all the relief to which he is entitled.[64] But, where two appeals have been made from the same order, they have sometimes been entertained and treated as one appeal.[65]

I. Joinder of Proceedings — 1. To Review Separate Actions. Two separate and distinct causes, which have not been consolidated in the trial court,[66] cannot be brought up for appellate review by one appeal,[67] or by one writ of error.[68]

2. To Review Separate Judgments or Orders. As a general rule, two separate judgments, decrees, or orders cannot be brought up for appellate review by one

63. Gaar *v.* Louisville Banking Co., 11 Bush (Ky.) 180, 21 Am. Rep. 209; Smith *v.* Northern Bank, 1 Metc. (Ky.) 575; Gilbert *v.* Moody, 18 Ky. L. Rep. 312, 36 S. W. 523; McKay *v.* Mayes, 17 Ky. L. Rep. 827, 32 S. W. 606; Overby *v.* Rogers, 12 Ky. L. Rep. 289; Worthington *v.* Covington Roller Skating Rink Co., 10 Ky. L. Rep. 363; Miller *v.* Miller, 7 Ky. L. Rep. 359; Home Ins. Co. *v.* Gaddis, 3 Ky. L. Rep. 159.

From a judgment in favor of one defendant, another defendant, against whom judgment was rendered, is not entitled to a cross-appeal. Horter *v.* Herndon, 12 Tex. Civ. App. 637, 35 S. W. 80, decided under a rule of court providing for cross-appeals. But it is otherwise under the code system, under which judgment can be entered determining the rights of the parties on each side as between themselves, as well as against the opposite party. Clark's Code Civ. Proc. N. C. (1900), §§ 424, 547.

64. Hopkins *v.* Hopkins, 39 Wis. 166; Young *v.* Groner, 22 Wis. 205; and 2 Cent. Dig. tit. "Appeal and Error," § 60.

Extent and limits of rule.— Where the orphans' court by one decree disposes of several claims growing out of the settlement of a trustee's account, it is irregular to take more than one appeal, since only one appeal is allowed from the same decree. Robert's Appeal, 92 Pa. St. 407. An appeal from the order of a surrogate, and one from his decision refusing to set aside such order, as irregular, are inconsistent, and cannot be maintained at the same time. Skidmore *v.* Davies, 10 Paige (N. Y.) 316. The rule against double appeals does not apply, however, where, by statute, an appeal is allowed from a judgment and another appeal from the order denying a motion on a new trial. Hawkins *v.* Hubbard, 2 S. D. 631, 51 N. W. 774 [*distinguishing* Hackett *v.* Gunderson, 1 S. D. 479, 47 N. W. 546].

Where, in a consolidated action, each defendant brings error, and a writ of error is also sued out by them jointly, the latter is superfluous, and may be dismissed without costs. New York Mut. L. Ins. Co. *v.* Hillmon, 145 U. S. 285, 12 S. Ct. 909, 36 L. ed. 706.

65. *In re* Davis, 11 Mont. 1, 27 Pac. 342.

66. Bramell *v.* Adams, 146 Mo. 70, 47 S. W. 931, to the effect that where cases were tried together, and the same evidence was received by consent in all, and a single decree entered, and the pleadings, taken together, made issues to which the decree was responsive, the cases were treated, on appeal, as if an order of consolidation had been made.

67. Harris *v.* Harris, 2 R. I. 538; and 2 Cent. Dig. tit. "Appeal and Error," § 59.

Extent of rule.— Separate petitions were filed by purchasers of separate tracts of land, against an administrator, for writs of assistance, and separate answers and replies filed. No order consolidating the causes was made, but the record recited that, by agreement, the evidence was heard at the same time in both matters, and that the findings of facts and conclusions of law should be embodied in one instrument, with the same effect as if found separately in each case. It was held that defendant could not incorporate both causes in one transcript and one appeal. Roach *v.* Baker, 145 Ind. 330, 43 N. E. 932, 44 N. E. 303. But it has been held that an appeal by an administrator from an order of the district court, on appeal from the probate court, sustaining objections to his final report, and from a decree of distribution subsequently entered, is not objectionable on the ground that two separate actions are united in one appeal. *In re* Dewar, 10 Mont. 422, 25 Pac. 1025.

Parties to separate suits cannot, by agreement for their trial together in the lower court, authorize their trial together in the appellate court. Mohr *v.* Cochran, (Tex. Civ. App. 1899), 49 S. W. 677.

68. Thus it has been held that, though several causes are between the same parties and a consolidated affidavit of defense is filed, a separate writ of error is necessary in each case. Hollohan *v.* M'Lean, 1 Wkly. Notes Cas. (Pa.) 262. But *compare* Powers *v.* Lillie, Kirby (Conn.) 160, wherein it was held that two judgments, rendered on suits of a like kind and depending on similar principles, may be joined in the same writ of error.

In Brown *v.* Spofford, 95 U. S. 474, 24 L. ed. 508, the United States supreme court condemned, as irregular, proceedings whereby defendant, in two separate suits, in the former of which judgment had been rendered before the latter had gone to trial, was permitted to file bills of exception purporting to be applicable to each case, and, without consolidating, remove them to the appellate court by one writ of error.

writ of error or one appeal,[69] especially where the parties necessary and proper to a review of one of the judgments would not be proper parties to a review of the other.[70] But it has been held that, for the purpose of an appeal, an order confirming a sale in a foreclosure suit and an order for a judgment for deficiency may be considered as one, though, in fact, entered separately.[71]

J. Splitting Appeals. Since a party can, as a general rule, only appeal from final judgments and orders,[72] he cannot divide a case into parts and carry it up by fragments,[73] especially when the final judgment is allowed to stand affected by the appeal.[74] But, where two judgments in an action are distinct and several, there may be an appeal from one, and not the other.[75]

69. *Alabama.*— De Sylva *v.* Henry, 4 Stew. & P. (Ala.) 409.

Colorado.— Vance *v.* Maroney, 3 Colo. 293.

Connecticut.— Richardson *v.* Richardson, 2 Root (Conn.) 159. *Contra*, Clark *v.* Warner, 6 Conn. 355; Seely *v.* Staples, 2 Root (Conn.) 74.

Pennsylvania.— Cauley *v.* Pittsburgh, etc., R. Co., 95 Pa. St. 398, 40 Am. Rep. 664.

South Dakota.— Anderson *v.* Hultman, 12 S. D. 105, 80 N. W. 165.

Texas.—Renn *v.* Samos, 42 Tex. 104; Moore *v.* Harris, 1 Tex. 36.

Virginia.—Ayers *v.* Lewellin, 3 Leigh (Va.) 609.

Wisconsin.— American Button-Hole, etc., Co. *v.* Gurnee, 38 Wis. 533; Noble *v.* Strachan, 32 Wis. 314.

But see Geddes' Succession, 36 La. Ann. 963, wherein it was held that where three separate issues are made in the settlement of a succession, all tending to one conclusion, and are the subjects of separate judgments, they may all be brought up in a single appeal, and with one appeal bond. Also Terry *v.* Chandler, 23 Wis. 456, wherein the action, which was by creditors against stock-holders, to enforce their personal liability, was discontinued, and each of defendants, who had filed separate answers by the same attorney — the issue presented in each being as to the amount due the corporation from the person answering— taxed in his own favor a full bill of costs, and it was held that only a single motion for retaxation was required, and a single appeal from an order denying the motion.

Appeal should be dismissed for duplicity when taken from two judgments, or from two appealable orders, or from a judgment and an appealable order (Ballou *v.* Chicago, etc., R. Co., 53 Wis. 150, 10 N. W. 87); but in order that an appeal may be dismissed for duplicity it must embrace two distinct appealable adjudications (Ballou *v.* Chicago, etc., R. Co., 53 Wis. 150, 10 N. W. 87, wherein it was held that an appeal in form from a judgment and from an order made in the action before judgment is single and valid).

70. It has accordingly been held that the decree confirming sale of real estate for partition, and the subsequent decree of dismissal of the petition of one of the cotenants, a life-tenant, for payment to her of the value of her life-estate, cannot properly be taken up for review by a single appeal, each being a final decree, and the necessary and proper parties to appeals therefrom being different. Kelly *v.* Deegan, 111 Ala. 152, 20 So. 378.

71. Cord *v.* Hirsch, 17 Wis. 403.

So, in Texas, it has been held that, while a judgment allowing or disallowing a claim in a suit in which a receiver has been appointed is appealable, an appeal may be taken, in one proceeding, from the general judgment and the special decrees rendered at the same term in favor of intervening creditors, by making all persons adversely interested parties to the appeal. Metropolitan Trust Co. *v.* Farmers', etc., Nat. Bank, 89 Tex. 329, 34 S. W. 736.

72. See *infra*, III.

73. McGehee *v.* Tucker, 122 N. C. 186, 29 S. E. 833; Davis *v.* Ely, 100 N. C. 283, 5 S. E. 239; Beaufort *v.* Satchwell, 88 N. C. 1; Hines *v.* Hines, 84 N. C. 122; and 2 Cent. Dig. tit. "Appeal and Error," § 60.

74. Thus, where there were two judgments — one for defendant, on an issue of law, raised by demurrer, that plaintiff recover interest; and the other, upon an issue of fact, which was for plaintiff, that he recover the principal on a bond — it was held that plaintiff could not divide the case into two parts by appealing from the judgment on the demurrer. Anderson *v.* Moberly, 46 Mo. 191.

75. Couder's Succession, 47 La. Ann. 810, 17 So. 317. Thus it has been held that where a landlord obtained a judgment fixing a lien upon certain chattels, and an intervener obtained a judgment foreclosing a mortgage on the same chattels, the defendant may appeal from one judgment without appealing from the other. Constantine *v.* Fresche, 17 Tex. Civ. App. 444, 43 S. W. 1045.

This rule will be applied even though there has been a consolidation of causes, if separate judgments are entered in each cause (Mills *v.* Paul, (Tex. Civ. App. 1895) 30 S. W. 242); or where two cases are heard together in the trial court, if the interests of the plaintiffs in one of the suits do not conflict with the interests of the plaintiffs in the other (Hall *v.* Virginia Bank, 14 W. Va. 584). An order in a case directed a reference to the same referee who was acting on two other cases, and recited that, "on the coming in of the said referee's report, the case shall then be heard in connection with one of the other cases affecting the same property." It was held that such order did not consolidate the two cases thus heard together, and that an appeal from the judgment in one of the

II. REQUISITIES OF APPELLATE JURISDICTION.[76]

A. Actual Controversy Must Exist — 1. GENERAL RULE STATED. It may be stated as a general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction.[77]

2. ABSTRACT QUESTIONS. Hence it is not within the province of appellate courts to decide abstract or hypothetical questions, disconnected from the granting of actual relief,[78] or from the determination of which no practical result can follow.[79]

3. FICTITIOUS PROCEEDINGS. For the same reason an appellate court will not consider a fictitious case, submitted merely for the purpose of testing the right to do a particular thing.[80]

4. WHEN DECISION OF QUESTION HAS BEEN RENDERED INEFFECTIVE — a. In General. So, if, pending an appeal, an event occurs which renders it impossible for the appellate court to grant any relief, the appeal will be dismissed.[81]

b. By Act of Appellant. Such a condition may arise by the act of the appellant himself.[82]

cases would not be dismissed for failure to appeal in the other. Lee *v.* Buck, 13 S. C. 178.

76. For dismissal of proceedings for want of jurisdiction see also *infra*, XIV.

77. Carter *v.* Graves, 12 N. C. 74; Pelham *v.* Rose, 9 Wall. (U. S.) 103, 19 L. ed. 602; and 2 Cent. Dig. tit. "Appeal and Error," § 63.

But, under the Louisiana constitution, it is not necessary that there should be technical *contestatio litis* in order to give the supreme court jurisdiction. Clark's Succession, 11 La. Ann. 124.

78. Murphy *v.* Boston, etc., R. Co., 110 Mass. 465; Capen *v.* Washington Ins. Co., 12 Cush. (Mass.) 517; Smith *v.* Cudworth, 24 Pick. (Mass.) 196; Matter of Woodworth, 64 Hun (N. Y.) 522, 19 N. Y. Suppl. 525, 46 N. Y. St. 432; Grow *v.* Garlock, 29 Hun (N. Y.) 598; and 2 Cent. Dig. tit. "Appeal and Error," § 64.

79. *Indiana.*— State *v.* Grant County, 153 Ind. 302, 54 N. E. 809.

Louisiana.— State *v.* Otero, 52 La. Ann. 1, 26 So. 812.

Massachusetts.— Murphy *v.* Boston, etc., R. Co., 110 Mass. 465.

New Hampshire.— Hazen *v.* Concord R. Co., 63 N. H. 390.

New York.— People *v.* Squire, 110 N. Y. 666, 18 N. E. 362.

North Carolina.— Blake *v.* Askew, 76 N. C. 325.

United States.— Pelham *v.* Rose, 9 Wall. (U. S.) 103, 19 L. ed. 602.

That the questions involved are of great public importance does not seem to change the rule (Chicago, etc., R. Co. *v.* Dey, 76 Iowa 278, 41 N. W. 17; State *v.* Waggoner, 88 Tenn. 290, 12 S. W. 721); though the contrary has been held in New York in respect to questions arising under the election laws (Matter of Madden, 148 N. Y. 136, 42 N. E. 534; Matter of Cuddeback, 3 N. Y. App. Div. 103, 39 N. Y. Suppl. 388).

80. Lincoln *v.* Aldrich, 141 Mass. 342, 5 N. E. 517; Port Gibson Bank *v.* Dickson, 4 Sm. & M. (Miss.) 689; Blake *v.* Askew, 76 N. C. 325; Berks County *v.* Jones, 21 Pa. St. 413. See also Fletcher *v.* Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162; and 2 Cent. Dig. tit. "Appeal and Error," § 66.

Proof that the action is not feigned will be required when the court has reason to believe that the case is a fictitious one. People *v.* Leland, 40 Ill. 118; Spraggins *v.* Houghton, 3 Ill. 211; McConnell *v.* Shields, 2 Ill. 582.

81. Vance County *v.* Gill, 126 N. C. 86, 35 S. E. 228; Herring *v.* Pugh, 125 N. C. 437, 34 S. E. 538; Colvard *v.* Graham County, 95 N. C. 515; Duquesne *v.* Cole, 7 Pa. Super. Ct. 474; Jackson *v.* Daugherty, (Tex. Civ. App. 1894) 26 S. W. 1116; Watson *v.* Merkle, 21 Wash. 635, 59 Pac. 484; Mills *v.* Green, 159 U. S. 651, 16 S. Ct. 132, 40 L. ed. 293; Meyer *v.* Pritchard, 131 U. S. ccix, appendix, 23 L. ed. 961 — from which cases it appears that the occurrence of such event may be shown by extrinsic evidence when it does not appear in the record. See 2 Cent. Dig. tit. "Appeal and Error," § 68 *et seq.*; and *infra*, IV, A, 1.

Thus, where the refusal of an injunction to restrain the making of a deed is sought to be reviewed on writ of error, the writ will not be dismissed on a suggestion of defendant's counsel, supported by affidavit that the deed has been executed and delivered since the writ of error was brought. Kirtland *v.* Macon, 62 Ga. 747.

82. Woodruff *v.* Austin, 16 Misc. (N. Y.) 543, 38 N. Y. Suppl. 787, 74 N. Y. St. 138, holding that if the appellant, by his own act, has deprived himself of any advantage to be gained by a reversal, his appeal will be dismissed.

This rule has been applied where, pending the appeal or after suing out of a writ of error, appellant obeyed commands of writ after having appealed from the order granting it (State *v.* Napton, 10 Mont. 369, 25 Pac. 1045; People *v.* Board of Education, 57 Hun (N. Y.) 594, 11 N. Y. Suppl. 296, 33 N. Y. St. 30); where appellant, on appeal

c. By Act of Appellee. Such a condition may likewise arise by the act of the appellee, as where, pending the appeal, he does, or relinquishes the right to do, some act in respect to which the appeal was taken.[83]

d. By Act of Court A Quo. This condition may arise from the act of the court *a quo*, as where, pending the appeal, some order or judgment issued in the case renders the determination of the questions presented by the appeal unnecessary.[84]

from a judgment dismissing without prejudice a foreclosure proceeding, commenced another suit (Hoskins *v.* McGirl, 12 Mont. 246, 29 Pac. 1120); where non-resident defendant gave general notice of appearance in an action after appealing from the order denying his motion to set aside personal service of summons on the ground that he was attending as a witness in the state (Woodruff *v.* Austin, 16 Misc. (N. Y.) 543, 38 N. Y. Suppl. 787, 74 N. Y. St. 138); where plaintiff in error in ejectment recognized defendant's title by taking a conveyance from him of the premises in controversy (Panko *v.* Irwin, 14 Nebr. 419, 16 N. W. 436); where taxes, the collection of which was sought to be enjoined, were paid (Wallace *v.* Indianapolis, 40 Ind. 287; Singer Mfg. Co. *v.* Wright, 141 U. S. 696, 12 S. Ct. 103, 35 L. ed. 906; Little *v.* Bowers, 134 U. S. 547, 10 S. Ct. 620, 33 L. ed. 1016; Tomboy Gold-Mines Co. *v.* Brown, 74 Fed. 12, 36 U. S. App. 580, 20 C. C. A. 264); where the action was dismissed in the lower court (Burnett *v.* Fouché, 79 Ga. 377, 4 S. E. 900; Russell *v.* Campbell, 112 N. C. 404, 17 S. E. 149; Pritchard *v.* Baxter, 108 N. C. 129, 12 S. E. 906).

But see Beatty *v.* Coble, 142 Ind. 329, 41 N. E. 590, wherein it was held that the fact that, pending an appeal from a judgment for defendant in an action to enjoin him from practising medicine in a specified territory under a covenant not to practise therein, appellant moved to another city was no ground for dismissing the appeal where it appeared that the two cities were in neighboring counties, and appellant retained his practice in the former city.

83. Wallingford *v.* Benson, 17 S. C. 591; Foote *v.* Smith, 8 Wyo. 510, 58 Pac. 898; and 2 Cent. Dig. tit. "Appeal and Error," § 70 *et seq.*

This rule has been applied where, pending appeal, appellee discontinued or dismissed the suit below (Chicago, etc., R. Co. *v.* Dey, 76 Iowa 278, 41 N. W. 17; Spaulding *v.* Milwaukee, etc., R. Co., 12 Wis. 607); where appellee discontinued the use of a name sought to be enjoined (Commercial Union Ins. Co. *v.* Smith, 61 Hun (N. Y.) 625, 16 N. Y. Suppl. 114, 40 N. Y. St. 758 [*affirming* 2 N. Y. Suppl. 296, 18 N. Y. St. 151]); where an executor (the appellee), was discharged by the court below upon his own petition, appellant having appealed from an order refusing to remove the executor (Hallowell's Appeal, 20 Pa. St. 215); where *remittitur* of record was entered of the amount claimed by appellant to be excessive (Wilson *v.* Russell, 40 Iowa 697); where restitution was made by appellee of the property in controversy (Russell *v.* Campbell, 112 N. C. 404, 17 S. E. 149, and *compare* Morgan *v.* Griffin, 6 Ill. 565, wherein an appeal, taken on a trial of the right of property before the sheriff, was properly dismissed on motion, founded on an uncontradicted affidavit of the sheriff that the property in question had been sold with the assent of the claimant, and that the proceeds thereof remained in the sheriff's hands subject to the order of the claimant).

After appeal from removal of tutrix, if the minor marries, thereby emancipating herself, the appeal, being thus without an object, will be dismissed. Matter of Wilds, 6 Rob. (La.) 31.

84. Lambert *v.* Snow, 9 Abb. Pr. (N. Y.) 91, 17 How. Pr. (N. Y.) 517; Paris Electric Light, etc., Co. *v.* Martin, (Tex. Civ. App. 1895) 31 S. W. 243; and see 2 Cent. Dig. tit. "Appeal and Error," § 71 *et seq.*

This rule will be applied where, pending appeal, the lower court dismisses the action (Swan Tp. *v.* McClannahan, 53 Ohio St. 403, 42 N. E. 34); makes final determination in favor of appellant who has appealed from a judgment on a rule (Palmer *v.* Day, 5 Rob. (La.) 182); quashes the assessment under which a sale is sought to be enjoined (Washington Market Co. *v.* District of Columbia, 137 U. S. 62, 11 S. Ct. 4, 34 L. ed. 572); renders final judgment for plaintiff, where defendant has appealed from an order not entered until after trial resulting in the final judgment (Brackett *v.* Griswold, 46 Hun (N. Y.) 442); renders final judgment in an action where one party has appealed from an order granting or refusing an injunction affecting only proceedings prior to judgment (Prentice Brownstone Co. *v.* King, 39 Nebr. 816, 58 N. W. 277; Watertown *v.* Cowen, 4 Paige (N. Y.) 510, 27 Am. Dec. 80; Pritchard *v.* Baxter, 108 N. C. 129, 12 S. E. 906); supersedes an order appealed from by a judgment rendered on a subsequent trial of the action (Milbank *v.* Jones, 4 Misc. (N. Y.) 613, 24 N. Y. Suppl. 356, 53 N. Y. St. 523); vacates judgment appealed from (Duryea *v.* Fuechsel, 145 N. Y. 654, 40 N. E. 204).

When, after a decree directing an executrix to sell lands, an order refusing to set aside the decree at the instance of a creditor is made, from which order an appeal is taken, and the court, on the day the order is made, revokes the letters of the executrix, appoints an administrator *de bonis non*, and directs him to sell the land, the order becomes inoperative, and, as a reversal would be a purely nugatory act, the appeal will be dismissed. Gloucester City *v.* Greene, 45 N. J. Eq. 747, 18 Atl. 81.

Where there are separate appeals from a

e. By Act of Law. This condition may also arise by act of law.[85]

f. By Lapse of Time. Mere lapse of time may create this condition,[86] as where, pending an appeal from the order of court in a case involving the infringement of a patent, the acts or tenure of a public or election officer, or other matter, the patent expires,[87] the official term comes to an end,[88] the election is held,[89] or an order of court is executed.[90]

5. When Interest of Litigants Ceases to Be Adverse. Similarly, where a litigation has ceased to be between parties having adverse interests, the case falls within the rule.[91]

6. Where Costs Only Are Involved. Where all substantial interest in the controversy has been parted with or extinguished, the court will not hear the appeal merely to determine the right to costs.[92]

judgment, and from an order refusing to vacate it, the judgment having been reversed the other appeal will be dismissed. Wisconsin River Lumber Co. *v.* Plumer, 49 Wis. 668, 6 N. W. 320.

85. Thus, in a case where a bill was filed to rescind a deed for a slave on an allegation of fraud, upon the emancipation of the slave by act of law the court declined to hear the cause, and ordered the bill to be dismissed without prejudice, and that each party should pay his own costs, as if the suit had abated. Kidd *v.* Morrison, 62 N. C. 31.

86. See 2 Cent. Dig. tit. "Appeal and Error," § 69.

87. Gamewell Fire-Alarm Tel. Co. *v.* Municipal Signal Co., 61 Fed. 208, 21 U. S. App. 1, 9 C. C. A. 450.

88. People *v.* Troy, 82 N. Y. 575; People *v.* Grace, 49 Hun (N. Y.) 607, 1 N. Y. Suppl. 661, 16 N. Y. St. 1011; Colvard *v.* Graham County, 95 N. C. 515; Cantwell *v.* Williams, 35 S. C. 602, 14 S. E. 549; Gordon *v.* State, 47 Tex. 208; McWhorter *v.* Northcutt, (Tex. 1900) 58 S. W. 720.

89. Matter of Manning, 139 N. Y. 446, 34 N. E. 931, 54 N. Y. St. 706; Matter of Schlueter, 47 N. Y. App. Div. 621, 62 N. Y. Suppl. 375; Mills *v.* Green, 159 U. S. 651, 12 S. Ct. 132, 40 L. ed. 293.

90. Cheong Ah Moy *v.* U. S., 113 U. S. 216, 5 S. Ct. 431, 28 L. ed. 983.

Thus a writ of error, sued out to a judgment refusing to enjoin a sale, will be dismissed when it appears that no supersedeas was obtained, and that the sale has consequently taken place. Thornton *v.* Manchester Invest. Co., 97 Ga. 342, 22 S. E. 987.

91. Gardner *v.* Goodyear Dental Vulcanite Co., 131 U. S. ciii, appendix, 21 L. ed. 141; East Tennessee, etc., R. Co. *v.* Southern Tel. Co., 125 U. S. 695, 8 S. Ct. 1391, 31 L. ed. 853; American Wood Paper Co. *v.* Heft, 8 Wall. (U. S.) 333, 19 L. ed. 378; Arnold *v.* Wolsey, 54 Fed. 268, 12 U. S. App. 157, 4 C. C. A. 319; and 2 Cent. Dig. tit. "Appeal and Error," § 67 *et seq.*

But *compare* Gross *v.* Shaffer, 29 Kan. 442, holding that, where an ejectment suit is pending in the supreme court, and plaintiff in error purchases the interest of defendant in error in the property in controversy, but does not agree to dismiss his petition in error or to pay any costs in the case, these facts do not of themselves confer upon defendant the right to have the case dismissed from the supreme court.

Attorney's speculation.—Where it appears, on defendant's appeal, that the nominal plaintiff did not authorize the suit, but that it was an attorney's speculation, the case will be dismissed. Gresham *v.* Chantry, 69 Iowa 728, 27 N. W. 752.

Death of party.— An appeal will be dismissed if it appears that the nominal plaintiff or appellant was dead at the time of the institution of the suit. Kerr *v.* Hays, 9 La. Ann. 241.

Upon the same principle, if it appears, from affidavits and other evidence filed in behalf of persons not parties to a suit, that an appeal is not conducted by parties having adverse interests, but for the purpose of obtaining a decision to affect interests of persons not parties, the appeal will be dismissed. Chamberlain *v.* Cleveland, 1 Black (U. S.) 419, 17 L. ed. 93; Lord *v.* Veazie, 8 How. (U. S.) 251, 12 L. ed. 1067. Thus, in South Spring Hill Gold Min. Co. *v.* Amador Medean Gold Min. Co., 145 U. S. 300, 12 S. Ct. 921, 36 L. ed. 712, the supreme court refused to adjudicate between two corporations which, after judgment below, had come under the control of the same persons, as the controversy then ceased to be a real one.

92. Eastburn *v.* Kirk, 2 Johns. Ch. (N. Y.) 317; Taylor *v.* Vann, 127 N. C. 243, 37 S. E. 263; Vance County *v.* Gill, 126 N. C. 86, 35 S. E. 228; Herring *v.* Pugh, 125 N. C. 437, 34 S. E. 538; Gray *v.* Atlantic, etc., R. Co., 77 N. C. 299; State *v.* Richmond, etc., R. Co., 74 N. C. 287; State *v.* Sloan, 69 N. C. 128; State *v.* Loomis, (Tex. Civ. App. 1895) 29 S. W. 415; Bolton *v.* San Antonio, 4 Tex. Civ. App. 174, 23 S. W. 279. *Contra*, Harrington *v.* Plainview, 27 Minn. 224, 6 N. W. 777; James *v.* Wilder, 25 Minn. 305. See 2 Cent. Dig. tit. "Appeal and Error," § 79.

As to right of appeal from judgment for costs see *infra*, III, D, 3, e.

Retention to award costs.— Where a trial court granted mandamus, with costs, and defendant, after a denial of his motion for a stay pending an appeal, complied with the writ and paid the costs, it was held error for the general term to dismiss the appeal on the ground that, as the writ had been complied with, there was no practical question, as the

B. Consent of Parties — 1. Cannot Confer Jurisdiction. No mere agreement of the parties, or waiver of objection, can confer jurisdiction upon an appellate court where it has none over the subject-matter of the suit,[93] where the amount in controversy is not sufficient to confer jurisdiction,[94] where there has been no final adjudication of the case in the court below,[95] where there has been no formal appeal from the judgment of the court below,[96] or where the time

question of costs paid by defendant was to be determined, and the case should have been examined on the merits. Martin *v.* W. J. Johnston Co., 128 N. Y. 605, 27 N. E. 1017, 38 N. Y. St. 885 [*reversing* 59 Hun (N. Y.) 622, 12 N. Y. Suppl. 844, 36 N. Y. St. 531].

93. *Alabama.*— Little *v.* Fitts, 33 Ala. 343; Johnston *v.* Fort, 30 Ala. 78.

California.— Brooks *v.* Calderwood, 19 Cal. 124.

Colorado.— Gordon *v.* Gray, 19 Colo. 167, 34 Pac. 840; Harvey *v.* Travelers Ins. Co., 18 Colo. 354, 32 Pac. 935; McClaskey *v.* Lake View Min., etc., Co., 18 Colo. 65, 31 Pac. 333; Crane *v.* Farmer, 14 Colo. 294, 23 Pac. 455.

Connecticut.— Chipman *v.* Waterbury, 59 Conn. 496, 22 Atl. 289; Savage *v.* White, 2 Root (Conn.) 377.

Florida.— Holbrook *v.* Allen, 4 Fla. 87.

Georgia.— Bass *v.* Bass, 73 Ga. 134.

Illinois.— Westcott *v.* Kinney, 120 Ill. 564, 12 N. E. 81; Peak *v.* People, 71 Ill. 278; John F. Alles Plumbing Co. *v.* Alles, 67 Ill. App. 252; Meinke *v.* Chicago, 9 Ill. App. 516.

Indiana.—Shroyer *v.* Lawrence, 9 Ind. 322.

Louisiana.—Johnston *v.* Cocke, 12 La. Ann. 859.

Massachusetts.— Carroll *v.* Richardson, 9 Mass. 329.

Minnesota.—Jones *v.* Minneapolis, 20 Minn. 491; Ames *v.* Boland, 1 Minn. 365.

Nevada.— Lambert *v.* Moore, 1 Nev. 231.

New Jersey.— Goldy *v.* Kircher, (N. J. 1892) 26 Atl. 578.

New York.— People *v.* Clerk of Marine Ct., 3 Abb. Dec. (N. Y.) 491.

North Carolina.— J. R. Cary Co. *v.* Allegood, 121 N. C. 54, 28 S. E. 61; Belden *v.* Snead, 84 N. C. 243.

Pennsylvania.— McKee *v.* Sanford, 25 Pa. St. 105.

Wisconsin.— *In re* Minnesota, etc., R. Co., 103 Wis. 191, 78 N. W. 753; Vogel *v.* Antigo, 81 Wis. 642, 51 N. W. 1008; Plano Mfg. Co. *v.* Rasey, 69 Wis. 246, 34 N. W. 85.

United States.— Montgomery *v.* Anderson, 21 How. (U. S.) 386, 16 L. ed. 160 (wherein it was held that, where an appeal was taken from a non-appealable order, the error was not cured by a stipulation of the parties of the existence of facts which would render the order appealable); Mills *v.* Brown, 16 Pet. (U. S.) 525, 10 L. ed. 1055; Doty *v.* Jewett, 19 Fed. 337.

See 2 Cent. Dig. tit. "Appeal and Error," § 88 *et seq.*

As to jurisdiction by consent, generally, see Courts.

But the rule applies only to jurisdiction over the subject-matter, and does not prevent parties, when the court has jurisdiction of the subject-matter, from admitting by consent irregular proof of a fact showing that the particular case is properly before it. Hills *v.* Miles, 13 Wis. 625.

94. Sons of America Bldg., etc., Assoc. *v.* Denver, 15 Colo. 592, 25 Pac. 1091; Crane *v.* Farmer, 14 Colo. 294, 23 Pac. 455; Ridge *v.* Crawfordsville, 4 Ind. App. 513, 31 N. E. 207; Dodd *v.* Cady, 1 Minn. 289; and 2 Cent. Dig. tit. "Appeal and Error," § 95.

Thus the appellate court will not hear a case brought up by consent on a *pro forma* verdict entered of record in favor of plaintiff for a sum large enough to give jurisdiction to the appellate court, upon a demurrer to evidence, where it is agreed that, if the decision is for plaintiff, the verdict shall be set aside and a writ of inquiry instituted to determine damages. State *v.* Ripple, 27 W. Va. 211.

95. *Alabama.*— Mabry *v.* Dickens, 31 Ala. 243; Benford *v.* Daniels, 20 Ala. 445; Merrill *v.* Jones, 8 Port. (Ala.) 554.

Arkansas.— Knox *v.* Beirne, 4 Ark. 460.

Georgia.— Zorn *v.* Lamar, 71 Ga. 80.

Indiana.— Champ *v.* Kendrick, 130 Ind. 545, 30 N. E. 635; Shroyer *v.* Lawrence, 9 Ind. 322.

Iowa.— Long *v.* Long, Morr. (Iowa) 381.

Louisiana.— Bird *v.* Bird, 23 La. Ann. 262.

Minnesota.— Rathbun *v.* Moody, 4 Minn. 364.

Tennessee.— Gurley *v.* Newport News, etc., R. Co., 91 Tenn. 486, 19 S. W. 571.

Texas.— Phillips *v.* Hill, 3 Tex. 397.

Wisconsin.— Hyde *v.* German Nat. Bank, 96 Wis. 406, 71 N. W. 659.

See 2 Cent. Dig. tit. "Appeal and Error," § 93.

96. *California.*—McAuliffe *v.* Coughlin, 105 Cal. 268, 38 Pac. 730.

Iowa.— Doerr *v.* Southwestern Mut. L. Assoc., 92 Iowa 39, 60 N. W. 225.

Kentucky.— Dean *v.* Dean, 6 Ky. L. Rep. 652.

Louisiana.— Batchelor *v.* His Creditors, 20 La. Ann. 193.

North Carolina.— Haslen *v.* Kean, 6 N. C. 382.

South Dakota.—Chamberlain *v.* Hedger, 10 S. D. 290, 73 N. W. 75.

United States.—Washington County *v.* Durant, 131 U. S. lxxx, appendix, 18 L. ed. 169.

See 2 Cent. Dig. tit. "Appeal and Error," § 91.

But see Holbrook *v.* Allen, 4 Fla. 87, wherein it was held that an appeal from a final judgment of the circuit court may be had and determined in the supreme court, though not brought up regularly according to prescribed forms, when such forms are dispensed with by agreement.

Under a Tennessee statute [Acts (1809) c. 126, § 9] providing that, by consent of the parties, a case may be adjourned to the su-

limited by law within which the appeal must be taken and perfected has expired.[97]

2. Cannot Abridge Jurisdiction. Nor, on the other hand, can the consent or agreement of the parties oust a court of its appellate jurisdiction,[98] or limit the principle of decision by excluding certain legal considerations which may be pertinent to the issue.[99]

C. Jurisdiction of Inferior Court. If an inferior court or tribunal has no jurisdiction of a cause, an appeal from its decision confers no jurisdiction upon the appellate court.[1] But it seems that the appellate court may in such cases

preme court for decision, the supreme court cannot acquire jurisdiction of a case by consent unless an agreed statement of facts is made by the parties, and incorporated in the record. Mayo *v.* Dickens, 6 Yerg. (Tenn.) 489. See also Anderson *v.* Cannon, Cooke (Tenn.) 27.

97. Higgins *v.* Haley, 28 La. Ann. 216; King *v.* Penn, 43 Ohio St. 57, 1 N. E. 84; Stark *v.* Jenkins, 1 Wash. Terr. 421. See Jacobs *v.* Morange, 1 Daly (N. Y.) 523 (wherein it was held that although, where a court has not jurisdiction of the subject-matter, the consent of parties will not confer it, a consent that an appeal may be brought after the time to appeal has elapsed is not open to that objection. Such a consent is not an attempt to confer a jurisdiction not vested in the court, but is a mere waiver of the right to insist that the time has passed for bringing the appeal); Morrison *v.* Craven, 120 N. C. 327, 26 S. E. 940; and 2 Cent. Dig. tit. "Appeal and Error," § 92.

Premature appeal.— An appeal from the insolvency court, taken by consent of parties to the supreme court then sitting, confers no jurisdiction where the statute requires appeals from such court to be taken to the supreme court next to be held in the county. Milliken *v.* Morey, 85 Me. 340, 27 Atl. 188; Eddy's Case, 6 Cush. (Mass.) 28.

98. Wasson *v.* Heffner, 13 Ohio St. 573.

99. Arapahoe County *v.* McIntire, 23 Colo. 137, 46 Pac. 638; Watts *v.* Tittabawassee Boom Co., 47 Mich. 540, 11 N. W. 377.

1. *Alabama.*—State *v.* Crook, 123 Ala. 657, 27 So. 334.

Iowa.—Hall *v.* McMahan, 4 Greene (Iowa) 376.

Kentucky.— Bullitt *v.* Com., 14 Bush (Ky.) 74; Haney *v.* Sharp, 1 Dana (Ky.) 442; Beasley *v.* Sims, 4 Bibb (Ky.) 268.

Massachusetts.— Osgood *v.* Thurston, 23 Pick. (Mass.) 110; Williams *v.* Blunt, 2 Mass. 207.

Michigan.—Mulder *v.* Corlett, 54 Mich. 80, 19 N. W. 756.

Missouri.— Abernathy *v.* Moore, 83 Mo. 65.

Nebraska.— Stenberg *v.* State, 48 Nebr. 299, 67 N. W. 190.

New York.— Harriott *v.* New Jersey R. Co., 8 Abb. Pr. (N. Y.) 284.

Texas.— Timmins *v.* Bonner, 58 Tex. 554; Moore *v.* Hillebrant, 14 Tex. 312, 65 Am. Dec. 118; Hearn *v.* Cutberth, 10 Tex. 216; Attridge *v.* Maxey, 15 Tex. Civ. App. 134, 39 S. W. 322.

Wisconsin.—Stringham *v.* Winnebago County, 24 Wis. 594.

United States.— Ryder *v.* Holt, 128 U. S. 525, 9 S. Ct. 145, 32 L. ed. 529.

See 2 Cent. Dig. tit. "Appeal and Error," § 81.

Appeals from justices' courts are within the rule. Dunnington *v.* Bailey, 27 Ark. 508; Gregory *v.* Williams, 24 Ark. 177; McKee *v.* Murphy, 1 Ark. 55; Thompson *v.* Colony, 6 Vt. 91; Blackwood *v.* Jones, 27 Wis. 498; Felt *v.* Felt, 19 Wis. 193; and, generally, Justices of the Peace.

Appeals from probate courts to county, district, superior, or other courts are within this rule. Olmstead's Appeal, 43 Conn. 110; Chadwick *v.* Chadwick, 6 Mont. 566, 13 Pac. 385; Chaves *v.* Perea, 3 N. M. 71, 2 Pac. 73; *Re* Parsons, 64 Vt. 193, 23 Atl. 519; Adams *v.* Adams, 21 Vt. 162; and 2 Cent. Dig. tit. "Appeal and Error," § 82.

Cases within original jurisdiction of appellate court.— It has been held in Texas that an appeal cannot be entertained although the court to which the appeal has been taken may have original jurisdiction of the matter presented (Timmins *v.* Bonner, 58 Tex. 554; Davis *v.* Stewart, 4 Tex. 223; Aulanier *v.* Governor, 1 Tex. 653); but in Illinois and Nebraska it has been held that, on appeal from the judgment of a court not having jurisdiction to a court having original jurisdiction of the matter, if the parties voluntarily appear and consent to the trial, the judgment of the latter court will be binding (Randolph County *v.* Ralls, 18 Ill. 29; Allen *v.* Belcher, 8 Ill. 593; Pearson *v.* Kansas Mfg. Co., 14 Nebr. 211, 15 N. W. 346).

See 2 Cent. Dig. tit. "Appeal and Error," § 83.

Cause tried de novo on appeal.— Where the county court has failed to obtain jurisdiction of a proceeding before it, the circuit court obtains none on appeal, even where the whole matter is tried *de novo* in the appellate court. Royston's Appeal, 53 Wis. 612, 11 N. W. 36.

Limits of rule.—An equity cause was tried in the circuit court and taken under advisement, decree to be entered in vacation. Before the cause was determined, it was, by division of the circuit, transferred to another judge. It was held that the court did not lose jurisdiction of the cause by the change in the presiding judge, and that the decree of the new judge, without notice to the parties, was at most erroneous, and not void, and the

entertain the appeal, for the purpose of dismissing the case, without any adjudication upon the merits.[2]

D. Waiver of Objections. The validity of an appeal is to be determined by the appellate tribunal;[3] and, where a cause is submitted on the merits without objection, and a decree rendered, it is too late to question the court's jurisdiction after the case has been remitted to the lower court,[4] or on a motion for a rehearing.[5]

III. DECISIONS REVIEWABLE.

A. Tribunals Subject to Review — 1. JUDICIAL NATURE OF DECISION. An appeal will lie only where there has been a decision by a tribunal or officer vested with judicial authority, and acting in a judicial capacity when making the decision.[6] As to what is a judicial decision is a question depending too much

supreme court had jurisdiction to try the cause *de novo* upon appeal from such decree. Hull *v.* Chicago, etc., R. Co., 65 Iowa 713, 22 N. W. 940. In Palys *v.* Jewett, 32 N. J. Eq. 302, a suit in equity, brought against a receiver for damages caused by the negligence of the receiver's employees, was tried before the vice-chancellor, whose decision was appealed from. The appellate court, expressing doubts as to whether the decision rendered in the court below was within the vice-chancellor's jurisdiction and susceptible of being reviewed on the merits upon appeal, heard the appeal and rendered judgment.

In Arkansas, it has been held that the supreme court will review a chancery case brought into it by appeal, whether the court below had jurisdiction or not. Bailey *v.* Gibson, 29 Ark. 472.

2. Hearn *v.* Cutberth, 10 Tex. 216 (holding that in such cases the appellate court may, without undertaking to adjudicate the merits, render the judgment which the court below ought to have rendered); Royston's Appeal, 53 Wis. 612, 11 N. W. 36. See also *infra*, XIV.

3. Lester *v.* Howard, 24 Md. 233; Hough *v.* Kelsey, 19 Md. 451; Thompson *v.* McKim, 6 Harr. & J. (Md.) 302; Matter of Colvin, 3 Md. Ch. 278; Chesapeake Bank *v.* McClellan, 1 Md. Ch. 328; Hillyer *v.* Schenck, 15 N. J. Eq. 398; and 2 Cent. Dig. tit. "Appeal and Error," § 98 *et seq.*

The supreme court need not inquire, for the purpose of an appeal, when the circuit court first obtained jurisdiction of the suit. It is sufficient if that court had jurisdiction when the decree appealed from was rendered. Missouri Pac. R. Co. *v.* Ketchum, 101 U. S. 289, 25 L. ed. 932.

4. Glazier *v.* Carpenter, 16 Gray (Mass.) 385.

5. Dudley E. Jones Co. *v.* Munger Improved Cotton Mach. Mfg. Co., 50 Fed. 785, 2 U. S. App. 188, 1 C. C. A. 668. That an appeal from an order of the probate court was taken to the supreme court through the appellate court, instead of directly, as required by statute, does not render the judgment of the supreme court invalid, the parties having submitted to its jurisdiction without objection. Lynn *v.* Lynn, 160 Ill. 307, 43 N. E. 482. That an appeal was taken from the criminal court direct to the supreme court, instead of through the superior court, as was proper, does not invalidate the judgment when no exception was taken. Rhyne *v.* Lipscombe, 122 N. C. 650, 29 S. E. 57.

6. **Decisions not judicial.**—*Alabama.*— McKimmey *v.* McKimmey, 52 Ala. 102; Cox *v.* Jones, 40 Ala. 297.

Arkansas.— *Ex p.* Allen, 26 Ark. 9.

Georgia.— Hillsman *v.* Harris, 84 Ga. 432, 11 S. E. 400; Bower *v.* Cook, 39 Ga. 27.

Illinois.—Kingsbury *v.* Sperry, 119 Ill. 279, 10 N. E. 8.

Kansas.— State Auditor *v.* Atchison, etc., R. Co., 6 Kan. 500, 7 Am. Rep. 575.

Kentucky.— Gorham *v.* Luckett, 6 B. Mon. (Ky.) 146; Taylor *v.* Com., 3 J. J. Marsh. (Ky.) 401.

Massachusetts.— Weymouth, Petitioner, 2 Cush. (Mass.) 335.

Michigan.— Buchoz *v.* Pray, 36 Mich. 429; Auditor-General *v.* Pullman Palace Car Co., 34 Mich. 59.

Missouri.— St. Charles *v.* Stewart, 49 Mo. 132; Phelps County *v.* Bishop, 46 Mo. 68; Hall *v.* De Armond, 46 Mo. App. 596; Barnes *v.* Rees, 43 Mo. App. 295.

New Jersey.— Layton *v.* State, 28 N. J. L. 575; Cooley *v.* Vansyckle, 14 N. J. Eq. 496.

New York.— Matter of State Commission in Lunacy, 76 Hun (N. Y.) 74, 27 N. Y. Suppl. 856, 58 N. Y. St. 740.

South Carolina.— Brown *v.* Pechman, 55 S. C. 555, 33 S. E. 732; *Ex p.* Gray, Rich. Eq. Cas. (S. C.) 475.

Tennessee.—Matter of Knight, 3 Lea (Tenn.) 401; *Ex p.* Chadwell, 1 Tenn. Ch. 95, 3 Baxt. (Tenn.) 98.

Vermont.— Downer *v.* Downer, 9 Vt. 231.

West Virginia.— Summers County *v.* Monroe County, 43 W. Va. 207, 27 S. E. 307; Pittsburg, etc., R. Co. *v.* Board of Public Works, 28 W. Va. 264.

United States.—Sanborn *v.* U. S., 27 Ct. Cl. 485; Adams *v.* U. S., 26 Ct. Cl. 290.

See 2 Cent. Dig. tit. "Appeal and Error," § 100 *et seq.*; and *supra*, I, C, 1, e.

As to jurisdiction of courts, both original and appellate, see COURTS; JUSTICES OF THE PEACE.

Granting corporate charter.— The power conferred by the Georgia constitution upon the courts to grant charters to corporations is legislative and not judicial; and, conse-

upon the circumstances of the particular case to admit of detailed discussion here. However, it may be stated as a general rule that, where any power is conferred upon a court, to be exercised by it as a court, in the manner and with the formalities of a court, and in its ordinary proceedings, the action of such court is to be deemed judicial irrespective of the original nature of the power, and the determination of the court thereon may be, therefore, appealable.[7] And the fact that the decision is not, strictly speaking, a judgment, or that the proceedings are not capable of being enrolled so as to constitute what is technically called a record, will not prevent it from being appealable.[8]

quently, no writ of error lies from the supreme court to review the action of the superior court in granting a charter. Augusta Gas-Light Co. *v.* West, 78 Ga. 318.

Judge acting as arbitrator.—When a case is referred to a judge before whom it does not come in due course of law, no appeal lies from his decision. Banigan *v.* Nelms, 106 Ga. 441, 32 S. E. 337; Waters *v.* McNabb, 30 Ga. 672; Lansing's Appeal, 10 Wis. 120.

Case tried before three attorneys.—A writ of error will not lie in a case tried before three attorneys at law, even though the parties reserved the right to except. Stanton *v.* Speer, 69 Ga. 771.

Opinion of court.—A mere statement of opinion by a judge or court, on which no decision is based, is not appealable. Wallace *v.* Johnson, 88 Ga. 68, 13 S. E. 836; Allen *v.* Allen, 2 Litt. (Ky.) 94; Cornell *v.* McCann, 48 Md. 592; Dyer *v.* Carr, 18 Mo. 246; Oliver *v.* Phelps, 20 N. J. L. 180.

Curbstone opinion of judge.—A writ of error does not lie to review the private, unofficial opinion of a judge of the superior court. Ashburn *v.* Dempsey, 15 Ga. 248.

Taxation of costs.—The adjustment of costs by a clerk is a ministerial action, from which no appeal will lie. Abbott *v.* Mathews, 26 Mich. 176; Crocker *v.* Collins, 44 S. C. 500, 22 S. E. 719.

The mere refusal of a judge or court to take any action is not ordinarily appealable, the remedy in such case being by mandamus.

California.—Greehn *v.* Shumway, 73 Cal. 263, 14 Pac. 863.

Kentucky.—McIntire *v.* Gettings, 15 B. Mon. (Ky.) 172; Craddock *v.* Croghan, 2 Ky. Dec. 100.

Minnesota.—Mayall *v.* Burke, 10 Minn. 285.

Missouri.—Ladue *v.* Spalding, 17 Mo. 159; Astor *v.* Chambers, 1 Mo. 191.

North Carolina.—Maxwell *v.* Caldwell, 72 N. C. 450.

Pennsylvania.—Hudson's Appeal, 27 Pa. St. 46, 67 Am. Dec. 445; Evans *v.* Clover, 1 Grant (Pa.) 164.

And see, generally, MANDAMUS.

7. Matter of Cooper, 22 N. Y. 67.

Decisions deemed judicial.—*Colorado.*—Martin *v.* Simpkins, 20 Colo. 438, 38 Pac. 1092.

Connecticut.—Beard's Appeal, 64 Conn. 526, 30 Atl. 775.

Illinois.—Bowden *v.* Bowden, 75 Ill. 143.

Kentucky.—Bate *v.* Speed, 10 Bush (Ky.) 644; Lowe *v.* Com., 3 Metc. (Ky.) 237; Gorham *v.* Luckett, 6 B. Mon. (Ky.) 146; Murray *v.* Oliver, 3 B. Mon. (Ky.) 1.

Louisiana.—Levee Com'rs *v.* Marks, 16 La. Ann. 112.

Maryland.—Hawkins *v.* Bowie, 9 Gill & J. (Md.) 428.

Massachusetts.—Conant *v.* Kendall, 21 Pick. (Mass.) 36.

Minnesota.—*In re* Penniman, 20 Minn. 245, 18 Am. Rep. 368.

Missouri.—North Missouri R. Co. *v.* Lockland, 25 Mo. 515.

New York.—Matter of Cooper, 22 N. Y. 67; Matter of Graduates, 11 Abb. Pr. (N. Y.) 301.

Oregon.—Douglas County Road Co. *v.* Douglas County, 5 Oreg. 406.

See 2 Cent. Dig. tit. "Appeal and Error," § 100 *et seq.*

As to proceedings in which writ of error lies see *supra*, I, C, 1, f.

As to proceedings in which appeal lies see *supra*, I, C, 2, f.

Judgment rendered without authority.—Where the person trying a case is not vested with judicial authority, either *de jure* or *de facto*, the judgment pronounced by him is a nullity, and, consequently, a writ of error will not lie to review the same. Hoagland *v.* Creed, 81 Ill. 506; Adams *v.* Wheeler, 1 D. Chipm. (Vt.) 417. But it has been held that an appeal will lie from such a judgment. Petty *v.* Durall, 4 Greene (Iowa) 120. See, generally, JUDGES.

What is a case of controversy.—Wherever a claim or contention takes such form that the judicial power is capable of acting upon it, it becomes a case of controversy. Smith *v.* Adams, 130 U. S. 167, 9 S. Ct. 566, 32 L. ed. 895.

Court for trial of contested election.—In Kansas, it is held that a court for the trial of contested elections is a judicial tribunal, from which an appeal will lie. Bland *v.* Jackson, 51 Kan. 496, 33 Pac. 295; Buckland *v.* Goit, 23 Kan. 327; Anthony *v.* Halderman, 7 Kan. 50; Steele *v.* Martin, 6 Kan. 430; State *v.* Sheldon, 2 Kan. 322.

In Tennessee, the circuit court, when hearing and deciding a contest of the election of sheriff, exercises judicial authority, and does not sit merely as a special tribunal. Moore *v.* Sharp, 98 Tenn. 65, 38 S. W. 411.

8. Clason *v.* Shotwell, 12 Johns. (N. Y.) 31. As to what constitutes a judgment or decree see JUDGMENTS; EQUITY.

2. Orders Made at Chambers. Where the statutes provide for appeals only in cases tried by a court, no appeal will lie from an order, judgment, or decree made out of court by a judge or other judicial officer;[9] and the fact that an order purports to have been made by the court does not render it appealable when it was, in fact, the order of the individual judge, and not of the court.[10] But, of course, an appeal may, by statute, be authorized in such cases.[11]

3. Special Tribunal Constituted for Particular Purpose. No appeal will lie from the decision of a special tribunal, constituted for a particular purpose, unless such appeal is expressly authorized by statute.[12]

B. Dependent on Nature or Form of Proceeding — 1. In General. As has been stated hitherto, the appellate jurisdiction can be exercised only by virtue of statutory authority.[13] Therefore, in determining whether an appeal will lie in a proceeding of a particular form or character, reference must always be had to the provisions governing such matters. An attempt to classify the actions and proceedings subject to review in the various jurisdictions would serve no useful purpose here.[14]

2. Special Proceedings. It is a well-settled rule in most jurisdictions that where a tribunal exercises a special, limited jurisdiction, conferred by statute, and in which the procedure is not according to the course of the common law, no appeal lies from its action therein unless such appeal is expressly provided by statute.[15] But in some jurisdictions the courts have, without any special statutory

9. *Iowa.*— *In re* Curley, 34 Iowa 184.

Kentucky.— Gill's Petition, 92 Ky. 118, 13 Ky. L. Rep. 351, 17 S. W. 166; Weddington *v.* Sloan, 15 B. Mon. (Ky.) 147.

Nevada.— Lyon County *v.* Esmeralda County, 18 Nev. 166, 1 Pac. 839.

Ohio.— Sheldon *v.* McKnight, 34 Ohio St. 316.

South Dakota.— Brown *v.* Edmonds, 5 S. D. 508, 59 N. W. 731; Holden *v.* Haserodt, 3 S. D. 4, 51 N. W. 340; Commercial Nat. Bank *v.* Smith, 1 S. D. 28, 44 N. W. 1024.

And see, generally, Judges; and *infra*, III, E, 7.

Minnesota—Court commissioners.—In Minnesota, the powers with which court commissioners are invested are those of a judge at chambers, and consequently no appeal lies to the supreme court from an order of a commissioner until it is passed upon by the district court. Pulver *v.* Grooves, 3 Minn. 359; Gere *v.* Weed, 3 Minn. 352.

"Justice" used as equivalent of "court."— In the provisions of the New York code of civil procedure relative to appeals from judgments of the marine court of the city of New York the term "justice" refers to the justices of the marine court, and is used as a correlative of, or of equivalent meaning with, the "marine court," or as synonymous with the term "the court below." Boomer *v.* Brown, 4 Daly (N. Y.) 229.

10. Broadwell *v.* Com., 98 Ky. 15, 17 Ky. L. Rep. 564, 32 S. W. 141; Black Hills Flume, etc., Co. *v.* Grand Island, etc., R. Co., 2 S. D. 546, 51 N. W. 342; Carper *v.* Fitzgerald, 121 U. S. 87, 7 S. Ct. 825, 30 L. ed. 882.

11. Shows *v.* Pendry, 93 Ala. 248, 9 So. 462; *Ex p.* Jackson, 45 Ark. 158; Findlay Rolling, etc., Mill Co. *v.* National Bank of Commerce, 57 Ohio St. 115, 48 N. E. 508.

12. Trinity College *v.* Hartford, 32 Conn. 452; Holtz *v.* Diehl, 26 Misc. (N. Y.) 224, 56 N. Y. Suppl. 841; Carmand *v.* Wall, 1 Bailey (S. C.) 209; Wade *v.* Murry, 2 Sneed (Tenn.) 49; U. S. *v.* Ferreira, 13 How. (U. S.) 40, 14 L. ed. 42. See *infra*, III, B, 2.

A board of county commissioners, in ordering an election to determine the location of a county-seat, acts ministerially and not judicially. Territory *v.* Neville, (Okla. 1900) 60 Pac. 790.

13. See *supra*, I.

14. See, generally, Courts; and also see the specific cross-references at the head of this article.

As to the proceedings in which an appeal will lie, irrespective of amount, see *infra*, III, C, 5.

15. *Colorado.*— Phillips *v.* Corbin, 25 Colo. 62, 49 Pac. 279.

Illinois.— Moore *v.* Mayfield, 47 Ill. 167.

Indiana.— French *v.* Lighty, 9 Ind. 475.

Iowa.— Lampson *v.* Platt, 1 Iowa 556.

Kentucky.— Johnston *v.* Com., 1 Bibb (Ky.) 598.

Maine.— *Ex p.* Pierce, 5 Me. 324.

Maryland.— Gadd *v.* Anne Arundel County, 82 Md. 646, 33 Atl. 433; Jackson *v.* Bennett, 80 Md. 76, 30 Atl. 612.

Massachusetts.— Young *v.* Blaisdell, 138 Mass. 344; Valentine *v.* Boston, 20 Pick. (Mass.) 201.

Michigan.— *In re* Sanborn, 107 Mich. 189, 65 N. W. 209; Woolley *v.* Crane, 86 Mich. 360, 49 N. W. 43.

Montana.— Deer Lodge County *v.* Kohrs, 2 Mont. 66.

Missouri.— State *v.* Schofield, 41 Mo. 39.

New York.— New York Cent. R. Co. *v.* Marvin, 11 N. Y. 276; Killoran *v.* Barton, 26 Hun (N. Y.) 648; Matter of Pioneer Paper Co., 36 How. Pr. (N. Y.) 110; Matter of Negus, 10 Wend. (N. Y.) 34.

North Carolina.— Davidson *v.* Cowan, 12 N. C. 304.

authority, allowed appeals in such cases.[16] Of course, the right to appeal in special proceedings may be, and generally is, given by statute or constitutional provision.[17]

3. Proceedings, Whether Civil or Criminal[18] — a. In General. In regard to certain classes of cases there has been some conflict of opinion as to whether they should be ranked as civil or criminal in nature. In such case questions relating to appeals depend upon the view obtaining in the particular jurisdiction as to the character of the proceeding.[19] If the action is regarded as criminal or quasi-

Ohio.— Moore *v.* Boyer, 42 Ohio St. 312; State *v.* Belmont County, 31 Ohio St. 451; Barger *v.* Cochran, 15 Ohio St. 460; Taylor *v.* Fitch, 12 Ohio St. 169.

Pennsylvania.— Davenport *v.* Jones, 126 Pa. St. 271, 17 Atl. 611; Hall's Appeal, 56 Pa. St. 238; Kimber *v.* Schuylkill County, 20 Pa. St. 366.

Rhode Island.— Coates *v.* Woodward, (R. I. 1901) 48 Atl. 932.

South Carolina.—Carmand *v.* Wall, 1 Bailey (S. C.) 209.

Texas.—Tadlock *v.* Texas Monumental Committee, 21 Tex. 166; Baker *v.* Chisholm, 3 Tex. 157.

Vermont.— Stiles *v.* Windsor, 45 Vt. 520.

Wisconsin.— Prince *v.* McCarty, 61 Wis. 3, 20 N. W. 655; Eaton *v.* Williams, 51 Wis. 99, 7 N. W. 838.

See 2 Cent. Dig. tit. "Appeal and Error," § 134 *et seq.*

And see *supra*, I, C, 1, f, (v); I, C, 2, f, (iv); III, A, 3.

As to the necessity of statute conferring right of appeal in general see *supra*, I.

As to appeals in summary proceedings, generally, see Summary Proceedings.

As to appeals in particular proceedings see the cross-references given at the beginning of this article.

Judgment made conclusive by statute.— Where a statute authorizing a special proceeding directs that the judgment shall be final and conclusive, this means that it shall not be subject to any review. Houghton's Appeal, 42 Cal. 35.

16. In Arkansas, it has been customary, where the statute providing for such proceeding contained no provisions about appeals, to grant appeals in special proceedings by virtue of the general statutes. *Ex p.* McCullough, 51 Ark. 159, 10 S. W. 259.

In California, while the constitution does not give the supreme court appellate jurisdiction in special proceedings, yet that court has long been accustomed to entertain jurisdiction in such cases, and refuses to alter its practice, although apparently in doubt as to its legality. Lord *v.* Dunster, 79 Cal. 477, 21 Pac. 865.

In Oregon it is held that Oreg. Const. art. 7, § 6, providing that "the supreme court shall have jurisdiction only to revise all final decisions of the circuit courts," gives that court jurisdiction to revise all final decisions of the circuit courts, even though the proceeding be special and no appeal is expressly provided for. North Pacific Presb. Board of Missions *v.* Ah Won, 18 Oreg. 339, 344, 22 Pac. 1105. But see *In re* Goldsmith, 12 Oreg. 414, 7 Pac. 97, 9 Pac. 565.

17. See the statutes and constitutional provisions, and the following cases:

Alabama.— Thompson *v.* Holt, 52 Ala. 491.

Arizona.—Bishop *v.* Perrin, (Ariz. 1892) 29 Pac. 648.

California.— Covarrubias *v.* Santa Barbara County, 52 Cal. 622; Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237.

Georgia.— Parker *v.* Beeman, 28 Ga. 475.

Idaho.— Miller *v.* Smith, (Ida. 1900) 61 Pac. 824.

Iowa.— Lawrence *v.* Thomas, 84 Iowa 362, 51 N. W. 11.

Maryland.— Paul *v.* Locust Point Co., 70 Md. 288, 17 Atl. 77; White *v.* Malcolm, 15 Md. 529.

New York.— Ithaca Agricultural Works *v.* Eggleston, 107 N. Y. 272, 14 N. E. 312; Rensselaer, etc., R. Co. *v.* Davis, 43 N. Y. 137; People *v.* Boardman, 4 Keyes (N. Y.) 59; Burk *v.* Ayers, 19 Hun (N. Y.) 17; *In re* Poole, 5 N. Y. Civ. Proc. 279.

South Carolina.— Johnstone *v.* Manigault, 13 S. C. 403.

As to when statutes authorizing appeals in special proceedings apply see *infra*, III, D, 3, z.

18. See 2 Cent. Dig. tit. "Appeal and Error," § 148 *et seq.*

19. Bastardy.— Under some statutes bastardy cases are regarded as civil proceedings. Rawlings *v.* People, 102 Ill. 475. But in Maine it has been held that the statutes providing for a review of civil actions did not apply to prosecutions under the statute for the maintenance of bastard children. *Ex p.* Gowen, 4 Me. 58. See, generally, Bastards.

Contempt of court.—Where a contempt consists in the refusal of the party to do something he is ordered to do, for the benefit or advantage of the adverse party, the proceeding is civil. State *v.* Schneider, 47 Mo. App. 669; State *v.* Horner, 16 Mo. App. 191; Hagerman *v.* Tong Lee, 12 Nev. 331; Phillips *v.* Welch, 11 Nev. 187; State *v.* Giles, 10 Wis. 101. But if the contempt consists in doing a forbidden act injurious to another, the proceeding is criminal. Phillips *v.* Welch, 11 Nev. 187. See, generally, Contempt.

Habeas corpus.— In Louisiana, an appeal will lie from a judgment in habeas corpus proceedings where the writ issued in a matter growing out of a civil action (*Ex p.* Lafonta, 2 Rob. (La.) 495); but not where the writ issued in a matter growing out of the administration of the criminal law (State *v.* Judge, 15 La. 192). See, generally, Habeas Corpus.

criminal, it will, of course, be governed by the statutes providing for review of criminal proceedings.[20]

b. Qui Tam or Penal Actions. As a general rule, actions to recover penalties are held to be civil proceedings, and are governed by the statutes relating to appeals in other civil actions.[21]

C. Dependent on Amount or Value in Controversy — 1. Nature of Limitation — a. In General. Where appellate jurisdiction is conferred upon a court without restriction as to the amount or value involved in the controversy, the maxim *de minimis non curat lex* has no application, and judgments may be reviewed without regard to the amount in controversy.[22] But where, by positive statutory or constitutional provision, the right to remove a cause for review, or the jurisdiction of the court to review, depends upon the amount of the judgment or the amount or value of the property involved in the controversy, the right cannot be extended or the jurisdiction exercised in any case which does not come within such provision.[23] These provisions are made not only to restrict the right to review generally, but also to define the limit of appellate jurisdiction of particular courts as between them and other appellate courts.[24] Sometimes, how-

Louisiana — Proceeding against debtor for fraud.—An action against an insolvent debtor for fraud under the Louisiana act of March 28, 1840, sections 10 and 11, is a civil suit. Martin *v.* Chrystal, 4 La. Ann. 344; State *v.* Judge, 15 La. 531.

Prosecutions under municipal ordinances for offenses not punishable at common law or by general statute are usually regarded as civil proceedings. Durango *v.* Reinsberg, 16 Colo. 327, 26 Pac. 820; Greeley *v.* Hamman, 12 Colo. 94, 20 Pac. 1; Knowles *v.* Wayne City, 31 Ill. App. 471. But where an ordinance prohibits that which is a crime or misdemeanor and punishable at common law or by statute, and prescribes a penalty for its violation by fine, with imprisonment on default of payment, a prosecution thereunder is quasi-criminal. Platteville *v.* McKernan, 54 Wis. 487, 11 N. W. 798. See, gen rally, Municipal Corporations.

20. As to review of criminal proceedings see Criminal Law.

Proceedings held to be criminal.—A prosecution by complaint of a master against an apprentice for disobedience. Francis *v.* Lewis, 11 Conn. 200. Removal of officer for malfeasance, or misfeasance, or wilful neglect of duty. Com. *v.* Thompson, 13 B. Mon. (Ky.) 159. Scire facias upon a recognizance for the appearance of a person charged with crime. State *v.* Jackson, 33 Me. 259. Proceedings to strike attorney from the roll for alleged fraud. State *v.* Tunstall, 51 Tex. 81.

21. People *v.* Blue Mountain Joe, 129 Ill. 370, 21 N. E. 923; Partridge *v.* Snyder, 78 Ill. 519; State *v.* Mace, 5 Md. 337; State *v.* Hayden, 32 Wis. 663; Jacob *v.* U. S., 1 Brock. (U. S.) 520, 13 Fed. Cas. No. 7,157. See, generally, Penalties.

22. Gephart *v.* Strong, 20 Md. 522.

23. *Arizona.*— Canada del Oro Mines *v.* Collins, (Ariz. 1894) 36 Pac. 33.

Arkansas.— Reynolds *v.* Sneed, 1 Ark. 99.

California.— Henigan *v.* Ervin, 110 Cal. 37, 42 Pac. 457.

Colorado.— McClaskey *v.* Lake View Min., etc., Co., 18 Colo. 65, 31 Pac. 333.

Connecticut.— Denison *v.* Denison, 16 Conn. 34.

Illinois.—Dougherty *v.* Hughes, 165 Ill. 384, 46 N. E. 229.

Indiana.— Baker *v.* Groves, 126 Ind. 593, 26 N. E. 1076.

Indian Territory.— Morrow *v.* Burney, (Indian Terr. 1899) 51 S. W. 1078.

Iowa.— Schultz *v.* Holbrook, 86 Iowa 569, 53 N. W. 285.

Kansas.— Obert *v.* Oberlin Loan, etc., Co., 54 Kan. 750, 39 Pac. 699.

Kentucky.— Clark *v.* Collins, (Ky. 1901) 60 S. W. 369.

Louisiana.— Fredericks *v.* Donaldson, 50 La. Ann. 471, 23 So. 446.

Missouri.— Kane *v.* Kane, 146 Mo. 605, 48 S. W. 446.

New York.— Belfer *v.* Ludlow, 129 N. Y. 650, 29 N. E. 320, 41 N. Y. St. 649.

Texas.— Meade *v.* Warring, 90 Tex. 121, 37 S. W. 598.

Virginia.— Cheatham *v.* Aistrop, 97 Va. 457, 34 S. E. 57.

Washington.— Moskeland *v.* Stephens, 18 Wash. 693, 50 Pac. 933.

West Virginia.— Shahan *v.* Shahan, (W. Va. 1900) 37 S. E. 552.

United States.— Texas, etc., R. Co. *v.* Saunders, 151 U. S. 105, 14 S. Ct. 257, 38 L. ed. 90.

Canada.— Dominion Salvage, etc., Co. *v.* Brown, 20 Can. Supreme Ct. 203.

See 2 Cent. Dig. tit. "Appeal and Error," § 172 *et seq.*

As to the necessity of objection that jurisdictional amount is not involved see *infra*, V, B, 1, c, (I), (B).

24. *Florida.*—Brillis *v.* Blumenthal, 13 Fla. 577; Anderson *v.* Brown, 6 Fla. 299.

Illinois.— Illinois University *v.* Bruner, 168 Ill. 49, 48 N. E. 54; Jordan *v.* Moore, 128 Ill. 56, 21 N. E. 212.

Indiana.—Baker *v.* Groves, 126 Ind. 593, 26 N. E. 1076; Galbreath *v.* Trum-, 83 Ind. 381; Jones *v.* Yetman, 6 Ind. 46.

Kansas.— Conklin *v.* Hutchinson, (Kan. 1900) 62 Pac. 1012.

ever, such provision is not for the purpose of shutting off all right to review, but relates to the particular remedy.[25]

b. Restriction of Extent of Review. The restriction being jurisdictional, the court cannot pass upon any other questions presented after determining that the amount involved is not sufficient to permit a review.[26]

c. Application to Courts of Law and Equity. A general provision of this character applies to courts of law and equity alike.[27]

d. Application to All Parties Alike. Statutory restrictions upon the right to have a judgment reviewed apply alike to all parties, and, in the absence of an express exception, to the government as well as to individuals,[28] and to public officers as well as to private persons.[29]

2. Character and Application of Pecuniary Restrictions — a. In General. The character of the limitation depends upon the particular provision in force. In some jurisdictions a provision restricting the right to appeal to cases in which the amount involved is of a certain sum is held to operate to prevent an appeal in cases not involving the recovery of a money judgment or a subject-matter of pecuniary value.[30] Again, the statute sometimes expressly confines the right

Kentucky.— Evans *v.* Sanders, 10 B. Mon. (Ky.) 291.

Louisiana.— Newman *v.* Cuney, 30 La. Ann. 1201. See also Tippit *v.* Lippmins, 22 La. Ann. 465, holding that where the supreme court had jurisdiction of appeals from parish courts only in probate cases, and when the amount exceeded a fixed sum, it could not entertain an appeal from a judgment of the district court on appeal from the parish court, as such a course would be virtually to entertain an appeal from the judgment of the parish court.

Missouri.— Forster Vinegar Co. *v.* Guggemos, 24 Mo. App. 444; Myers *v.* Myers, 22 Mo. App. 94.

Texas.— McLane *v.* Evans, (Tex. 1900) 58 S. W. 723; Meade *v.* Warring, 90 Tex. 121, 37 S. W. 598.

United States.— Shute *v.* Keyser, 149 U. S. 649, 13 S. Ct. 960, 37 L. ed. 884 (construing judiciary act of March 3, 1891, as not affecting jurisdiction of supreme court of United States over judgments and decrees of the supreme courts of the territories when the matter in dispute exceeds five thousand dollars); Washington, etc., R. Co. *v.* District of Columbia, 146 U. S. 227, 13 S. Ct. 64, 36 L. ed. 951; *Ex p.* Craft, 124 U. S. 370, 8 S. Ct. 509, 31 L. ed. 449 (under act March 3, 1885, as to appeals from decree of supreme court of District of Columbia); U. S. *v.* Union Pac. R. Co., 105 U. S. 263, 26 L. ed. 1021 (under U. S. Rev. Stat. (1878), §§ 702, 1909, as to writs of error and appeals from final judgments and decrees of the supreme court of Wyoming); Baltimore, etc., R. Co. *v.* Grant, 98 U. S. 398, 25 L. ed. 231 (under act of Feb. 25, 1879, as to appeal from judgment or decree of supreme court District of Columbia).

See 2 Cent. Dig. tit. "Appeal and Error," § 306 *et seq.*; and *infra*, III, C, 4.

Particular courts, see Courts.

25. Thus, in Bumbalek *v.* Peehl, 95 Wis. 127, 70 N. W. 71, it was held that the statute relating to appeals did not impose such restrictions upon writs of error. See also Kimball *v.* Moody, 18 Me. 359; Murphy *v.* Byrd, Hempst. (U. S.) 211, 17 Fed. Cas. No. 9,947*a*. Conversely, it is held that, where appeals are allowed from the circuit court to the supreme court in all cases appealed from justices' courts where the amount involved is of a certain sum, it does not matter that the case is taken from the justice's court to the circuit court by certiorari, as the thing which gives the supreme court jurisdiction is the amount in controversy. O'Leary *v.* Harris, 50 Miss. 13.

26. Rose's Succession, 48 La. Ann. 418, 19 So. 450 (holding that a decree appointing an administratrix and incidentally determining the validity of a marriage is not appealable upon the validity of the marriage, unless the value of the succession involved is of an amount necessary to confer appellate jurisdiction); Police Jury *v.* Villaviabo, 12 La. Ann. 788; Walters *v.* Chichester, 84 Va. 723, 6 S. E. 1.

27. Dougherty *v.* Hughes, 165 Ill. 384, 46 N. E. 229 (holding that, if an appeal lies under such a statute, the amount is sufficient whether the suit is at law or at equity); Andrews *v.* Burdick, 62 Iowa 714, 16 N. W. 275 (holding that the code provision limiting appeals to cases where the amount was of a fixed sum applied to chancery cases as well as to those at law, and was not in conflict with the constitutional provision which provided in general terms for the trial of chancery causes *de novo* by the supreme court). See also Cross *v.* Burke, 146 U. S. 82, 13 S. Ct. 22, 36 L. ed. 896.

28. U. S. *v.* Broadhead, 127 U. S. 212, 8 S. Ct. 1191, 32 L. ed. 147; U. S. *v.* Union Pac. R. Co., 105 U. S. 263, 26 L. ed. 1021. And, where the constitution fixes the minimum jurisdictional amount, a statute which confers jurisdiction, without regard to amount, where the state is interested, is held to be unconstitutional. McIntosh *v.* Braden, 80 Va. 217.

29. Benson *v.* Christian, 129 Ind. 535, 29 N. E. 26.

30. Hite *v.* Hinsel, 39 La. Ann. 113, 1 So. 415; State *v.* Knight, 1 Mart. N. S. (La.) 700; People *v.* Clayton, 4 Utah 449, 11 Pac.

to cases in which the judgment shall be of a prescribed amount; and, under such a provision, it has been held that the right cannot be extended to cases not involving a judgment for money.[31] On the other hand, there are a number of decisions to the effect that, under a general provision restricting the right to appeal to cases which involve a certain amount or value, the right to appeal remains unaffected in cases which are not for the recovery of money or in which the value of the subject-matter involved is not measured by money, and that such a general provision applies only to cases for the recovery of money, or where the subject-matter of the suit is of pecuniary value.[32]

b. Value as Measured in Money — (I) *In General.* Where the right to bring proceedings for the review of a judgment is confined to cases for the recovery of money, or to cases involving a subject-matter of pecuniary value, the amount in controversy must be measured in money.[33]

(II) *When Money Judgment Not Directly Sought.* When the object of the suit is not directly and expressly for the purpose of obtaining a money judgment the amount involved is determined by the value in money of the relief to the plaintiff or of the loss to the defendant should the relief be granted, or, *vice versa*, should the relief be denied.[34] If the amount thus estimated is in excess of

213; Simms *v.* Simms, 175 U. S. 162, 20 S. Ct. 58, 44 L. ed. 115; Perrine *v.* Slack, 164 U. S. 452, 17 S. Ct. 79, 41 L. ed. 510; Abadie *v.* U. S., 149 U. S. 261, 13 S. Ct. 836, 37 L. ed. 726; Smith *v.* Adams, 130 U. S. 167, 9 S. Ct. 566, 32 L. ed. 895; Youngstown First Nat. Bank *v.* Hughes, 106 U. S. 523, 1 S. Ct. 489, 27 L. ed. 268; Barry *v.* Mercein, 5 How. (U. S.) 103, 12 L. ed. 70.

31. Fischer *v.* Hanna, 21 Colo. 9, 39 Pac. 420; Shackelford *v.* King, 6 Colo. 37. When the jurisdiction depends upon a judgment of a certain amount or in replevin upon the finding of the value of the property to a certain amount, the controverted allegations of value in the pleadings cannot confer jurisdiction where the judgment fails to find any value. Denver First Nat. Bank *v.* Follett, (Colo. 1900) 62 Pac. 361, upon the authority of Conly *v.* Boyvin, 25 Colo. 498, 55 Pac. 732.

32. *California.*— Conant *v.* Conant, 10 Cal. 249, 70 Am. Dec. 717, holding that the constitutional provision that the supreme court shall have appellate jurisdiction in all cases when the matter in dispute exceeds a fixed sum should be read to mean that the court has appellate jurisdiction in all cases, provided that when the subject of the litigation is capable of pecuniary computation the matter in dispute must exceed in value the amount prescribed.

Illinois.— Richards *v.* People, 100 Ill. 423.

Iowa.— Miles *v.* Tomlinson, 110 Iowa 322, 81 N. W. 587; Geyer *v.* Douglass, 85 Iowa 93, 52 N. W. 111.

Kansas.— McPherson *v.* State, 56 Kan. 139, 42 Pac. 374 [*distinguishing* the jurisdiction of the supreme court under such a provision from that of the court of appeals, which was invested with final appellate jurisdiction in certain cases, as to which see Stevens *v.* Moore, 4 Kan. App. 757, 46 Pac. 1011].

West Virginia.— In this state it was held that the amount in controversy must appear to be sufficient in a case involving matters simply pecuniary. Davis *v.* Webb, 46 W. Va. 6, 33 S. E. 97; Neal *v.* Van Winkle, 24 W. Va. 401.

Wisconsin.— State *v.* McKone, 95 Wis. 216, 70 N. W. 164.

See also *infra*, III, C, 5, a.

33. In the first class of cases, if, as measured by a money standard, the subject-matter is not of the value prescribed for the amount in controversy, proceedings in review will not lie. In the second class of cases, if the subject-matter in controversy has no pecuniary value, proceedings in review will lie; but, if it has a pecuniary value, then the right to bring proceedings in review must be determined with reference to the value of the subject-matter as measured in money. See the following cases:

Colorado.— St. Joe, etc., Min. Co. *v.* Aspen First Nat. Bank, 24 Colo. 537, 52 Pac. 678.

Louisiana.— Hite *v.* Hinsel, 39 La. Ann. 113, 1 So. 415; Lombard *v.* Belanger, 35 La. Ann. 311.

Missouri.— Kane *v.* Kane, 146 Mo. 605, 48 S. W. 446, holding that a suit for an accounting is not *eo nomine* within the appellate jurisdiction of the supreme court.

Utah.— People *v.* Clayton, 4 Utah 449, 11 Pac. 213.

United States.— Simms *v.* Simms, 175 U. S. 162, 20 S. Ct. 58, 44 L. ed. 115; Perrine *v.* Slack, 164 U. S. 452, 17 S. Ct. 79, 41 L. ed. 510; Ritchie *v.* Mauro, 2 Pet. (U. S.) 243, 7 L. ed. 411.

34. Gast Bank Note, etc., Co. *v.* Fennimore Assoc., 147 Mo. 557, 49 S. W. 511. See also Mutual Reserve Fund L. Assoc. *v.* Smith, 169 Ill. 264, 48 N. E. 208, 61 Am. St. Rep. 172; *In re* Moss Cigar Co., 50 La. Ann. 789, 23 So. 544; State *v.* Police Jury, 39 La. Ann. 759, 2 So. 305; U. S. *v.* Trans-Missouri Freight Assoc., 166 U. S. 290, 17 S. Ct. 540, 41 L. ed. 1007; Smith *v.* Adams, 130 U. S. 167, 9 S. Ct. 566, 32 L. ed. 895, a proceeding contesting the election for the selection of a county-seat, held not to be removable by appeal or error

the lowest limit of appellate jurisdiction the court will take cognizance.[35] And, if the liability is held to exist and is thus measured in money, the manner of its discharge will not affect the character of the judgment, and, whether it confers the right to an execution or subjects property to be sold for its satisfaction, it is a money judgment within the terms of the statute.[36]

c. Tort or Contract. When a recovery of money only is sought, no matter whether the action is in tort or in contract, the pecuniary restriction applies.[37]

d. Construction of Contract. In an action involving a construction of a contract, the pecuniary limitation as to appellate jurisdiction applies, and if there is a *bona fide* contention for more than the amount limiting such jurisdiction an appeal will lie.[38] And where the right of recovery grows out of relations which bring the liability within the class of obligations known as quasi-contracts, created by law, as distinguished from those created by the parties themselves, the case is subject to the pecuniary limitations of the statute upon the right of appeal.[39]

e. Validity of Ordinance or Statute. The pecuniary limitation of appellate jurisdiction applies to cases involving the validity of ordinances and statutes; and, if the amount involved is not sufficient to confer jurisdiction, appellate jurisdiction will not be assumed on the ground of the invalidity of such ordinance or statute,[40] where the ordinance is not unconstitutional in itself,[41] as where the question raised is upon the application of an ordinance.[42]

f. Enforcement of Lien. Where a money judgment is sought, that controls the amount in controversy, notwithstanding a lien also may be involved or

because impossible to determine the benefit the county may gain or the damage it may suffer from the result of the election contested.

35. See Handy *v.* New Orleans, 39 La. Ann. 107, 1 So. 593; Young *v.* Wilson, 34 La. Ann. 385; Gast Bank Note, etc., Co. *v.* Fennimore Assoc., 147 Mo. 557, 49 S. W. 511; Evens, etc., Fire Brick Co. *v.* St. Louis Smelting, etc., Co., 48 Mo. App. 634; Horner School *v.* Wescott, 124 N. C. 518, 32 S. E. 805; U. S. *v.* Trans-Missouri Freight Assoc., 166 U. S. 290, 17 S. Ct. 540, 41 L. ed. 1007 (which was a bill seeking a dissolution of an association of common carriers for the regulation of rates, and it was held sufficient to confer jurisdiction upon the supreme court that it appeared that the rates exceeded one thousand dollars per day, and that the carriers claimed that the association was necessary to the prosperity, if not to the life, of each company); Harris *v.* Barber, 129 U. S. 366, 9 S. Ct. 314, 32 L. ed. 697; Carter *v.* Cutting, 8 Cranch (U. S.) 251, 3 L. ed. 553.

36. Standley *v.* Hendrie, etc., Mfg. Co., 25 Colo. 376, 55 Pac. 723; St. Joe, etc., Min. Co. *v.* Aspen First Nat. Bank, 24 Colo. 537, 52 Pac. 678.

An order of the county court rejecting a claim against the county is a proceeding to establish a claim and is not in the nature of a mandamus to require a levy to pay it; and a judgment in the circuit court on appeal from such order for the claim against the county is a judgment for the recovery of money, and, if not of sufficient amount, the superior court has no jurisdiction to review it. Lincoln County Ct. *v.* Hansford, 6 Ky. L. Rep. 734.

37. Benson *v.* Christian, 129 Ind. 535, 29 N. E. 26. An action to recover for the conversion of stock is subject to the provision of the statute limiting appeals to cases in which the amount of the judgment shall exceed a fixed sum. McClaskey *v.* Lake View Min., etc., Co., 18 Colo. 65, 31 Pac. 333.

38. Horner School *v.* Wescott, 124 N. C. 518, 32 S. E. 885.

Validity of ordinance and contract thereunder.— The court has jurisdiction to pass upon the validity of an ordinance and contract executed thereunder when the value of the contract exceeds the jurisdictional amount. Handy *v.* New Orleans, 39 La. Ann. 107, 1 So. 593; State *v.* Judge, 23 La. Ann. 761.

39. Actions for separate maintenance are of this character. Seelye *v.* Seelye, 143 Ill. 264, 32 N. E. 427; Umlauf *v.* Umlauf, 103 Ill. 651.

40. Broadwell *v.* Com., 98 Ky. 15, 17 Ky. L. Rep. 564, 32 S. W. 141. Handy *v.* New Orleans, 39 La. Ann. 107, 1 So. 593 (where jurisdiction was assumed because the value involved exceeded the jurisdictional amount); State *v.* Rebassa, 9 La. Ann. 305.

41. See *infra*, III, C, 5, b. In Broadwell *v.* Com., 98 Ky. 15, 17 Ky. L. Rep. 564, 32 S. W. 141, the court refused to consider even the constitutionality of the statute.

42. State *v.* Marshall, 47 La. Ann. 646, 17 So. 202; Second Municipality *v.* Corning, 4 La. Ann. 407.

Repeal.— Where the only question is whether an ordinance, imposing a fine, levying a tax, etc., of less than the jurisdictional amount, has been repealed by an act of legislature, the supreme court will not have jurisdiction. Police Jury *v.* Villaviabo, 12 La. Ann. 788.

A judgment annulling or confirming an ordinance, where the amount involved is less than the jurisdictional amount, is not appealable. State *v.* Judge, 23 La. Ann. 761.

claimed,[43] and, though a lien is declared and adjudged to be superior to rights of particular parties, the liability imposed upon such interests is held to be measured in money, and the judgment is a money judgment under the statute relating to appeals.[44] On the other hand, where the right to appeal is restricted to cases in which the judgment is for the recovery of money or personal property, it is held that a suit for the enforcement of a lien, or purely *in rem*, and in which a personal judgment is not sought or recovered, does not come within the statute, and is appealable without regard to the amount in controversy.[45]

g. Enforcement of Judgment — (I) *In General.* An action to enforce a money judgment is an action for the recovery of money, subject to the pecuniary limitation of the statute relating to the appellate jurisdiction.[46]

(II) *Manner of Enforcing Judgment of Appellate Court.* So the statutory pecuniary limitation upon the right to appeal is held to apply to the review of the action of the lower court upon a mandate of the appellate court after a cause is remanded.[47]

h. Incidental Order. So, if an incidental order, though arising out of the original action, relates to a demand entirely distinct from it and under the jurisdictional amount, an appeal will not lie upon the basis of the principal action.[48] And, if the matter is raised and determined incidentally for the purpose of reaching a conclusion upon the principal matter involved, the jurisdiction of the appellate court must be determined by the value of the principal subject-matter.[49] An order made after final judgment is held to be a separate and independent proceeding, and if it involves money only, of a less amount than that conferring appellate jurisdiction, an appeal will not lie.[50]

i. Continuance or Dissolution of Marriage Relation. Where the jurisdiction is confined exclusively to cases in which the value of the matter in dispute is of a certain sum, a controversy as to the continuance or dissolution of the marriage relation cannot be reviewed, because the subject-matter is not one that can be reduced to a standard of money value.[51] Where, however, the restriction as to the amount in controversy excludes the appellate jurisdiction only as to cases

43. Poland *v.* Carrigan, 20 Cal. 174; Morrison *v.* Goodwin, 28 W. Va. 328, wherein the only controversy was whether judgments — each for less than the jurisdictional amount — were liens upon certain land, and it was held that there was no jurisdiction.

Where the validity of a lien is merely prerequisite to the right to recover damages, as under a statute which gives the holder of a lien on sawlogs a right of action for damages for their destruction, an action for such damages is within the code provision restricting appeals in actions for the recovery of money or property to a fixed original amount or value of property, notwithstanding the plaintiff may pray the court to declare his lien valid. Tom *v.* Sayward, 5 Wash. 383, 31 Pac. 976. See also Durand *v.* Simpson Logging Co., 21 Wash. 21, 56 Pac. 846; Chapin *v.* Kenoyer, 12 Wash. 536, 41 Pac. 916.

44. Standley *v.* Hendrie, etc., Mfg. Co., 25 Colo. 376, 55 Pac. 723. See also *infra*, III, C, 2, y, (II), (B), (2), (b).

45. Fehler *v.* Gosnell, 99 Ky. 380, 18 Ky. L. Rep. 238, 35 S. W. 1125; Bitzer *v.* O'Bryan, 21 Ky. L. Rep. 1307, 54 S. W. 951; Allen *v.* Long, 19 Ky. L. Rep. 488, 41 S. W. 17.

46. Louisville, etc., R. Co. *v.* Cambron, 13 Ky. L. Rep. 540. But see Fenton *v.* Morgan, 16 Wash. 30, 47 Pac. 214. See also *infra*, III, C, 4, h, (XVII).

47. City Nat. Bank *v.* Hunter, 152 U. S. 512, 14 S. Ct. 675, 38 L. ed. 534, holding that an appeal to review the action of the lower court in such case should be dismissed where the interest awarded, and concerning which error is alleged, is less than the jurisdictional amount. In Louisiana it was held that, where the lower court on remand acted upon a question not covered by the decree of the supreme court, involving an amount below the jurisdiction of the supreme court, a separate appeal could not be taken from such action. Bey's Succession, 47 La. Ann. 219, 16 So. 825. But, on the other hand, in Brown *v.* Pontchartrain Land Co., 49 La. Ann. 1779, 23 So. 292, the appellate court was held to have jurisdiction under the statutory provision that a court rendering a judgment should be the proper tribunal to decide as to the proper method of enforcing its judgment.

48. State *v.* Judge, 4 Rob. (La.) 85.

49. Rose's Succession, 48 La. Ann. 418, 19 So. 450.

50. Fairbanks *v.* Lampkin, 99 Cal. 429, 34 Pac. 101.

The refusal to quash an execution on a judgment for a fine is independent of, and collateral to, the judgment imposing the fine. State *v.* Blair, 29 W. Va. 474, 2 S. E. 333.

51. Simms *v.* Simms, 175 U. S. 162, 20 S. Ct. 58, 44 L. ed. 115.

involving pecuniary value, a judgment or decree in a divorce proceeding is subject to review.[52]

j. Custody and Care of Children. Where appellate jurisdiction is confined exclusively to cases involving a certain amount in controversy, a decision as to the custody and care of children is not reviewable, because the matter in dispute is incapable of being reduced to a pecuniary standard of value.[53]

k. Probate Matters. If the probate of a will has any legal operation and is not merely void, the controversy as to the validity of the probate is a matter in dispute equal to the value of the estate devised away from those seeking to revoke the probate.[54]

l. Dismissal of Suit. It has been held that an appeal will lie from a judgment dismissing a complaint upon the ground that it failed to state a cause of action, without regard to the amount in controversy;[55] but, where the amount of the judgment is made the pecuniary test of appellate jurisdiction, it is held that proceedings to review a judgment of nonsuit,[56] a judgment of dismissal, or that the plaintiff take nothing,[57] or a judgment sustaining a demurrer and dismissing the action, will not lie.[58]

m. Refusal to Quash Execution. A judgment refusing to quash an execution is merely pecuniary, and the amount involved controls the right to bring error.[59]

n. Actions Involving Right to Office. Under the construction that a statute limiting the right of review to cases involving a fixed sum intends that the restriction shall be confined to cases involving an amount of money or something having a money value, a judgment in an action involving the right to a public office is reviewable without regard to the amount in controversy.[60] But where the right to appeal is given only in cases in which the judgment shall amount to a prescribed sum, it is held that no appeal lies from a simple judgment of ouster,[61] and it is also held that an appeal from a judgment in quo warranto will not lie under a provision applying only to cases involving money, or some right the value of which can be computed in money.[62] On the other hand, the emoluments of the office are considered sufficient as the value of that which is in controversy to bring such a controversy under the operation of the pecuniary limitations of the statute. If the emoluments are of a sufficient amount the appellate court will have jurisdiction[63] —

52. McPherson *v.* State, 56 Kan. 139, 42 Pac. 374.

53. Perrine *v.* Slack, 164 U. S. 452, 17 S. Ct. 79, 41 L. ed. 510 (being as to the nnality of a judgment of the court of appeals of the District of Columbia); De Krafft *v.* Barney, 2 Black (U. S.) 704, 17 L. ed. 350; Barry *v.* Mercein, 5 How. (U. S.) 103, 12 L. ed. 70.

54. Carter *v.* Cutting, 8 Cranch. (U. S.) 251, 3 L. ed. 553.

55. Griffith *v.* Maxwell, 20 Wash. 403, 55 Pac. 571.

56. Timerman *v.* South Denver Real Estate Co., 20 Colo. 147, 36 Pac. 901.

57. Meyer *v.* Brophy, 15 Colo. 572, 25 Pac. 1090; Morrow *v.* Burney, (Indian Terr. 1899) 51 S. W. 1078; Baldwin *v.* Farris, (Indian Terr. 1899) 51 S. W. 1077; Shapleigh Hardware Co. *v.* Brittain, (Indian Terr. 1899) 48 S. W. 1069.

58. Sons of America Bldg., etc., Assoc. *v.* Denver, 15 Colo. 592, 25 Pac. 1091. So, in New York, an order sustaining a demurrer was held not to be appealable to the court of appeals when the amount claimed was less than that prescribed by the appellate jurisdiction of that court. Burleigh *v.* Center, 74 N. Y. 608. See *infra*, III. C, 4, h, (1).

59. State *v.* Blair, 29 W. Va. 474, 2 S. E. 333.

60. McPherson *v.* State, 56 Kan. 139, 42 Pac. 374.

61. Londoner *v.* People, 15 Colo. 246, 25 Pac. 183, holding that an appeal will not lie in such a case where there is no judgment for damages, the judgment of ouster not relating to a franchise.

62. People *v.* Clayton, 4 Utah 449, 11 Pac. 213; State *v.* McKone, 95 Wis. 216, 70 N. W. 164, upon reasoning similar to that in Barry *v.* Mercein, 5 How. (U. S.) 103, 12 L. ed. 70, in which last case the question was whether habeas corpus proceedings came within the law authorizing appeals under such a statute, and it was held that they did not, because the right in dispute could not be calculated in money. But the supreme court of the United States does not apply this reasoning to proceedings for the trial of a right to office. See *infra*, note 63.

63. Fish *v.* Collens, 21 La. Ann. 289; State *v.* Judge, 20 La. Ann. 574; Dryden *v.* Swinburn, 15 W. Va. 234; U. S. *v.* Addison, 22 How. (U. S.) 174, 16 L. ed. 304 (though payable in instalments, such compensation being fixed by law); Columbian Ins. Co. *v.* Wheelright, 7 Wheat. (U. S.) 534, 5 L. ed. 516.

Suspension.—State *v.* Judge, 22 La. Ann. 49.

Prohibition to court martial.—An appeal will lie to the supreme court of the United

otherwise not.[64] But a proceeding under the code to determine conflicting claims to an office, though the office is purely honorary, is held to embrace a money demand so as to sustain the jurisdictional test where the court may, in case of a decision adverse to the defendant, impose a fine, and such judgment is prayed.[65]

o. Contempt Proceedings. Where the pecuniary limitation upon the appellate jurisdiction applies to cases in which the demand shall exceed a fixed sum, it is held that the right to appeal from a judgment in contempt proceedings imposing a fine for a larger amount cannot be based upon such provision.[66]

p. Franchise. If the value of a franchise exceeds the judicial amount limiting appellate jurisdiction, it will confer jurisdiction of an appeal from a judgment awarding a peremptory mandamus to compel the granting of the privilege.[67] If the jurisdictional amount is not made a restriction in cases involving franchises, it is not sufficient that the franchise may be incidentally drawn in question.[68]

q. Fines and Penalties. Where appellate jurisdiction in penal actions is expressly confined to cases in which the judgment for a fine shall exceed a prescribed sum, this pecuniary limitation of course controls.[69] On the other hand, when the prosecution for the recovery of a fine or penalty is considered in the nature of a civil action, the general statutory pecuniary limitation relating to appeals applies.[70]

r. Forfeiture of Bail. While an appeal will lie from a judgment of forfeiture on a bail bond in a criminal prosecution, the matter of forfeiture being attracted

States to review a judgment of the supreme court of the District of Columbia dismissing a petition for writ of prohibition to a court martial convened to try a pay-inspector in the navy for an offense punishable by dismissal and deprivation of salary exceeding five thousand dollars during the residue of his term of office. Smith *v.* Whitney, 116 U. S. 167, 6 S. Ct. 570, 29 L. ed. 601.

Corporate office.— In Louisiana, it was held that an appeal would lie, in a proceeding brought by directors of a bank to enforce their right to exercise the duties of their office, where damages in amount sufficient to give appellate jurisdiction were claimed. Prieur *v.* Commercial Bank, 7 La. 509. But there is no appellate jurisdiction in a case presenting a contest between parties for certain functions to which no salary is attached; and the amount of a fund of a corporation which the parties to the suit may manage or control is not the matter in dispute in such a case. Schwartz *v.* Firemen's Charitable Assoc., 41 La. Ann. 404, 6 So. 652.

64. People *v.* Willard, 110 N. Y. 662, 18 N. E. 353, 18 N. Y. St. 604, where the officer received no salary or perquisites.

65. People *v.* Perry, 79 Cal. 105, 21 Pac. 423.

66. Tyler *v.* Connolly, 65 Cal. 28, 2 Pac. 414 [*overruling* People *v.* O'Neil, 47 Cal. 109], holding that in such a case there is no demand for any sum, and that the demand contemplated by the constitutional provision above referred to is made to appear in the pleadings; that, though a proceeding for contempt is a criminal case, the appellate jurisdiction of the supreme court in criminal cases is confined to such as are prosecuted by indictment or information.

67. State *v.* Police Jury, 39 La. Ann. 759, 2 So. 305. But, conversely, it must appear, in a suit by a corporation having a grant and exclusive privilege from a city, to enjoin interference therewith, that damages to which complainant will be subjected will exceed the jurisdictional limit. El Paso Water Co. *v.* El Paso, 152 U. S. 157, 14 S. Ct. 494, 38 L. ed. 396.

68. Clark *v.* Brown, 8 Gratt. (Va.) 549; Skipwith *v.* Young, 5 Munf. (Va.) 276. See *infra*, III, C, 2, y.

A judgment of ouster, in an action for the usurpation of a public office, does not relate to a franchise. Londoner *v.* People, 15 Colo. 246, 25 Pac. 183.

69. Meader Furniture Co. *v.* Newport, 16 Ky. L. Rep. 829, 30 S. W. 207. See also Broadwell *v.* Com., 98 Ky. 15, 17 Ky. L. Rep. 564, 32 S. W. 141; Johnson *v.* State, 26 Tex. App. 395, 9 S. W. 611.

70. Quigley *v.* Aurora, 50 Ind. 28; Kansas City *v.* Zahner, 138 Mo. 453, 40 S. W. 103; Neal *v.* Com., 21 Gratt. (Va.) 511. But in Illinois quasi-criminal cases — such as actions for penalties and bastardy proceedings — are considered as exceptions to the cases coming within the statute limiting the right of appeal by the amount involved in the controversy, and are put upon the same footing as criminal cases, appeals and writs of error being allowed without regard to the amount sought to be recovered or the judgment of the court below. Umlauf *v.* Umlauf, 103 Ill. 651.

Character of action immaterial.— In Huntley *v.* Davis, 1 Conn. 391, it was held that an appeal will lie in a *qui tam* action where the damages laid exceed the jurisdictional limit; that it was unnecessary to decide whether the action was civil, criminal, or in the nature of both; that this consideration could make no difference as to the right of appeal, and that the words of the statute were sufficiently comprehensive to include every possible action that could be brought by the parties.

to the criminal prosecution,[71] the intrinsic nature of such a bond is civil,[72] and it is held that, where cash bail is forfeited for a failure of defendant to appear at the proper time, and, upon certiorari, the cause is remanded and ordered to be heard on the merits, an appeal from this judgment is controlled by the statutory pecuniary limitation, because the case has assumed the character of a civil proceeding.[73]

s. Forcible Entry and Detainer. Actions of forcible entry and detainer are within the pecuniary limitations regulating the right to appeal,[74] notwithstanding the particular statute relating to forcible entry and detainer provides for an appeal, but without expressly referring to such restriction.[75]

t. Habeas Corpus. A proceeding in habeas corpus is a civil, and not a criminal, proceeding,[76] and a judgment therein is not reviewable where the statute imposing pecuniary restrictions upon the appellate jurisdiction is held to require that the subject-matter of the controversy be money or a right the value of which is estimated in money.[77]

u. Injunction. The pecuniary limitation upon appellate jurisdiction is held to apply, in an injunction suit, to an order granting an injunction,[78] and such limitation is applicable in these proceedings where the matter involved is purely pecuniary, so as to permit or prevent an appeal according as the amount involved is or is not sufficient under the particular provision.[79] So the principle is pertinent here that when the object of the suit is not to obtain a money judgment, but other relief, the amount involved is determined by the value in money of the relief to plaintiff or the loss to defendant should the relief be granted, or, *vice versa*, should the relief be denied.[80] But where the right to appeal is not restricted in any cases except those for the recovery of a debt, damages, or property, a decree granting an injunction is appealable.[81]

71. Louisiana Soc., etc. *v.* Cage, 45 La. Ann. 1394, 14 So. 422.

72. Louisiana Soc., etc. *v.* Cage, 45 La. Ann. 1394, 14 So. 422 (referring to the absence of appellate jurisdiction of the supreme court in a suit on such a bond, the amount of which is under the pecuniary limitation); State *v.* Hendricks, 40 La. Ann. 719, 722, 5 So. 24 (wherein, after laying down the proposition stated in the text, the court added: "In so saying, we do not lose sight of the fact that it has been treated as a criminal proceeding, in order to determine questions of jurisdiction in cases of appeals from judgments of forfeiture of bail bonds").

73. State *v.* Fisher, 4 Wash. 382, 30 Pac. 502.

74. Crane *v.* Farmer, 14 Colo. 294, 23 Pac. 455 (appeal allowable only where the judgment amounts to the sum prescribed, etc.); Seator *v.* Fay, 188 Ill. 507, 59 N. E. 235 (referring to the final appellate jurisdiction of the court of appeals, from whose judgment appeal to supreme court was dismissed); Stein *v.* Stely, (Tex. Civ. App. 1895) 32 S. W. 861 (under a provision that an appeal will not lie from a final judgment of the county court in such action unless such judgment allows more than one hundred dollars damages).

75. Crane *v.* Farmer, 14 Colo. 294, 23 Pac. 455.

76. Cross *v.* Burke, 146 U. S. 82, 13 S. Ct. 22, 36 L. ed. 896.

77. Cross *v.* Burke, 146 U. S. 82, 13 S. Ct. 22, 36 L. ed. 896; Pratt *v.* Fitzhugh, 1 Black (U. S.) 271, 17 L. ed. 206 (involving liability to arrest on execution); Barry *v.* Mercein, 5 How. (U. S.) 103, 12 L. ed. 70 (contest as to custody of child). See also Broadwell *v.* Com., 98 Ky. 15, 17 Ky. L. Rep. 564, 32 S. W. 141.

78. Bourne *v.* Beck, (Ky. 1900) 58 S. W. 690 (holding that an appeal will not lie from such an order unless the amount in controversy is sufficient to give jurisdiction); *Ex p.* Craft, 124 U. S. 370, 8 S. Ct. 509, 3 L. ed. 449.

79. Citizens Bank *v.* Webre, 44 La. Ann. 334, 10 So. 728; Harmony Club *v.* New Orleans Gas Light Co., 42 La. Ann. 453, 7 So. 538; People *v.* Horton, 64 N. Y. 58; Cooke *v.* Piles, 2 Munf. (Va.) 151.

80. Joint Dist. No. 70, etc. *v.* School Dist. No. 11, 60 Kan. 295, 56 Pac. 479 (holding that, in an action to enjoin the transfer of territory and to attach it to a joint-school district, the amount in controversy is the amount arising from an authorized levy of taxes on the real estate for school purposes); Hull *v.* Johnson, (Kan. App. 1901) 63 Pac. 455; Gast Bank Note, etc., Co. *v.* Fennimore Assoc., 147 Mo. 557, 49 S. W. 511; *Ex p.* Craft, 124 U. S. 370, 8 S. Ct. 509, 31 L. ed. 449; Washington Market Co. *v.* Hoffman, 101 U. S. 112, 25 L. ed. 782.

81. Richards *v.* People, 100 Ill. 423, decree enjoining obstruction of highway. But where the statute provides that no appeal will lie from a decree dissolving an injunction where the amount is less than a fixed sum, unless some matter not merely pecuniary is drawn in question, an appeal from such a decree will not lie where a pecuniary matter of less value than that fixed by the statute is involved. Shoemaker *v.* Bowman, 98 Va. 688, 37 S. E. 278.

v. Mandamus and Prohibition. Mandamus proceedings are held to come within the operation of the statutes imposing pecuniary limitations upon appellate jurisdiction, as where, to confer such jurisdiction, there must be a fixed amount involved or the subject-matter must be of that value as estimated in money;[82] and prohibition is likewise brought within the operation of such statute.[83] But a judgment for mandamus is not a judgment for the recovery of money or personal property, and, under a statute imposing pecuniary limitations only, appellate jurisdiction in mandamus does not depend upon the amount in controversy.[84]

w. Appointment of Receiver. Even though an appeal will not lie directly from an order appointing a receiver,[85] an appeal from an order appointing a receiver and staying proceedings against an insolvent corporation is held to be appealable by a creditor whose claim is of sufficient amount, as such order affects the creditor's claim, and is not merely for the distribution of a fund or for the appointment of a receiver.[86]

x. Taxes and Revenue. An action involving tax levies involves matter susceptible of a money value.[87] Where the contest turns merely on the application of an ordinance imposing a tax, or upon individual liability to pay it, the right to appeal will depend upon the matter in controversy,[88] unless a constitutional question is involved, upon which the court alone may have jurisdiction.[89] If the appellate jurisdiction is extended to cases involving a tax, without regard to the amount in controversy, the matter involved must be a tax in the strict sense of a burden for public use, else the jurisdiction will depend upon pecuniary considerations,[90] and if such jurisdiction is so extended to cases for the enforcement of the revenue laws, the case must be strictly of such character.[91]

y. Exceptions — (1) *In General.* Where the provision making the right to appeal depend upon the amount involved is subject to exceptions in particular cases or upon particular circumstances prescribed, the case must fall within the exception, or the right to review will be determined by the amount involved.[92] If

82. State *v.* Shakespeare, 41 La. Ann. 156, 60 So. 592; Police Jury *v.* Hubbs, 38 La. Ann. 149; U. S. *v.* Seymour, 153 U. S. 353, 14 S. Ct. 871, 38 L. ed. 742; Columbian Ins. Co. *v.* Wheelright, 7 Wheat. (U. S.) 534, 5 L. ed. 516. See also *supra*, III, C, 2, n.

Appeal from judgment awarding costs.— But an appeal, by the relator in a mandamus proceeding, from that part only of the judgment in his favor which awards costs, on the ground that they are inadequate, is not permissible, as the appeal involves nothing but costs, and no amount exclusive thereof. State *v.* Kellogg, 97 Wis. 532, 73 N. W. 22. See also *infra*, III, C, 4, h, (III).

83. State *v.* Knight, 1 Mart. N. S. (La.) 700; Smith *v.* Whitney, 116 U. S. 167, 6 S. Ct. 570, 29 L. ed. 601. But, under the general supervisory control of the supreme court of the state over inferior courts given by an article of the constitution, it was held that the supreme court had such supervisory control without regard to the amount in controversy. State *v.* Judge, 39 La. Ann. 994, 3 So. 91.

84. Stone *v.* Craft, 21 Ky. L. Rep. 1515, 55 S. W. 701.

85. See *infra*, III, D.

86. *In re* Moss Cigar Co., 50 La. Ann. 789, 23 So. 544. See *infra*, III, C, 4, h, (XVII).

87. Joint Dist. No. 70, etc. *v.* School Dist. No. 11, 9 Kan. App. 883, 57 Pac. 1060.

88. Pratt *v.* Holmes, 43 La. Ann. 1016, 10 So. 198; Police Jury *v.* Villaviabo, 12 La. Ann. 788; Albert *v.* Brewer, 9 La. Ann. 64; Neal *v.* Com., 21 Gratt. (Va.) 511; and see 2 Cent. Dig. tit. "Appeal and Error," § 175.

Whether or not an act imposing a tax has been repealed is not a question which will confer jurisdiction in an action for the collection of the tax, but the amount in controversy is the test. Washington, etc., R. Co. *v.* District of Columbia, 146 U. S. 227, 13 S. Ct. 64, 36 L. ed. 951.

89. Favrot *v.* Baton Rouge, 38 La. Ann. 230, to the effect that legality or constitutionality of the tax must be in contestation, or the jurisdiction of the supreme court will depend upon the amount in controversy. Where the whole issue is as to the validity of the assessment, the amount in controversy must control the right to appeal. State *v.* Recorder of Mortgages, 41 La. Ann. 533, 6 So. 819.

90. Sweeney *v.* Otis, 37 La. Ann. 520.

91. Mason *v.* Gamble, 21 How. (U. S.) 390, 16 L. ed. 81, holding that an act of congress, authorizing a writ of error at the instance of either party upon a final judgment in civil actions brought by the United States for the enforcement of the revenue laws, etc., without regard to the sum or value in controversy, did not embrace an action against the collector for the payment of dues paid under protest, but only such cases in which the United States are plaintiffs in the suit.

92. Finnup *v.* Garfield Tp., 7 Kan. App. 815, 53 Pac. 377; Heraughty *v.* Grant, 6 Kan. App. 923, 50 Pac. 506; Newell *v.* Daniels, 5 Kan. App. 505, 47 Pac. 565; Neal *v.* Com., 21 Gratt. (Va.) 511.

Questions of law certified.— Thus, where the court may certify questions of law, if the amount in controversy is not sufficient to con-

the amount involved in the controversy is less than that which gives the appellate court a general jurisdiction, and the jurisdiction therefore depends upon the presence of a particular question — as the constitutionality of a statute or the jurisdiction of the lower court — its review of the cause must be confined to these particular questions, and others cannot be considered or decided,[93] though where a case is properly before an appellate court on a principal demand, with an incidental demand attached to it by appellee, both of which demands were decided by the lower court, and are included in the same judgment and are incapable of separation, the court will consider the entire cause, though the incidental matter is of a value less than sufficient to confer jurisdiction by itself.[94] The exception of cases in which is drawn in question an authority exercised under the United States, in the act of congress restricting the right of appeal by the amount in controversy, refers to an authority exercised or claimed in favor of one of the parties to the cause, the validity of which is put in issue on the trial of the case.[95] And an action upon a bond given to supersede a judgment or decree of a United States court is not an action brought on account of the deprivation of any right, penalty, or immunity secured by the constitution of the United States, or of any right or privilege of a citizen of the United States, so as to confer appellate jurisdiction upon the supreme court of the United States without regard to the sum or value in dispute.[96]

(II) *Subject-Matter of Exception Must Be Directly in Issue* — (A) *In General.* If in a controversy of a particular character appellate proceedings are permitted without restriction as to the amount involved, the case in hand must be of the character prescribed, or else the amount involved must be sufficient to confer appellate jurisdiction. The right or title is the subject-matter of the exception, and must be directly in issue.[97]

fer appellate jurisdiction, the jurisdiction must rest upon the certificate, and if that is wanting, or is made in an improper case, the proceedings in review must be dismissed.

Illinois.— Seator *v.* Fay, 188 Ill. 507, 59 N. E. 235; Illinois University *v.* Bruner, 168 Ill. 49, 48 N. E. 54; Fitzpatrick *v.* Chicago, etc., R. Co., 139 Ill. 248, 28 N. E. 837.

Iowa.— Schultz *v.* Holbrook, 86 Iowa 569, 53 N. W. 285; Giger *v.* Chicago, etc., R. Co., 80 Iowa 492, 45 N. W. 906; Harrington *v.* Pierce, 38 Iowa 260.

New York.— People *v.* Willard, 110 N. Y. 662, 18 N. E. 353, 18 N. Y. St. 604.

Washington.— Moskeland *v.* Stephens, 18 Wash. 693, 50 Pac. 933.

Wisconsin.— Blonde *v.* Menominee Bay Shore Lumber Co., 103 Wis. 284, 79 N.W. 226; Troy Carriage Co. *v.* Bonell, 102 Wis. 424, 78 N. W. 752.

United States.— Williamsport Nat. Bank *v.* Knapp, 119 U. S. 357, 7 S. Ct. 274, 30 L. ed. 446; Weeth *v.* New England Mortg. Security Co., 106 U. S. 605, 1 S. Ct. 91, 27 L. ed. 99; Colorado Cent. R. Co. *v.* White, 101 U. S. 98, 25 L. ed. 860.

93. Favrot *v.* Baton Rouge, 38 La. Ann. 230; Hinds *v.* Sells, 63 Ohio St. 328, 58 N. E. 800; Mississippi Mills *v.* Cohn, 150 U. S. 202, 14 S. Ct. 75, 37 L. ed. 1052; Ambler *v.* Eppinger, 137 U. S. 480, 11 S. Ct. 173, 34 L. ed. 765.

If the supreme court acquires jurisdiction on the ground that the validity of a statute is involved, it will assume jurisdiction of the entire cause notwithstanding, by reason of the amount involved, an inferior appellate court would have been the proper appellate tribunal in the absence of the question of the validity of the statute. Benson *v.* Christian, 129 Ind. 535, 29 N. E. 26.

94. De Lesdernier *v.* De Lesdernier, 45 La. Ann. 1364, 14 So. 191.

Removal of fence pursuant to judgment of court.— Authority exercised by the United States in removing a fence, pursuant to a judgment of a court, is not within the meaning of such act. Cameron *v.* U. S., 146 U. S. 533, 13 S. Ct. 184, 36 L. ed. 1077.

95. Title to territorial office.— Defendants, in an action in the nature of quo warranto, claiming to be territorial officers, and basing their title upon an election by the people of the territory under and by virtue of the territorial statute, exercise no authority under the United States, and the case does not come within the provisions of such act. People *v.* Clayton, 4 Utah 449, 11 Pac. 213.

96. Cogswell *v.* Fordyce, 128 U. S. 391, 9 S. Ct. 112, 32 L. ed. 484.

97. *Colorado.*— Spangler *v.* Green, 21 Colo. 505, 42 Pac. 674, 52 Am. St. Rep. 259.

Connecticut.— Scovill *v.* Seeley, 14 Conn. 238.

Illinois.— Richards *v.* People, 100 Ill. 423.

Kentucky.— Turner *v.* Pash, (Ky. 1891) 17 S. W. 809.

New York.— Wheeler *v.* Scofield, 67 N. Y. 311; McMillen *v.* Cronin, 57 How. Pr. (N. Y.) 53.

Virginia.— Cash *v.* Humphreys, 98 Va. 477, 36 S. E. 517; Florance *v.* Morien, 98 Va. 26, 34 S. E. 890.

(B) *Land or Freehold Involved*— (1) In General. Where the right to bring appellate proceedings is restricted by the amount in controversy except where the title to land or a freehold is involved, it is not every action which simply concerns real estate that will come within such exceptions. The title must be directly in issue.[98]

(2) Damages. An action on the case for an injury to plaintiff's land does not involve a freehold or franchise, though these are incidentally drawn into question[99]—as in trespass *quare clausum fregit*—but the jurisdiction will depend upon the amount of damages.[1] Where the recovery in an action for assault and battery is less than the amount justifying an appeal, the appeal will not lie even though the action involves the right to use a private highway.[2]

(3) To Subject Land—(a) In General. The fact that the land is sought to be subjected to the payment of a claim does not make the case one involving title to land.[3] Such an action involves a pecuniary demand under the statute restricting appellate jurisdiction.[4] So, in a suit to reach the excess of a curtesy

West Virginia.— Deaton *v.* Mitchell, 45 W. Va. 670, 31 S. E. 968; Faulconer *v.* Stinson, 44 W. Va. 546, 29 S. E. 101; Greathouse *v.* Sapp, 26 W. Va. 87.

United States.— Under an act exempting causes involving the validity of patents and copyrights from the rule restricting the right to appeal to the supreme court of the United States to matters exceeding a certain value, patents for land are not intended, but only patents for inventions and discoveries. Street *v.* Ferry, 119 U. S. 385, 7 S. Ct. 231, 30 L. ed. 439.

98. *Colorado.*— Hahn's Peak, etc., Canal, etc., Min. Co. *v.* Lees, (Colo. 1900) 62 Pac. 841; Paddack *v.* Staley, 24 Colo. 188, 49 Pac. 281; Wyatt *v.* Larimer Irrigation, etc., Co., 18 Colo. 298, 33 Pac. 144, 36 Am. St. Rep. 280; Brandenburg *v.* Reithman, 7 Colo. 323, 3 Pac. 577.

Illinois.— Carbine *v.* Fox, 98 Ill. 146; Rose *v.* Choteau, 11 Ill. 167.

Indiana.— Duckworth *v.* Mosier, 4 Ind. App. 267, 30 N. E. 936.

Kansas.— Newell *v.* Daniels, 5 Kan. App. 505, 47 Pac. 565.

Kentucky.— Bourne *v.* Beck, (Ky. 1900) 58 S. W. 690; Ponder *v.* Lard, 102 Ky. 605, 19 Ky. L. Rep. 1649, 44 S. W. 138; French *v.* Sewell, 13 Ky. L. Rep. 902, 29 S. W. 976; Church *v.* Halley, 10 Ky. L. Rep. 447.

Louisiana.— De Blois *v.* New Orleans, 45 La. Ann. 1308, 14 So. 190.

Missouri.— Bradley *v.* Milwaukee Mechanics Ins. Co., 147 Mo. 634, 49 S. W. 867 (involving a defense, in an action on an insurance policy, that plaintiff was not the sole owner of the property at the time the policy was issued, the court saying that if the title to real estate remains after the judgment where it was when the suit was begun, the title to the real estate is not involved); Price *v.* Blankenship, 144 Mo. 203, 45 S. W. 1123; State *v.* Court of Appeals, 67 Mo. 199; Skrainka *v.* Allen, 2 Mo. App. 387.

New York.— La Rue *v.* Smith, 153 N. Y. 428, 47 N. E. 796; Hill *v.* Water, etc., Com'rs, 150 N. Y. 547, 44 N. E. 1105; Miele *v.* Deperino, 135 N. Y. 618, 31 N. E. 1047, 47 N. Y. St. 837; Scully *v.* Sanders, 77 N. Y. 598; Nichols *v.* Voorhis, 74 N. Y. 28.

Ohio.— Bassett *v.* Bassett, 5 Cinc. L. Bul. 440.

West Virginia.— Robrecht *v.* Wharton, 29 W. Va. 746, 2 S. E. 793; Greathouse *v.* Sapp, 26 W. Va. 87; Childs *v.* Hurd, 25 W. Va. 530.

United States.— Farmers' Bank *v.* Hooff, 7 Pet. (U. S.) 168, 8 L. ed. 646.

Title in third person.—Where defendants denied plaintiff's claim of title, but, instead of setting up title in themselves, attempted to show title in third persons with whom they were not in privity, it was held that the title was not involved within the meaning of the statute. Trevett *v.* Barnes, 110 N. Y. 500, 18 N. E. 257, 18 N. Y. St. 533.

Admission of title.—Where appellees practically admit that the title to the soil and freehold are in appellant it cannot be said with any degree of propriety that the freehold is involved. Richards *v.* People, 100 Ill. 423.

99. Clark *v.* Brown, 8 Gratt. (Va.) 549; Skipwith *v.* Young, 5 Munf. (Va.) 276.

1. Scovill *v.* Seeley, 14 Conn. 238 (which involved the appealability of an order sustaining a demurrer to a declaration claiming damages less than the jurisdictional amount, the court holding that in such a case it did not appear from the record that the title to land was either drawn in question or determined); Hutchinson *v.* Kellam, 3 Munf. (Va.) 202; Greathouse *v.* Sapp, 26 W. Va. 87.

2. McMillen *v.* Cronin, 57 How. Pr. (N. Y.) 53. But in Randall *v.* Crandall, 6 Hill (N. Y.) 342, upon the question of original jurisdiction it was held that in trespass *quare clausum fregit* the defense that the *locus in quo* was a public highway raised a question of title to land, and therefore could not be tried before a justice.

3. Johns *v.* Potter, 61 Iowa 393, 16 N. W. 283; Faulconer *v.* Stinson, 44 W. Va. 546, 29 S. E. 1011.

Execution.—And the fact that an execution is levied, or may be levied, on real estate does not of itself bring the title in issue so as to authorize an appeal on that ground. Gorman *v.* Glenn, (Ky. 1900) 58 S. W. 776.

4. A suit to subject land to the payment of a judgment involves a pecuniary demand, and not the title to land. Cash *v.* Humphreys, 98 Va. 477, 36 S. E. 517. A decree reciting that

interest to satisfy a debt, if defendant is directed to pay certain instalments until the debt is satisfied, this is a personal judgment and does not involve the title to realty.[5]

(b) Liens and Mortgages. An action to foreclose a mortgage concerns real estate, but the title thereto is not necessarily involved.[6] So a proceeding to enforce a lien does not involve the freehold within the meaning of the statute making an exception in favor of cases involving the freehold. The amount of the claim determines the appellate jurisdiction.[7]

3. What Law Governs — a. United States Supreme Court. The appellate jurisdiction of the supreme court of the United States is regulated by, and depends entirely upon, acts of congress, and the mere adoption of a state statute as to the mode of procedure in a particular case will not govern the right of appeal in opposition to the act of congress defining the appellate jurisdiction.[8]

b. Provision Adopted After Final Judgment. The mere adoption of a new provision after final judgment in a cause will not change the remedies as to such judgment so as to confer appellate jurisdiction where none existed before.[9]

c. Pending Causes. Generally, a provision imposing a pecuniary limitation upon appellate jurisdiction, without an express exception made to exempt particular cases from its operation, applies to causes pending before the adoption of the provision,[10] upon the principle that the right is a mere privilege and not a vested right.[11] Even when judgment is rendered before the passage or taking effect of the act, the pecuniary provision applies if appellate proceedings have not

land in the hands of a remainder-man is liable for taxes involves a pecuniary question and not a title to land. Florance *v.* Morien, 98 Va. 26, 34 S. E. 890. See also *infra*, III, C, 4, h, (xvii).

5. Turner *v.* Pash, (Ky. 1891) 17 S. W. 809.

6. Newell *v.* Daniels, 5 Kan. App. 505, 47 Pac. 565.

7. *Colorado.*— Cravens *v.* Lee, 24 Colo. 225, 49 Pac. 424; Scheeren *v.* Stramann, 24 Colo. 111, 48 Pac. 966; Spangler *v.* Green, 21 Colo. 505, 42 Pac. 674, 52 Am. St. Rep. 259.

Iowa.— Brown *v.* Smith, 76 Iowa 315, 41 N. W. 27; Colyar *v.* Pettit, 63 Iowa 97, 18 N. W. 694; Andrews *v.* Burdick, 62 Iowa 714, 16 N. W. 275.

Kansas.— Park *v.* Busenbark, 59 Kan. 65, 51 Pac. 907.

Kentucky.— Turner *v.* Pash, (Ky. 1891) 17 S. W. 809; Pittman *v.* Wakefield, 90 Ky. 171, 11 Ky. L. Rep. 972, 13 S. W. 525; Brannin *v.* Gleason, 14 Ky. L. Rep. 109; Quiggins *v.* McCarty, 4 Ky. L. Rep. 444; French *v.* French, 4 Ky. L. Rep. 234.

New York.— A. Hall Terra Cotta Co. *v.* Doyle, 133 N. Y. 603, 30 N. E. 1010, 44 N. Y. St. 900; Norris *v.* Nesbit, 123 N. Y. 650, 25 N. E. 377, 33 N. Y. St. 603; Wheeler *v.* Scofield, 67 N. Y. 311.

Virginia.— Patteson *v.* McKinney, 88 Va. 748, 14 S. E. 379; Buckner *v*, Metz, 77 Va. 107; Fink *v.* Denny, 75 Va. 663; Umbarger *v.* Watts, 25 Gratt. (Va.) 167.

West Virginia.— Deaton *v.* Mitchell, 45 W. Va. 670, 31 S. E. 968; Faulconer *v.* Stinson, 44 W. Va. 546, 29 S. E. 1011.

A mere right to a remedy against land is not an interest in real estate. Andrews *v.* Burdick, 62 Iowa 714, 16 N. W. 275.

Kentucky — Street-assessment lien.— An appeal lies from the judgment in an action to enforce a street-assessment lien, without regard to the amount in controversy, as the title to land is involved. Mackin *v.* Wilson, (Ky. 1898) 45 S. W. 663.

8. Baltimore, etc., R. Co. *v.* Sixth Presb. Church, 19 Wall. (U. S.) 62, 22 L. ed. 97.

9. Rogers *v.* Goldthwaite, McGloin (La.) 127. A right to appeal from a judgment which has passed through all the appellate courts that have jurisdiction to hear it cannot be conferred by legislature, and a statute giving a right of appeal in particular cases to the several appellate courts of the state, including an appeal to the court of appeals, though the amount in controversy may be less than the sum fixed for the appellate jurisdiction of that court in other cases, is held to apply to such actions only in which the right of appeal had not been exhausted when the act was passed. Germania Sav. Bank *v.* Suspension Bridge, 159 N. Y. 362, 54 N. E. 33.

10. *California.*— Luther *v.* Ship Apollo, 1 Cal. 15.

Kansas.— Skoin *v.* Limerick, 50 Kan. 465, 31 Pac. 1051; Puffer *v.* Kennedy, 49 Kan. 59, 30 Pac. 167.

Kentucky.— Hill *v.* Booth, (Ky. 1900) 58 S. W. 993; Caldwell *v.* Hampton, 21 Ky. L. Rep. 262, 51 S. W. 174; Hale *v.* Grogan, 20 Ky. L. Rep. 1856, 50 S. W. 257.

Virginia.— McGruder *v.* Lyons, 7 Gratt. (Va.) 233.

United States.— Street *v.* Ferry, 119 U. S. 385, 7 S. Ct. 231, 30 L. ed. 439; Del Valle *v.* Harrison, 93 U. S. 233, 23 L. ed. 892; Northern Pac. R. Co. *v.* Amato, 49 Fed. 881, 1 U. S. App. 113, 1 C. C. A. 468.

11. Hale *v.* Grogan, 20 Ky. L. Rep. 1856, 50 S. W. 257; Baltimore, etc., R. Co. *v.* Grant, 98 U. S. 398, 25 L. ed. 231.

already been instituted.[12] But such general provision is not applicable to cases in which appeals have been perfected or writs of error sued out before the adoption or taking effect of the act.[13]

d. Construction of General and Special Laws. Statutes conferring jurisdiction generally are considered in connection with the provisions relating to the pecuniary restriction upon the jurisdiction of the particular appellate court, and not as conferring appellate jurisdiction without regard to such limitations;[14] but

12. Skoin *v.* Limerick, 50 Kan. 465, 31 Pac. 1051; Puffer *v.* Kennedy, 49 Kan. 59, 30 Pac. 167; Hill *v.* Booth, (Ky. 1900) 58 S. W. 993; Kendall *v.* Spradling, 15 B. Mon. (Ky.) 33; Hale *v.* Grogan, 20 Ky. L. Rep. 1856, 50 S. W. 257. Under the Louisiana code of practice requiring the judge to sign all final judgments, a judgment is rendered when it is signed so as to become subject to appeal or error, and error will not lie to a circuit court judgment for less than five thousand dollars, announced before, but not signed until after, May 1, 1875, under the act of congress providing for a reëxamination in the supreme court of the United States of final judgments of circuit courts rendered previous to May 1, 1875, when the matter in dispute exceeds the sum or value of two thousand dollars and of such as were rendered after that date where it exceeds five thousand dollars. Del Valle *v.* Harrison, 93 U. S. 233, 23 L. ed. 892.

After appeal granted and abandoned.—An act which changes the minimum amount of a judgment from which an appeal may be prosecuted applies to an appeal granted by the clerk after the act went into effect, though an appeal, which was afterward abandoned, was granted by the lower court before the act went into effect. Frost *v.* Rowan, 21 Ky. L. Rep. 1777, 56 S. W. 427.

13. *Kansas.*—Leavenworth Coal Co. *v.* Barber, 47 Kan. 29, 27 Pac. 114 (holding that under such a statute, which went into effect from and after its publication, a writ of error should be dismissed in a controversy over a less sum than that prescribed where the petition and præcipe, though filed on the day of publication, were not filed until a later hour); Hite *v.* Stimmell, 45 Kan. 469, 25 Pac. 852.

Kentucky.— See Kendall *v.* Spradling, 15 B. Mon. (Ky.) 33.

Louisiana.— Levy *v.* Collins, 32 La. Ann. 1003.

Texas.— Meriweather *v.* Whitley, 38 Tex. 525, holding that the repeal of an act prohibiting appeals from judgments under a certain amount will not aid the jurisdiction of the appellate court of an appeal already pending.

Virginia.— McGruder *v.* Lyons, 7 Gratt. (Va.) 233, applying the statutory pecuniary limitation if the application for the appeal is not made before the code provision goes into effect.

Wisconsin.— Kingsley *v.* Great Northern R. Co., 91 Wis. 380, 64 N. W. 1036.

United States.—Keller *v.* Ashford, 133 U. S. 610, 10 S. Ct. 494, 33 L. ed. 667 (under an act of congress limiting the appellate jurisdiction of the supreme court of the United States from the supreme court of the District of Columbia in cases in which appeals or writs of error "shall hereafter be allowed," the court holding that the words referring to the time when the appeal or writ of error is allowed, instead of to the time when it is entertained by the supreme court, were intended to prevent the cutting off of appeals taken and allowed before the passage of the act, as had been held to be the effect of the language used in the previous act of 1879, as indicated in Baltimore, etc., R. Co. *v.* Grant, 98 U. S. 398, 25 L. ed. 231); Cook *v.* U. S., 2 Wall. (U. S.) 218, 17 L. ed. 755 (holding that after a writ of error to review a judgment in favor of the United States government has been taken, an act of congress authorizing the reduction of such judgment to a sum below the amount necessary to be involved to give the supreme court jurisdiction does not affect such jurisdiction).

Pending appeals transferred under new constitution.—Where a cause was pending on appeal under the constitution of 1864, and, by an act of the legislature, it was transferred to the supreme court created by the constitution of 1868, it was held that the appeal was subject to the provisions of the latter constitution relating to the amount in controversy necessary to give jurisdiction. Myers *v.* Mitchell, 20 La. Ann. 533.

Repeal of appellate jurisdiction.— In McClain *v.* Williams, 10 S. D. 332, 73 N. W. 72, 43 L. R. A. 287, 289, it was held that where an act forbids an appeal in cases where the amount recovered is less than a fixed sum, and no reservation is made as to appeals previously taken, the act applies to appeals pending at the time of its approval. This seems to be on the ground that, if a law conferring jurisdiction is repealed without reservation, all pending causes fall with the law repealed. To the same effect see Baltimore, etc., R. Co. *v.* Grant, 98 U. S. 398, 25 L. ed. 231.

14. See Canada del Oro Mines *v.* Collins, (Ariz. 1894) 36 Pac. 33; Crane *v.* Farmer, 14 Colo. 294, 23 Pac. 455. See also Richmond *v.* Milwaukee, 21 How. (U. S.) 80, 16 L. ed. 60; Murphy *v.* Byrd, Hempst. (U. S.) 211, 17 Fed. Cas. No. 9,947*a*.

Act conferring original jurisdiction.—Whitsitt *v.* Union Depot, etc., R. Co., 103 U. S. 770, 26 L. ed. 337, holding that although the act of 1875 gave the circuit courts of the United States original cognizance of suits of a civil nature arising under the constitution and laws of the United States when the value of the matter in dispute exceeds five hundred dollars, it did not change the jurisdiction of the supreme court of the United States for the review of judgments and decrees of such circuit courts.

where the constitution confers the right of appeal to the court of last resort from all final judgments in designated courts, a statute which denies the right in certain cases, according to the amount involved, is held to be void.[15]

4. Showing and Determination of Amount or Value — a. In General.[16] Broadly, the amount involved in controversy is the highest sum, according to the statutory limitation, for which judgment can be rendered.[17]

b. Necessity of Showing in General. Generally speaking, the value or amount in controversy must be made to appear affirmatively. If it cannot be ascertained the appeal will be dismissed,[18] and the burden is on appellant to establish the jurisdiction.[19] Mere uncertain inference or speculation is not sufficient.[20] On the other hand, if the pecuniary limitation is merely an exception to the general

15. Payne *v.* Davis, 2 Mont. 381; Smith *v.* Wheeler, 4 Okla. 138, 44 Pac. 203 — holding that the legislature can regulate the manner, but cannot deny the right, of appeal.

Contra.— Such a statute was held to be compatible with the constitution declaring that the supreme court, except in cases otherwise directed by the constitution, should have appellate jurisdiction only, which would be coëxtensive with the statute, under such restrictions or regulations, not repugnant to the constitution, as might from time to time be prescribed by law. Anderson *v.* Brown, 6 Fla. 299; Otoway *v.* Devall, 6 Fla. 302. So in McClain *v.* Williams, 10 S. D. 332, 73 N. W. 72, 43 L. R. A. 287, 289, it was held that such a statute was not void, the constitution conferring upon the court of last resort "appellate jurisdiction . . . under such regulations and limitations as may be prescribed by law." But, on a rehearing, it was held that under the article of the constitution which required that laws relative to courts should be of general and uniform operation in the state, the act was void, as it applied only to appeals in the circuit court, and that county courts had concurrent jurisdiction to the same extent in certain cases and were therefore courts of the same class or grade.

Application to law and equity cases.— Such a statutory provision was held to apply to chancery as well as to law cases, and in this respect was not in conflict with the constitution providing, in general terms, for the trial of chancery cases *de novo* by the supreme court. Andrews *v.* Burdick, 62 Iowa 714, 16 N. W. 275.

16. See 2 Cent. Dig. tit. "Appeal and Error," §§ 233 *et seq.*, 254 *et seq.*

17. Baber *v.* Pittsburg, etc., R. Co., 93 Ill. 342; Calder *v.* Police Jury, 44 La. Ann. 173, 10 So. 726; Forstall *v.* Larche, 39 La. Ann. 286, 1 So. 650; Holmes *v.* Oregon, etc., R. Co., 7 Sawy. (U. S.) 380, 9 Fed. 229; Aitken *v.* Doherty, 11 Manitoba 624.

Effect of increased valuation in answer.— Where plaintiff alleges that the personal property sued for is worth a specified sum, and claims a specified amount of damages for detention, defendant's allegation that the property is worth a larger sum will not enable him to appeal from the judgment, since no judgment could be rendered for more than justified by plaintiff's pleading. One can take judgment for no more than he asks. Thurston *v.* Lamb, 90 Iowa 363, 57 N. W. 875.

18. *Kansas.*—Packard *v.* Packard, 56 Kan. 132, 42 Pac. 335.

Kentucky.— York *v.* Riggan, 10 Ky. L. Rep. 816.

Louisiana.— Ducoing *v.* Billgery, 30 La. Ann. 250; Police Jury *v.* Fontaine, 11 Rob. (La.) 476; McRae *v.* Bushnell, 4 Mart. N. S. (La.) 483.

Missouri.— State *v.* Gill, 107 Mo. 44, 17 S. W. 758.

United States.—Parker *v.* Morrill, 106 U. S. 1, 1 S. Ct. 14, 27 L. ed. 72.

See 2 Cent. Dig. tit. "Appeal and Error," § 255.

The cause will not be remanded in order to establish the value of the property claimed in plaintiff's petition. Hunter *v.* Oelrich, Dall. (Tex.) 357.

Finding of state court.— A writ of error to the supreme court of appeals of Virginia will be dismissed where it appears that that court refused to entertain an appeal in the case on the ground that the matters involved were purely pecuniary, and that the amount in controversy was less than sufficient to give it jurisdiction under the state constitution. Callan *v.* Bransford, 139 U. S. 197, 11 S. Ct. 519, 35 L. ed. 144.

Showing interest sufficient to support appeal. State *v.* Miscar, 34 La. Ann. 834; Swan *v.* Bry, 21 La. Ann. 481. See also 2 Cent. Dig. tit. "Appeal and Error," § 259.

Sufficiency of evidence.— Petition in error sufficiently showing amount (Kemper *v.* Lord, 6 Kan. App. 64, 49 Pac. 638. See also McLane *v.* Evans, (Tex. 1900) 58 S. W. 723; May *v.* Rice, 101 U. S. 231, 25 L. ed. 797); injunction bond (Anderson *v.* Smith, 28 La. Ann. 649); value stated in conveyance (Kahn *v.* Kerngood, 80 Va. 342; Edwards *v.* Edwards, 29 La. Ann. 597).

Record showing, see *infra*, XIII.

19. Wilson *v.* Blair, 119 U. S. 387, 7 S. Ct. 230, 30 L. ed. 441. But an appeal will not be dismissed on the ground that certain claims were colusively assigned for the purpose of jurisdiction, unless such fact is made to appear. Filler *v.* Tyler, 91 Va. 458, 22 S. E. 235.

20. Hicks *v.* Ferd Heim Brewing Co., 7 Kan. App. 812, 52 Pac. 916; Wade *v.* Loudon, 30 La. Ann. 660; Huntington *v.* Saunders, 163 U. S. 319, 16 S. Ct. 1120, 41 L. ed. 174; Cameron *v.* U. S., 146 U. S. 533, 13 S. Ct. 184, 36 L. ed. 1077. But see Watson *v.* Brown, 7 Ky. L. Rep. 215.

appellate jurisdiction of the court, then, to defeat the jurisdiction, it must appear that the case falls within the exception.[21]

c. Determination from Pleadings — (I) *In General.* Ordinarily, the amount in controversy will be determined by the pleadings — the amount claimed on the one side and denied on the other.[22] This depends largely upon the statute, however. Sometimes the amount demanded by the party seeking a money judgment controls absolutely, in which case it must be ascertained by the conclusion or *ad damnum* of the declaration.[23] On the other hand, the amount demanded or the prayer of the pleading will not prevail over the facts pleaded.[24]

(II) *Reciprocal Right Shown by Pleadings.* If it appears from the

21. Peterson First Nat. Bank *v.* Bourdelais, 109 Iowa 497, 80 N. W. 553.

22. *Connecticut.*—Burke *v.* Grace, 53 Conn. 513, 4 Atl. 257, under a statutory provision limiting the right to an appeal "when the matter in demand," etc., holding that the amount is something to be seen on the face of the writ and is not to be determined in any other mode.

Georgia.— Taylor *v.* Blasingame, 73 Ga. 111, where the right to appeal is conferred upon either party in the event the principal claim or amount exceeds a fixed sum, and holding that, under such a provision, the exercise of the right depends upon the pleadings and not upon reductions which may be made upon a final hearing upon the testimony of witnesses or findings of the jury.

Illinois.— Stanton *v.* Kinsey, 151 Ill. 301, 37 N. E. 871, under a statute relating to appeals from the court of appeals (a court of intermediate appellate jurisdiction) in actions where there was no trial on an issue of fact. See also *infra*, III, C, 4, h, (II).

Indiana.— Flora *v.* Russell, (Ind. App. 1892) 31 N. E. 936, as between the jurisdiction of the supreme court and the court of appeals, holding that on an appeal by plaintiff from an order sustaining a demurrer to two of his counts, where he sued in three counts for an amount in each within the jurisdiction of the supreme court, and a conditional verdict was rendered on the third count for a less amount, the supreme court had jurisdiction, because it could not be said that the plaintiff would not recover more than the amount of the verdict on the counts to which the demurrer had been sustained.

Iowa.— Ruiter *v.* Plate, 77 Iowa 17, 41 N. W. 474; Ellithorpe *v.* Reidesil, 71 Iowa 315, 32 N. W. 238; Ormsby *v.* Nolan, 69 Iowa 130, 28 N. W. 569.

Kentucky.—Huff *v.* Logan, (Ky. 1901) 60 S. W. 483 (holding that, where the original petition did not state a cause of action and the amended petition sought to recover less than the jurisdictional amount, the sufficiency of the amendment would not be considered); Spiceland *v.* Shelton, 21 Ky. L. Rep. 863, 53 S. W. 274 (holding that, where the petition shows the principal of the debt to be less than the jurisdictional amount, an appeal will not lie though the judgment is for more than that amount and does not show that any part of it is interest); Schnabel *v.* Jacobs, 20 Ky. L. Rep. 1596, 49 S. W. 774.

Louisiana.— Taylor *v.* Almada, 50 La. Ann. 351, 23 So. 365.

Missouri.— Kane *v.* Kane, 146 Mo. 605, 48 S. W. 446, holding that, where no amount is specified in the petition, a judgment for the defendant is not appealable.

New York.— Zoeller *v.* Riley, 98 N. Y. 668, 7 N. Y. Civ. Proc. 303, 1 How. Pr. N. S. (N. Y.) 525, holding that, in an action not founded on contract, the amount demanded is the amount in controversy within the statutory provision. See also Van Gelder *v.* Van Gelder, 81 N. Y. 128; and *infra*, III, C, 4, h, (II).

Vermont.— Fisk *v.* Wallace, 51 Vt. 418.

Virginia.— Vaiden *v.* Bell, 3 Rand. (Va.) 448.

United States.— Washington, etc., R. Co. *v.* District of Columbia, 146 U. S. 227, 13 S. Ct. 64, 36 L. ed. 951 (insufficient allegation of value); Olney *v.* The Steamship Falcon, 17 How. (U. S.) 19, 15 L. ed. 43 (holding that a claim of "$1800 and upward" is too indefinite); Agnew *v.* Dorman, Taney (U. S.) 386, 1 Fed. Cas. No. 100.

Exemplary damages discretionary.— Where the complaint asks actual and exemplary damages, the amount in controversy is the aggregate, notwithstanding exemplary damages are not a matter of right, but discretionary with the court. Thompson *v.* Jackson, 93 Iowa 376, 61 N. W. 1004, 27 L. R. A. 92.

Sufficiency of the pleadings will not be considered. Williamson *v.* Brandenberg, 6 Ind. App. 95, 31 N. E. 369; Hayden *v.* Kallis, 6 Ky. L. Rep. 510.

23. Henigan *v.* Ervin, 110 Cal. 37, 42 Pac. 457; Chamberlain *v.* Cochran, 8 Pick. (Mass.) 522; Klein *v.* Allenbach, 6 Nev. 159; Dominion Salvage, etc., Co. *v.* Brown, 20 Can. Supreme Ct. 203.

24. Lockwood *v.* Knapp, 4 Conn. 257 (holding that the demand for damages would not be sufficient to confer jurisdiction where it appeared that the amount actually due and in suit was less than sufficient for that purpose); Williamson *v.* Brandenberg, 133 Ind. 594, 32 N. E. 834; Central City *v.* Treat, 101 Iowa 109, 70 N. W. 110; Nash *v.* Beckman, 86 Iowa 249, 53 N. W. 228; Shacker *v.* Hartford F. Ins. Co., 93 U. S. 241, 23 L. ed. 862. But where plaintiff claims a certain amount, and lays the *ad damnum* at a less amount, it is held that on a general verdict against him the amount claimed is the sum laid in the *ad damnum*. Scott *v.* Lunt, 6 Pet. (U. S.) 349, 8 L. ed. 423.

pleadings that one of the parties to the suit has an appealable interest, entitling him to appeal to the supreme court, the same right will be recognized in favor of his opponent.[25]

(III) *Parties Bound by Showing.* Where the plaintiff makes the requisite jurisdictional allegations as to the value of the property involved, he cannot, on appeal, deny the jurisdiction of the appellate court by showing a less valuation in order to obtain a dismissal of the appeal.[26]

d. Value of Property or Right. Upon the principle that, when the object of the suit is not to obtain a money judgment, but to obtain other relief, the amount involved must be determined by the value in money of the relief to plaintiff or of the loss to defendant, a pleading which does not allege such value is not sufficient to give the appellate court jurisdiction on an appeal from an adverse judgment,[27] though it is also held that such value may sufficiently appear from the evidence.[28] So, where the proceeding is such that the amount actually involved does not appear prior to the trial of the particular issues, the amount must be determined from the evidence.[29]

e. Finding of Value. Under a statute giving the right to appeal from a final judgment only when the matter in demand exceeds a fixed amount, it is held that the right of appeal depends not upon any finding by the court as to the value of the matter in demand, but solely upon the statement of the amount as it appears in the complaint as returned to the court.[30] But in other cases it appears that the finding of such value by the verdict is effective to control the right to appeal.[31]

25. Mutual Reserve Fund L. Assoc. *v.* Smith, 169 Ill. 264, 48 N. E. 208, 61 Am. St. Rep. 172; New Orleans, etc., R. Co. *v.* Barton, 43 La. Ann. 171, 9 So. 19; Penter *v.* Staight, 1 Wash. 365, 25 Pac. 469.

See 2 Cent. Dig. tit. "Appeal and Error," § 260.

26. Brown *v.* Citizens' Bank, 7 Kan. App. 811, 52 Pac. 907; Boggs *v.* Hays, 44 La. Ann. 859, 11 So. 222.

Effect of answer.— Defendant cannot increase value by alleging a greater value than that laid in the complaint, because no greater judgment could be rendered than the value alleged by plaintiff. Thurston *v.* Lamb, 90 Iowa 363, 57 N. W. 875.

27. Saux *v.* Patton, 34 La. Ann. 1155; Dugan *v.* Police Jury, 26 La. Ann. 673; Gast Bank Note, etc., Co. *v.* Fennimore Assoc., 147 Mo. 557, 49 S. W. 511; El Paso Water Co. *v.* El Paso, 152 U. S. 157, 14 S. Ct. 494, 38 L. ed. 396.

Salary fixed by law need not be alleged in suit involving right to office. Tish *v.* Collens, 21 La. Ann. 289.

28. People *v.* Horton, 64 N. Y. 58.

Where evidence was offered in the court below, but rejected, to show that the value of the office in dispute was over three hundred dollars, the evidence should have been received, and the case is appealable. Lanier *v.* Gallatas, 13 La. Ann. 175.

29. Payne *v.* Chicago, etc., R. Co., 170 Ill. 607, 48 N. E. 1053, holding that the direction of the creditor to summon a person as garnishee in an attachment does not indicate or determine the amount or nature of the claim against the garnishee; that in such case the amount involved must be determined from the evidence — as where no issue is taken on the answer of the garnishee and the parties proceeded to a trial and examination of witnesses as to whether the garnishee is indebted to the attachment debtor — and that if the evidence shows that if any judgment could have been rendered against the garnishee it must have been a judgment for less than the jurisdictional amount, an appeal will be dismissed as to such creditor. See also Gudgell *v.* Bath County Ct., 8 Ky. L. Rep. 677.

On a mere conflict of evidence as to value the court will take jurisdiction. Reinerth *v.* Rhody, 52 La. Ann. 2029, 28 So. 277.

30. Burke *v.* Grace, 53 Conn. 513, 4 Atl. 257.

31. Clarkson *v.* Clarkson, 1 Duv. (Ky.) 268; Herrin *v.* Pugh, 9 Wash. 637, 38 Pac. 213 (holding that, under the provision that the appellate jurisdiction of the supreme court shall not extend to civil actions where the value of the property does not exceed a certain amount, the mere recital by a claimant of attached property of its value in his affidavit does not, in the absence of a finding that its value exceeds that sum, give the court jurisdiction of an appeal by him); Brown *v.* Barry, 3 Dall. (U. S.) 365, 1 L. ed. 638 (holding that where the suit is for "seven hundred and seventy pounds, sterling money of Great Britain," and the value of the money is not averred, the verdict of the jury, finding the value, fixes the same for the purpose of determining the jurisdiction). See also Stirman *v.* Smith, 8 Ky. L. Rep. 781.

By statute providing that the supreme court shall not review any judgment unless the damages awarded, or, in replevin, the value found, exceeds a certain sum, see Denver First Nat. Bank *v.* Follett, (Colo. 1900) 62 Pac. 361; Stevenson *v.* Clarke, 2 Colo. App. 108, 29 Pac. 1031.

Release of value found.—In Bennett *v.* Butterworth, 8 How. (U. S.) 124, 12 L. ed. 1013,

f. Affidavit. It has been held that the affidavit filed for the writ in replevin may be looked to to ascertain the value of the property.[32] But, necessarily, it would seem, in cases in which the pleading or record must show the jurisdictional fact, the amount or value cannot be shown by affidavits in the appellate court.[33] On the other hand, however, where the matter in dispute does not appear from the pleadings or evidence, the rule of practice prevails in some jurisdictions to permit proof of some kind, even by affidavit, either before or after appeal, to show the fact.[34]

g. Amount Actually in Controversy — (1) *In General.* It is not always the sum demanded or claimed which controls, but that which is actually in controversy between the parties as the case stands in the appellate court,[35] to ascer-

which was a suit for the recovery of four slaves, whose value plaintiff alleged to be two thousand seven hundred dollars, the jury found a verdict for the plaintiff "for one thousand two hundred dollars, the value of the negro slaves in suit," and plaintiff thereupon released the judgment for one thousand two hundred dollars, the court adjudging that he recover of defendant the said slaves, and it was held that the case was within the appellate jurisdiction of the supreme court.

Judgment in attachment — Claim by third person.— In an action of assumpsit, commenced by attachment originating in the county court, the sheriff levied upon certain property of defendant in the attachment, and another person interposed a claim of property therein. Upon the trial of this claim a verdict was rendered against the claimant and judgment entered thereon, from which the claimant appealed to the circuit court, where the judgment was affirmed. The claimant then sought to bring the cause by writ of error to the supreme court. The judgment in the attachment suit was nearly three hundred dollars, but the value of the property levied upon was not stated. It was held that in determining the amount in controversy reference could be had to the judgment in the attachment suit. Brillis *v.* Blumenthal, 13 Fla. 577.

Certificate of trial judge — Pennsylvania.— The supreme court has no jurisdiction of an appeal from a judgment on a case stated in an action of ejectment where there is no certificate by the trial judge that the value of the land is greater than fifteen hundred dollars, as required by the Pennsylvania act of May 5, 1899 [Pa. Pamphl. L. (1899), p. 249, § 4]. Such an appeal will be remitted to the superior court. Matthews *v.* Rising, 194 Pa. St. 217, 44 Atl. 1067.

32. Rohe *v.* Pease, 189 Ill. 207, 59 N. E. 520; Morris *v.* Preston, 93 Ill. 215.

33. McGuirk *v.* Burry, 93 Ill. 118; Ashley *v.* Millett, 8 Ky. L. Rep. 536. See also The Elizabeth, L. R. 3 A. & E. 33.

Where value certified by trial judge.— Where there is nothing on the record to show whether the value of the property really in controversy is greater or less than one thousand dollars, evidence should be presented to the lower court so that a proper certificate may be made to determine the jurisdiction of the appellate court. *In re* Misselwitz, 177 Pa. St. 359, 35 Atl. 722.

34. Waters Pierce Oil Co. *v.* New Iberia, 47 La. Ann. 863, 17 So. 343; Gee *v.* Thompson, 39 La. Ann. 310, 1 So. 537; Testart *v.* Belot, 32 La. Ann. 603; Austin Real Estate, etc., Co. *v.* Bahn, 87 Tex. 582, 29 S. W. 646, 30 S. W. 430 (a suit in which it was unnecessary to allege or prove value); U. S. *v.* Trans-Missouri Freight Assoc., 166 U. S. 290, 17 S. Ct. 540, 41 L. ed. 1007; U. S. *v.* The Brig Union, 4 Cranch (U. S.) 216, 2 L. ed. 600. See also McCoy *v.* McCoy, 33 W. Va. 60, 10 S. E. 19.

See 2 Cent. Dig. tit. "Appeal and Error," § 257.

Affidavit on notice.— See Course *v.* Stead, 4 Dall. (U. S.) 22, 1 L. ed. 724.

Affidavit too late after dismissal of appeal. Richmond *v.* Milwaukee, 21 How. (U. S.) 391, 16 L. ed. 72.

Affidavit in opposition to jurisdiction.— Where, on an appeal by the children and heirs at law of a deceased married woman from a decree ordering her real estate to be sold for the payment of debts alleged to have been due from her to appellee, the face of the record shows the value of the property sufficiently to give the supreme court jurisdiction, and appellee has refused to appear in the supreme court, it is too late, upon a motion to set aside the judgment, to present extrinsic evidence of the actual value of the property. Dodge *v.* Knowles, 114 U. S. 436, 5 S. Ct. 1108, 1197, 29 L. ed. 296. See also Red River Cattle Co. *v.* Needham, 137 U. S. 632, 11 S. Ct. 208, 34 L. ed. 799.

Weight and sufficiency.— See Talkington *v.* Dumbleton, 123 U. S. 745, 8 S. Ct. 335, 31 L. ed. 313; Zeigler *v.* Hopkins, 117 U. S. 683, 6 S. Ct. 919, 29 L. ed. 1019; Gage *v.* Pumpelly, 108 U. S. 164, 2 S. Ct. 390, 27 L. ed. 668.

35. *Connecticut.*—Steavens *v.* Bass, 1 Root (Conn.) 127.

Indiana.— Dearborn County *v.* Kyle, 137 Ind. 421, 36 N. E. 1090.

Iowa.— Central City *v.* Treat, 101 Iowa 109, 70 N. W. 110; Schultz *v.* Holbrook, 86 Iowa 569, 53 N. W. 285.

Kansas.— Stinson *v.* Cook, 53 Kan. 179, 35 Pac. 1118.

Kentucky.— Logan *v.* Davis, 5 Ky. L. Rep. 424.

tain which the appellate court may look into the entire record.[36] Or, as otherwise stated, the amount is determined by the case as it stands in the appellate court rather than by the amount in controversy in the lower court.[37] This last statement, however, while consistent with the principle that the real amount in controversy will control, is not always broadly true, because sometimes it depends upon the conditions under which the review is sought.[38] The matter in controversy, however, must not only be of sufficient value, but the controversy in relation to the matter of such value must be continued by the appellate proceedings.[39]

(II) *Fictitious or Colorable Claim.* If the claim is merely colorable and fictitious demands are inserted in order to give jurisdiction, and this latter fact is made to appear, it is held in some cases that the court will refuse to entertain jurisdiction, because jurisdiction can no more be conferred by improper devices than it can be taken away in such manner.[40]

h. Particular Considerations in Determination of Amount or Value — (I) *Distinction Between Appeal by Plaintiff and by Defendant.* Ordinarily the amount claimed by plaintiff determines the appellate jurisdiction where

Louisiana.— Bush *v.* Bérard, 39 La. Ann. 899, 2 So. 790, holding that, on appeal from an assessment of taxes, the amount in dispute is the difference between the taxes due or the assessment assailed and those which would be due under the reduction sought.

Missouri.— May *v.* Jarvis-Conklin Mortg. Trust Co., 138 Mo. 47, 40 S. W. 122.

New York.— A. Hall Terra Cotta Co. *v.* Doyle, 133 N. Y. 603, 30 N. E. 1010, 44 N. Y. St. 900.

Virginia.— Atlantic, etc., R. Co. *v.* Reid, 87 Va. 119, 12 S. E. 222 (difference between an award of a second board of commissioners and that of a former board, to which latter the plaintiff in error made no objections, is the test of appellate jurisdiction); Campbell *v.* Smith, 32 Gratt. (Va.) 288.

West Virginia.— McKinney *v.* Kirk, 9 W. Va. 26.

Wisconsin.— Henk *v.* Baumann, 100 Wis. 28, 75 N. W. 313.

United States.— New England Mortg. Security Co. *v.* Gay, 145 U. S. 123, 12 S. Ct. 815, 36 L. ed. 646; East Tennessee, etc., R. Co. *v.* Southern Tel. Co., 112 U. S. 306, 5 S. Ct. 168, 28 L. ed. 746 (difference between assessment and value of entire property assessed is the matter in litigation in a dispute over the assessment of a jury of condemnation).

Canada.— Labelle *v.* Barbeau, 16 Can. Supreme Ct. 390.

See also *infra*, III, C, 4, h, (I), (II); and III, C, 4, h, (XIII).

Value as per stipulation given in admiralty. — Starin *v.* The Schooner Jesse Williamson, 108 U. S. 305, 2 S. Ct. 669, 27 L. ed. 730.

Particular error assigned.— But where the appeal is restricted by the amount involved it is held that the right is not limited by the amount affected by the error assigned, but by the amount involved in the action. Woolley *v.* Lyon, 115 Ill. 296, 6 N. E. 30.

Construction of pleading.— In the consideration of jurisdictional allegations, the court will be guided by the real pecuniary interest affecting the parties as disclosed by the pleading taken as a whole, and not by strained allegations of interests which could never be judicially ascertained and determined. Schwartz *v.* Firemen's Charitable Assoc., 41 La. Ann. 404, 6 So. 652.

36. *Illinois.*— Lewis *v.* Shear, 93 Ill. 121.

Indiana.— Keadle *v.* Siddens, 131 Ind. 597, 31 N. E. 362.

Louisiana.— Wilkins *v.* Gantt, 32 La. Ann. 929.

Missouri.— State *v.* Lewis, 96 Mo. 146, 8 S. W. 770; Kirchgraber *v.* Lloyd, 59 Mo. App. 59.

New York.— Campbell *v.* Mandeville, 110 N. Y. 628, 17 N. E. 866, 16 N. Y. St. 830; Roosevelt *v.* Linkert, 67 N. Y. 447.

Vermont.— Church *v.* Vanduzee, 4 Vt. 195.

Virginia.—Batchelder *v.* Richardson, 75 Va. 835.

Wisconsin.— Burkhardt *v.* Elgee, 93 Wis. 29, 66 N. W. 525, 1137.

United States.—Gray *v.* Blanchard, 97 U. S. 564, 24 L. ed. 1108.

37. Davis *v.* Webb, 46 W. Va. 6, 33 S. E. 97; Gordon *v.* Ogden, 3 Pet. (U. S.) 33, 7 L. ed. 592; Decker *v.* Williams, 73 Fed. 308.

38. Thus, as construing the expression "value in controversy," "matter in controversy," or "matter in dispute," as in effect of the same significance, see Vance *v.* Cox, 2 Dana (Ky.) 152; Logan *v.* Davis, 6 Ky. L. Rep. 137; Harman *v.* Lynchburg, 33 Gratt. (Va.) 37. But see Dashiell *v.* Slingerland, 60 Cal. 653, wherein the plaintiff's demand is held to control and distinguish earlier cases, in which the "matter in dispute" was the controlling provision of the law in force. See *infra*, III, C, 4, h, (I), (II).

39. Logan *v.* Davis, 6 Ky. L. Rep. 137; Hartsook *v.* Crawford, 85 Va. 413, 7 S. E. 538; Puyallup Light, etc., Co. *v.* Stevenson, 21 Wash. 604, 59 Pac. 504; Davis *v.* Webb, 46 W. Va. 6, 33 S. E. 97.

40. Block *v.* Kearney, 43 La. Ann. 381, 8 So. 916; Cox *v.* Carr, 79 Va. 28. See also Sherwin *v.* Colburn, 25 Vt. 613. As where the course of plaintiff on the trial, the nature of the action, and the evidence all show that the plaintiff could not seriously believe the demand for damages would be sustained. Lea *v.* Orleans, 46 La. Ann. 1444, 16 So. 456. Or

defendant prevails in the court below;[41] and so, if a plaintiff sues for an amount sufficient to confer appellate jurisdiction, this amount will control on appeal by him, notwithstanding he fails to recover the entire amount claimed,[42] unless plaintiff, by his own course, limits his claim to the amount awarded.[43] On the other hand, in many cases it is considered that while the amount in controversy as to a plaintiff who recovers nothing is the demand, as the judgment is then against him to that extent, yet, if he recovers a part of his demand, then the judgment is against him for that part only which he has failed to recover, and this difference is the criterion of appellate jurisdiction.[44] But however this may be, when defendant appeals it is held that, at least in the absence of a set-off or counterclaim,[45] the judgment, or the amount by the payment of which he may discharge himself, and not the amount of the plaintiff's claim, determines the right of appel-

as where it appears that there are included in the demand items which it is obvious should be rejected, and which, when rejected, leave the amount less than the jurisdictional amount. Schmidt *v.* Brown, 33 La. Ann. 416. See 2 Cent. Dig. tit. "Appeal and Error," § 207 *et seq.*

41. *California.*— Skillman *v.* Lachman, 23 Cal. 198, 83 Am. Dec. 96.

Indiana.— Morton Gravel Road Co. *v.* Wysong, 51 Ind. 4.

Kentucky.— Vance *v.* Cox, 2 Dana (Ky.) 152.

Missouri.— Kane *v.* Kane, 146 Mo. 605, 48 S. W. 446.

Pennsylvania.— Stewart *v.* Keemle, 4 Serg. & R. (Pa.) 72.

Virginia.— McCrowell *v.* Burson, 79 Va. 290.

United States.—Cooke *v.* Woodrow, 5 Cranch (U. S.) 13, 3 L. ed. 22.

42. *Arkansas.*— Reynolds *v.* Smeed, 1 Ark. 199.

California.— Dashiell *v.* Slingerland, 60 Cal. 653; Solomon *v.* Reese, 34 Cal. 28.

Louisiana.— Notwithstanding a plea of *res adjudicata* is sustained, and a part of the plaintiff's demand is dismissed, leaving in controversy less than the jurisdictional amount *pendente lite*, the supreme court is not divested of jurisdiction. Mehlé *v.* Bensel, 39 La. Ann. 680, 2 So. 201. Where defendant alleged in his answer that the land in dispute was of a value sufficient to confer appellate jurisdiction, and called upon his vendor in warranty for a judgment against him for that amount, and judgment was rendered in the action for the plaintiff for the land and for the defendant against the warrantor for a sum less than that alleged in the answer to be the value of the land, it was held that the appellate court had jurisdiction of an appeal by the warrantor. Huntington *v.* Bordeaux, 42 La. Ann. 346, 7 So. 553.

Ohio.— Draper *v.* Clark, 59 Ohio St. 336, 52 N. E. 832.

West Virginia.— Faulconer *v.* Stinson, 44 W. Va. 546, 29 S. E. 1011.

Canada.— Petrie *v.* Machan, 28 Ont. 504.

See 2 Cent. Dig. tit. "Appeal and Error," § 221.

43. Jewell *v.* Sullivan, 130 Ind. 574, 30 N. E. 789 (on appeal by plaintiff from a refusal of the trial court to enter judgment on a verdict in his favor for an amount less than the jurisdictional amount, though his original claim was much larger; and to the same point is Hepburn *v.* Lewis, 2 Call (Va.) 497); Weaver *v.* Cone, 189 Pa. St. 298, 42 Atl. 529 (failure to file exceptions to referee's report and appeal from judgment in favor of defendant on his exceptions to the report); Peters *v.* Carner, 183 Pa. St. 65, 38 Atl. 509 (appeal from a judgment for the defendant *non obstante veredicto*, assigning for error the refusal of the court to enter judgment on the verdict).

44. *Kentucky.*— Miller *v.* Yocum, 12 B. Mon. (Ky.) 421; Logan *v.* Davis, 6 Ky. L. Rep. 137.

Missouri.— Holker *v.* Hennessey, 141 Mo. 527, 42 S. W. 1090, 64 Am. St. Rep. 524, 39 L. R. A. 165, as to amount in dispute.

Ohio.— Draper *v.* Clark, 59 Ohio St. 336, 52 N. W. 832.

Virginia.— Batchelder *v.* Richardson, 75 Va. 835.

United States.— Carne *v.* Russ, 152 U. S. 250, 14 S. Ct. 578, 38 L. ed. 428; Devere *v.* Steamship Haverton, 137 U. S. 145, 11 S. Ct. 35, 34 L. ed. 603 [*distinguishing* Irvine *v.* The Steamship Hesper, 122 U. S. 256, 7 S. Ct. 1177, 30 L. ed. 1175, in that there the district court awarded eight thousand dollars, while the circuit court gave only four thousand two hundred dollars; but the case was one of salvage in which the value of the property was over one hundred thousand dollars, compensation being sought in such sum, proportioned to the value, as the court might deem meet and reasonable, and there was no finding of the district court which bound the supreme court, and, in case of a reversal, a much larger sum than the jurisdictional amount might have been awarded in addition to the sum which was awarded. Therefore, in that case, the difference between the judgment of the two courts in no respect represented the amount in dispute]; Hilton *v.* Dickinson, 108 U. S. 165, 2 S. Ct. 424, 27 L. ed. 688 [*distinguishing* earlier cases and holding that there was no difference, in principle, between the position of a plaintiff and that of a defendant; that plaintiff does not, any more than defendant, take a case up to secure what he has already got, but to get more.]

45. Hedley *v.* Geissler, 189 Ill. 172, 59 N. E. 580; Hall *v.* Spurgeon, 23 Ind. 73; Dunning *v.* Lacey, 96 Ky. 611, 16 Ky. L. Rep. 721, 29 S. W. 435; Pierce *v.* Wade, 100 U. S. 444, 25 L. ed. 735.

late jurisdiction.[46] In other jurisdictions the amount sought to be recovered by plaintiff in his pleading is the amount in controversy,[47] whether the appeal is by plaintiff or by defendant, this ruling, however, depending upon the particular language of the provision in this regard.[48]

(II) *On Appeals from Intermediate Courts.* The amount in controversy in the court of last resort is the amount which was in controversy or dispute in the intermediate appellate court.[49] And while the judgment of the intermediate appellate court is sometimes the criterion, because the statute confines the appellate jurisdiction of the court of last resort by the amount of the recovery in the former court, the jurisdiction of the court of last resort is often confined by the amount of such judgment because it is the only real matter in controversy. Thus, if the plaintiff is satisfied with the judgment in the court of first instance and the defendant appeals, that judgment is the only amount in controversy between the parties; and it is held that plaintiff cannot afterward appeal from a judgment adverse to him, notwithstanding his original demand was of sufficient amount.[50] As to defendant the rule prevails that the judgment recovered by plaintiff, and not the amount claimed by him, controls, and the application of this rule is continued upon the question of the finality of the judgment of the intermediate

46. *Arkansas.*— Reynolds *v.* Sneed, 1 Ark. 199.

Illinois.— Hedley *v.* Geissler, 189 Ill. 172, 59 N. E. 580.

Indiana.— Cincinnati, etc., R. Co. *v.* McDade, 111 Ind. 23, 12 N. E. 135.

Kansas.— Richmond *v.* Brummie, 52 Kan. 247, 34 Pac. 783.

Kentucky.— Hill *v.* Booth, (Ky. 1900) 58 S. W. 993.

Missouri.— McGregor *v.* Pollard, 130 Mo. 332, 32 S. W. 640. But while the judgment recovered by the plaintiff may be of such an amount as to justify an appeal to the intermediate court of appeals, instead of to the supreme court, if that judgment is reversed at the instance of the defendant and the cause remanded, the amount in dispute immediately becomes as it originally was before any judgment was rendered; and, if such original amount is sufficient to permit an appeal to the supreme court, the plaintiff may appeal from a judgment entered for the defendant on the second trial. Hennessy *v.* Bavarian Brewing Co., 145 Mo. 104, 46 S. W. 966, 68 Am. St. Rep. 554, 41 L. R. A. 385.

Ohio.— Draper *v.* Clark, 59 Ohio St. 336, 52 N. W. 832.

Virginia.— Cash *v.* Humphreys, 98 Va. 477, 36 S. E. 517; Gage *v.* Crockett, 27 Gratt. (Va.) 735.

West Virginia.— Faulconer *v.* Stinson, 44 W. Va. 546, 29 S. E. 1011.

United States.— Lamar *v.* Micou, 104 U. S. 465, 26 L. ed. 774; Walker *v.* U. S., 4 Wall. (U. S.) 163, 18 L. ed. 319.

Canada.— Massey-Harris Co. *v.* McLaren, 11 Manitoba 370; Ontario, etc., R. Co. *v.* Marcheterre, 17 Can. Supreme Ct. 141.

See 2 Cent. Dig. tit. "Appeal and Error," § 220.

47. *California.*— Dashiell *v.* Slingerland, 60 Cal. 653.

Georgia.— Brown *v.* Robinson, 91 Ga. 275, 18 S. E. 156; Taylor *v.* Blasingame, 73 Ga. 111, both of which cases were decided under a code provision making the principal demand or damages claimed in the pleadings control.

Iowa.— Rand *v.* Binder, (Iowa 1898) 75 N. W. 505.

Nevada.— Klein *v.* Allenbach, 6 Nev. 159, construing the constitutional provision conferring jurisdiction where the demand should exceed a fixed amount, and *following* Solomon *v.* Reese, 34 Cal. 28, in the construction of similar language.

Texas.— Mobley *v.* Porter, (Tex. Civ. App. 1899) 54 S. W. 655.

Washington.— Bleecker *v.* Satsop R. Co., 3 Wash. 77, 27 Pac. 1073, under a provision making the original amount in demand the criterion. See also Penter *v.* Staight, 1 Wash. 365, 25 Pac. 469.

Canada.— Citizens' Light, etc., Co. *v.* Parent, 27 Can. Supreme Ct. 316, under a provision that "whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded, and not that recovered, if they are different."

48. See *supra*, note 47.

49. Grounds *v.* Ralph, 1 Ariz. 227, 25 Pac. 648; Barney *v.* The Steamboat D. R. Martin, 91 U. S. 365, 23 L. ed. 439.

50. *Illinois.*— Martin *v.* Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620.

New York.— Schenck *v.* Marx, 125 N. Y. 703, 26 N. E. 15, 34 N. Y. St. 607.

Virginia.— Lewis *v.* Long, 3 Munf. (Va.) 136.

United States.— Barney *v.* The Steamboat D. R. Martin, 91 U. S. 365, 23 L. ed. 439.

Canada.— Cossette *v.* Dun, 18 Can. Supreme Ct. 222 (holding that where the judgment appealed from by the defendant is of a sufficient amount, and on the appeal it was reduced below that sum, the plaintiff might further appeal, because the value of the matter in controversy as to him was the judgment of the court of first instance); Monette *v.* Lefebvre, 16 Can. Supreme Ct. 387.

appellate court.[51] These rules will be found to rest upon the reason that in the particular case the real amount in controversy is that which restricts the right to appeal therein, though a positive provision of statute will prevail in the construction thereof.[52] So, on the other hand, where the action of the first appellate court has the effect of opening the original controversy, it is held that the judgment of the trial court will then no longer control.[53]

51. *Illinois.*— Lake Erie, etc., R. Co. *v.* Faught, 129 Ill. 257, 21 N. E. 620. The same principle applies to an appeal by the complainant in an original bill from that part of the decree only which is against him on the cross-bill. Moore *v.* Williams, 132 Ill. 589, 24 N. E. 619, 22 Am. St. Rep. 563. Where the judgment of the trial court disposes of a sufficient amount, and this is affirmed in the intermediate court, the supreme court will have jurisdiction. Svanoe *v.* Jurgens, 144 Ill. 507, 33 N. E. 955. But where the intermediate appellate court affirms the judgment for a reduced amount, it is held that the amount of the original judgment is still the amount which limits the further right of appeal to the court of last resort, even where both appeals are by the defendant. Chicago, etc., R. Co. *v.* Davis, 159 Ill. 53, 42 N. E. 382, 50 Am. St. Rep. 143.

Indiana.— Cincinnati, etc., R. Co. *v.* McDade, 111 Ind. 23, 12 N. E. 135; Louisville, etc., R. Co. *v.* Coyle, 85 Ind. 516.

Mississippi.— Clark *v.* Gresham, 67 Miss. 203, 7 So. 223; Ward *v.* Scott, 57 Miss. 826.

New York.— Butterfield *v.* Rudde, 58 N. Y. 489.

Virginia.—Hay *v.* Pistor, 2 Leigh (Va.) 707.

Contra, Citizens' Light, etc., Co. *v.* Parent, 27 Can. Supreme Ct. 316, under a statute requiring that the amount by which the right of appeal is to be determined shall be that demanded and not that recovered, if such amounts are different.

52. Thus, in Illinois, under particular statutes prevailing, the amount depended upon the amount of the judgment of the intermediate appellate court, even though that judgment was in affirmance of a judgment in favor of the defendant below, or it depended upon the amount as shown by the pleadings and the record. The distinction was between the terms of the statute as applicable to actions *ex contractu,* in which the amount involved was made the test, and actions sounding in damages, in which the judgment was made the test irrespective of the claim set up, where such damages were speculative and depended upon proof. For example: in an action to recover damages growing out of alleged negligence a judgment of the appellate court, affirming a judgment of the trial court in favor of the defendant, is final. See Baber *v.* Pittsburg, etc., R. Co., 93 Ill. 342, where such statutes were fully examined; and in connection therewith see also Fitzpatrick *v.* Chicago, etc., R. Co., 139 Ill. 248, 28 N. E. 837; Crittenden *v.* Crittenden, 138 Ill. 511, 28 N. E. 747; Bradshaw *v.* Standard Oil Co., 114 Ill. 172, 28 N. E. 574; Brant *v.* Gallup, 111 Ill. 487, 53 Am. Rep. 638; Hankins *v.* Chicago, etc., R. Co., 100 Ill. 466; Balsley *v.* St. Louis, etc., R. Co., (Ill. 1886) 6 N. E. 474. By a later statute an appeal was provided to the supreme court from the intermediate appellate courts when the amount claimed in the pleadings exceeds a certain amount, in actions where there is no trial on an issue of fact in the lower court. Stanton *v.* Kinsey, 151 Ill. 301, 37 N. E. 871.

Dismissal of appeal.— Where no appeal can be taken from a particular court affirming or reversing a judgment of an inferior court, it has been held that the court of last resort still has jurisdiction to review the action of the intermediate appellate court when the latter neither affirms nor reverses the judgment of the inferior court, but refuses to exercise its jurisdiction on the ground of the amount involved. Evans *v.* Sanders, 10 B. Mon. (Ky.) 291. On the other hand, it has been held that the refusal of a court to award certiorari to review a judgment of a justice is not reviewable by the court of appeals where the amount involved is not sufficient to give the latter court jurisdiction. Farnsworth *v.* Baltimore, etc., R. Co., 28 W. Va. 815. And it is no objection that appellant will be remediless unless the court of last resort assumes jurisdiction, because the intermediate court, in proper cases, may be compelled by mandatory process to exercise its jurisdiction. Anderson *v.* Brown, 6 Fla. 299. And the dismissal of an appeal by the intermediate court is held to dispose of the decree appealed from as effectually as an affirmance. Moore *v.* Williams, 132 Ill. 589, 24 N. E. 619, 22 Am. St. Rep. 563. So, in Texas, where an appeal is allowed from a judgment of an intermediate appellate court upon an appeal from a justice's court where the judgment in the trial *de novo* or the amount in controversy exceeds a fixed amount, an appeal will not lie from a judgment of such intermediate appellate court dismissing an appeal from the justice's court unless the amount in controversy exceeds a prescribed sum. Allen *v.* Hall, (Tex. Civ. App. 1901) 60 S. W. 586; Gulf, etc., R. Co. *v.* Rowley, (Tex. Civ. App. 1893) 22 S. W. 182. Other cases have held to the contrary. Loper *v.* State, (Tex. Civ. App. 1891) 17 S. W. 1090; Williams *v.* Sims, (Tex. App. 1890) 16 S. W. 786, the latter relying upon Pevito *v.* Rodgers, 52 Tex. 581. This case, however, rather supports the first two cases above cited, holding that, where such an appeal was dismissed in the intermediate appellate court, the legal effect of the dismissal was precisely the same against appellant in that case as if it had resulted from a trial *de novo,* because it fixed upon him an absolute liability for the amount of the judgment of the justice of the peace of more than sufficient amount.

53. **Dismissal on appeal from justice.**— Thus, where defendant appeals from a judgment of a justice, and, upon the trial in the

(III) *Interest and Costs* — (A) *Rule Against Increasing Amount in Controversy.* The accumulation of interest after action brought will not confer appellate jurisdiction.[54] And, if plaintiff's claim or the amount involved in the suit is not sufficient to confer appellate jurisdiction at the time of the appeal, the appellate court can acquire no jurisdiction by subsequent enlargement of such claim or amount in controversy.[55] But where the matter in dispute has reference to the amount at the date of the judgment in the lower court, which includes interest on the verdict, such interest is properly considered in determining the appellate jurisdiction, as the amount of the whole judgment controls.[56]

(B) *Costs* — (1) Subject to Pecuniary Limitation. If a judgment or order relating to the payment of costs may be reviewable, upon the theory that the costs constitute the amount in controversy, the matter will at least come within the pecuniary restrictions of the statute.[57]

intermediate appellate court, the plaintiff is not confined to the recovery of the amount awarded by the justice, if his cause is dismissed on such appeal an appeal by him will lie to the supreme court. Beach *v.* Livergood, 15 Ind. 496. See also Anderson *v.* Coble, 26 Ind. 329.

Reversal of decree dismissing bill.— Where a decree dismissing a bill is reversed on defendant's appeal, and the cause is remanded with instructions to enter a decree for complainant for an amount within the jurisdiction of the supreme court, an appeal will lie to that court from the latter decree. Dougherty *v.* Hughes, 165 Ill. 384, 46 N. E. 229.

Cause remanded at defendant's instance.— So, where the plaintiff claims more than the jurisdictional amount and recovers less, and the judgment is reversed at his instance in the intermediate appellate court, and the cause is remanded for a new trial, as to the defendant the judgment in reversal involves the full amount of the plaintiff's claim. Draper *v.* Clark, 59 Ohio St. 336, 52 N. E. 832.

54. Keiser *v.* Cox, 116 Ill. 26, 4 N. E. 384; Dufresne *v.* Guévremont, 26 Can. Supreme Ct. 216. But see, otherwise, Griffin *v.* Harriman, 74 Iowa 436, 38 N. W. 139; Penter *v.* Staight, 1 Wash. 365, 25 Pac. 469 — wherein the amount claimed had been demanded before suit, on account of which it was said the proper judgment would have been for the principal, with interest thereon to the date of the judgment; and therefore it was proper that the prayer of the complainant should be for more than the bare principal.

See 2 Cent. Dig. tit. "Appeal and Error," § 276 *et seq.*

55. *Arizona.*— Johnson *v.* Tully, (Ariz. 1887) 12 Pac. 567.

Connecticut.— Denison *v.* Denison, 16 Conn. 34.

Indiana.— Cincinnati, etc., R. Co. *v.* Grames, 135 Ind. 44, 33 N. E. 896.

Iowa.— Hays *v.* Chicago, etc., R. Co., 64 Iowa 593, 21 N. W. 98, holding that where, on appeal to the circuit court from a judgment of a justice of the peace, the case is triable on the petition in the justice's court, the interest on the judgment cannot be added so as to give the supreme court jurisdiction on appeal.

Louisiana.— Rogers *v.* Goldthwaite, 32 La. Ann. 48.

New York.— Van Gelder *v.* Van Gelder, 81 N. Y. 128; Josuez *v.* Conner, 75 N. Y. 156.

Utah.— Openshaw *v.* Utah, etc., R. Co., 6 Utah 268, 21 Pac. 999, holding that, where a judgment whose principal sum would not authorize an appeal, says nothing of interest, the supreme court of the United States will have no jurisdiction on error to the supreme court of Utah, notwithstanding the statute in Utah allows interest on judgments.

United States.— Western Union Tel. Co. *v.* Rogers, 93 U. S. 565, 23 L. ed. 977; Knapp *v.* Banks, 2 How. (U. S.) 73, 11 L. ed. 184.

56. Massachusetts Ben. Assoc. *v.* Miles, 137 U. S. 689, 11 S. Ct. 234, 34 L. ed. 834. So, where a judgment in the district court of a territory is affirmed by the supreme court of the territory, and at the date of the affirmance the interest, added to the original judgment, was sufficient to give the supreme court of the United States jurisdiction, the value of the matter in dispute was to be determined by the amount due at the time of the judgment of the supreme court of the territory. Benson Min., etc., Co. *v.* Alta Min., etc., Co., 145 U. S. 428, 12 S. Ct. 877, 36 L. ed. 762; Zeckendorf *v.* Johnson, 123 U. S. 617, 8 S. Ct. 261, 31 L. ed. 277.

Unauthorized amendment of judgment.— Where a judgment was entered on a verdict, but was afterward amended, on defendant's *ex parte* motion, to include interest on the verdict, which interest was not claimed by the plaintiff, it was held that this would not make the matter in dispute exceed the jurisdictional amount so as to bring the case within the jurisdiction of the supreme court. Northern Pac. R. Co. *v.* Booth, 152 U. S. 671, 14 S. Ct. 693, 38 L. ed. 591.

57. Perry *v.* Quackenbush, 105 Cal. 299, 38 Pac. 740 (holding that the jurisdiction depends upon the demand made by the plaintiff in the *ad damnum* clause of the complaint; and, where the amount of costs claimed is less than the jurisdictional amount, an order, made at the final judgment and striking out a cost-bill, is not appealable); Doyle *v.* Wilkinson, 120 Ill. 430, 11 N. E. 890 (holding that where, upon affirming a judgment by the court of appeals, the costs are taxed by the clerk, such costs constitute a simple money demand and the action of the court of appeals in overruling a motion to retax will not be reviewed

(2) Costs Excluded as Incidental to Action — (a) In General. The matter in dispute relates entirely to the subject-matter of the action, and, as costs are merely incidental to the action, they cannot be added to the demand sued for in order to confer appellate jurisdiction;[58] and where the jurisdiction is made to depend upon the amount of the judgment recovered or the amount in controversy, exclusive of costs, costs cannot be included, and an appeal from a judgment for costs only will not lie.[59] But, where the amount involved in the trial court is sufficient to confer appellate jurisdiction, it will not be affected by the fact that the court orders part of the amount to be paid as costs;[60] and, where costs are taxed as a part of the judgment and the statute extends the right to appeal to cases in which a particular amount is recovered, it is held that the costs constitute a part of the judgment in determining such jurisdictional amount.[61]

(b) Damages. So the including of statutory damages in a judgment will not confer jurisdiction on appeal, as such damages are merely incidental to the matter in dispute;[62] but where the statute provides specifically for the recovery of a particular item as a part of the damages sustained, such item is not costs, but is a part of the damages sustained, and as such is considered as a part of the amount in controversy.[63]

where the amount of the costs is not sufficient to give the supreme court jurisdiction); Dougart's Succession, 42 La. Ann. 516, 7 So. 794.

Costs taxed after decision of appellate court.—Where a judgment was affirmed without taxing costs and, after the mandate had been remitted, the costs, amounting to less than the jurisdictional amount of the appellate court, were taxed in the lower court, it was held that a writ of error brought up only the proceedings subsequent to the mandate, and, the amount involved being insufficient, there was no jurisdiction. Sizer *v.* Many, 16 How. (U. S.) 98, 14 L. ed. 861.

58. Henigan *v.* Ervin, 110 Cal. 37, 42 Pac. 457; Votan *v.* Reese, 20 Cal. 89; Bradenberger *v.* Regler, 68 Iowa 300, 27 N. W. 247; Payne *v.* Davis, 2 Mont. 381.

Attorney's fee.— An attorney's fee, claimed and allowed in an action, has been considered as costs incidental to the cause, and therefore is no part of the original amount in controversy. Durand *v.* Simpson Logging Co., 21 Wash. 21, 56 Pac. 846. But it is different where the attorney's fee is a distinct item of indebtedness under a contract. Mayer *v.* Stahr, 35 La. Ann. 57. See also *infra*, III, C, 4, h, (III), (B), (2), (b).

Special order after final judgment.— But, under the constitutional provision that the supreme court shall have appellate jurisdiction in all cases in equity except such as arise in justices' courts, and also in all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, shall amount to three hundred dollars, it is held that the supreme court has jurisdiction of an appeal from a special order made after final judgment in favor of the plaintiff in a divorce suit requiring the defendant to pay counsel fees and costs to enable the plaintiff to contest the defendant's motion for a new trial, although the amount involved in such appeal is less than three hundred dollars [*overruling* Langan *v.* Langan, 83 Cal. 618, 23 Pac. 1084, as well as Fairbanks *v.* Lampkin, 99 Cal. 429, 34 Pac. 101, in so far as the last case holds to the contrary.]

59. *Colorado.*— Pitkin County *v.* Aspen Min., etc., Co., 1 Colo. App. 125, 27 Pac. 875.

Indiana.— Jeffersonville, etc., R. Co. *v.* Harrold, 3 Ind. App. 592, 30 N. E. 158.

Kansas.— Missouri Pac. R. Co. *v.* Yawger, 52 Kan. 691, 35 Pac. 814, holding that an appeal will not lie from an order on a motion to retax costs, though the costs exceed the jurisdictional amount. And where compensation allowed is in the nature of costs, appellate jurisdiction cannot be assumed for the purpose of reviewing an order allowing such compensation. Greer *v.* Thompson, 5 Kan. App. 643, 47 Pac. 547.

Kentucky.— Moore *v.* Boner, 7 Bush (Ky.) 26, holding, however, that when the title to land is put in issue, in which class of cases the code contains no exception to the right of either party to appeal, a judgment as to costs is appealable.

Wisconsin.— State *v.* Kellogg, 97 Wis. 532, 73 N. W. 22.

United States.— City Nat. Bank *v.* Hunter, 152 U. S. 512, 14 S. Ct. 675, 38 L. ed. 534.

60. Voigt *v.* Kersten, 164 Ill. 314, 45 N. E. 543.

61. Winn *v.* Sanborn, 10 S. D. 340, 73 N. W. 96.

62. Zabriskie *v.* Torrey, 20 Cal. 173; Kiernan *v.* Germaine, 62 Miss. 75 (holding that the damages given by statute as an incident to a recovery in the circuit court against a defendant who appeals from the judgment of a justice of the peace are to be excluded in determining the sufficiency of the amount in controversy with regard to the appellate jurisdiction of the supreme court); Melson *v.* Melson, 2 Munf. (Va.) 542, upon the same point as the last case. But see Woolley *v.* Lyon, 115 Ill. 296, 6 N. E. 30.

63. Tullerton *v.* Cedar Rapids, etc., R. Co., 101 Iowa 156, 70 N. W. 106; Clark *v.* Ford, 7 Kan. App. 332, 51 Pac. 938; Louisville, etc., R.

(3) Interest Due on Amount Claimed. Where interest on a principal amount is a part of the claim or subject-matter involved in the controversy, such interest will be considered as determining appellate jurisdiction,[64] and interest which is not given *eo nomine* — as upon a contract ascertaining the sum payable — but which is a part of the damages, is to be included in the amount in controversy in determining appellate jurisdiction.[65] But it is also held that, under provisions conferring appellate jurisdiction in cases in which the amount in controversy, exclusive of interest and costs, shall reach a fixed sum, interest accruing after the action is instituted, as well as that embraced in the amount sued on should be excluded.[66]

(4) Proceeding Involving Former Judgment. Costs which are to be excluded in estimating the amount or value in controversy, however, are the costs of the action in which the judgment appealed from is rendered. In a new and independent suit, in which the judgment, embracing costs, is involved as the matter in controversy, the whole judgment, including costs, will constitute the matter in dispute.[67] And where the statute authorizes the same ruling with

Co. *v.* Sanders, 11 Ky. L. Rep. 53; Gulf, etc., R. Co. *v.* Werchan, 3 Tex. Civ. App. 478, 23 S. W. 30.

64. *California.*— Skillman *v.* Lachman, 23 Cal. 198, 83 Am. Dec. 96.

Louisiana.— Bruno *v.* Oviatt, 48 La. Ann. 471, 19 So. 464. Before this, and holding otherwise, see Boagni *v.* Gordon, 34 La. Ann. 1052. But it is the amount due and demanded which determines the right of appeal. Rogers *v.* Goldthwaite, 32 La. Ann. 48.

New York.—Mitchell *v.* Pike, 17 Hun (N. Y.) 142. Where plaintiff sued for injuries to personal property, it was held that, on appeal by the defendant from a judgment awarding damages with interest, the matter in controversy in the court of appeals is the amount of the judgment as rendered, including the interest, and if that, excluding costs, is not less than the jurisdictional amount, the court has jurisdiction to review the judgment, though a different rule restricts the plaintiff, as upon an appeal by him the sum demanded in the complaint becomes material. Graville *v.* New York Cent., etc., R. Co., 104 N. Y. 674, 10 N. E. 539.

Virginia.— Stratton *v.* Mutual Assur. Soc., 6 Rand. (Va.) 22.

West Virginia.— Arnold *v.* Lewis County Ct., 38 W. Va. 142, 18 S. E. 476, involving the consideration of interest as a part of the amount in controversy to give the court of last resort jurisdiction to review the judgment of the circuit court in favor of the defendant, on the trial of the cause brought to that court by certiorari to a justice's court, in which judgment had been rendered for plaintiff for an amount of damages less than that sued for, with interest.

United States.— Woodward *v.* Jewell, 140 U. S. 247, 11 S. Ct. 784, 35 L. ed. 478 (as to computation of interest where amount of claim was reduced by payments before suit to an amount below appellate jurisdiction, but exclusive of interest); The Steamer Rio Grande *v.* Otis, 19 Wall. (U. S.) 178, 22 L. ed. 60.

When the pleading must be looked to.— Where a cause is dismissed in the district court and the decree is affirmed in the circuit court, the supreme court must look to the appellant's claim in order to determine whether it exceeds the jurisdictional amount so as to give the supreme court jurisdiction, for no computation of interest up to the time of the judgment or decree will be made if the interest is not specially claimed. Udall *v.* The Steamship Ohio, 17 How. (U. S.) 17, 15 L. ed. 42. See also Hays *v.* Chicago, etc., R. Co., 64 Iowa 593, 21 N. W. 98.

An erroneous ascertainment of interest in excess of one hundred dollars, when an adjudication, and not a mere clerical error, is appealable to the court of last resort. Wick *v.* Dawson, (W. Va. 1900) 37 S. E. 639.

65. Schultz *v.* Tessman, 92 Tex. 488, 49 S. W. 1031, which was a suit, for damages for the breach of a contract, in which the sum payable was not ascertained.

66. Wagner *v.* Kastner, 79 Ind. 162; Clark *v.* Collins, (Ky. 1901) 60 S. W. 369 [and, where the petition shows that the principal of the debt sued for is less than the jurisdictional amount, an appeal will not lie though the judgment is for more than the jurisdictional amount and does not show that any part of it is interest. Spiceland *v.* Shelton, 21 Ky. L. Rep. 863, 53 S. W. 274; but, under an earlier statute, see Orth *v.* Clutz, 18 B. Mon. (Ky.) 223, holding that as, by the revised statute, before the code of practice, interest as well as costs had been expressly excluded from the computation of the jurisdictional amount, the exclusion by the code of practice of costs only from such computation raised a rational presumption that interest was not intended to be excluded]; State *v.* Recorder of Mortgages, 33 La. Ann. 14, under the constitutional provision that the appellate jurisdiction of the supreme court should extend to all cases when the matter should exceed a fixed sum exclusive of interest; and distinguishing prior cases under an earlier constitutional provision extending such jurisdiction to cases when the matter in dispute should exceed a certain sum, without mentioning interest.

67. *Kansas.*— McClelland *v.* Cragun, 54 Kan. 599, 38 Pac. 776.

respect to costs as it does with respect to the fine imposed, in a suit to subject premises to the payment of the fine and costs, both are taken as constituting the amount in controversy.[68] So, in a suit brought to vacate a judgment, as the judgment bears interest from its date, the amount in controversy is the judgment with such interest computed.[69]

(IV) *Aggregate of Claims, Interests, or Judgments*—(A) *In General.* Several and separate interests of different appellees cannot be united so as to make up the jurisdictional amount where such parties could not have united their interests if a recovery had been had against them.[70] Neither co-defendants nor co-plaintiffs can unite their separate and distinct interests for the purpose of giving appellate jurisdiction.[71]

(B) *Consolidation.* Where two suits, though by the same plaintiff, against

Kentucky.— Nashville, etc., R. Co. *v.* Mattingly, 101 Ky. 219, 19 Ky. L. Rep. 373, 40 S. W. 173; Haycroft *v.* Walden, 14 Ky. L. Rep. 892 (motion to quash execution); Tribble *v.* Deatheridge, 10 Ky. L. Rep. 156 (appeal from judgment dismissing petition for an injunction against execution on judgment).

West Virginia.— Clevenger *v.* Dawson, 15 W. Va. 348.

Wisconsin.— Mayo *v.* Hansen, 94 Wis. 610, 69 N. W. 344, 59 Am. St. Rep. 918, 36 L. R. A. 561.

Canada.— Turcotte *v.* Dansereau, 26 Can. Supreme Ct. 578, holding that an opposition, filed under the provisions of articles 484 and 487 of the code of civil procedure of Lower Canada for the purpose of vacating a judgment entered by default, is a judicial proceeding within the meaning of section 29 of the supreme and exchequer courts act; and, where the appeal depends upon the amount in controversy, there is an appeal to the supreme court of Canada if the amount of principal and interest due at the time of the filing of the opposition under the judgment sought to be annulled is of the sum or value of two thousand dollars.

Contra.— See Oglesby *v.* Helm, 26 La. Ann. 61; Cooke *v.* Piles, 2 Munf. (Va.) 151.

68. State *v.* McCulloch, 77 Iowa 450, 42 N. W. 367.

69. Dryden *v.* Wyllis, 51 Iowa 534, 1 N. W. 703; Schwartz *v.* Schmidt, 37 La. Ann. 41; State *v.* Police Jury, 34 La. Ann. 95, jurisdiction of a proceeding for an order to compel a levy of a tax to pay a judgment which with interest added, exceeds the jurisdictional amount.

70. Payne *v.* Chicago, etc., R. Co., 170 Ill. 607, 48 N. E. 1053; Chamberlin *v.* Browning, 177 U. S. 605, 20 S. Ct. 820, 44 L. ed. 906. See also Louisiana Western R. Co. *v.* Hopkins, 33 La. Ann. 806; Ready *v.* New Orleans, 27 La. Ann. 169.

In Gibson *v.* Shufeldt, 122 U. S. 27, 7 S. Ct. 1066, 30 L. ed. 1083, 1085, Mr. Justice Gray lays down this general rule: "That the joinder in one suit of several plaintiffs or defendants, who might have sued or been sued in separate actions, does not enlarge the appellate jurisdiction; that when property or money is claimed by several persons suing together, the test is whether they claim it under one common right, the adverse party having no interest in its apportionment or distribution among them, or claim it under separate and distinct rights, each of which is contested by the adverse party; that when two persons are sued, or two parcels of property are sought to be recovered or charged, by one person in one suit, the test is whether the defendant's alleged liability to the plaintiff, or claim to the property, is joint or several; and that, so far as affected by any such joinder, the right of appeal is mutual, because the matter in dispute between the parties is that which is asserted on the one side and denied on the other." See also Handley *v.* Stutz, 137 U. S. 366, 11 S. Ct. 117, 34 L. ed. 706.

Appeal by one partner.— In a suit against a partnership in which the members are jointly bound, for an amount within the jurisdiction of the court of appeals, one of the defendants may alone appeal, though his part of the joint liability is not sufficient to give the court of appeals jurisdiction. Broussard *v.* Babin, McGloin (La.) 286.

71. *Illinois.*—Martin *v.* Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620.

Kentucky.—Oswald *v.* Morris, 92 Ky. 48, 13 Ky. L. Rep. 355, 17 S. W. 167.

Louisiana.— State *v.* Judges, (La. 1901) 29 So. 892; Landry *v.* Caffery Cent. Sugar Refinery, etc., Co., 104 La. 757, 29 So. 349. But *compare* Colt *v.* O'Callaghan, 2 La. Ann. 984.

Pennsylvania.— Jennings' Estate, 195 Pa. St. 406, 45 Atl. 1055.

Virginia.— White *v.* Valley Bldg., etc., Co., 96 Va. 270, 31 S. E. 20.

West Virginia.— Fleshman *v.* Fleshman, 34 W. Va. 342, 12 S. E. 713.

United States.— Chamberlin *v.* Browning, 177 U. S. 605, 20 S. Ct. 820, 44 L. ed. 906; Henderson *v.* Wadsworth, 115 U. S. 264, 6 S. Ct. 40, 29 L. ed. 377. Where plaintiffs, on behalf of themselves and all others who may join them, bring a suit to foreclose a railroad mortgage, given to secure bonds in excess of five thousand dollars, it was held that the suit does not involve more than that amount if the overdue bonds and coupons held by the plaintiffs are less and the other bondholders do not see fit to join in the suit. Bruce *v.* Manchester, etc., R. Co., 117 U. S. 514, 6 S. Ct. 849, 29 L. ed. 990.

See 2 Cent. Dig. tit. "Appeal and Error," § 276 *et seq.*

different defendants, involve the same issues and are tried together, but are not in fact consolidated, separate judgments being rendered in each, they cannot be tried together upon the question of appellate jurisdiction.[72] And where separate suits involve separate and distinct demands, or subject-matters entirely disconnected and independent, appellate jurisdiction cannot be aided by consolidation;[73] but, on the other hand, it is held that where several suits by the same plaintiff against the same defendant are essentially one, and are thus properly consolidated, the aggregate amount of the claim may be taken as sufficient to confer appellate jurisdiction.[74]

(c) *Distinct Judgments.* Separate judgments cannot be added together in order to give jurisdiction; though the legal questions involved may be identical, the judgments are entirely distinct.[75] But it is held that where one party has

72. Bradley *v.* Milwaukee Mechanics Ins. Co., 147 Mo. 634, 49 S. W. 867. But see Marshall *v.* Fall, 9 La. Ann. 92.

Cross-causes of damage in admiralty.— Cross-causes of damage, each in the sum of one hundred pounds, were heard at the same time and upon the same evidence, and a decree was pronounced in the first cause, dismissing it; by the decree in the second cause the defendant's ship was pronounced solely to blame. By agreement the amount of damage was referred to the assessors of the court and the owners of the ship pronounced to be solely to blame entered two appeals in the court of admiralty, one against the decree in each cause, and it was held that the two suits could not be considered as one on appeal; that if the damage decreed to be due in the cause in which the ship was pronounced to be to blame did not exceed fifty pounds, then, under the legislative act providing that no appeal shall be allowed unless the amount decreed or ordered to be due shall exceed that sum, the appeal must be dismissed. The Elizabeth, L. R. 3 A. & E. 33.

73. Harrison *v.* Moss, 41 La. Ann. 239, 6 So. 528 (holding that where several creditors sequester and attach their debtor's property, and the amount in each case is less than that fixed for the jurisdiction of the appellate court, that court cannot acquire jurisdiction by reason of the consolidation of the causes for the convenience of the trial); Louisiana Western R. Co. *v.* Hopkins, 33 La. Ann. 806 (holding that the right to embrace several landholders in one expropriation suit does not make the judgment appealable according to the aggregate amount allowed all the defendants, but that each defendant represents a separate and distinct action); Lawson *v.* Bransford, 87 Va. 75, 12 S. E. 108; Garneau *v.* Port Blakely Mill Co., 20 Wash. 97, 54 Pac. 771 (holding that the consolidation of a number of actions by different plaintiffs against the same defendant will not invest the appellate court with jurisdiction where the amount involved in each case is less than that fixed for the jurisdiction of the appellate court). See also Clay *v.* Blair, 4 Ky. L. Rep. 629.

By consent.— Where the plaintiff's claim against each of several defendants was less than the jurisdictional amount, but the cases were consolidated by consent, thus making the aggregate of the claims of sufficient jurisdictional amount, it was held that an appeal would lie. Ballio *v.* Prudhome, 8 Mart. N. S. (La.) 338. So, where, by agreement, several cases at law were consolidated with an equity cause, and, without objection, were tried together as an equity cause, it was held that the amount involved in the consolidated cause would be sufficient to confer appellate jurisdiction. Tuthill Spring Co. *v.* Smith, 90 Iowa 331, 57 N. W. 853. But where the jurisdiction of the appellate court is limited to two thousand dollars, such court has no jurisdiction of two consolidated causes, in one of which the amount demanded is four hundred dollars and in the other (in which the defendant in the former suit is plaintiff), the amount demanded is sixteen hundred dollars, as in no event could a judgment be rendered for an amount in excess of sixteen hundred dollars. Davis *v.* Bargas, 41 La. Ann. 313, 6 So. 469.

On appeal.—After several appeal cases have been consolidated into one case for trial, with the consent of the parties and by order of the appellate court, it is too late for appellants to attack the jurisdiction as to one of the alleged causes, on the ground that the amount involved therein is too small to bring it within the statute allowing appeal. Reynolds *v.* Neal, 91 Ga. 609, 18 S. E. 530.

74. Devries *v.* Johnston, 27 Gratt. (Va.) 805, involving the consolidation of three suits, by the same plaintiff against the same defendant, to enforce the payment, by attachment and sale of the same land, of three notes payable at different times. So where, by order of court, three rules, which had been taken by an executor upon an adjudication at a succession sale of three different properties, to show cause why the adjudication should not be complied with, had been consolidated and a single judgment rendered, the aggregate amount in dispute, and not that involved in each rule, will determine the appellate jurisdiction. Justus' Succession, 47 La. Ann. 302, 16 So. 841.

75. *Colorado.*— Spangler *v.* Green, 21 Colo. 505, 42 Pac. 674, 52 Am. St. Rep. 259.

Illinois.— Aultman, etc., Co. *v.* Weir, 134 Ill. 137, 24 N. E. 771.

Kentucky.— Fehler *v.* Gosnell, 99 Ky. 380, 18 Ky. L. Rep. 238, 35 S. W. 1125; Clarkson *v.* Clarkson, 1 Duv. (Ky.) 268.

two judgments, the aggregate amount of which exceeds the jurisdictional limit, the court will take jurisdiction as to such party.[76]

(D) *Several Claims by Same Party.* Action on several independent claims presented by the same party is not reviewable where such action does not involve the jurisdictional amount in connection with either claim.[77] So the combining of several claims in different counts has been held to be insufficient to confer jurisdiction where no one of such claims is by itself sufficient for the purpose,[78] and an appeal will not lie if the matter in dispute is below the jurisdictional amount, notwithstanding it forms a part of a series of claims which, in the aggregate, would exceed that sum.[79] But, on the other hand, if the subject-matter consists of two claims owned by the same person, and the judgment affects the whole of such subject-matter, the aggregate value is the amount in controversy,[80] and, if the object of the suit is to cancel tax inscriptions for a number of years, and plaintiff summarizes all of the assessments and asks the cancellation on grounds common to all, this is not a cumulation of separate and distinct demands.[81]

(E) *One Judgment Apportioned Against Several Defendants.* On the other hand, it has been held that, where the verdict is for plaintiff for a gross sum sufficient to confer appellate jurisdiction upon the supreme court, an appeal by the several defendants will lie notwithstanding the amount so awarded is apportioned among them so that the liability of none would alone be sufficient to confer appellate jurisdiction.[82]

Louisiana.—State ex rel. MacKenzie, 39 La. Ann. 508, 2 So. 68.

United States.— Hunt *v.* Bender, 154 U. S. 556, 14 S. Ct. 1163, 18 L. ed. 915.

Judgments in same action.— Where a cross-bill was filed in a foreclosure suit, and the court decreed the payment of the amount then due on the mortgage note as a condition to granting the relief sought, and at a subsequent hearing decreed that seven hundred and eighty-five dollars be paid or the cross-bill would be dismissed, it was held that the amounts of the two decrees could not be added together to give the court jurisdiction on appeal. Akin *v.* Cassiday, 105 Ill. 22.

76. See *infra*, III, C, 4, h, (IV), (D).

77. Barlow *v.* Thrall, 11 Vt. 247, wherein the owner of two separate and independent claims presented them to commissioners of an insolvent estate, and it was held that such owner was not entitled to an appeal where the commissioners did not disallow twenty dollars on either one of the demands; that the sum disallowed on both demands could not be added together to make up that amount.

78. Denison *v.* Denison, 16 Conn. 34.

Same cause in two counts.— Where the complaint states substantially the same cause of action in different paragraphs, the amount claimed is not the sum of the demands in the different paragraphs, but the actual amount sued for. Keadle *v.* Siddens, 131 Ind. 597, 31 N. E. 362; Riffe *v.* Wabash R. Co., 137 Mo. 186, 38 S. W. 921.

79. Mayor *v.* Maignan, 8 Mart. N. S. (La.) 122.

80. Filler *v.* Tyler, 91 Va. 458, 22 S. E. 235; Hawley *v.* U. S., 108 U. S. 543, 2 S. Ct. 846, 27 L. ed. 820 — holding that, where several judgment plaintiffs unite in an application for a mandamus to compel payment of judgments against a town on its bonds, the several judgments could not be added together so as to make up the jurisdictional amount, but that the aggregate amount of two judgments in favor of one of plaintiffs would confer such jurisdiction as to that plaintiff. See also Tebbe *v.* Police Jury, 34 La. Ann. 137.

Claims assigned pending suit.— Where the amount claimed in a bill was less than the jurisdictional amount, but in the progress of the cause another creditor came in by petition, alleging his claim against the common debtor, and praying that it might be allowed and payment enforced against the same property pursued by plaintiff, who afterward took a *bona fide* assignment of the claim for value and without recourse, which, added to his own debt, made a sum exceeding that required for jurisdiction, it was held that the two debts together constituted the matter and the aggregate the amount in controversy, and that the fact that the assignment was made pending the suit did not affect the question. Fink *v.* Denny, 75 Va. 663. But it was held otherwise where the assignment was not recognized by the master, nor by the court confirming the master's report. McCarty *v.* Hamaker, 82 Va. 471, 5 S. E. 538.

81. Palmer *v.* Board of Assessors, 42 La. Ann. 1122, 8 So. 487.

82. Priest *v.* Deaver, 21 Mo. App. 209 [*followed* in Washington Sav. Bank *v.* Butchers', etc., Bank, 61 Mo. App. 448, which was a proceeding in equity, brought, by creditors against defendants, to recover from the latter unpaid balances of stock subscriptions, the total claim of plaintiffs on which the action was prosecuted amounting to more than sufficient to confer appellate jurisdiction, but the liability of each of the defendants being less than such amount, and it was held that, on an appeal to the court of appeals by defendants, the aggregate amount of the recovery would control and the cause should be transferred to the supreme court].

(F) *Claim or Denial of Right Under Single Title.* Where several claim under the same title, the validity of which title is necessarily involved in the determination of the cause, the appellate court will have jurisdiction notwithstanding the individual claim of no one of plaintiffs exceeds the jurisdictional amount, if the whole amount involved is sufficient.[83] And if the appellee's right to sue and stand in judgment against appellants on a contract, by the terms of which contract more than the jurisdictional amount is involved, is denied by appellants, this constitutes the matter in dispute.[84]

(G) *One Judgment Sought by Several Plaintiffs.* Where several plaintiffs seek one judgment for the enforcement of their several demands, such demands being founded upon the same liability, the aggregate amount is held to furnish the criterion of appellate jurisdiction in their behalf,[85] and the defendant may appeal, notwithstanding the interest of each plaintiff in the judgment would not be of sufficient amount to confer jurisdiction.[86] And where the amount decreed against appellant consists of several sums in favor of various appellees, no one of which sums would come within the jurisdictional amount, but the aggregate of which amount is in excess of the jurisdictional limit, it is held that the defendant may appeal.[87]

(H) *Value of Property as Subject-Matter of Suit.* Where the proceeding is by or against several parties jointly, concerning a subject-matter of sufficient value to confer appellate jurisdiction, and in which separate and distinct

83. New Orleans Pac. R. Co. *v.* Parker, 143 U. S. 42, 12 S. Ct. 364, 36 L. ed. 66.

One of several articles in insurance policy. — But where the property in suit is specifically insured for less than the jurisdictional amount, and is of less value than such amount, the court will not have jurisdiction though the policy is a general one, embracing other objects aggregating in value more than the jurisdictional amount. Werlein *v.* Merchants' Mut. Ins. Co., 30 La. Ann. 1399.

84. Vinet *v.* Bres, 48 La. Ann. 1254, 20 So. 693.

Where several plaintiffs, who are the owners of property fronting on a shell-road which has been constructed by one under a contract with a municipal corporation, sue to annul the contract, and the defendant sets up a reconventional demand against each of the plaintiffs for the amount due him under the contract, the matter in dispute is the amount involved in the contract; and, as the defendants could appeal if the judgment had been against them on the validity of the contract, the plaintiffs can appeal from a judgment sustaining the reconventional demand of the defendant who built the road under the contract. Ready *v.* New Orleans, 27 La. Ann. 169.

85. State *v.* Jumel, 34 La. Ann. 201, holding that where several pensioners of the state seek in one action to enforce the payment of their pensions, the supreme court will have jurisdiction of an appeal by them if the aggregate amount of the pensions exceeds the amount fixed for such jurisdiction.

86. Armstrong *v.* Vicksburg, etc., R. Co., 46 La. Ann. 1448, 16 So. 468. In a proceeding for a peremptory mandamus to compel a tax-collector to collect a tax which had been levied for the joint benefit of the relators, the value of the matter in dispute is measured by the whole amount of the tax, and not by the separate amounts into which it is to be divided when collected. Davies *v.* Corbin, 112 U. S. 36, 5 S. Ct. 4, 28 L. ed. 627.

Award to libellants in admiralty. — Where salvors unite in a claim for a single salvage service rendered jointly by them, the owner of the property is entitled to an appeal where the sum decreed exceeds the jurisdictional amount, although the lower court apportioned the recovery among the salvors according to their respective merits. Sinclair *v.* Cooper, 103 U. S. 754, 26 L. ed. 322. And where a decree in admiralty awarded to libellant an amount in excess of that fixed for appellate jurisdiction, but apportioned it according to the interests of the owner of the vessel and of the trustee for the owners of the cargo, the amount in controversy is the entire sum awarded. Propeller Burlington *v.* Ford, 137 U. S. 386, 11 S. Ct. 138, 34 L. ed. 731 [*distinguishing Ex p.* Baltimore, etc., R. Co., 106 U. S. 5, 1 S. Ct. 35, 27 L. ed. 78, in that the owners of the vessel and the owners of the cargo were parties to the proceeding, and recovered the amounts due them respectively].

87. Rhodes *v.* Scholfield, 6 La. Ann. 251; Powers *v.* Yonkers, 114 N. Y. 145, 21 N. E. 132, 22 N. Y. St. 768; Hicks *v.* Roanoke Brick Co., 94 Va. 741, 27 S. E. 596; Shields *v.* Thomas, 17 How. (U. S.) 3, 15 L. ed. 93. See also Staib's Estate, 188 Pa. St. 238, 41 Atl. 528, 43 Wkly. Notes Cas. (Pa.) 194; Handley *v.* Stutz, 137 U. S. 366, 10 S. Ct. 117, 34 L. ed. 706, this last case being an appeal by stock-holders from decree in suit by creditors to compel payment of unpaid subscriptions to capital stock.

Severance. — Where, in a suit against a municipal corporation, plaintiffs whose individual claims did not exceed the jurisdictional amount united with other creditors whose claims exceeded the necessary sum, such plain-

claims are not set up, the value of such property will determine the appellate jurisdiction.[88]

(I) *Retention of Cause When One Interest Sufficient.* In some cases it is held that where the claims of all the appellants, except that of one of them, are below the sum necessary to confer appellate jurisdiction, but the questions as to all are identical and their interests are inseparable, the appellate court will retain jurisdiction as to all.[89]

(V) *Set-Off and Counter-Claim*[90] — (A) *Where Ad Damnum Controls.* The cases are not in accord as to the effect of a counter-claim or set-off upon the amount in controversy. Where the appellate jurisdiction depends strictly upon the amount demanded in the complaint, as shown by the *ad damnum* clause, it is held that such jurisdiction is determined in no way by the counter-claim set up by defendant.[91]

tiffs would not be permitted to sever and thus deprive the city of the benefit of an appeal. Bowman *v.* New Orleans, 27 La. Ann. 501.

88. Lartigue *v.* White, 25 La. Ann. 291, 325; Friend *v.* Wise, 111 U. S. 797, 4 S. Ct. 695, 28 L. ed. 602, which last was ejectment against several defendants for the same parcels of land, the complaint alleging the joint entry and ouster, and the answer not setting up separate claims to the distinct parcels, the judgment being for the recovery of possession against all the defendants jointly. See also U. S. *v.* Trans-Missouri Freight Assoc., 166 U. S. 290, 17 S. Ct. 540, 41 L. ed. 1007, which was a bill seeking the dissolution of an association of common carriers organized for the regulation of rates, and *distinguishing* Gibson *v.* Shufeldt, 122 U. S. 27, 7 S. Ct. 1066, 30 L. ed. 1083. See *supra*, note 70.

Creditors' suit.— In Louisiana, it is held that where several creditors of a common debtor join as plaintiffs in a suit to annul acts of the debtor in fraud of their rights, in confession of judgment, while such creditors cannot cumulate their claims for the purpose of conferring jurisdiction when none of the several claims comes within the jurisdictional amount, yet where the suit is not merely to avoid the transactions complained of in their effects upon the plaintiffs, but the prayer is to annul them outright and the judgments sought to be annulled amount to more than the jurisdictional amount, the annulment sought is the annulment of such judgments in the case of each plaintiff, and the appellate jurisdiction will be maintained. Marx *v.* Meyer, 50 La. Ann. 1229, 23 So. 923. See also *infra*, III, C, 4, h, (XVII).

89. Craig *v.* Williams, 90 Va. 500, 18 S. E. 899, 44 Am. St. Rep. 934; Witz *v.* Osburn, 83 Va. 227, 2 S. E. 33. See also *infra*, III, C, 4, h, (XX).

Appeal from decree on cross-bill.— Where complainant in the original bill appeals only from that part of the decree which found against him on an issue made by the cross-bill, and that part of the decree requires him to pay an amount under the jurisdictional limit, such amount only will control the appellate jurisdiction. Moore *v.* Williams, 132 Ill. 589, 24 N. E. 619, 22 Am. St. Rep. 563. But see Telford *v.* Garrels, 132 Ill. 550, 24 N. E. 573, as to an appeal by both parties, complainants in original and cross-bill, where, if jurisdiction can be sustained over an appeal from the decree on the cross-bill notwithstanding an amount is involved less than the jurisdictional amount, it must be upon the ground that the matter in both suits is based upon the same contracts, and that the suits are so intimately connected that they cannot be separated.

On general motion to dismiss appeal see The Steamer Rio Grande *v.* Otis, 19 Wall. (U. S.) 178, 22 L. ed. 60.

90. See 2 Cent. Dig. tit. "Appeal and Error," § 237.

91. Lord *v.* Goldberg, 81 Cal. 596, 22 Pac. 1126, 15 Am. St. Rep. 82.

Plaintiff's appeal.— Where plaintiff's right to appeal depends upon the amount demanded, under the rule that such demand is the amount in controversy, even though plaintiff's judgment be for less, his right to appeal is not affected by the fact that the recovery is reduced by an offset or judgment rendered for defendant on the offset. Gillespie *v.* Benson, 18 Cal. 409.

Defendant's appeal.— So, upon the principle that where plaintiff is appellant and the judgment is for the defendant the jurisdiction of the appellate court is determined by the amount claimed by the complaint, but that if the appeal is by plaintiff from a judgment in his own favor, then the amount in dispute is the difference between the amount of the judgment and the sum claimed by the complaint, it was held that, if the appeal is taken by defendant from a judgment in his own favor where he has set up a counter-claim, the amount in dispute is the difference between the amount of the judgment and the sum claimed in the counter-claim, and if that judgment is for more than the jurisdictional amount less than he claims in his answer, the appellate court will have jurisdiction. Skillman *v.* Lachman, 23 Cal. 198, 83 Am. Dec. 96. But inasmuch as it was afterward settled in this state that the *ad damnum* controlled plaintiff's right to appeal, even though he recovered a judgment for less than that which he claimed, it would seem that the above rule, applied to a defendant, would no longer prevail. See *infra*, III, C, 4, h, (I).

Judgment of justice — Amount on interme-

(B) *Claims Must Be Independently Sufficient.* And so it is held that the respective claims of the parties must be of sufficient jurisdictional amount in order to give either party the right to a review,[92] or that such opposing claims cannot be added, as there must be a possibility of a judgment, in favor of the party complaining, for an amount sufficient to confer jurisdiction.[93]

(C) *Rule Permitting Consideration of Opposing Claims* — (1) As Showing Real Amount in Controversy. On the other hand, opposing claims may be considered, but to what extent the cases are not in harmony. It would seem that the rule best supported is that, while plaintiff's demand cannot be added to defendant's demand, if such aggregate amount does not represent the actual amount in controversy, yet, if the difference between the recovery as had and that which the opposite party sought represents a loss to the latter of an amount equal to that fixed for the appellate jurisdiction, this, as to him, is the real amount in controversy, and confers jurisdiction.[94]

(2) Extent of Rule. This rule, however, generally has reference to the real controversy between the parties in respect of the amount. Thus, where the amount of the set-off or counter-claim is itself not sufficient, and that is the only

diate appeal.— In an action for damages, laid at two hundred dollars, brought before a justice, the defendant pleaded an offset of one hundred and twenty-five dollars, and appealed from a judgment in favor of the plaintiff for twenty-five dollars. On the appeal the defendant recovered a judgment for eighty-six dollars, and it was held, on appeal by plaintiff, that the amount in dispute was less than two hundred dollars. Simmons *v.* Brainard, 14 Cal. 278.

92. Crosby *v.* Crosby, 92 Tex. 441, 49 S. W. 359. So, in Louisiana, it is held that the appealable character of the principal and reconventional demands must each be separately established, and both demands cannot be cumulated in order to bring the case within the appellate jurisdiction. Watkins Banking Co. *v.* Louisiana Lumber Co., 47 La. Ann. 581, 17 So. 143. But, on the other hand, it is held that where defendant denies liability on the entire demand of plaintiff, and pleads in reconvention an amount exceeding the acknowledged indebtedness, the test of the jurisdiction is the amount of the judgment which could be rendered in the case. State *v.* Judges, 48 La. Ann. 672, 19 So. 617. See also Allen *v.* Nettles, 39 La. Ann. 788, 2 So. 602. And where plaintiff's demand is less than the jurisdictional amount, but the reconventional demand is above that amount, it is held that the appeal will be noticed only so far as it affects the whole demand. Lamorere *v.* Avery, 32 La. Ann. 1008.

93. Fox *v.* Duncan, 60 Iowa 321, 14 N. W. 358, wherein the above general principle was recognized, but both the plaintiff's claim and the counter-claim were below the appellate jurisdiction, and the plaintiff had judgment for an amount which, added to the counter-claim, would not bring the whole amount within the appellate jurisdiction and the ruling was made on appeal by the plaintiff. This case was founded upon Madison *v.* Spitsnogle, 58 Iowa 369, 12 N. W. 317, wherein it was held that it must appear from the pleading that it was possible to have rendered judgment against one of the parties for an amount coming within that fixed for appellate jurisdiction, though this case, like that first cited, was one in which the ultimate loss to the party complaining was not of an amount equal to that fixed for appellate jurisdiction by adding to the amount of the judgment against him the whole amount which he claimed against the successful party. Other cases in this state are of the same character, where jurisdiction has been denied. See Schultz *v.* Holbrook, 86 Iowa 569, 53 N. W. 285; Buckland *v.* Shephard, 77 Iowa 329, 42 N. W. 311.

94. *Illinois.*— Smith *v.* Rountree, 185 Ill. 219, 56 N. E. 1130.

Indiana.— Coles *v.* Peck, 96 Ind. 333, 49 Am. Rep. 161.

Kentucky.— Walter A. Wood Mowing, etc., Mach. Co. *v.* Taylor, 20 Ky. L. Rep. 536, 46 S. W. 720.

New York.— Charlton *v.* Scoville, 144 N. Y. 691, 39 N. E. 394.

West Virginia.— Faulconer *v.* Stinson, 44 W. Va. 546, 29 S. E. 1011.

United States.— Buckstaff *v.* Russell, 151 U. S. 626, 14 S. Ct. 448, 38 L. ed. 292. And on the disallowance of defendant's counter-claim plaintiff cannot, by remitting a part of the judgment, defeat defendant's right to a writ of error. Block *v.* Darling, 140 U. S. 234, 11 S. Ct. 832, 35 L. ed. 476. See also New Orleans, etc., R. Co. *v.* McNeely, 47 La. Ann. 1298, 17 So. 798.

Election to reduce judgment by deducting claims.— Where, upon a libel to recover damages against ship-owners, a decree passed against them for more than the jurisdictional amount, with leave to set off a sum due them for freight, which set-off would reduce the amount decreed against them to less than the jurisdictional amount, and the party electing to make the set-off, saving his right to appeal, the reduced decree was held to be the final decree, from which no appeal would lie. Sampson *v.* Welsh, 24 How. (U. S.) 207, 16 L. ed. 632.

amount in controversy, the defendant cannot appeal;[95] but where the defendant, by counter-claim or set-off, demands a sum sufficient to give the appellate court jurisdiction, and is defeated, as by a peremptory instruction or an improper dismissal of his claim, an appeal will lie on the amount of his claim.[96]

(D) *Where No Affirmative Judgment Rendered on Counter-Claim.* Where no affirmative judgment is rendered in favor of defendant upon a counter-claim, but the result of the suit is simply to defeat plaintiff's claim, his right to appeal depends upon the amount put in controversy by his complaint.[97]

(E) *Improper Counter-Claim or Set-Off.* Where the answer does not properly set up the counter-claim,[98] or where it clearly appears that a demurrer to the counter-claim was properly sustained,[99] or that the set-off was a mere specious pretense,[1] or is improperly filed in the particular action, the amount of such counter-claim will not be considered in determining appellate jurisdiction.[2] Where the evidence tends to show that the demand is not of sufficient amount to confer appellate jurisdiction, it may thus sufficiently appear that the real amount in controversy is less than that required to permit an appeal, notwithstanding the demand set up is for a greater sum,[3] though it is also held that the amount of a set-off is the proper test of appellate jurisdiction and that it makes no difference that the claim is found in the end not sustained by the evidence to the amount set up.[4] And the court will not necessarily acquire jurisdiction because what purports to be a counter-claim for a sufficient amount appears on the record, but it will examine the pleading and, if no facts are found which would enable defendant to give proof under the counter-claim or recover on it, the appeal will be disposed of as if no counter-claim had been filed.[5]

(F) *Where Counter-Claim Is Abandoned.* Where a counter-claim or plea of reconvention is abandoned on the trial, it cannot be considered for the purpose of giving appellate jurisdiction.[6]

(G) *Where Amount of Judgment Recovered Controls.* Where the right to review depends upon the amount of the judgment recovered, it has been held

95. Fordsville Banking Co. *v.* Gray, (Ky. 1901) 60 S. W. 372. Where defendant admitted plaintiff's demand but set up a counter-claim, and judgment was rendered for plaintiff for the balance, it was held that on plaintiff's appeal the only amount in controversy was the amount of the counter-claim. Pennie *v.* Continental L. Ins. Co., 67 N. Y. 278. And, on defendant's appeal in such a case, the amount of the judgment in favor of the plaintiff is the test. Kendrick *v.* Spotts, 90 Va. 148, 17 S. E. 853.

96. Ward *v.* Rhorer, 21 Ky. L. Rep. 947, 53 S. W. 649; Conrad *v.* De Montcourt, 138 Mo. 311, 39 S. W. 805; Faulconer *v.* Stinson, 44 W. Va. 546, 29 S. E. 1011 [*distinguishing* between the disallowance of a set-off and the application of the amount claimed in the set-off to reduce plaintiff's judgment].

97. Pickett *v.* Hollingsworth, 6 Ind. App. 436, 33 N. E. 911.

98. Kurtz *v.* Hoffman, 65 Iowa 260, 21 N. W. 597, an answer which asked a judgment for costs only.

99. Chesapeake, etc., R. Co. *v.* Roe, 21 Ky. L. Rep. 1145, 54 S. W. 1.

1. Manchester Paper-Mills Co. *v.* Heth, (Va. 1893) 18 S. E. 189. See also Gagné *v.* Barrow, 15 La. Ann. 135.

2. Case Mfg. Co. *v.* Sweeny, 47 W. Va. 638, 35 S. E. 853, involving a set-off of unliquidated damages. See also Koch *v.* Godchaux, 46 La. Ann. 1382, 16 So. 181. *Contra*, see Lake Shore, etc., R. Co. *v.* Van Auken, 1 Ind. App. 492, 27 N. E. 119.

3. Berger *v.* Rife, 7 Kan. App. 639, 53 Pac. 152; Heraughty *v.* Grant, 6 Kan. App. 923, 50 Pac. 506 (upon the question of plaintiff's right to a review of a judgment in favor of defendant for an amount claimed by the latter, where, from the admissions of plaintiff, judgment could not have been rendered in his favor for a sum sufficient to confer appellate jurisdiction); Blake *v.* Krom, 128 N. Y. 64, 27 N. E. 977, 37 N. Y. St. 873; Bradstreet Co. *v.* Higgins, 112 U. S. 227, 5 S. Ct. 117, 28 L. ed. 715.

4. Faulconer *v.* Stinson, 44 W. Va. 546, 29 S. E. 1011.

5. Societa Italiana di Beneficenza *v.* Sulzer, 138 N. Y. 468, 34 N. E. 193, 52 N. Y. St. 904.

6. Schulz *v.* Tessman, 92 Tex. 488, 49 S. W. 1031 (failure to support claim by evidence); St. Clair *v.* Day, 89 N. Y. 357. Where a counter-claim was stricken out before a justice of the peace, an offer of evidence to support the counter-claim, on the trial of an appeal from said court without an application to file new pleadings, does not raise any question as to the ruling upon the striking out of the counter-claim, and an appeal to the supreme court from a judgment excluding the evidence will be dismissed. Gabriel *v.* Seattle, etc., R. Co., 7 Wash. 515, 35 Pac. 410.

that such judgment will be conclusive upon the right notwithstanding it embraces the allowance of a counter-claim.[7]

(II) *Set-Off of Judgments.* A denial of a motion by plaintiff to apply as a credit on his judgment another judgment, against him and in favor of defendant, is not reviewable when the amount of defendant's judgment is below the appellate jurisdiction, as that judgment is the matter in dispute.[8]

(VI) *Continuing and Future Rights or Liabilities*—(A) *In General.* A continuing order, under which payments for more than the jurisdictional amount may be enforced, is within the jurisdiction of the appellate court.[9]

(B) *Value of Future Right or Liability Involved.* But appellate jurisdiction may be sustained where the value of the right in controversy exceeds the jurisdictional amount, though such value is made up in part of the future exercise of the right, when the continuance of the right is fixed and the value thereof is certainly ascertainable,[10] and where plaintiff is entitled to a present judgment fixing his right to future amounts the latter are a part of the amount in controversy, upon the question of appellate jurisdiction.[11]

(VII) *Matter Must Be Directly Involved*—(A) *In General.* The subject-matter, the value of which is sought to be made the basis of the appellate

7. Roosevelt *v.* Linkert, 67 N. Y. 447; Troy Carriage Co. *v.* Bonell, 102 Wis. 424, 78 N. W. 752, in which last case, however, defendant admitted partial liability, which left a balance of an amount which, added to the judgment rendered in favor of defendant, would not make up the jurisdictional amount of the appellate court. In State *v.* Lewis, 96 Mo. 146, 8 S. W. 770, defendant denied plaintiff's cause of action and set up a counter-claim; the court found for plaintiff on his cause of action a sum less than that claimed, and for defendant on his counter-claim a sum less than that claimed, and rendered a judgment in favor of plaintiff for the difference, from which judgment the defendant appealed. It was held that the finding in defendant's favor on the counter-claim eliminated that dispute from the case, as plaintiff did not appeal, and that the finding for plaintiff on his cause of action in an amount less than that sued for eliminated from the remaining dispute the difference between the amount sued for and the amount found, as plaintiff had not appealed, and left in the case as the amount alone in dispute the amount found due to plaintiff.

8. Crandall *v.* Blen, 15 Cal. 406.

9. Langan *v.* Langan, 86 Cal. 132, 24 Pac. 852 (which was an order for alimony, the court saying, however, that if the order had been so limited by its terms that it could not be enforced for so much as the jurisdictional amount, the case would have been different); Garrett *v.* Mosby, 10 Ky. L. Rep. 723 (holding that a judgment in an action on a covenant for support during plaintiff's life, adjudging that defendant pay a certain sum per year until plaintiff's death, is for an annuity, and that, where there is no doubt that the value of such annuity exceeds the jurisdictional amount, an appeal will lie. This was with reference to the jurisdiction of the superior court, but in Watson *v.* Brown, 7 Ky. L. Rep. 215, referring to the jurisdiction of the court of appeals, it was held that, where an annual rent during appellant's life was involved and the uncertainty of its value and duration rendered it impossible to determine the amount, an appeal would be entertained); State *v.* Judge, 21 La. Ann. 65 (if the aggregate amount of instalments collectible under the judgment exceeds the jurisdictional amount). But an appeal from an order or judgment setting aside a fieri facias for alimony for one month, where the amount is below the jurisdiction of the court, cannot be entertained. Imhof *v.* Imhof, 45 La. Ann. 706, 13 So. 90. And an appeal will not lie, from an order on a rule to show cause why an execution should not issue for an instalment of a monthly allowance, where the amount for which the execution is ordered is less than the jurisdictional amount. Fletcher *v.* Henley, 13 La. Ann. 150. But when, at the time the claim for alimony had been disposed of, it amounted to a sum in excess of that required to give the supreme court jurisdiction, an appeal from the judgment fixing the amount will not be dismissed. Carroll *v.* Carroll, 48 La. Ann. 835, 19 So. 872.

10. U. S. *v.* Trans-Missouri Freight Assoc., 166 U. S. 290, 17 S. Ct. 540, 41 L. ed. 1007; Harris *v.* Barber, 129 U. S. 366, 9 S. Ct. 314, 32 L. ed. 697. *Compare* Harmony Club *v.* New Orleans Gas-Light Co., 42 La. Ann. 453, 7 So. 538; Willis *v.* Eastern Trust, etc., Co., 167 U. S. 76, 17 S. Ct. 739, 42 L. ed. 83.

In Miles *v.* Tomlinson, 110 Iowa 322, 81 N. W. 587, a proceeding against fence-viewers, to test the validity of their action in ordering plaintiff to build a fence, was held to be appealable because, in addition to other reasons, such action fixed not only plaintiff's original liability, but also his liability for the future maintenance of the fence, which might ultimately involve in its results more than an amount necessary to give the right of appeal.

11. State *v.* Judges, 48 La. Ann. 672, 19 So. 617, wherein plaintiff prayed for the execution of a contract in its entirety, and asked for a judgment for future commissions, to be paid in instalments. See also *infra*, III, C, 4, h, (VII).

jurisdiction, must be directly and actually in issue, and remote consequences and mere incidental or collateral claims will not be considered.[12] Where the suit is brought by an individual taxpayer to enjoin the issuance of bonds, the jurisdictional amount is not the amount of the whole issue sought to be enjoined, but the amount of the taxes which complainant will be compelled to pay.[13]

(B) *Collateral Effect of Judgment.* The jurisdictional amount must be determined by the amount in controversy in the particular proceeding, and not by the collateral effect of the decision upon claims by other parties,[14] or upon defendants in another proceeding by the same party.[15]

(VIII) *Effect of Agreement or Stipulation.* Where the case is or is not one within the appellate jurisdiction by reason of the sufficiency or insufficiency of the actual amount or value involved, the parties cannot, by agreement or stipulation, defeat such jurisdiction in the one case or confer it in the other.[16]

(IX) *Suit For Less Than Amount Actually Claimed.* It is no fraud on

12. *Illinois.*— Lamar Ins. Co. *v.* Gulick, 96 Ill. 619. But where A claimed an indebtedness against B in the sum of four hundred dollars, and B claimed that A owed him a much larger sum, and the matter was submitted to arbitration, which resulted in an award in favor of B for seven hundred and four dollars, it was held that, in a bill by A to set aside the award, more than one thousand dollars was involved, because the litigation involved not only the award, for if that should be sustained A would not only be deprived of his claim of four hundred dollars against B, but would have to pay, in addition thereto, seven hundred and four dollars. Moshier *v.* Shear, 100 Ill. 469.

Louisiana.— Thompson *v.* Lemelle, 32 La. Ann. 932; State *v.* Knight, 1 Mart. N. S. (La.) 700.

Washington.— Lotz *v.* Mason County, 6 Wash. 166, 32 Pac. 1049.

Wisconsin.— Oakley *v.* Hibbard, 2 Pinn. (Wis.) 21, 52 Am. Dec. 139.

United States.— Hollander *v.* Fechheimer, 162 U. S. 326, 16 S. Ct. 795, 40 L. ed. 985; Abadie *v.* U. S., 149 U. S. 261, 13 S. Ct. 836, 37 L. ed. 726 [*following* Cameron *v.* U. S., 146 U. S. 533, 13 S. Ct. 184, 36 L. ed. 1077], holding that an appeal to the supreme court from a decree, under the act of Feb. 25, 1885 (23 U. S. Stat. at L. p. 321), directing defendant to remove, within thirty days, a certain fence inclosing public lands, and, in default thereof, requiring the marshal to destroy the same, cannot be supported by showing that the fence is worth over five thousand dollars, as the fence is not the matter in dispute, nor does the decree deprive defendant thereof.

Contingent loss or damage which may accrue to complainant cannot be considered on a bill to enjoin the levy of an execution. Ross *v.* Prentiss, 3 How. (U. S.) 771, 11 L. ed. 824. *Contra*, Ludeling *v.* Garrett, 50 La. Ann. 118, 23 So. 94.

13. Colvin *v.* Jacksonville, 158 U. S. 456, 15 S. Ct. 866, 39 L. ed. 1053.

14. U. S. *v.* Wanamaker, 147 U. S. 149, 13 S. Ct. 279, 37 L. ed. 118, holding that, on a petition to the supreme court of the District of Columbia for a writ of mandamus to compel the postmaster-general to readjust a postmaster's salary, the jurisdictional amount must be determined by the amount in controversy in that particular proceeding.

15. Millaudon *v.* Judge, 6 Mart. N. S. (La.) 24; Hosack *v.* Crill, 197 Pa. St. 370, 47 Atl. 609 (holding that the amount actually in controversy controls, though the judgment may incidentally settle the right to future sums greatly in excess of such jurisdictional amount); Clay Center *v.* Farmers' L. & T. Co., 145 U. S. 224, 12 S. Ct. 817, 36 L. ed. 685; Rodier *v.* Lapierre, 21 Can. Supreme Ct. 69 (under statute, however, and holding that the particular case did not come within the statute, and to the same point see Dominion Salvage, etc., Co. *v.* Brown, 20 Can. Supreme Ct. 203, which was a suit for a call of ten per cent. on shares of stock). But in Stuart *v.* Valley R. Co., 32 Gratt. (Va.) 146, it was held, under the constitutional and statutory provisions relating to the subject in that state at that time, that, in a suit for the recovery of first two quotas on a number of shares of stock, while the judgment against defendant was for less than the jurisdictional amount, the court of appeals had jurisdiction because the subject in controversy was the validity of the subscription for the whole number of shares of stock, which exceeded in value the jurisdictional amount. See also Peychaud *v.* Weber, 25 La. Ann. 133.

Anticipating future levies.— In an action involving taxes, one year's levy alone can be considered, and future levies cannot be anticipated. Joint Dist. No. 70, etc. *v.* School Dist. No. 11, 9 Kan. App. 883, 51 Pac. 1060.

16. *Connecticut.*— Hurlbut *v.* Rogers, 2 Root (Conn.) 60.

Indiana.— Hotchkiss *v.* Jones, 4 Ind. 260, holding that where, on error by defendant, he sets up that the judgment had been rendered, by agreement, for more than was due in order to give the supreme court jurisdiction, the judgment will be affirmed without investigating the ground on which it was rendered.

Kentucky.— Colling *v.* Knefler, 10 Ky. L. Rep. 39.

Louisiana.— Connors *v.* Citizens' Mut. Ins. Co., 22 La. Ann. 330.

United States.— Willis *v.* Eastern Trust, etc., Co., 167 U. S. 76, 17 S. Ct. 739, 42 L. ed.

the jurisdiction of the appellate court that plaintiff sues for an amount of damages less than that which he demanded before suit, and which brings the amount under that permitting an appeal.[17]

(x) *Effect of Amendment Increasing Amount.* The trial court may permit an amendment increasing plaintiff's demand, and the amended pleading will determine the amount in controversy;[18] but a case cannot be brought within the appellate jurisdiction by an amendment made solely to inflate the demand.[19] And where the amount claimed in the petition in the court below is not sufficient to give appellate jurisdiction, no amendment of the petition after judgment can effect this result.[20]

(xi) *Reduction by Amendment or Remission.* The value of property in dispute, or the amount in controversy, as claimed in the plaintiff's amended or supplemental pleading, is held to be the test of appellate jurisdiction, though the amount or value originally alleged was greater.[21] If, before judgment, the successful party remits a part of the amount in controversy, and this reduces it below the appealable amount, there will be no appellate jurisdiction.[22] But appel-

83; Webster *v.* Buffalo Ins. Co., 110 U. S. 386, 4 S. Ct. 79, 28 L. ed. 172. But such a stipulation may be regarded in a particular case, together with other facts which appear in the record, as sufficient proof of the amount in controversy to sustain the jurisdiction. U. S. *v.* Trans-Missouri Freight Assoc., 166 U. S. 290, 17 S. Ct. 540, 41 L. ed. 1007. See also Matthews *v.* Rising, 194 Pa. St. 217, 44 Atl. 1067.

17. Western Union Tel. Co. *v.* Durham, 17 Tex. Civ. App. 310, 42 S. W. 792.

18. Thompson *v.* Jackson, 93 Iowa 376, 61 N. W. 1004, 27 L. R. A. 92; Metcalfe *v.* The Steamship Alaska, 130 U. S. 201, 9 S. Ct. 461, 32 L. ed. 923; Washer *v.* Bullitt County, 110 U. S. 558, 4 S. Ct. 249, 28 L. ed. 249. See also Danielson *v.* Andrews, 1 Pick. (Mass.) 156.

Contra — Rejected amendment.— On appeal by plaintiff the additional amount claimed in an amended petition, which was properly rejected, cannot, for the purpose of giving jurisdiction of the appeal, be added to that claimed in the original petition. Cully *v.* Louisville, etc., R. Co., 101 Ky. 319, 19 Ky. L. Rep. 490, 41 S. W. 21.

19. March *v.* McNeely, 36 La. Ann. 287. See also *supra*, III, C, 4, g, (II).

Amendment of ad damnum.— Where the amount alleged to be due in the body of the declaration is less than the jurisdictional amount, and the evidence is to the same effect, an amendment merely in the matter of the amount of damages claimed, so as to make it exceed the jurisdictional amount, will not confer jurisdiction. This was upon the principle that the amount in controversy is to be determined by the actual matter in dispute. Lee *v.* Watson, 1 Wall. (U. S.) 337, 17 L. ed. 557. See also Hurlbut *v.* Rogers, 2 Root (Conn.) 60.

20. Trimble *v.* Missouri, etc., R. Co., (Kan. App. 1900) 61 Pac. 449.

On appeal from inferior court to circuit court, an amendment filed in the latter will not prevail over the claim in the former where the evidence in the circuit court showed the real claim was for less amount than that set up in the amendment. McFadden *v.* Rhodes, 19 Ind. App. 487, 49 N. E. 836.

21. Sharp *v.* Nelson, 93 Iowa 466, 61 N. W. 946 (holding that an amendment, after verdict, by the successful party in an action, reducing the amount in controversy below one hundred dollars, in order to defeat the right of appeal, must be made before the adjournment of the term of court at which the judgment is rendered); Giger *v.* Chicago, etc., R. Co., 80 Iowa 492, 45 N. W. 906; Martine *v.* Hopkins, 40 La. Ann. 322, 3 So. 734; Groebel *v.* Ristroph, 35 La. Ann. 490; Opelika *v.* Daniel, 109 U. S. 108, 3 S. Ct. 70, 27 L. ed. 873.

See 2 Cent. Dig. tit. "Appeal and Error," § 293 *et seq.*

Amendment not limiting recovery will not affect jurisdiction shown by original pleading. Milward Co. *v.* Luigart, 19 Ky. L. Rep. 701, 41 S. W. 568.

Real amount in controversy.— Although a complaint for the recovery of the value of certain stock killed by the cars of defendant may have been based upon a statute awarding double damages as a penalty, yet where, prior to trial, in view of the unconstitutionality of such provision, the plaintiff dismisses from his complaint the paragraphs relating to such penalty, and confines his recovery and prayer for relief to the actual value of the stock, thereby reducing the amount in controversy below the sum of two hundred dollars, no appeal will lie from a judgment rendered in the action. Huber *v.* Brown, 17 Wash. 4, 48 Pac. 412.

Withdrawal of part of claim.— King *v.* Galvin, 62 N. Y. 238. See also Neal *v.* Van Winkle, 24 W. Va. 401.

Dismissal of counts.— Cooper *v.* Wilson, 71 Iowa 204, 32 N. W. 261.

22. Nevada *v.* Klum, 76 Iowa 428, 41 N. W. 62; State *v.* Judge, 21 La. Ann. 728 (involving the entry of a *remittitur* before judgment [but in this state it is settled that a *remittitur* after the verdict of a jury has no more effect than a *remittitur* after judgment in a case not tried by jury. New Orleans, etc., R. Co. *v.* McNeely, 47 La. Ann. 1298, 17 So. 798]); Texas, etc., R. Co. *v.* Horn, 151 U. S. 110, 14 S. Ct. 259, 38 L. ed. 91 (wherein, after verdict for an amount greater than that required to give appellate jurisdiction, a *remit-*

late jurisdiction cannot be defeated by a remission after judgment.[23] On the other hand, it is held that, where a suit was brought upon a special contract for a fixed sum upon which interest is legally due, plaintiff cannot remit the interest so as to deprive defendant of his right to appeal.[24]

(XII) *Reduction by Payment.* After appellate jurisdiction has attached, a partial payment on a judgment cannot, it is held, have the effect of preventing a review.[25] But if, pending the action involved in the trial court, such payment is made or the matter in controversy is partially compromised and settled, the balance left unsettled and unpaid will control the appellate jurisdiction.[26]

(XIII) *Admission of Part of Plaintiff's Claim.* Where defendant admits a part of plaintiff's claim, the balance remaining after deducting the amount admitted is the amount in controversy.[27]

(XIV) *Part of Claim Usurious.* Where the amount of the claim, except that part of it which the court decides to be usurious and therefore not recoverable, is not disputed, the amount of the usury is, within the meaning of the appeal statute, the true amount involved on plaintiff's appeal.[28]

(XV) *Part of Claim Barred.* Where a part of the claim appears on the

titur was entered so as to bring the judgment below such amount, but the judgment was for the whole amount, reciting, however, the *remittitur* and confining the execution to the balance, and it was held that the defendant could not appeal). See also Robinson *v.* Garver, 8 Ky. L. Rep. 59.

Release as fraud on jurisdiction.— But in Hansbrough *v.* Stinnett, 22 Gratt. (Va.) 593, it was held that a release by plaintiff in the circuit court of five dollars from a verdict of five hundred dollars was in fraud of the jurisdiction of the court of appeals.

23. State *v.* Lazarus, 34 La. Ann. 864, 1117; Finch *v.* Hartpence, 29 Nebr. 368, 45 N. W. 684; New York El. R. Co. *v.* New York Fifth Nat. Bank, 118 U. S. 608, 7 S. Ct. 23, 30 L. ed. 259.

To defeat appeal or to make recovery proper.— A distinction is drawn between a *remittitur* for the express purpose of depriving a party of his right to appeal, and one resulting from the decision of the trial court that a verdict is excessive. Where, in the latter instance, a *remittitur* is entered in consequence of a motion for a new trial, an appeal will not lie. Wimbush *v.* Chinault, 58 Miss. 234. See also Edwards *v.* Howard, 20 Ky. L. Rep. 1667, 49 S. W. 964, and Washington Mfg., etc., Co. *v.* Barnett, 19 Ky. L. Rep. 958; 42 S. W. 1120.

24. Howard *v.* Chamberlin, 64 Ga. 684, wherein the court said that, had the suit been for damages for a breach of the contract, the case would have been different.

25. Harris *v.* Stubenrauch, 18 La. Ann. 724; Cook *v.* U. S., 2 Wall. (U. S.) 218, 17 L. ed. 755. But if a judgment debtor himself procures the partial satisfaction of a judgment by payment, leaving the amount unpaid less than that which is necessary to give appellate jurisdiction, this will be fatal to defendant's right to have the judgment reviewed. Thorp *v.* Bonnifield, 177 U. S. 15, 20 S. Ct. 533, 44 L. ed. 652.

26. Hassett *v.* Germania Bldg. Assoc., 78 Iowa 386, 43 N. W. 275; Chicago, etc., R. Co. *v.* Minick, (Kan. 1900) 62 Pac. 1007; Guidry *v.* Garland, 41 La. Ann. 756, 6 So. 563; Cox *v.* Western Land, etc., Co., 123 U. S. 375, 8 S. Ct. 162, 31 L. ed. 178.

27. *Iowa.*—Marlow *v.* Marlow, 56 Iowa 299, 9 N. W. 229, where judgment was rendered for plaintiff for the amount tendered in court, leaving a balance in dispute below the appellate jurisdiction. But where the tender is of a part of the principal, and the remainder of the principal, with interest, is sufficient to give appellate jurisdiction, such tender will not defeat appellate jurisdiction. Griffin *v.* Harriman, 74 Iowa 436, 38 N. W. 139.

Kansas.— See Berger *v.* Rife, 7 Kan. App. 639, 53 Pac. 152.

Louisiana.— State *v.* Judges, 48 La. Ann. 672, 19 So. 617, wherein it was said that the only judgment that could be entered in such a case is the judgment for the balance found to be due.

New York.— A. Hall Terra Cotta Co. *v.* Doyle, 133 N. Y. 603, 30 N. E. 1010, 44 N. Y. St. 900.

Wisconsin.— Blonde *v.* Menominee Bay Shore Lumber Co., 103 Wis. 284, 79 N. W. 226; Troy Carriage Co. *v.* Bonell, 102 Wis. 424, 78 N. W. 752.

United States.— Jenness *v.* Citizens' Nat. Bank, 110 U. S. 52, 3 S. Ct. 425, 28 L. ed. 67.

See 2 Cent. Dig. tit. "Appeal and Error," § 236.

Allegation of part payment and denial of balance.— But the mere admission that a certain part of the claim was once due, accompanied by an allegation of the payment and denial that any more is due, does not deprive the appellate court of jurisdiction. Miller *v.* Gidiere, 36 La. Ann. 201.

Judgment for part confessed.— In Louisiana, where defendant admitted a part of the claim sued on, it was held that although the balance of the claim was not appealable, yet defendant could appeal unless plaintiff, upon confession and deposit of the amount in court, takes a partial judgment for the amount confessed. Blache *v.* Aleix, 15 La. Ann. 50.

28. New England Mortg. Security Co. *v.* Gay, 145 U. S. 123, 12 S. Ct. 815, 36 L. ed. 646.

face of the pleading to be barred by the statute of limitations, and the balance of the claim is less than the amount limited for appellate jurisdiction, an appeal will not lie.[29]

(XVI) *Penalty of Bond.* In an action on a bond the real amount involved is that due by the breach rather than that contained in the penalty of the bond.[30]

(XVII) *Value of Property or Right Involved*—(A) *Value of Property in General.* Where the subject-matter of the controversy is land or other property, the right to which is directly in issue, the value of such property is the matter in controversy.[31] But, under the principle that the real amount in controversy controls, if the title to the property claimed or recovered is not in fact in issue, but only a part thereof, the value of that part will control.[32] And while the individual interest of an appellant, though below appellate jurisdiction, will not control as against the actual value of the property involved in the action,[33] yet if the controversy which is continued in the appellate court does not still represent the value of the property, but only a part of the adjudication involving particular interests, the value of the latter will control.[34]

(B) *Particular Claim or Interest Only Involved.* Where the suit relates

29. Schultz *v.* Holbrook, 86 Iowa 569, 53 N. W. 285. But it is held differently, if the appeal is from an order dismissing an entire claim, where a part thereof is not barred, though such part is below the amount necessary to confer jurisdiction. Folts *v.* State, 118 N. Y. 406, 23 N. E. 567, 29 N. Y. St. 42. But see Dearborn County *v.* Kyle, 137 Ind. 421, 36 N. E. 1090, where it is held that if the statute of limitations is pleaded to the whole of the amount claimed, and the reply seeks to avoid the statute as to a part only of such amount, the latter part is the amount in controversy on appeal from a judgment sustaining a demurrer to the reply.

30. *Kentucky.*—Lee *v.* Russell, (Ky. 1901) 60 S. W. 376.

Missouri.— State *v.* St. Louis Ct. of Appeals, 87 Mo. 569.

North Carolina.—But see, *contra*, Joyner *v.* Roberts, 112 N. C. 111, 16 S. E. 917.

Virginia.— Duffy *v.* Figgat, 80 Va. 664.

Washington.— Leavitt *v.* Carr, 22 Wash. 361, 60 Pac. 1044.

United States.— U. S. *v.* Hill, 123 U. S. 681, 8 S. Ct. 308, 31 L. ed. 275.

Judgment for penalty dischargeable by payment of less.— Where the judgment was the common-law judgment for the penalty of the bond, dischargeable by payment of a sum less than the appealable amount, the defendant might bring error or appeal. Cobb *v.* Com., 3 T. B. Mon. (Ky.) 391; Wilson *v.* Daniel, 3 Dall. (U. S.) 401, 1 L. ed. 655 [*overruled*, however, upon the general proposition that the amount claimed determines the amount in controversy. See Gordon *v.* Ogden, 3 Pet. (U. S.) 33, 7 L. ed. 592].

31. Walker *v.* Barrow, 43 La. Ann. 863, 9 So. 479 (value of property in partition suit); McLeod *v.* Simonton, 39 La. Ann. 853, 2 So. 608; Jones *v.* Fritschle, 154 U. S. 590, 14 S. Ct. 1171, 21 L. ed. 552; Kenaday *v.* Edwards, 134 U. S. 117, 10 S. Ct. 523, 33 L. ed. 853 (on an appeal by the trustee and purchaser from a decree setting aside a trustee's sale, removing the trustee and denying him commissions, the value of the property determines the jurisdiction of the supreme court; the right of the trustee to commissions does not constitute the whole matter in dispute); Richmond *v.* Milwaukee, 21 How. (U. S.) 80, 16 L. ed. 60; Carter *v.* Cutting, 8 Cranch (U. S.) 251, 3 L. ed. 553 (value of property involved as controlling an appeal on order dismissing a petition to revoke probate of a will).

See 2 Cent. Dig. tit. "Appeal and Error," § 210 *et seq.*

Conveyance in separate parcels.— And, though appellant had conveyed land to various parties in separate parcels, in a suit against appellant and his vendees for recovery of the land the title to the whole tract is in issue, and the jurisdictional amount is determined by its value. Simon *v.* Richard, 42 La. Ann. 842, 8 So. 629.

32. Vicksburg, etc., R. Co. *v.* Smith, 135 U. S. 195, 10 S. Ct. 728, 34 L. ed. 95; Old Grant *v.* McKee, 1 Pet. (U. S.) 248, 7 L. ed. 131.

In a partition suit the value of the undivided part in controversy, and not that of the whole of the land, determines the appellate jurisdiction. McCarthy *v.* Provost, 103 U. S. 673, 26 L. ed. 337. See also Hood *v.* Sangster, 16 Can. Supreme Ct. 723.

In a boundary action the real amount in dispute is the value of the land contested or included between the contested lines. Hite *v.* Hinsel, 39 La. Ann. 113, 1 So. 415.

33. Ross *v.* Enaut, 46 La. Ann. 1250, 15 So. 803 (involving title to land); Andrews *v.* Partee, (Miss. 1901) 29 So. 788.

34. Pittsburgh Locomotive, etc., Works *v.* National Bank, 154 U. S. 626, 14 S. Ct. 1180, 24 L. ed. 270, holding that where plaintiff was adjudged possession and ownership of property, subject to the payment of a money judgment in favor of defendant, and defendant acquiesced but plaintiff objected to the money judgment, the amount of this judgment determined his right to a writ of error. See also Green *v.* Fisk, 154 U. S. 668, 14 S. Ct. 1193, 26 L. ed. 486.

only to the enforcement of a particular demand, and not to the right or title to the property itself, the particular interest or demand affected by the judgment, and not the value of the property, controls, and this, notwithstanding the proceeding involves the ultimate enforcement of the claim upon the property.[35] And when the suit is not to obtain a money judgment, but other relief — as that afforded by injunctive process — the amount involved must be determined by the value in money of the relief to plaintiff or of the loss to defendant, and not by the value of the property.[36] It may happen, however, that this particular interest is in fact the value of the property — as where the property of one person is seized for the debt of another — and in this event the value of the matter in controversy, as regards the right of the real owner to appeal, is the value of the property.[37]

(c) *Tax Suits.* As a general rule the test of appellate jurisdiction in actions involving the validity of, or liability for the payment of, taxes is the amount of the taxes sought to be avoided, and not the value of the property upon which they are assessed.[38]

35. *Illinois.*— Walker *v.* Malin, 94 Ill. 596.
Iowa.— See Johns *v.* Pattee, 61 Iowa 393, 16 N. W. 280.
Kentucky.— Moon *v.* Potter, 19 Ky. L. Rep. 897, 38 S. W. 864.
Louisiana.— Munday *v.* Lyons, 35 La. Ann. 990. But see Guss *v.* Routon, 33 La. Ann. 1046, wherein, in a suit to enjoin the seizure and sale of a homestead, the value of the latter was held to be the matter in dispute, and such value being lower than the amount required for appellate jurisdiction, the complainant was denied an appeal, without regard to the amount of the creditor's claim.
Virginia.— Showalter *v.* Rupe, (Va. 1897) 27 S. E. 840, holding that the amount involved in an appeal from a decree subjecting land to the payment of a debt is the amount of the debt, and not the value of the land. But see Buckner *v.* Metz, 77 Va. 107, wherein the value of the land was held to control so as to defeat an appeal by a judgment creditor from a decree dismissing his bill to enforce the lien of his judgment, because the value of the land was not sufficient.
Washington.— Doty *v.* Krutz, 13 Wash. 169, 43 Pac. 17, holding that amount of lien prevails in action for damages for removal out of state of property subject to the lien.
United States.— Ross *v.* Prentiss, 3 How. (U. S.) 771, 11 L. ed. 824.
See also *supra*, III, C, 2, y, (II), (B); and 2 Cent. Dig. tit. "Appeal and Error," § 212.
Priority of claims.— Where the only error alleged consists in decreeing a lien prior to that of the complaining party, at most the only amount in controversy is the amount of the lien declared to be prior, and if that is not sufficient appellate jurisdiction cannot be maintained. Obert *v.* Oberlin Loan, etc., Banking Co., 54 Kan. 750, 39 Pac. 699. In a contest between parties for priority of execution the value of the property is not the test if neither party claims any privilege thereon. State ex rel. MacKenzie, 39 La. Ann. 508, 2 So. 68. Though it is held otherwise if third persons, enjoining the seizure and sale of property, claim superior rights upon it, in which event the value of the property, and not the amount of the judgment enjoined, controls. Meyer *v.* Logan, 33 La. Ann. 1055. And where the judgment in favor of appellant is of sufficient amount, and appellant is entitled to a superior lien on attached property, the appellate court will have jurisdiction to pass upon the right of appellant to have his judgment declared a superior lien, notwithstanding the claim of one of the appellees who was given priority is less than the jurisdictional amount. Cabell *v.* Patterson, 98 Ky. 520, 17 Ky. L. Rep. 836, 32 S. W. 746. See also Pitts *v.* Spotts, 86 Va. 71, 9 S. E. 501; McMurray *v.* Moran, 134 U. S. 150, 10 S. Ct. 427, 33 L. ed. 814. See also Adler *v.* Cannon, 42 La. Ann. 835, 8 So. 593.

36. Gast Bank Note, etc., Co. *v.* Fennimore Assoc., 147 Mo. 557, 49 S. W. 511.

37. Brown *v.* Vancleave, 9 Ky. L. Rep. 150; Rhodes *v.* Black, 34 La. Ann. 406; State *v.* Judge, 24 La. Ann. 424; Andrews *v.* Partee, (Miss. 1901) 29 So. 788. But *compare* Cash *v.* Humphreys, 98 Va. 477, 36 S. E. 517, which, though not upon the same point, seems virtually different in effect. A judgment creditor sought to subject land in the hands of a third person to the payment of his judgment, and it was held that the pecuniary demand asserted by such judgment creditor was the matter in controversy, and not "the title or boundary of land." And in Endom *v.* Ludeling, 34 La. Ann. 1024, on appeal by defendant, a third person, to enforce a mortgage, the title of defendant not being denied and the only question being the liability of the property to be subjected, the value of the land was held not to control, and, the amount for which the mortgage was sought to be enforced being insufficient, the supreme court refused to entertain jurisdiction.

38. Conklin *v.* Hutchinson, (Kan. 1900) 62 Pac. 1012; Hull *v.* Johnson, (Kan. App. 1901) 63 Pac. 455; De Blois *v.* New Orleans, 45 La. Ann. 1308, 14 So. 190 (in mandamus proceedings to compel the erasure of tax inscriptions on the ground that they were improperly assessed); Johnson *v.* Cavanac, 40 La. Ann. 773, 5 So. 61; Aymar *v.* Bourgeois, 36 La. Ann. 392 (holding that, in a suit to en-

(D) *Value of Fund.* On the other hand, it is held that the amount involved in an appeal from an order affecting an entire fund — as upon an application for a distribution thereof, according to priorities — is determined by the amount of the fund.[39] But when the controversy relates entirely to the allowance or disallowance of a particular claim, the amount in controversy is not determined by the value of the whole fund or estate against which the claim is made.[40] Where the debt of one claiming under an assignment and the fund arising from the property assigned each exceeds the jurisdictional amount, such party is entitled to appeal from an adverse decree in a suit by him against an attaching creditor to have the assignment declared valid, without regard to the amount of the claim of the attaching creditor.[41] And if the particular claim or

join a tax sale, the validity of the taxes having been sustained by a prior judgment, the test of appellate jurisdiction was the amount of the tax, and not the value of the property seized); Florance *v.* Morien, 98 Va. 26, 34 S. E. 890. But see Stanley *v.* Hubbard, 27 W. Va. 740, holding that, in a controversy as to the right to sell property for taxes, there is no right of appeal by the owner where the property is worth less than the appealable amount, though the taxes exceed such amount.

39. MacVeagh *v.* Roysten, 172 Ill. 515, 50 N. E. 153; Longwith *v.* Riggs, 123 Ill. 258, 14 N. E. 840; Receivership Sheets Lumber Co., 104 La. 771, 29 So. 328; Hamilton *v.* His Creditors, 51 La. Ann. 1035, 25 So. 965; Fredericks *v.* Donaldson, 50 La. Ann. 471, 23 So. 446; Matter of Pelican Saw Mill, etc., Co., 50 La. Ann. 404, 23 So. 363. But an order appointing a receiver and staying proceedings against an insolvent corporation is held not to come within such provision, as there is no fund available from the assets, which have not yet been disclosed by the record, and the creditors are not contending among themselves over any fund; but the question of jurisdiction is to be determined by the amount of the creditors' claim upon which the right of action is suspended. *In re* Moss Cigar Co., 50 La. Ann. 789, 23 So. 544. See 2 Cent. Dig. tit. "Appeal and Error," §§ 281–283.

40. *Illinois.*— Moore *v.* Sweeney, 128 Ill. 204, 21 N. E. 205.

Kentucky.— Murrell *v.* Humphries, 17 Ky. L. Rep. 125, 30 S. W. 606; Anderson *v.* Simmons, 7 Ky. L. Rep. 438.

Louisiana. — Mascari's Succession, (La. 1901) 29 So. 718 (holding that where the amount remaining for distribution, after deducting claims due, by an estate is less than the lower limit of the appellate jurisdiction, no appeal will lie); Hamilton *v.* His Creditors, 51 La. Ann. 1035, 25 So. 965 [*distinguishing In re* Southern Liquor, etc., Co., 49 La. Ann. 1455, 22 So. 414, and Duran's Succession, 34 La. Ann. 585, in that, in both of these cases, when the judgments homologating the accounts became final there was but one opponent before the courts, and he claimed less than the appealable amount; whereas, in the instant case, when the judgment ordering the distribution was rendered, there were a number of contestants whose claims affected the entire fund of more than the jurisdictional amount.] But where, after a judgment homologating an account had become final, two parties claimed interest on their demands, and had a judgment on a rule to show cause why it should not be allowed under a proper interpretation of the first judgment, it was held that had the original judgment allowed interest the other parties could have appealed by reason of the fund to be distributed, and they had the same right when the allowance was thus subsequently made. Factors, etc., Ins. Co. *v.* New Harbor Protection Co., 39 La. Ann. 583, 2 So. 407. So, where a creditor, claiming a vendor's lien upon goods which he and other creditors had attached, makes his claim in his own attachment suit, citing the other creditors as defendants, the amount of the proceeds of the particular property affected by the lien, without regard to the total amount subject to the attachments, will control the jurisdiction. Adler *v.* Cannon, 42 La. Ann. 835, 8 So. 593.

Pennsylvania.— Jennings' Estate, 195 Pa. St. 406, 45 Atl. 1055.

Virginia.— See Crockett *v.* Woods, 97 Va. 391, 34 S. E. 96; Wilson *v.* Wilson, 93 Va. 546, 25 S. E. 596.

West Virginia.— Where a reference was had to ascertain to whom the funds in the suit belonged and the value of the interest of the parties therein, and the report of the commissioner was confirmed without exception, which report showed that none of the petitioners for the appeal had any interest in the funds except certain ones mentioned, whose interest was to an extent very much less than the amount necessary to confer appellate jurisdiction, it was held that the supreme court had no jurisdiction of the appeal. McCoy *v.* McCoy, 33 W. Va. 60, 10 S. E. 19.

United States.— Chapman *v.* Handley, 151 U. S. 444, 14 S. Ct. 386, 38 L. ed. 227; Miller *v.* Clark, 138 U. S. 223, 11 S. Ct. 300, 34 L. ed. 966. But where the particular decree as to the item complained of as insufficient to confer jurisdiction contains a provision that an earlier decree in the cause shall stand ratified and confirmed, and the earlier decree is sufficient to support an appeal, an appeal from the later decree will not be dismissed. Richardson *v.* Green, 130 U. S. 104, 9 S. Ct. 443, 32 L. ed. 872.

Canada.— See Lachance *v.* La Société de Prets, etc., 26 Can. Supreme Ct. 200.

See also *infra*, III, C, 4, h, (xx).

41. Estes *v.* Gunter, 121 U. S. 183, 7 S. Ct. 854, 30 L. ed. 884.

interest is sufficient the jurisdiction cannot be questioned upon the ground that the estate, when distributed, will not yield a sufficient amount.[42] Where the entire fund claimed by both parties is awarded in shares to each, the value of the share of one of the parties who appeals will control the amount in controversy.[43]

(E) *Value of Possession.* Where the right to the possession and not to the property itself is the matter in controversy, the value of the possession, and not the value of the property, will control as to the amount in controversy.[44]

(F) *Replevin.* Generally, it is held that, in the determination of the jurisdictional amount on appeal in actions of replevin, the value of the property,[45] or the value of the property and the damages for its wrongful detention, will control[46] rather than the particular interest of a party to the action.[47] But where the

By assignee or trustee.— A trustee in an assignment or trust deed may, as representative of the whole fund, appeal from a decree in favor of judgment creditors of the assignor or of one claiming under a distinct title, without regard to the amount of the individual debts secured by the deed, or of the execution creditors. Saunders *v.* Waggoner, 82 Va. 316; Freeman *v.* Dawson, 110 U. S. 264, 4 S. Ct. 94, 28 L. ed. 141. See also *supra*, III, C, 4, h, (IV).

42. Vincent *v.* Phillips, 47 La. Ann. 1216, 17 So. 786; Clark *v.* Bever, 139 U. S. 96, 11 S. Ct. 468, 35 L. ed. 88. But, on the other hand, where the amount in an administrator's hands had been ascertained, it was held that, in an action against the sureties of the administrator to recover the shares in the fund which had been apportioned, no appeal would lie in favor of a creditor whose share was below the jurisdictional amount, even though the original claim was larger. Hartsook *v.* Crawford, 85 Va. 413, 7 S. E. 538.

Distribution pending appeal.— Where creditors have litigated *in concurso* the test of appellate jurisdiction is the amount of the fund to be distributed at the time of the appeal, and the distribution of the fund pending a devolutive appeal will not justify a dismissal. Hamilton *v.* His Creditors, 51 La. Ann. 1035, 25 So. 965.

Priority of claims.— Where the judgment of the trial court disposes of a sufficient amount — as where a claim is allowed against an estate — and the judgment is affirmed in the appellate court, the supreme court will have jurisdiction because the amount thus awarded will constitute the amount in controversy; and it cannot be contended that the difference between what appellee will receive if his claim is not paid as one of the class to which it is assigned by the judgment, and what he will receive as his share if he is paid as of another class, should control, where there is nothing in the record from which this difference can be ascertained. Svanoe *v.* Jurgens, 144 Ill. 507, 33 N. E. 955.

43. Keogh *v.* Orient F. Ins. Co., 154 U. S. 639, 14 S. Ct. 1181, 24 L. ed. 558; Labelle *v.* Barbeau, 16 Can. Supreme Ct. 390.

44. Flagg *v.* Walker, 109 Ill. 494; Norwood *v.* Wimby, 104 La. 645, 29 So. 311. In a petitory action, in which defendant claims possession under a contract with the plaintiff, the matter in dispute is the value of the right of occupation, and not that of the title. Harris *v.* Stockett, 35 La. Ann. 387; Harris *v.* Barber, 129 U. S. 366, 9 S. Ct. 314, 32 L. ed. 697.

See 2 Cent. Dig. tit. "Appeal and Error," § 231.

Surrender of possession.— In an action of unlawful detainer and for recovery of damages, possession of the premises was surrendered subsequent to the taking of the appeal, and it was held that the controversy existing in the appellate court only embraced the demand for damages, and that if that was not sufficient in amount the appellate court had no jurisdiction. Puyallup Light, etc., Co. *v.* Stevenson, 21 Wash. 604, 59 Pac. 504.

45. Denver First Nat. Bank *v.* Follett, (Colo. 1900) 62 Pac. 361; Rohe *v.* Pease, 189 Ill. 207, 59 N. E. 520; Mullins *v.* Bullock, 14 Ky. L. Rep. 40, 19 S. W. 8; Vaiden *v.* Bell, 3 Rand. (Va.) 448.

Distraint.— But in distraint for rent the amount for which the avowry is made, and not the value of the goods, determines the amount in controversy. Peyton *v.* Robertson, 9 Wheat. (U. S.) 527, 6 L. ed. 151. To the same effect see Biddle *v.* Paine, 74 Miss. 494, 21 So. 250.

46. *Iowa.*— Ruiter *v.* Plate, 77 Iowa 17, 41 N. W. 474. Plaintiff's interest and damages for wrongful detention may be added. Ormsby *v.* Nolan, 69 Iowa 130, 28 N. W. 569.

Kentucky.— Where third persons replevy property taken by a constable under an execution, and the petition avers that the property was worth a certain amount and asks judgment for the return thereof and for damages, a judgment for the return of the property and costs authorizes an appeal, as the judgment is not one for costs only. Mullins *v.* Bullock, 14 Ky. L. Rep. 40, 19 S. W. 8.

Vermont.— Fisk *v.* Wallace, 51 Vt. 418.

Virginia.— Vaiden *v.* Bell, 3 Rand. (Va.) 448.

Washington.— Freeburger *v.* Caldwell, 5 Wash. 769, 32 Pac. 732.

West Virginia.— Davis *v.* Webb, 46 W. Va. 6, 33 S. E. 97.

47. Cummins *v.* Holmes, 107 Ill. 552; Eidson *v.* Woolery, 10 Wash. 225, 38 Pac. 1025.

Real amount in controversy.— On the other hand, where one of the parties in replevin

ownership and right to possession are not denied, and the only issue is as to a particular interest or damages, the value of the property does not control.[48]

(G) *Fraudulent Conveyance.* In a suit to set aside a fraudulent conveyance and to subject the property to the satisfaction of the complainant's debt, the debt is the amount involved rather than the value of the property, at least so far as the creditor is concerned,[49] and the same may be said in regard to the right of appeal on the part of the alleged fraudulent grantor.[50] But where the alleged fraudulent grantee appeals from an adverse judgment depriving him of property which he claims, the value of such property furnishes, as to him, the true test of the amount involved.[51]

(H) *Garnishment.* In a garnishment proceeding the amount involved is the amount of the debt owing by the garnishee to the judgment debtor, or the value

claims under an execution of less than the jurisdictional amount which was levied on the property in controversy, and demands the return of the property or a judgment for the amount of said execution, it is held that he is not entitled to an appeal from an adverse judgment, because in such a case the amount of the execution, and not the value of the property, is the test. Davis *v.* Upright, 54 Iowa 752, 6 N. W. 266. So, where the appeal is from a part of the judgment — as where the judgment was in favor of plaintiff for a portion of the property and in favor of defendant for the return of the residue or its value — neither party can complain of the part of the judgment against him if the value of the interest is not sufficient. Pierce *v.* Wade, 100 U. S. 444, 25 L. ed. 735, holding that the principle, that where a case is taken up by a defendant the amount of the recovery against him controls, applies to a plaintiff in replevin when defendant obtains judgment for the return of the property taken under the writ. See also Stinson *v.* Cook, 53 Kan. 179, 35 Pac. 1118; George *v.* Hunter, 5 Kan. App. 250, 47 Pac. 559.

48. Mohme *v.* Livingston, 54 Iowa 458, 6 N. W. 717; Frost *v.* Rowan, 21 Ky. L. Rep. 1777, 56 S. W. 427.

49. *Kentucky.*— Myall *v.* Jackson, 14 Ky. L. Rep. 48.

Louisiana.— The distinction is between the revocatory action and one *en déclaration dé simulation.* The effect of the judgment in a revocatory action is to subject the property to the satisfaction of the creditor's claim, but beyond this the title of the vendee is not affected and is not revested in the vendor. In such an action the amount of the debt, and not the value of the property, is the test. But where the contract is assailed as null and void and as a simulated sale, the value the property controls. See Moore *v.* Ringuet, 45 La. Ann. 1115, 13 So. 670; Boggs *v.* Hays, 44 La. Ann. 859; 11 So. 222; Flower *v.* Prejean, 42 La. Ann. 897, 8 So. 596. But it has also been held that when plaintiff's claim exceeds the jurisdictional amount, and the value of the property, the sale of which is sought to be annulled as fraudulent, is less than the amount, the creditor in the revocatory action cannot recover any amount larger than the value of the property, and therefore this is the only amount at issue, and by it the jurisdiction is to be determined. State *v.* Blackman, 50 La. Ann. 126, 23 So. 205.

Virginia.— Umbarger *v.* Watts, 25 Gratt. (Va.) 167.

United States.— Chatfield *v.* Boyle, 105 U. S. 231, 26 L. ed. 944, as to the combining of several interests of complainant creditors on an appeal from a decree dismissing the bill. And so it is held that where judgment creditors, whose aggregate claims exceed the jurisdictional amount, but each several claim is less than that amount, successfully attack a judgment confessed by their insolvent debtor to a co-defendant, an appeal will not lie. Schweb *v.* Smith, 106 U. S. 188, 1 S. Ct. 221, 27 L. ed. 156. See also *supra,* III, C, 4, h, (IV); and *infra,* III, C, 4, h, (XX).

Canada.— See Flatt *v.* Ferland, 21 Can. Supreme Ct. 32.

See 2 Cent. Dig. tit. "Appeal and Error," § 213.

Effect of cross-bill.— To a bill to set aside a deed as in fraud of creditors, filed by a creditor whose debt amounted to less than the sum fixed by statute for an appealable judgment, the defendant answered by cross-bill, alleging that the deed was executed in order to secure to him a debt in excess of such limit. It was held that complainant stood in the same relation, in regard to the appeal, as if the cross-bill had been an original bill to foreclose, or his own bill had been a bill to redeem; and, where the decree below contained a provision for redemption by complainant, on payment of a sum exceeding the statutory limit beyond that claimed by him, his appeal should stand. Lobstein *v.* Lehn, 120 Ill. 549, 12 N. E. 68.

Jurisdiction independent of amount in controversy.— Fenton *v.* Morgan, 16 Wash. 30, 47 Pac. 214, holding that an action by a judgment creditor, to set aside a deed by the debtor as in fraud of the latter's creditors, was not an action for the recovery of money but of an equitable nature, so that the jurisdiction on appeal did not depend upon the fact that the amount remaining unpaid on complainant's judgment was less than the minimum amount fixed for the jurisdiction of the appellate court in actions for the recovery of money.

50. Hawkins *v.* Gresham, 85 Va. 34, 6 S. E. 472. See also Parker *v.* Valentine, 27 W. Va. 677.

51. Kahn *v.* Kerngood, 80 Va. 342; Parker *v.* Valentine, 27 W. Va. 677.

of the property seized in the garnishee's hands.[52] But, where the garnishment proceeding is one in which a judgment *in solido* is sought against the debtor and the garnishee, the question of jurisdiction is held to depend upon the demand of the creditor.[53]

(I) *Amount Secured by Mortgage.* In a suit involving a mortgage the subject-matter involved in a judgment or decree affecting the security is the amount secured by the mortgage;[54] but, where the controversy relates only to particular claims in the proceeds, the general rule already stated prevails.[55]

(XVIII) *Validity of Judgment.* In a controversy involving the validity of

52. Payne *v.* Chicago, etc., R. Co., 170 Ill. 607, 48 N. E. 1053, appeal by judgment creditor. *Contra,* Handlin *v.* Burnett, McGloin (La.) 244. But where property worth more than the jurisdictional amount is seized in the hands of the garnishee, whose claim is also for more than that amount, it is held that the appellate jurisdiction attaches without regard to the amount of the creditor's judgment. Bier *v.* Gautier, 35 La. Ann. 206, in which case, however, the matter in dispute was the existence and validity of the garnishee's pledge, and the judgment recognized the pledgee's right, but ordered the property turned over to the officer to be sold providing the bid was sufficient to cover the amount for which it had been pledged.

53. Leverich *v.* Dulin, 23 La. Ann. 505, on appeal by garnishee. Where the contest is between the plaintiff and the garnishee, both claiming a right of priority and preference on the property seized, the dispute is limited to that property, and the jurisdiction of the appellate court is tested by its value. Wood *v.* Rocchi, 32 La. Ann. 1120, on appeal by the garnishee.

54. Citizens Bank *v.* Webre, 44 La. Ann. 334, 10 So. 728; Bussiere *v.* Williams, 37 La. Ann. 387 (on a rule by a judgment creditor to obtain an erasure of mortgages, the amount of the mortgage sought to be canceled, and not the amount of the judgment or the value of the property affected thereby, is held to be the test of appellate jurisdiction); Schmelz *v.* Rix, 95 Va. 509, 28 S. E. 890 (on appeal from a decree enjoining sale under a trust deed securing notes of sufficient jurisdictional amount, but from which usurious discount has been deducted, which reduced the amount, holding that the whole amount secured is the amount of the controversy); Elliott *v.* Sackett, 108 U. S. 132, 2 S. Ct. 375, 27 L. ed. 678 (holding that under a bill seeking to reform a deed by which complainant is made to assume payment of a mortgage, the amount in controversy is the amount of the encumbrance and not of the deficiency which may remain after foreclosure).

Taxes — Foreclosure of chattel mortgage. — In Texas, in cases of foreclosure of mortgages and lien upon specific property, the amount in controversy is not that of the debt, but of the security given for its payment. Cotulla *v.* Goggan, 77 Tex. 32, 13 S. W. 742; Marshall *v.* Taylor, 7 Tex. 235; Cox *v.* Wright, (Tex. Civ. App. 1894) 27 S. W. 294. But in Lawson *v.* Lynch, 9 Tex. Civ. App. 582, 29 S. W. 1128, the court was of a different opinion, though recognizing that it was bound by the rule adopted by the supreme court of the state. It refused, however, to extend the principle to other cases than those to which the rule had already been applied, distinguishing the cases above cited and other cases in this state in that the liens therein were created by contract or the act of the parties upon specific chattels, and holding that in the instant case the rule would not apply to the lien of a landlord which was given by law generally on the crops of the tenant, and which was a charge upon no more of such specific property than was necessary to pay the debt, but that in such a case the amount claimed determined the jurisdiction. This ruling was followed in Bohannon *v.* Roensch, 13 Tex. Civ. App. 218, 35 S. W. 873.

Property destroyed pending suit. — Where, pending the trial of an action on a note secured by mortgage on personal property, the property is destroyed and the action on the note is prosecuted, the jurisdiction of the court of civil appeals is determined by the amount of the note. Tufts *v.* Hodges, 8 Tex. Civ. App. 240, 28 S. W. 110.

55. Sedgwick *v.* Johnson, 107 Ill. 385 (wherein sureties on a bond, who had paid money for their principal thereon, and had been sued and were threatened with other suits, brought a suit to foreclose an indemnity mortgage to which a prior mortgagee was made a party, and the court found the sums due on both mortgages, and ordered a sale, out of the proceeds of which the prior mortgagee was to be paid a certain amount and the complainants another certain amount, the latter representing the amount which had been paid by them, and the balance was to be paid into court to abide other orders in case of further payments by complainants. The total amount involved was held to be the sum of the amounts thus ordered to be paid to the parties out of the proceeds, and, being less than the jurisdictional amount, no appeal would lie); McMurray *v.* Moran, 134 U. S. 150, 10 S. Ct. 427, 33 L. ed. 814.

Application of excess. — Where there is a small excess over the mortgage debt the court of appeals will not have jurisdiction of an appeal involving only the question whether or not there was error in awarding such surplus to a judgment creditor of the mortgagor instead of to the latter. Mauk *v.* Harper, 15 Ky. L. Rep. 490, 24 S. W. 241.

Several secured by one mortgage. — Where a claim on a fund in the registry of the admiralty, of several creditors, secured in a body by one mortgage, exceeded the jurisdictional amount, it was held that an appeal would lie

a judgment, the amount of the judgment determines the appellate jurisdiction, which depends upon pecuniary limitations.[56]

(XIX) *INTERVENTION AND CLAIM OF THIRD PERSON.* Where an intervening creditor controverts plaintiff's judgment or attachment, it is held that plaintiff's claim is the test of appellate jurisdiction.[57] But, in a contest between an attaching creditor and the claimant of the attached property or of the fund in court or in the hands of a garnishee, the value of the property or the amount of the fund fixes the appellate jurisdiction.[58]

(XX) *CROSS-APPEALS.* On appeal by a plaintiff, involving an amount sufficient to give jurisdiction, the court will have jurisdiction of an appeal by defendant from a part of the same judgment, against him and in favor of plaintiff, though for less than the jurisdictional amount,[59] and it has been held also that the amount really in controversy between the parties, as the case stands in the appellate court, and which will be concluded by the judgment to be rendered by such court in disposing of the appeals of both parties, furnishes the test of appellate jurisdiction.[60]

by the mortgagees in a body, without regard to the amounts of their separate claims. Rodd *v.* Heartt, 17 Wall. (U. S.) 35, 21 L. ed. 627,

56. Singer *v.* McGuire, 40 La. Ann. 638, 4 So. 578. See *supra*, III, C, 2, g; III, C, 2, y; III, C, 4, h, (XVII), (B).

Interpreting former judgment.— Factors, etc., Ins. Co. *v.* New Harbor Protection Co., 39 La. Ann. 583, 2 So. 407.

57. White Castle Lumber, etc., Co. *v.* Hart, 48 La. Ann. 1034, 20 So. 201.

Party impleaded by defendant.— If it should be conceded that the demand of a defendant against a person whom he has impleaded for his own convenience would give the appellate court jurisdiction to revise a judgment, on the trial between the original parties to a controversy, not exceeding the amount necessary to give the appellate court jurisdiction, such demand must be so related to the subject-matter in controversy between the original parties as to admit of its adjudication in their suit, and must be such as, if admitted or proven, would entitle the party asserting it to a recovery against the party impleaded for a sum of money or property of sufficient amount to give appellate jurisdiction. Hudson *v.* Norwood, 13 Tex. Civ. App. 662, 35 S. W. 1075.

58. Martin *v.* Duncan, 156 Ill. 274, 41 N. E. 43; Riley *v.* Caltron, 10 Ky. L. Rep. 40; Grubbs *v.* Franks, 7 Ky. L. Rep. 438 (part of property upon which landlord claimed lien); Wickham *v.* Nalty, 42 La. Ann. 423, 7 So. 609; Flash *v.* Schwabacker, 32 La. Ann. 356.

See 2 Cent. Dig. tit. "Appeal and Error," § 211.

Where value must be found.— Where a plea of intervention was filed in replevin by a third person, and there was a general verdict for the plaintiff, it was held, under statute allowing appeals only where the judgment shall amount to a fixed sum, that no appeal would lie by the intervener even if the judgment be treated as a dismissal of the intervention. Meyer *v.* Brophy, 15 Colo. 572, 25 Pac. 1090.

Plaintiff's demand controlling as to him.— Where plaintiff in an attachment had a judgment against the debtor sustaining plaintiff's demand, except as to interveners who were awarded a judgment against the plaintiff, the plaintiff's debt imparts to the suit its character in relation to its appealability. Newman *v.* Baer, 50 La. Ann. 323, 23 So. 279; State *v.* Judges, 34 La. Ann. 1046. But see Kuh *v.* Garwin, 53 Mo. App. 64.

Proceeds adjudged to claimant.— Where the judgment awards to a claimant of attached property a certain part of the proceeds, it is held that this amount is the amount in controversy. Wolf *v.* Glenn, 8 Ky. L. Rep. 425.

Funds garnished under separate judgments. — Where, in garnishment proceedings under two judgments aggregating more than the jurisdictional amount, the intervener's petition is filed in one of the actions, claiming a sum which had been garnished equal to both judgments, and it is agreed that such petition may be made applicable to both judgments, it is held that the petition becomes a single proceeding for the whole amount, and therefore the intervener is entitled to appeal. Edwards *v.* Cosgro, 71 Iowa 296, 32 N. W. 350.

Judgment against intervener for property released to him.— But the amount of a judgment against an intervener, to whom property seized was released on forthcoming bond, fixes the jurisdictional amount on appeal. State *v.* Court of Appeals, 47 La. Ann. 740, 17 So. 290.

Intervener seeking money judgment.— Fillmore *v.* Hintz, 90 Iowa 758, 57 N. W. 882, holding that where an intervener set up a claim in an action on notes, and sought to have a trust declared in the notes for the payment thereof, plaintiff's denial of the trust set up by the intervener is not a denial of the intervener's right to a sum which he alleged he had received on his claim, and the net amount claimed by the intervener will determine the appellate jurisdiction.

59. Brown *v.* Vancleave, 9 Ky. L. Rep. 150; Bradley *v.* Milwaukee Mechanics' Ins. Co., 147 Mo. 634, 49 S. W. 867; Ellis *v.* Harrison, 104 Mo. 270, 16 S. W. 198; U. S. *v.* Mosby, 133 U. S. 273, 10 S. Ct. 327, 33 L. ed. 625; Walsh *v.* Mayer, 111 U. S. 31, 4 S. Ct. 260, 28 L. ed. 338. But see Cannon *v.* Edwards, 6 Ky. L. Rep. 734.

60. Douglas *v.* Kansas City, 147 Mo. 428, 48 S. W. 851. See also Brown *v.* Vancleave, 9 Ky. L. Rep. 150.

5. Jurisdiction Irrespective of Amount — a. In General. Ordinarily, statutes making the right of appeal to depend upon the amount in controversy except from their operation, either expressly or by implication, certain classes of cases in which appeals will lie without regard to the magnitude of the interests involved.[61] The provisions on this subject vary quite materially in the different jurisdictions, but as a rule they do not apply to cases not directly involving property rights or not susceptible of pecuniary estimation[62] — as, for instance, divorce suits,[63] mandamus,[64] certiorari,[65] and injunction proceedings.[66] Where general and unlimited appellate

On cross-appeal as to items disallowed.— Where, under a statute, authorizing an appeal to the supreme court on behalf of the United States from all adverse judgments of the court of claims, the United States appeals, and the amount of the adverse judgment is more than thirteen thousand dollars, the claimant, who has also appealed, may show that certain items were improperly disallowed him, though they do not amount to the required sum. U. S. *v.* Mosby, 133 U. S. 273, 10 S. Ct. 327, 33 L. ed. 625. But in Virginia it was held that, under a creditor's bill, an appellee, one of the complainant creditors, cannot assign for error the action of the court in rejecting his claim as a charge upon the estate, when such claim is less than that required to give the appellate court jurisdiction, and a rule of court permitting an assignment of error by an appellee does not so extend the jurisdiction of the court, but is intended only for the benefit of appellees in cases which are appealable. Crockett *v.* Woods, 97 Va. 391, 34 S. E. 96; Wilson *v.* Wilson, 93 Va. 546, 25 S. E. 596.

61. See the statutes and constitutional provisions. See also Courts.

Cases involving revenue and tax laws are usually appealable without respect to the amount in dispute. See Taxation.

Indiana — Replevin.— In Hall *v.* Durham, 113 Ind. 327, 15 N. E. 529, it was held that a statute prohibiting appeals where less than a certain amount was involved did not apply to an action of replevin, because in such action the controversy was not in regard to amounts or values, but related merely to the right of the parties to the possession of the goods, chattels, or articles of personal property at the time of the commencement of such action.

Kentucky — Claim payable out of public treasury.— An appeal lies from an order refusing to allow the claim of an officer, payable out of the public treasury, without reference to the amount. *Ex p.* Jones, 13 Ky. L. Rep. 138.

Massachusetts — Issue in law.— In Massachusetts, a party aggrieved by the judgment of the common pleas on any issue in law may appeal to the supreme court irrespective of the amount involved. Hovey *v.* Crane, 10 Pick. (Mass.) 440.

Missouri — State officer a party.— Under Mo. Const., art. 6, § 12, an appeal lies to the supreme court irrespective of the amount, where a state officer is a party to the suit. State *v.* Henning, 110 Mo. 82, 19 S. W. 494; State *v.* Spencer, 91 Mo. 206, 3 S. W. 410; State *v.* Dillon, 90 Mo. 229, 2 S. W. 417; State *v.* Board of Health, 90 Mo. 169, 2 S. W. 291; State *v.* Horner, 10 Mo. App. 307.

Washington — Equitable proceedings.— In equitable proceedings an appeal lies irrespective of the amount involved. Blake *v.* State Sav. Bank, 12 Wash. 619, 41 Pac. 909; Fox *v.* Nachtsheim, 3 Wash. 684, 29 Pac. 140.

United States — Cases touching patent rights.— Under U. S. Rev. Stat. (1878), § 699, the federal supreme court has appellate jurisdiction in any case touching patent rights without regard to the amount in controversy. St. Paul Plow Works *v.* Starling, 127 U. S. 376, 8 S. Ct. 1327, 32 L. ed. 251. See Patents.

Writ of error distinguished from appeal.— In some jurisdictions it has been held that a statute limiting the right to appeal by fixing a jurisdictional amount does not include writs of error. Bowers *v.* Green, 2 Ill. 42; Hemmenway *v.* Hicks, 4 Pick. (Mass.) 497.

62. **Contempt.**— In contempt proceedings an appeal will lie in some jurisdictions irrespective of the amount involved. Leopold *v.* People, 140 Ill. 552, 30 N. E. 348; Worland *v.* State, 82 Ind. 49. See Contempt.

Judgment enforcing street assessment.— A judgment to enforce a street assessment is *in rem*, and therefore appealable without regard to the amount for which the lien is adjudged, under Ky. Stat., § 950. Fehler *v.* Gosnell, 99 Ky. 380, 18 Ky. L. Rep. 238, 35 S. W. 1125.

Abatement of nuisance.— Where judgment was given for less than the jurisdictional amount, and there was a further judgment that a certain nuisance be abated, it was held that an appeal would lie to the supreme court, the judgment not being confined to the amount recovered. Vonderweit *v.* Centerville, 15 Ind. 447.

Refusal to obey mandate.— An appeal from the refusal of a trial court to obey a mandate of the court of appeals will lie to the latter court, though the amount involved is less than would authorize an appeal to such court from a judgment or order of the trial court. McIlvoy *v.* Russell, 16 Ky. L. Rep. 737, 29 S. W. 630.

63. Conant *v.* Conant, 10 Cal. 249, 70 Am. Dec. 717; Bryant *v.* Austin, 36 La. Ann. 808. See, generally, Divorce.

64. Eden Dist. Tp. *v.* Templeton, 72 Iowa 687, 34 N. W. 472; Price *v.* Smith, 93 Va. 14, 24 S. E. 474. See, generally, Mandamus.

65. Heinlen *v.* Phillips, 88 Cal. 557, 26 Pac. 366 [*overruling* Bienenfeld *v.* Fresno Milling Co., 82 Cal. 425, 22 Pac. 1113]; Hyslop *v.* Finch, 99 Ill. 171; Davis *v.* Davis, 40 W. Va. 464, 21 S. E. 906; Farnsworth *v.* Baltimore, etc., R. Co., 28 W. Va. 815. See, generally, Certiorari.

66. Chalcraft *v.* Louisville, etc., R. Co., 113 Ill. 86; Peck *v.* Herrington, 104 Ill. 88; Geyer

jurisdiction is conferred on a court by constitutional provision, it may enter the appeals regardless of the amount in controversy, notwithstanding an act of the legislature to the contrary.[67]

b. Cases Involving Constitutional Questions. Generally, where a case involves a constitutional question, an appeal will lie regardless of the amount in controversy.[68] But jurisdiction of an appeal will not be assumed because of an allegation that a constitutional question is involved. The court will examine and determine for itself whether such claim is well founded;[69] and, in order for jurisdiction to attach, it must affirmatively appear that a fairly debatable constitutional question[70] was necessarily involved,[71] and was decided adversely to appellant.[72]

c. Cases Involving Validity of Statutes or Ordinances. Generally, a case involving the validity of a statute or municipal ordinance is appealable, irrespective of the amount involved.[73] No appeal will lie on this ground, however, where the validity of the statute or ordinance is not the primary subject of the inquiry, but is collateral only to the main controversy;[74] and the mere statement of counsel that a question as to the validity of a statute is involved will not authorize an appeal where it is evident from the record that no such question is in issue.[75]

d. Cases Involving Franchises. In many jurisdictions, if the case is one

v. Douglass, 85 Iowa 93, 52 N. W. 111; Francisco *v.* Gauthier, 35 La. Ann. 393; McDonough *v.* Le Roy, 1 Rob. (La.) 173. See, generally, INJUNCTIONS.

67. Graves *v.* Black, 1 Mo. 221; Blunt *v.* Sheppard, 1 Mo. 219.

68. For a full discussion of the question see COURTS; CONSTITUTIONAL LAW.

69. Erb *v.* Morasch, 60 Kan. 251, 56 Pac. 133.

70. Morris *v.* People, 23 Colo. 465, 48 Pac. 534, wherein it was held that the question must be fairly debatable.

Question already settled.— Jurisdiction will not be taken of an appeal on the ground that it involves a constitutional question, where such question has already been definitely settled. Virden *v.* Allan, 107 Ill. 505; *In re* Boyle's Retail Liquor License, 190 Pa. St. 577, 42 Atl. 1025, 45 L. R. A. 399; Western Union Tel. Co. *v.* Goddin, 94 Va. 513, 27 S. E. 429. And see Western Union Tel. Co. *v.* Powell, 94 Va. 268, 26 S. E. 828.

71. Hurd *v.* Carlile, 18 Colo. 461, 33 Pac. 164.

Other questions decisive of controversy.— An appeal does not lie on the ground that a constitutional question is involved, where the other questions determined are decisive of the controversy between the parties. Madden *v.* Day, 24 Colo. 418, 51 Pac. 165; Board of Health *v.* Pooley, 11 La. Ann. 743.

The record must be looked to, and not the briefs, in determining whether a constitutional question is involved, so as to authorize an appeal. Kirkwood *v.* Johnson, 148 Mo. 632, 50 S. W. 433.

Must be raised in lower court.— The record must show that the constitutional question was raised in the court below. State *v.* Tsni Ho, 37 La. Ann. 50; Baldwin *v.* Fries, 103 Mo. 286, 15 S. W. 760. As to raising constitutional questions for the first time on appeal see *infra*, V.

72. Hurd *v.* Carlile, 18 Colo. 461, 33 Pac. 164.

73. See COURTS.

"Statute" includes "ordinance."— Utah Const., art. 8, § 9, providing that the decision of the district court in cases originally brought in a justice's court shall not be final "in cases involving the validity or constitutionality of a statute," applies in the case of city ordinances as well as of statutes. Eureka City *v.* Wilson, 15 Utah 53, 67, 48 Pac. 41, 150, 62 Am. St. Rep. 904.

74. Cairo *v.* Bross, 99 Ill. 521; North Manchester *v.* Oustal, 132 Ind. 8, 31 N. E. 450; Griffee *v.* Summitville, 10 Ind. App. 332, 37 N. E. 1068; New Orleans *v.* Reems, 49 La. Ann. 792, 21 So. 599; Thibodaux *v.* Constantin, 48 La. Ann. 338, 19 So. 135; Parish *v.* Broussard, 42 La. Ann. 841, 8 So. 590; Baltimore, etc., R. Co. *v.* Hopkins, 130 U. S. 210, 9 S. Ct. 503, 32 L. ed. 908.

Questions not affecting validity.—The questions whether an action is properly brought under a statute, whether a recovery can be had under a statute, and whether there is any statute governing the action, are not questions affecting the validity of a statute, within the constitutional restriction as to appeals. Doty *v.* Krutz, 13 Wash. 169, 43 Pac. 17.

Question involving interpretation.— Where a question involves only the interpretation and not the constitutional validity of a statute, an appeal does not lie as a matter of right. Standard Oil Co. *v.* Angevine, 60 Kan. 167, 55 Pac. 879; Mathews Lumber Co. *v.* Hardin, 87 Tex. 639, 30 S. W. 898.

Invalidity assumed by trial court.— In Jacobs *v.* Puyallup, 10 Wash. 384, 38 Pac. 994, it was held that defendant was not entitled to an appeal on the ground that the decision involved the validity of a statute (the invalidity of which statute defendant set up as one of his defenses) where the court in its instructions assumed the invalidity of the statute, and charged that the jury must find for defendant unless they found certain facts entitling plaintiff to recover, notwithstanding the said invalidity.

75. St. Louis Transfer Co. *v.* Canty, 103 Ill. 423.

involving a franchise, an appeal is allowed without regard to the amount in controversy.[76]

e. Cases Involving Title to Land. In many jurisdictions, either by constitutional provision or statute, an appeal is allowed, irrespective of the amount in controversy, in actions involving the title to land.[77]

D. Dependent on Nature and Scope of Decision — 1. Final Decisions — a. In General. It is a well-settled principle of law that an appeal will not lie, in the absence of a statute permitting it, from an interlocutory order, judgment, or decree. There must be a final order, judgment, or decree rendered in the cause to permit a review.[78] Interlocutory orders are reviewable, in the absence of a

76. See Courts. As to what is a franchise see Franchises.

77. **Title directly in issue.**— In the following cases it was held that title to land was so involved as to authorize an appeal without regard to the amount in controversy:

Colorado.— Wyatt *v.* Larimer, etc., Irrigation Co., 18 Colo. 298, 33 Pac. 144, 36 Am. St. Rep. 280; Atkinson *v.* Tabor, 7 Colo. 195, 3 Pac. 64.

Connecticut.— Dunton *v.* Mead, 6 Conn. 418.

Illinois.— Sanford *v.* Kane, 127 Ill. 591, 20 N. E. 810; Farmers' Nat. Bank *v.* Sperling, 113 Ill. 273; Bozarth *v.* Landers, 113 Ill. 181.

Iowa.— Jones *v.* Blumenstein, 77 Iowa 361, 42 N. W. 321; McBurney *v.* Graves, 66 Iowa 314, 23 N. W. 682.

Kentucky.— Stillwell *v.* Duncan, 103 Ky. 59, 19 Ky. L. Rep. 1701, 44 S. W. 357, 39 L. R. A. 863; Hughes *v.* Swope, 88 Ky. 254, 8 Ky. L. Rep. 256, 1 S. W. 394; Smith *v.* Cochran, 7 Bush (Ky.) 147; Smith *v.* Moberly, 15 B. Mon. (Ky.) 70; Caskey *v.* Lewis, 15 B. Mon. (Ky.) 27; Byrd *v.* Rose, 19 Ky. L. Rep. 1898, 44 S. W. 958; Corbett *v.* Howell, 10 Ky. L. Rep. 793, 10 S. W. 653; Taylor *v.* Loller, 8 Ky. L. Rep. 773, 3 S. W. 165; Mockbee *v.* Fields, 8 Ky. L. Rep. 342, 1 S. W. 485; Thacker *v.* Crawford, 5 Ky. L. Rep. 764; Atkinson *v.* Reiley, 5 Ky. L. Rep. 682; Smith *v.* Smith, 4 Ky. L. Rep. 893.

Louisiana.— Ludeling *v.* Garrett, 50 La. Ann. 118, 23 So. 94.

Maine.— Barker *v.* Whittemore, 22 Me. 556; Murray *v.* Ulmer, 5 Me. 126.

Massachusetts.— Plympton *v.* Baker, 10 Pick. (Mass.) 473; Blood *v.* Kemp, 4 Pick. (Mass.) 169; Davis *v.* Mason, 4 Pick. (Mass.) 156.

Missouri.— Baier *v.* Berberich, 77 Mo. 413.

New York.— Getman *v.* Ingersoll, 117 N. Y. 75, 17 N. Y. Civ. Proc. 436, 22 N. E. 750, 26 N. Y. St. 660; Warren *v.* Wilder, 114 N. Y. 209, 21 N. E. 159, 23 N. Y. St. 108; Shaw *v.* McCarty, 11 Daly (N. Y.) 150.

Ohio.— Miller *v.* Cincinnati, 5 Ohio Cir. Ct. 583.

Virginia.— Sellers *v.* Reed, 88 Va. 377, 13 S. E. 754; Barker *v.* Jenkins, 84 Va. 895, 6 S. E. 459; Pannill *v.* Coles, 81 Va. 380.

West Virginia.— Lehman *v.* Hinton, 44 W. Va. 1, 29 S. E. 984; McClaugherty *v.* Morgan, 36 W. Va. 191, 14 S. E. 992; Buster *v.* Holland, 27 W. Va. 510; Gorman *v.* Steed, 1 W. Va. 1.

United States.— Stinson *v.* Dousman, 20 How. (U. S.) 461, 15 L. ed. 966.

As to pleading title to land in an action commenced in a justice's court see Justices of the Peace.

When title is not directly in issue, but is only incidentally or collaterally involved, this rule does not apply. See *supra*, III, C, 2, y, (II).

The fact that the land has been sold after order of the court does not abridge the right to appeal. The controversy as to the right to the proceeds will be regarded as involving the title to land, and an appeal will lie regardless of amount. Clements *v.* Waters, 90 Ky. 96, 11 Ky. L. Rep. 880, 13 S. W. 431.

Incidental controversies.— Where a case involves title to land, controversies incident to the main issue, though not of themselves relating to the title, must follow the appeal. Jones *v.* Blumenstein, 77 Iowa 361, 42 N. W. 321.

Condemnation proceedings.— A proceeding to condemn lands for public uses involves title. Skinner *v.* Lake View Ave. Co., 57 Ill. 151; Morris *v.* Chicago, 11 Ill. 650; Matter of Essex Ave., 44 Mo. App. 288; St. Louis, etc., R. Co. *v.* Lewright, 44 Mo. App. 212. And see Eminent Domain.

78. Numerous authorities sustain the text, among which may be cited the following cases:

Alabama.— Tatum *v.* Yahn, (Ala. 1900) 29 So. 201.

Arizona.— Spicer *v.* Simms, (Ariz. 1899) 57 Pac. 610.

Arkansas.— Palmer *v.* McChesney, 26 Ark. 452.

California.—People *v.* Thurston, 5 Cal. 517.

Colorado.— Daniels *v.* Miller, 8 Colo. 542, 9 Pac. 18.

Connecticut.— Morse *v.* Rankin, 51 Conn. 326.

Florida.— Tunno *v.* International R., etc., Co., 34 Fla. 300, 16 So. 180.

Georgia.— Allen *v.* Savannah, 9 Ga. 286.

Idaho.— Adams *v.* McPherson, 2 Ida. 855, 27 Pac. 577.

Illinois.— *Ex p.* Thompson, 93 Ill. 89.

Indiana.— Thomas *v.* Service, 90 Ind. 128.

Kansas.— Atchison, etc., R. Co. *v.* Brown, 26 Kan. 443.

Kentucky.— Howard *v.* Louisville, etc., R. Co., 17 Ky. L. Rep. 814, 32 S. W. 746.

Louisiana.—Bailey *v.* Sims, 3 La. Ann. 217.

Maine.— State *v.* Brown, 75 Me. 456.

Maryland.—Cunningham *v.* Carroll County, (Md. 1901) 48 Atl. 1046.

Massachusetts.— Comins *v.* Turner's Falls Co., 140 Mass. 146, 3 N. E. 304.

permissive statute, only on appeal from the final judgment that is rendered in the cause.[79]

b. Determination of Controversy. A judgment, order, or decree, to be appealable, must determine the controversy, or the rights of the parties, and leave nothing further to be done.[80] Accordingly, a judgment or order of court, though determining the law applicable to the issues of an action, yet leaving questions of fact unsettled, is not a final judgment.[81] It has been held, however, that when a

Michigan.— Holbrook *v.* Cook, 5 Mich. 225.
Mississippi.— Shotwell *v.* Taliaferro, 25 Miss. 105.
Missouri.— Johnson *v.* Board of Education, 65 Mo. 47.
Montana.— Beattie *v.* Hoyt, 3 Mont. 140.
Nebraska.— State *v.* Higby, (Nebr. 1900) 84 N. W. 261.
New Jersey.— Cooper *v.* Vanderveer, 47 N. J. L. 178.
New Mexico.— Lyndonville Nat. Bank *v.* Folsom, (N. M. 1900) 62 Pac. 976.
New York.— Feist *v.* Third Ave. R. Co., 13 Misc. (N. Y.) 240, 25 N. Y. Civ. Proc. 257, 34 N. Y. Suppl. 57, 68 N. Y. St. 13.
North Carolina.— Hailey *v.* Gray, 93 N. C. 195.
Ohio.— Evans *v.* Iles, 7 Ohio St. 233.
Pennsylvania.— Mackaness *v.* Long, 85 Pa. St. 158.
Tennessee.— Whitfield *v.* Greer, 3 Baxt. (Tenn.) 78.
Texas.— Paris *v.* Mason, 37 Tex. 447.
Utah.— North Point Consol. Irrigation Co. *v.* Utah, etc., Canal Co., 14 Utah 155, 46 Pac. 824.
Vermont.— Nelson *v.* Brown, 59 Vt. 600, 10 Atl. 721.
Virginia.—Tucker *v.* Sandridge, 82 Va. 532.
Wisconsin.— Crocker *v.* State, 60 Wis. 553, 19 N. W. 435.
United States.—Hayes *v.* Fischer, 102 U. S. 121, 26 L. ed. 95.
See 2 Cent. Dig. tit. "Appeal and Error," § 329 *et seq.*

79. *Arkansas.*— Davie *v.* Davie, 52 Ark. 224, 12 S. W. 558, 20 Am. St. Rep. 170.
California.— Baker *v.* Baker, 10 Cal. 527; De Barry *v.* Lambert, 10 Cal. 503.
Minnesota.— Duluth Transfer R. Co. *v.* Duluth Terminal R. Co., 81 Minn. 62, 83 N. W. 497.
New York.— Gilmore *v.* Ham, 61 Hun (N. Y.) 1, 21 N. Y. Civ. Proc. 102, 15 N. Y. Suppl. 391, 39 N. Y. St. 664.
North Carolina.— Bennett *v.* Shelton, 117 N. C. 103, 23 S. E. 95; Martin *v.* Flippin, 101 N. C. 452, 8 S. E. 345.
Vermont.— Nelson *v.* Brown, 59 Vt. 600, 10 Atl. 721.
Virginia.— Harper *v.* Vaughan, 87 Va. 426, 12 S. E. 785.
Wisconsin.—Schattschneider *v.* Johnson, 39 Wis. 387.

80. Numerous authorities sustain the text, among which may be cited the following cases:
Alabama.— Randall *v.* Hardy, 107 Ala. 476, 19 So. 971; Hastie *v.* Aiken, 67 Ala. 313.
Arkansas.— Davie *v.* Davie, 52 Ark. 224, 12 S. W. 558, 20 Am. St. Rep. 170; Johnson *v.* Clark, 4 Ark. 235.
California.— Williams *v.* Conroy, 52 Cal. 414.
Colorado.— Standley *v.* Hendrie, etc., Mfg. Co., 25 Colo. 376, 55 Pac. 723.
Connecticut.— Guarantee Trust, etc., Co. *v.* Philadelphia, etc., R. Co., 69 Conn. 709, 38 Atl. 792, 38 L. R. A. 804.
Florida.— Griffin *v.* Orman, 9 Fla. 22.
Georgia.— Allen *v.* Savannah, 9 Ga. 286.
Illinois.— McParland *v.* Larkin, (Ill. 1889) 21 N. E. 565.
Iowa.— Thompson *v.* Pickel, 20 Iowa 490.
Kentucky.— Graham *v.* Noland, 1 J. J. Marsh. (Ky.) 328.
Maryland.— Waverly Mut., etc., Land, etc., Assoc. *v.* Buck, 64 Md. 338, 1 Atl. 561; Nally *v.* Long, 56 Md. 567.
Massachusetts.— Riley *v.* Farnsworth, 116 Mass. 223; Goddard *v.* Perkins, 9 Gray (Mass.) 411.
Michigan.— Hake *v.* Coach, 105 Mich. 425, 63 N. W. 306; Watson *v.* Watson, 47 Mich. 427, 11 N. W. 227.
Minnesota.—McMahon *v.* Davidson, 12 Minn. 357.
Missouri.— Deickhart *v.* Rutgers, 45 Mo. 132; Hill *v.* Young, 3 Mo. 337.
New Hampshire.— Wentworth *v.* Treanor, 31 N. H. 528.
New Jersey.—Newark Plank Road, etc., Co. *v.* Elmer, 9 N. J. Eq. 754.
New York.—Dickenson *v.* Codwise, 11 Paige (N. Y.) 189; Mills *v.* Hoag, 7 Paige (N. Y.) 18, 31 Am. Dec. 271.
North Carolina.— Hinton *v.* Virginia L. Ins. Co., 116 N. C. 22, 21 S. E. 201; *Ex p.* Spencer, 95 N. C. 271.
Ohio.— Hobbs *v.* Beckwith, 6 Ohio St. 252; Phillips *v.* Mustard, 2 Ohio Dec. 455.
South Carolina.— Lowndes *v.* Miller, 25 S. C. 119; Donaldson *v.* Farmers', etc., Bank, 4 S. C. 106.
South Dakota.— Heegaard *v.* Dakota L. & T. Co., 3 S. D. 569, 54 N. W. 656.
Tennessee.—Patton *v.* Irvin, 8 Baxt. (Tenn.) 453; Meadows *v.* State, 7 Coldw. (Tenn.) 416.
Texas.— Raymond *v.* Conger, 51 Tex. 536.
Vermont.— Hayes *v.* Stewart, 23 Vt. 622.
Virginia.—Miller *v.* Cook, 77 Va. 806; Rogers *v.* Strother, 27 Gratt. (Va.) 417.
United States.— St. Clair County *v.* Lovingston, 18 Wall. (U. S.) 628, 21 L. ed. 813; Desvergers *v.* Parsons, 60 Fed. 143, 23 U. S. App. 239, 8 C. C. A. 526.
See 2 Cent. Dig. tit. "Appeal and Error," § 494.

81. Potter *v.* Talkington, (Ida. 1897) 49 Pac. 14.

decree purports to be final, and execution is awarded upon it, it may be revised, although not in fact final.[82] It has also been held that the question whether a decree is final and appealable is not determined by the name which the court below gives it, but is to be decided by the appellate court on a consideration of the essence of what is done by the decree.[83]

c. Finality as to All Parties — (1) *In General.* An appeal or writ of error will not lie, as a rule, unless there has been a final disposition of the case as to all the parties.[84] But where a complaint is filed against several persons, but no summons is issued, and one of such persons alone appears, a judgment for him is final and appealable.[85]

A reservation in a decree of a right to apply to the court for any order that may be necessary to the due execution of the decree does not destroy its appealability. Gaston *v.* Boyd, 52 Tex. 282; Winthrop Iron Co. *v.* Meeker, 109 U. S. 180, 3 S. Ct. 111, 27 L. ed. 898; French *v.* Shoemaker, 12 Wall. (U. S.) 86, 20 L. ed. 270. See also Brown *v.* Vancleave, 86 Ky. 381, 9 Ky. L. Rep. 593, 6 S. W. 25, wherein it was held that a judgment is final which completely settles the rights of the parties, although there is an order retaining the cause on the docket for the purpose of executing the judgment, which is discharged by the payment of the amount of the judgment into court. To the same effect see Arnold *v.* Sinclair, 11 Mont. 556, 29 Pac. 340, 28 Am. St. Rep. 489.

82. Hollis *v.* Caughman, 22 Ala. 478.

A decree that is partly final in that it settles the substantial merits of the case, but is interlocutory in that it orders an account between the parties, is appealable.

Alabama.— Adams *v.* Sayre, 76 Ala. 509.

Illinois.— Allison *v.* Drake, 145 Ill. 500, 32 N. E. 537.

Iowa.— McMurray *v.* Day, 70 Iowa 671, 28 N. W. 476.

Minnesota.— Ayer *v.* Termatt, 8 Minn. 96.

New York.— Johnson *v.* Everett, 9 Paige (N. Y.) 636.

83. Potter *v.* Beal, 50 Fed. 860, 5 U. S. App. 49, 2 C. C. A. 60.

Bar to another suit.— To constitute a final judgment for purpose of appeal it is not essential that it should be a bar to another suit. Colorado Eastern R. Co. *v.* Union Pac. R. Co., 94 Fed. 312, 36 C. C. A. 263.

84. Numerous authorities sustain the text, among which may be cited the following cases:

Alabama.—Alexander *v.* Bates, (Ala. 1900) 28 So. 415; Martin *v.* Kelly, 113 Ala. 577, 21 So. 337.

Arkansas.— Bivins *v.* McElroy, 11 Ark. 23, 52 Am. Dec. 258.

California.— Feris *v.* Baker, 127 Cal. 520, 59 Pac. 937.

Connecticut.— Finch *v.* Ives, 24 Conn. 387.

Georgia.— Fouché *v.* Harrison, 78 Ga. 359, 3 S. E. 330.

Illinois.— Pain *v.* Kinney, 175 Ill. 264, 51 N. E. 621; Dreyer *v.* Goldy, 171 Ill. 434, 49 N. E. 560.

Indiana.— Keller *v.* Jordan, 147 Ind. 113, 46 N. E. 343.

Iowa.— Baird *v.* Omaha, etc., R., etc., Co., 111 Iowa 627, 82 N. W. 1020.

Kansas.— Blackwood *v.* Shaffer, 44 Kan. 273, 24 Pac. 423.

Kentucky.— Kellar *v.* Tilly, 3 Dana (Ky.) 443; Gentry *v.* Walker, 14 Ky. L. Rep. 351, 20 S. W. 291.

Louisiana.— Abrams *v.* Jay, 16 La. Ann. 373.

Maryland.— L. A. Thompson Scenic R. Co. *v.* Norvell, (Md. 1899) 44 Atl. 1026.

Massachusetts.— See Swett *v.* Sullivan, 7 Mass. 342.

Michigan.— Teller *v.* Willis, 12 Mich. 384.

Minnesota.— Billson *v.* Lardner, 67 Minn. 35, 69 N. W. 477.

Missouri.—Sater *v.* Hunt, 75 Mo. App. 468; Merchants' Exch. Mut. Benev. Soc. *v.* Sessinghaus, 59 Mo. App. 106.

New Mexico.— U. S. *v.* Gwyn, 4 N. M. 635, 42 Pac. 167.

New York.— Geneva Bank *v.* Hotchkiss, Code Rep. N. S. (N. Y.) 153, 5 How. Pr. (N. Y.) 478.

Ohio.— Hinde *v.* Whitney, 31 Ohio St. 53.

Oregon.— Watkins *v.* Mason, 11 Oreg. 72, 4 Pac. 524.

Tennessee.— Lang *v.* Ingalls Zinc Co., 99 Tenn. 476, 42 S. W. 198; Hume *v.* Commercial Bank, 1 Lea (Tenn.) 220.

Texas.— Powers *v.* Schmidt, 87 Tex. 385, 28 S. W. 1055; Missouri Pac. R. Co. *v.* Scott, 78 Tex. 360, 14 S. W. 791.

Virginia.—Wells *v.* Jackson, 3 Munf. (Va.) 458.

Washington.— Johnson *v.* Lighthouse, 8 Wash. 32, 35 Pac. 403; Dwyer *v.* Schlumpf, 6 Wash. 25, 32 Pac. 1005.

West Virginia.— Kearfoot *v.* Dandridge, 45 W. Va. 673, 31 S. E. 947.

United States.— Meagher *v.* Minnesota Thresher Mfg. Co., 145 U. S. 608, 12 S. Ct. 876, 36 L. ed. 834; U. S. *v.* Girault, 11 How. (U. S.) 22, 13 L. ed. 587; Baker *v.* Old Nat. Bank, 91 Fed. 449, 63 U. S. App. 34, 33 C. C. A. 570.

See 2 Cent. Dig. tit. "Appeal and Error," § 484.

85. Davis, etc., Bldg., etc., Co. *v.* Hillsboro Creamery Co., 9 Ind. App. 553, 37 N. E. 294. See also Bradshaw *v.* Miners' Bank, 81 Fed. 902, 53 U. S. App. 399, 26 C. C. A. 673, wherein it was held that the right of appeal is not affected by the fact that there is no decree against one of the respondents who was not served with process, and who, though a

(11) *Dismissal as to One Party.* A judgment or decree dismissing as to one of several defendants sought to be jointly charged is not final so as to permit an appeal.[86]

d. Judgment by Divided Court. The fact that a judgment is rendered by an evenly divided court does not impair its character as a final judgment.[87]

e. Part of Judgment or Order. An appeal cannot be taken from a part only of a judgment or order,[88] in the absence of a statute permitting it,[89] unless such part is not connected with, or dependent upon, the remaining portion.[90] It has also been held that if a party elects to avail himself of such parts of a judgment as are favorable to him, he cannot, where all the parts are dependent upon one another, appeal from those which are adverse.[91] But where an action is against two defendants whose liabilities are separate and distinct, or is upon two distinct subject-matters, and a several judgment is rendered in favor of one defendant and against the other, or in favor of plaintiff as to one subject-matter and against him as to the other, the fact that an appeal has been brought by the

proper, is not a necessary, party to the suit. And see Bryson *v.* Thurmond, 103 Ga. 463, 30 S. E. 269, wherein it was held that where, in a suit against two persons, a plea in abatement for want of service has been sustained by the court as to one of the defendants, and no steps are subsequently taken to perfect service, such judgment is a final disposition of the case as to that defendant, and any error therein can be corrected only by direct writ of error.

86. *Colorado.*—Hagerman *v.* Moore, 2 Colo. App. 83, 29 Pac. 1014.

Georgia.—Zorn *v.* Lamar, 71 Ga. 80; Shealy *v.* Toole, 66 Ga. 573.

Illinois.— Thompson *v.* Follansbee, 55 Ill. 427; Packer *v.* Roberts, 44 Ill. App. 232; Hoffman, etc., Mfg. Co. *v.* Haxton Steam Heater Co., 18 Ill. App. 484.

Ohio.— An order dismissing a petition as to some of the defendants is a final order as to them. Connell *v.* Brumback, 18 Ohio Cir. Ct. 502.

Texas.— Owens *v.* Mitchell, 33 Tex. 225. *Compare* Welge *v.* Jackson, (Tex. Civ. App. 1895) 32 S. W. 371.

Washington.— An order dismissing an action as to some of the defendants, though not all, is appealable. Pennsylvania Mortg. Invest. Co. *v.* Gilbert, 13 Wash. 684, 43 Pac. 941, 45 Pac. 43.

West Virginia.— A decree dismissing a bill as to one defendant is, as to that defendant, a final decree. Dick *v.* Robinson, 19 W. Va. 159.

United States.—Hohorst *v.* Hamburg-American Packet Co., 148 U. S. 262, 13 S. Ct. 590, 37 L. ed. 443; Beck, etc., Lithographing Co. *v.* Wacker, etc., Brewing, etc., Co., 76 Fed. 10, 22 C. C. A. 11.

Dismissal of one caveat.— An order upon a motion for the dismissal of one of several caveats filed against the probate of a will is not a final judgment from which error will lie. Habersham *v.* Wetter, 59 Ga. 11.

87. Hartman *v.* Greenhow, 102 U. S. 672, 26 L. ed. 271.

88. *Alabama.*— Booker *v.* Jemison, 4 Ala. 408.

Montana.— Plaisted *v.* Nowlan, 2 Mont. 359; Barkley *v.* Logan, 2 Mont. 296.

North Carolina.— Bain *v.* Bain, 106 N. C. 239, 11 S. E. 327; Hicks *v.* Gooch, 93 N. C. 112.

Ohio.— Wright *v.* Western Union Tel. Co., 4 Ohio Cir. Ct. 375.

Oregon.— Farmers' Bank *v.* Key, 33 Oreg. 443, 54 Pac. 206.

Washington.—Where judgment is partly in favor of a party and partly adverse to him, he should appeal from the adverse part only, and not from the whole judgment. Healy *v.* Seward, 5 Wash. 319, 31 Pac. 874.

See 2 Cent. Dig. tit. "Appeal and Error," § 866.

89. A statute permitting an appeal from any specific part of a judgment does not extend to a money judgment for a definite sum. Hampton *v.* Logan County, (Ida. 1896) 43 Pac. 324; Cromwell *v.* Burr, 9 Daly (N. Y.) 482. Such a statute permits an appeal from so much of an order as requires a party, substituted as a defendant in lieu of her deceased ancestor, to pay the costs of the action, though no appeal be taken from the residue thereof. Van Loan *v.* Squires, 51 Hun (N. Y.) 360, 4 N. Y. Suppl. 371, 21 N. Y. St. 526. See also Bank of Commerce *v.* Fuqua, 11 Mont. 285, 28 Pac. 291, 28 Am. St. Rep. 461, 14 L. R. A. 588.

90. *California.*—Luck *v.* Luck, 83 Cal. 574, 23 Pac. 1035, wherein it was held that, in divorce, a judgment denying plaintiff's prayer, and awarding the custody of the children to defendant, is final, and appeal lies from any part of the decree.

Iowa.— Gleiser *v.* McGregor, 85 Iowa 489, 52 N. W. 366.

Minnesota.— Hall *v.* McCormick, 31 Minn. 280, 17 N. W. 620.

Oregon.— Inman *v.* Henderson, 29 Oreg. 116, 45 Pac. 300.

Rhode Island.— Harris *v.* Harris, 2 R. I. 538.

Tennessee.—Sharp *v.* Fields, 5 Lea (Tenn.) 326.

United States.— Worthington *v.* Beeman, 91 Fed. 232, 63 U. S. App. 536, 33 C. C. A. 475.

91. Murphy *v.* Spaulding, 46 N. Y. 556; Harris *v.* Taylor, 20 N. Y. Wkly. Dig. 379.

unsuccessful defendant from the judgment against him, and has been determined by the appellate court, while it estops plaintiff from questioning that portion of the judgment, does not preclude him from appealing from the residue.[92]

f. Necessity of Taxation of Costs. In some states a judgment is not deemed final, so as to support an appeal, until the costs are taxed and inserted therein.[93]

g. Refusal to Enter Judgment. A refusal of the court to enter judgment is not a final judgment from which an appeal will lie.[94]

h. Void Judgments or Orders. Although a judgment is void, it is so far to be considered in existence by the appellate court that it may be reviewed and reversed, and the parties restored to the positions they originally occupied.[95]

92. Genet *v.* Davenport, 60 N. Y. 194.

93. Richardson *v.* Rogers, 37 Minn. 461, 35 N. W. 270; Sloop Leonede *v.* U. S., 1 Wash. Terr. 153; Joint School-Dist. No. 7 *v.* Kemen, 68 Wis. 246, 32 N. W. 42; Hoye *v.* Chicago, etc., R. Co., 65 Wis. 243, 27 N. W. 309, 310; Milwaukee County *v.* Pabst, 64 Wis. 244, 25 N. W. 11; Smith *v.* Hart, 44 Wis. 230.

See 2 Cent. Dig. tit. "Appeal and Error," § 428.

But see Craig *v.* The Hartford, McAll. (U. S.) 91, 6 Fed. Cas. No. 3,333, wherein it was held that a decree which is final in all other respects is not converted into an interlocutory decree in that it directs a taxation of costs. See also Williams *v.* Wait, 2 S. D. 210, 49 N. W. 209, 39 Am. St. Rep. 768, wherein it was held that an appeal will not be dismissed because taken before the costs and disbursements in the court below are taxed and inserted in the entry of the judgment appealed from.

In Idaho it has been held that, when the party entitled to costs fails to file his memorandum thereof within the time prescribed, he thereby waives his right to costs, and the clerk has no right thereafter to insert them in the record of judgment; and in such a case the fact that the costs do not appear in the record of judgment does not make the judgment not a final judgment and not appealable. Cantwell *v.* McPherson, 2 Ida. 1044, 29 Pac. 102.

94. Branford *v.* Erant, 1 N. M. 579; Lane *v.* Ellinger, 32 Tex. 369.

95. *Alabama.*— Ayres *v.* Dobson, 5 Stew. & P. (Ala.) 441. But as a decree of the probate court, void upon its face, may be vacated by that court on motion, no appeal will lie from the decree. Hays *v.* Cockrell, 41 Ala. 75.

California.— Merced Bank *v.* Rosenthal, 99 Cal. 39, 31 Pac. 849, 33 Pac. 732.

Colorado.— Filley *v.* Cody, 4 Colo. 109; Cooper *v.* American Cent. Ins. Co., 3 Colo. 318.

Connecticut.— Stonington *v.* States, 31 Conn. 213. But where a judgment is rendered for plaintiff, which cannot be enforced by legal process because unauthorized and void, no appeal lies therefrom. Seymour *v.* Belden, 28 Conn. 443.

Georgia.— Walker *v.* Banks, 65 Ga. 20.

Illinois.— Ross *v.* Hamer, 52 Ill. App. 251.

Indiana.— Louisville, etc., R. Co. *v.* Lockridge, 93 Ind. 191; Shoemaker *v.* Grant County, 36 Ind. 175. But where a judgment is void because rendered in vacation, no appeal lies therefrom. Backer *v.* Eble, 144 Ind. 287, 43 N. E. 233.

Kentucky.— A default judgment, without service of process upon, or entry of appearance by, defendant is void, and may be reversed on appeal after a motion in the lower court to set aside the judgment has been overruled. Hermann *v.* Martin, 21 Ky. L. Rep. 1396, 55 S. W. 429. See also Swafford *v.* Howard, 20 Ky. L. Rep. 1793, 50 S. W. 43.

Maryland.— Price *v.* Taylor, 21 Md. 356. And where, by mistake, a judgment was entered as of Sunday, the judgment may be stricken out on motion, and entered as of another day; and from a refusal to grant such motion an appeal may be taken. Ecker *v.* New Windsor First Nat. Bank, 62 Md. 519.

Massachusetts.—Waters *v.* Randall, 8 Metc. (Mass.) 132.

Minnesota.—An order refusing to vacate an unauthorized judgment passes upon and determines the positive legal rights of a party, and is therefore appealable. Piper *v.* Johnston, 12 Minn. 60.

Missouri.— Ferguson *v.* Ferguson, 36 Mo. 197; Smith *v.* Jacobs, 77 Mo. App. 254. A judgment on default, in a suit to foreclose a mortgage, being made final, is irregular, and can be set aside on motion by defendant; but, not having made such motion, he cannot avail himself of the irregularity by a writ of error to the supreme court. Lawther *v.* Agee, 34 Mo. 372.

New Mexico.— A judgment in an action at law begun and ended in vacation is void; and there being, therefore, no final judgment, an appeal therefrom will be dismissed. Staab *v.* Atlantic, etc., R. Co., 3 N. M. 349, 9 Pac. 381.

New York.—Catlin *v.* Rundell, 1 N. Y. App. Div. 157, 37 N. Y. Suppl. 979, 73 N. Y. St. 521; Gormly *v.* McIntosh, 22 Barb. (N. Y.) 271; Wands *v.* Robarge, 24 Misc. (N. Y.) 273, 53 N. Y. Suppl. 700; Loeb *v.* Smith, 24 Misc. (N. Y.) 200, 52 N. Y. Suppl. 677; Smith *v.* Van Kuren, 2 Barb. Ch. (N. Y.) 473.

North Carolina.—Darden *v.* Maget, 18 N. C. 498.

Oregon.— Stites *v.* McGee, (Oreg. 1900) 61 Pac. 1129; Therkelsen *v.* Therkelsen, 35 Oreg. 75, 54 Pac. 885, 57 Pac. 373.

Tennessee.— *Ex p.* Martin, 5 Yerg. (Tenn.) 456, 26 Am. Dec. 276. See also McDonald *v.* McDonald, 5 Yerg. (Tenn.) 306.

Texas.— Hearn *v.* Cutberth, 10 Tex. 216. But a judgment or decree of a district court, pronounced at a time when, by law, no dis-

2. Interlocutory Decisions. In some jurisdictions appeals from enumerated interlocutory orders are authorized by statute. But as such appeals are the creation of statute, they cannot be extended by implication, and will only lie when expressly authorized.[96]

3. Particular Decisions — a. Admission of Attorney. In New York it has been held that an order denying an application for admission to the bar is appealable to the court of appeals, under the provision of the code giving appeals from final orders affecting a substantial right in special proceedings.[97]

b. Bills of Review. An order granting leave to file a bill of review is not a final order from which an appeal lies.[98] Otherwise, however, of an order denying leave to file such bill.[99]

c. Certiorari. An order granting or refusing, or quashing or refusing to quash, a writ of certiorari, is not appealable.[1]

d. Conduct, Place, or Time of Trial — (1) *Calendars.* The privilege of a

trict court could be held, is not appealable. Campbell *v.* Chandler, 37 Tex. 32; Doss *v.* Waggoner, 3 Tex. 515; Hodges *v.* Ward, 1 Tex. 244.

Washington.— Fox *v.* Nachtsheim, 3 Wash. 684, 29 Pac. 140.

West Virginia.— Cook *v.* Dorsey, 38 W. Va. 196, 18 S. E. 468.

Wisconsin.— Ashland Lodge No. 63, etc. *v.* Williams, 100 Wis. 223, 75 N. W. 954, 69 Am. St. Rep. 912; Calkins *v.* Hays, 4 Wis. 200; Abrams *v.* Jones, 4 Wis. 806.

United States.— Wilson *v.* Daniel, 3 Dall. (U. S.) 401, 1 L. ed. 655. A decree rendered by a district judge in a circuit court, in a case where he has no vote, is good until vacated, and therefore appealable. Baker *v.* Power, 124 U. S. 167, 8 S. Ct. 416, 31 L. ed. 382.

See 2 Cent. Dig. tit. "Appeal and Error," § 749.

96. See the statutes of the several states and the following cases:

California.— De Barry *v.* Lambert, 10 Cal. 503; Juan *v.* Ingoldsby, 6 Cal. 439.

Indiana.— Reese *v.* Beck, 9 Ind. 238; Woolley *v.* State, 8 Ind. 377.

Minnesota.—Fulton *v.* Andrea, 72 Minn. 99, 75 N. W. 4.

Missouri.—Voorhis *v.* Western Union Bldg., etc., Assoc., 59 Mo. App. 55.

New York.— Townsend *v.* Hendricks, 40 How. Pr. (N. Y.) 143.

Virginia.— Elder *v.* Harris, 75 Va. 68.

In North Carolina, where an interlocutory order will deprive a party of a substantial right if the alleged error shall not be corrected before the final judgment, an appeal lies. Skinner *v.* Carter, 108 N. C. 106, 12 S. E. 908; Leak *v.* Covington, 95 N. C. 193; Merrill *v.* Merrill, 92 N. C. 657.

In West Virginia it has been held that an interlocutory decree, to be appealable, must adjudicate all the questions raised, in the pleadings or otherwise, and determine the principles and rules by which relief must be administered. Wood *v.* Harmison, 41 W. Va. 376, 23 S. E. 560.

97. Matter of Cooper, 22 N. Y. 67, 20 How. Pr. (N. Y.) 1; Matter of Graduates, 11 Abb. Pr. (N. Y.) 301.

In Maryland it has been held that no appeal lies from an order of the county court admitting a person as an attorney of that court. State *v.* Johnston, 2 Harr. & M. (Md.) 160.

98. Maxfield *v.* Freeman, 39 Mich. 64.

In Mississippi it has been held that a bill to review a partition is not a part of the original cause, and a decree sustaining such bill is a final decree from which an appeal will lie. Gilleylen *v.* Martin, 73 Miss. 695, 19 So. 482.

99. Beecher *v.* Marquette, etc., Rolling Mill Co., 40 Mich. 307; Lee *v.* Braxton, 5 Call (Va.) 459. See also State *v.* Lanahan, 17 Mont. 518, 43 Pac. 712, wherein it was held that a judgment of the district court refusing a writ of review against a justice court is appealable. But see Bowyer *v.* Lewis, 1 Hen. & M. (Va.) 553, wherein it was held that an order rejecting a motion to allow a bill of review, where the right of property had been determined but an account remained to be taken, is merely interlocutory.

1. *Georgia.*— Macon *v.* Shaw, 14 Ga. 162.

Illinois.— Board of Supervisors *v.* Magoon, 109 Ill. 142; Hersey *v.* Schaedel, 6 Ill. App. 188.

Maryland.—Crockett *v.* Parke, 7 Gill (Md.) 237.

New Jersey.— State *v.* Jersey City, 43 N. J. L. 662; State *v.* French, 24 N. J. L. 736.

New York.— An order denying a motion to quash a common-law certiorari, issued in a case not reviewable by certiorari, is appealable. People *v.* Public Park Com'rs, 97 N. Y. 37. See also Matter of Corwin, 135 N. Y. 245, 32 N. E. 16, 48 N. Y. St. 238.

North Carolina.— Farmers Nat. Bank *v.* Burns, 107 N. C. 465, 12 S. E. 252.

Texas.— Hamman *v.* Lewie, 34 Tex. 474.

West Virginia.— A final decision on a writ of certiorari is reviewable on writ of error from the court of appeals. Arnold *v.* Lewis County Ct., 38 W. Va. 142, 8 S. E. 476; Cunningham *v.* Squires, 2 W. Va. 422, 98 Am. Dec. 770. See also Welch *v.* Wetzel County, 29 W. Va. 63, 1 S. E. 337.

Wisconsin.— See State *v.* Oconomowoc, 104 Wis. 622, 80 N. W. 942.

See, generally, Certiorari; and 2 Cent. Dig. tit. "Appeal and Error," § 571.

preference of a cause upon the calendar is a substantial right, and an appeal lies from a denial thereof.[2]

(II) *Change of Venue.* An order granting or refusing a change of venue is not appealable.[3]

(III) *Continuance.* An order granting or refusing a continuance is not a final order from which an appeal lies.[4]

(IV) *Removal of Cause*—(A) *In General.* Though there are decisions to the effect that an order removing or refusing to remove a cause from a state court to a federal court is not appealable,[5] the great weight of authority, and

2. Herzfeld *v.* Strauss, 24 N. Y. App. Div. 95, 49 N. Y. Suppl. 92; Hinkley *v.* Troy, etc., R. Co., 42 Hun (N. Y.) 281; Schwartz *v.* Wolfrath, 24 Misc. (N. Y.) 406, 28 N. Y. Civ. Proc. 55, 53 N. Y. Suppl. 263; Buell *v.* Hollins, 16 Misc. (N. Y.) 551, 38 N. Y. Suppl. 879, 74 N. Y. St. 772.

See 2 Cent. Dig. tit. "Appeal and Error," § 732.

An order denying a motion for leave to transfer a case from the equity docket to the law docket is appealable. Wright *v.* Herlong, 16 S. C. 620.

3. *Alabama.*— Bryan *v.* State, 43 Ala. 321.

Iowa.— Kay *v.* Pruden, 101 Iowa 60, 69 N. W. 1137.

Kentucky.— Mercer *v.* Glass, 89 Ky. 199, 11 Ky. L. Rep. 373, 12 S. W. 194. And an order refusing a change cannot be reviewed even upon appeal from the final judgment. Owensboro, etc., R. Co. *v.* Barclay, 19 Ky. L. Rep. 997, 43 S. W. 177.

Louisiana.— Fields *v.* Gagné, 33 La. Ann. 339.

Maryland.— Davis *v.* State, 3 Harr. & J. (Md.) 154.

Michigan.— Greeley *v.* Stilson, 27 Mich. 153.

Minnesota.— Allis *v.* White, 59 Minn. 97, 60 N. W. 809.

Nevada.— State *v.* Shaw, 21 Nev. 222, 29 Pac. 321.

New York.—Pascocello *v.* Brooklyn Heights R. Co., 26 Misc. (N. Y.) 412, 56 N. Y. Suppl. 177.

Ohio.— Snell *v.* Cincinnati St. R. Co., 60 Ohio St. 256, 54 N. E. 270.

South Carolina.— McCown *v.* Northeastern R. Co., 55 S. C. 384, 33 S. E. 506.

Texas.— Vance *v.* Hogue, 35 Tex. 432.

Utah.—An order changing the place of trial is an appealable order. Elliot *v.* Whitmore, 10 Utah 246, 37 Pac. 461.

Washington.— Bogle *v.* Puget Sound Co-operative Colony, 3 Wash. 138, 28 Pac. 376.

Wisconsin.— Evans *v.* Curtiss, 98 Wis. 97, 73 N. W. 432.

United States.— McFaul *v.* Ramsey, 20 How. (U. S.) 523, 15 L. ed. 1010.

See 2 Cent. Dig. tit. "Appeal and Error, §§ 374, 726.

Remand after change of venue.— No appeal lies from an order remanding a cause to a court from which there has been an attempt to change the venue. Hamrick *v.* Danville, etc., Gravel Road Co., 30 Ind. 147; Turner *v.* Browder, 18 B. Mon. (Ky.) 825; Wygall *v.* State Treasurer, 33 Tex. 328.

4. *California.*— Haraszthy *v.* Horton, 46 Cal. 545.

Colorado.— Lutterell *v.* Swisher, 5 Colo. 54.

Florida.— Read *v.* Gooding, 20 Fla. 773.

Georgia.—Cartter *v.* Rome, etc., Constr. Co., 89 Ga. 158, 15 S. E. 36; Haygood *v.* Georgia Banking, etc., Co., 60 Ga. 291.

Iowa.— Jaffray *v.* Thompson, 65 Iowa 323, 21 N. W. 659.

Kentucky.— Owings *v.* Beall, 1 Litt. (Ky.) 257.

Louisiana.— Newman *v.* Wildenstein, 42 La. Ann. 925, 8 So. 607.

Maine.— Rumsey *v.* Bragg, 35 Me. 116.

Maryland.— Hopkins *v.* State, 53 Md. 502; Cumberland Coal, etc., Co. *v.* McKaig, 27 Md. 258.

Massachusetts.— Reynard *v.* Brecknell, 4 Pick. (Mass.) 302.

New York.—Martin *v.* Hicks, 6 Hun (N. Y.) 74, 51 How. Pr. (N. Y.) 355; McKeon *v.* Kellard, 6 Misc. (N. Y.) 31, 26 N. Y. Suppl. 72, 55 N. Y. St. 513.

North Carolina.— Jaffray *v.* Bear, 98 N. C. 58, 3 S. E. 914; Clark *v.* Latham, 53 N. C. 1. But an appeal lies if a continuance is granted to await the recovery from insanity of defendant. Stratford *v.* Stratford, 92 N. C. 297.

South Carolina.— Latimer *v.* Latimer, 42 S. C. 205, 20 S. E. 159; Morgan *v.* Keenan, 27 S C. 248, 3 S. E. 297.

Texas.— Tinsley *v.* Trimble, 35 Tex. 425; Dow *v.* Hotchkiss, 2 Tex. 471.

Wisconsin.— Whitefoot *v.* Leffingwell, 90 Wis. 182, 63 N. W. 82.

United States.— Missouri, etc., R. Co. *v.* Elliott, 102 Fed. 96, 42 C. C. A. 188.

See 2 Cent. Dig. tit. "Appeal and Error," § 729.

5. *California.*— Brooks *v.* Calderwood, 19 Cal. 124; Hopper *v.* Kalkman, 17 Cal. 517.

Minnesota.— St. Anthony Falls Water-power Co. *v.* King Wrought-Iron Bridge Co., 23 Minn. 186, 23 Am. Rep. 682.

Mississippi.— Jackson *v.* Alabama Great Southern R. Co., 58 Miss. 648.

Nevada.— State *v.* Curler, 4 Nev. 445.

Tennessee.— Jones *v.* Davenport, 7 Coldw. (Tenn.) 145. *Compare* Campbell *v.* Wallen, Mart. & Y. (Tenn.) 266.

Texas.—Durham *v.* Southern L. Ins. Co., 46 Tex. 182, wherein it was held that the right of a party to have a cause transferred on his application could only be inquired into by the supreme court of a state on a refusal of the application after final judgment. See also Rosenfield *v.* Condict, 44 Tex. 464.

what is believed to be the better reason, hold that such an order is one from which an appeal will lie.[6]

(B) *Remand to State Court.* An order of a United States circuit court, remanding or refusing to remand a case to the state court from which it was removed, is an order from which no appeal or writ of error will lie.[7]

(V) *Trial by Jury*—(A) *Actions at Law.* An order denying a jury trial in a legal action affects a substantial right, and is appealable.[8]

(B) *Suits in Equity.* From an order settling issues in an equity case, in which the judge may try all the issues, or may, either on the application of counsel or on his own motion, send any question on which he prefers the judgment of the jury to that tribunal, no appeal lies.[9]

e. Costs—(I) *Judgment for Costs.* A judgment merely for costs, without a final disposition of the cause, is not a final judgment.[10] But a judgment for costs

United States.—Akerly *v.* Vilas, 1 Abb. (U. S.) 284, 2 Biss. (U. S.) 110, 1 Fed. Cas. No. 119.

6. *Alabama.*—*Ex p.* Southern Tel. Co., 73 Ala. 564.

Georgia.—Stafford *v.* Hightower, 68 Ga. 394.

Indiana.—Burson *v.* National Park Bank, 40 Ind. 173, 13 Am. Rep. 285 [*overruling* Aurora *v.* West, 25 Ind. 148].

Louisiana.—Johnson *v.* New Orleans Nat. Banking Assoc., 33 La. Ann. 479; Goodrich *v.* Hunton, 29 La. Ann. 372; Rosenfield *v.* Adams Express Co., 21 La. Ann. 233. *Compare* Bodenheimer's Succession, 35 La. Ann. 1033.

Massachusetts.—Bryan *v.* Richardson, 153 Mass. 157, 26 N. E. 435; Ellis *v.* Atlantic, etc., R. Co., 134 Mass. 338.

Michigan.—Crane *v.* Reeder, 28 Mich. 527, 15 Am. Rep. 223.

New York.—De Camp *v.* New Jersey Mut. L. Ins. Co., 2 Sweeny (N. Y.) 481 [*distinguishing* Illius *v.* New York, etc., R. Co., 13 N. Y. 597].

Ohio.—Home L. Ins. Co. *v.* Dunn, 20 Ohio St. 175, 5 Am. Rep. 642; Hadley *v.* Dunlap, 10 Ohio St. 1.

West Virginia.—Henen *v.* Baltimore, etc., R. Co., 17 W. Va. 881.

Wisconsin.—Whiton *v.* Chicago, etc., R. Co., 25 Wis. 424, 3 Am. Rep. 101; Akerly *v.* Vilas, 24 Wis. 165, 1 Am. Rep. 166.

United States.—Kanouse *v.* Martin, 15 How. (U. S.) 198, 14 L. ed. 660.

See 2 Cent. Dig. tit. "Appeal and Error," §§ 472, 724.

7. Act of congress of March 3, 1887, § 6 [24 Stat. at L. pp. 552, 555, c. 373], as amended by act of congress of Aug. 13, 1888 [25 Stat. at L. p. 433, c. 866]; May *v.* State Nat. Bank, 59 Ark. 614, 28 S. W. 431; Illinois Cent. R. Co. *v.* Brown, 156 U. S. 386, 15 S. Ct. 656, 39 L. ed. 461; Bender *v.* Pennsylvania Co., 148 U. S. 502, 13 S. Ct. 640, 37 L. ed. 537; Joy *v.* Adelbert College, 146 U. S. 355, 13 S. Ct. 186, 36 L. ed. 1003; Birdseye *v.* Shaeffer, 140 U. S. 117, 11 S. Ct. 885, 35 L. ed. 402; Gurnee *v.* Patrick County, 137 U. S. 141, 11 S. Ct. 34, 34 L. ed. 601; Texas Land, etc., Co. *v.* Scott, 137 U. S. 436, 11 S. Ct. 140, 34 L. ed. 730; Richmond, etc., R. Co. *v.* Thouron, 134 U. S. 45, 10 S. Ct. 517, 33 L. ed. 871; Chicago, etc., R. Co. *v.* Gray, 131 U. S. 396, 9 S. Ct. 793, 33 L. ed. 212; Sherman *v.* Grinnell, 123 U. S. 679, 8 S. Ct. 260, 31 L. ed. 278; Wilkinson *v.* Nebraska, 123 U. S. 286, 8 S. Ct. 120, 31 L. ed. 152; Morey *v.* Lockhart, 123 U. S. 56, 8 S. Ct. 65, 31 L. ed. 68; Patten *v.* Chilley, 50 Fed. 337, 5 U. S. App. 9, 1 C. C. A. 522; *In re* Coe, 49 Fed. 481, 5 U. S. App. 6, 1 C. C. A. 326.

See 2 Cent. Dig. tit. "Appeal and Error," §§ 472, 725.

8. Beary *v.* Hoster, 53 Hun (N. Y.) 632, 6 N. Y. Suppl. 330, 24 N. Y. St. 878; Dean *v.* Empire State Mut. Ins. Co., 9 How. Pr. (N. Y.) 69.

See 2 Cent. Dig. tit. "Appeal and Error," § 633.

A ruling sustaining or overruling a motion to have certain issues in an action at law transferred for trial in equity is an order affecting the substantial rights of the parties from which an appeal will lie. Matter of Bradley, 108 Iowa 476, 79 N. W. 280; Price *v.* Ætna Ins. Co., 80 Iowa 408, 45 N. W. 1053.

9. *Massachusetts.*—Crittenden *v.* Field, 8 Gray (Mass.) 621; Ward *v.* Hill, 4 Gray (Mass.) 593.

New Jersey.—An order of the chancellor, made at the final hearing, for an issue to be tried by a jury, is appealable. American Dock, etc., Co. *v.* Public Schools, 37 N. J. Eq. 266; Newark, etc., R. Co. *v.* Newark, 23 N. J. Eq. 515 [*disapproving* Black *v.* Lamb, 12 N. J. Eq. 108].

New York.—Clarke *v.* Brooks, 1 Abb. Dec. (N. Y.) 355; Seymour *v.* McKinstry, 13 Hun (N. Y.) 284; Paul *v.* Parshall, 14 Abb. Pr. N. S. (N. Y.) 138; Wood *v.* New York, 4 Abb. Pr. N. S. (N. Y.) 152; Lansing *v.* Russell, 4 How. Pr. (N. Y.) 213. *Compare* Ellensohn *v.* Keyes, 6 N. Y. App. Div. 601, 39 N. Y. Suppl. 774.

Pennsylvania.—Scheetz's Appeal, 35 Pa. St. 88.

South Carolina.—Hammond *v.* Foreman, 43 S. C. 264, 21 S. E. 3.

See 2 Cent. Dig. tit. "Appeal and Error," § 586.

10. Crockett *v.* Lewis, 66 Mo. 671; Evans *v.* Russell, 61 Mo. 37; State *v.* Newton, 26 Mo. App. 11; Reynolds *v.* Tecumseh, 48 Nebr. 785, 67 N. W. 792; Little *v.* Gamble, 47 Nebr. 827, 66 N. W. 849; Barnhouse *v.* Adams, 47 Nebr. 756, 66 N. W. 826; Warren *v.* McKen-

on the dismissal of the suit is a final judgment from which an appeal will lie.[11] And an appeal lies from a judgment for costs in an independent proceeding to recover them.[12]

(II) *Taxation of Costs.* Rulings on a taxation of costs in an action are not, as a rule, appealable of themselves; and are reviewable, if at all, only on appeal from the final judgment.[13]

f. Creditors' Suits. A decree, in a creditor's suit, ascertaining the amounts and priorities of all the debts sought to be established as liens, and ordering the sale of the property for payment of the debts, is a final decree from which an appeal will lie;[14] and the same is true of an order distributing the proceeds of the sale.[15] It has been held, however, that a decree which does not order a sale or payment of complainant's demand, is merely interlocutory.[16]

g. Cross-Bill. A decree upon a cross-bill, pending the original suit, is but a partial decree, from which no appeal lies.[17] It has been held, however, that

zie, 23 Ohio St. 626; Patterson *v.* Hall, 30 Tex. 464; Neyland *v.* White, 25 Tex. 319; Holt *v.* Wood, 23 Tex. 474, 76 Am. Dec. 72.

See 2 Cent. Dig. tit. "Appeal and Error," § 481.

11. O'Connor *v.* Koch, 56 Mo. 253. But see Stricker *v.* Holtz, 50 Iowa 291, wherein it was held that no appeal lies from a judgment for costs rendered against a plaintiff on dismissal of suit for his non-appearance.

12. State *v.* Byrd, 93 N. C. 624; Taney *v.* Woodmansee, 23 W. Va. 709.

13. *Alabama.*—Randolph *v.* Rosser, 7 Port. (Ala.) 249.

California.— Flubacher *v.* Kelly, 49 Cal. 116; Levy *v.* Getleson, 27 Cal. 685. But an order striking out a cost bill subsequent to the rendition and entry of the judgment is appealable, and can be reviewed without an appeal from the judgment. Yorba *v.* Dobner, 90 Cal. 337, 27 Pac. 185. See also Jones *v.* Frost, 28 Cal. 245.

Connecticut.— An order denying a motion for costs, on the ground that the cause had been withdrawn before the return-day, and before it had been entered upon the docket of the court, is a final judgment, and is appealable. Wildman *v.* Munger, 70 Conn. 380, 39 Atl. 599.

District of Columbia.— Johnson *v.* District of Columbia, 7 Mackey (D. C.) 220.

Indiana.—A final order overruling a motion for retaxation of costs is a final judgment. Hill *v.* Shannon, 68 Ind. 470.

Kansas.— Kandt *v.* Chicago, etc., R. Co., 6 Kan. App. 920, 49 Pac. 692.

Kentucky.— Com. *v.* Fugate, 1 T. B. Mon. (Ky.) 1; Williams *v.* Jackman, 2 J. J. Marsh. (Ky.) 352.

Minnesota.— Febler *v.* Southern Minnesota R. Co., 28 Minn. 156, 9 N. W. 635; Minnesota Valley R. Co. *v.* Flynn, 14 Minn. 552.

Missouri.— Manning *v.* Standard Theater Co., 63 Mo. App. 366.

Montana.— State *v.* Millis, 19 Mont. 444, 48 Pac. 773.

Nevada.— Where the case as made in the court below is one of which the supreme court might have appellate jurisdiction, it has jurisdiction of an appeal from an order retaxing costs, made subsequent to judgment. Comstock Mill, etc., Co. *v.* Allen, 21 Nev. 325, 31 Pac. 434.

New Hampshire.—Friel *v.* Plumer, 69 N. H. 498, 43 Atl. 618, 76 Am. St. Rep. 190.

New York.— Brown *v.* Leigh, 50 N. Y. 427.

North Carolina.— An appeal lies from an order construing a judgment and ordering retaxation of costs thereunder. Morristown Mills Co. *v.* Lytle, 118 N. C. 837, 24 S. E. 530. See also Guilford *v.* Beaufort County, 120 N. C. 23, 27 S. E. 94.

Oregon.— Burt *v.* Ambrose, 11 Oreg. 26, 4 Pac. 465.

South Carolina.— An appeal lies from a judgment confirming a taxation of costs in an action at law. Stegall *v.* Bolt, 11 S. C. 522. And an order refusing to allow a party to tax costs incurred on appeal is appealable. Hall *v.* Hall, 45 S. C. 4, 22 S. E. 881.

Vermont.— Lamoille County Sav. Bank, etc., Co. *v.* Buck, 69 Vt. 369, 38 Atl. 62.

Virginia.—Shipman *v.* Fletcher, 95 Va. 585, 29 S. E. 325; Ashby *v.* Kiger, 3 Rand. (Va.) 165.

Wisconsin.—An interlocutory judgment imposing costs on a party is appealable. Sanborn *v.* Perry, 86 Wis. 361, 56 N. W. 337. And the same is true of an order ratifying the refusal of the clerk to tax the costs. State *v.* Reesa, 57 Wis. 422, 15 N. W. 383.

United States.—In the courts of the United States no appeal lies from a decree for costs, except where they are made payable from a fund in court. Foster *v.* Elk Fork Oil, etc., Co., 99 Fed. 617, 40 C. C. A. 21.

See, generally, Costs; and 2 Cent. Dig. tit. "Appeal and Error," § 823 *et seq.*

14. Core *v.* Strickler, 24 W. Va. 689; Andrews *v.* National Foundry, etc., Works, 73 Fed. 516, 34 U. S. App. 632, 19 C. C. A. 548.

See 2 Cent. Dig. tit. "Appeal and Error," § 458.

15. McLaughlin *v.* List, 5 Ky. L. Rep. 291.

16. Portwood *v.* Outon, 1 B. Mon. (Ky.) 149. See also Ogilvie *v.* Knox Ins. Co., 2 Black (U. S.) 539, 17 L. ed. 349, wherein it was held that, on a creditors' bill, the court cannot, until after a report by a master and an ascertainment of all the facts, make a final decree which will support an appeal.

17. Treadway *v.* Coe, 21 Conn. 283; Ayres *v.* Carver, 17 How. (U. S.) 591, 15 L. ed. 179.

where the only issues tried are those made by a cross-petition and reply, and there is a decree rendered against defendant, he may appeal.[18]

h. Disbarment of Attorney. An appeal will lie from an order suspending or disbarring an attorney.[19]

i. Dismissal or Nonsuit — (1) *Judgment of Dismissal or Nonsuit.* As a general rule an appeal may be taken from a judgment of dismissal or nonsuit, as such judgment is a final determination of the cause.[20]

See 2 Cent. Dig. tit. "Appeal and Error," § 511.

A decree on an intervening petition in a foreclosure suit, claiming priority over the mortgage, which decree adjudges the priority, fixes the amount due, and directs provision to be made for such priority in the order of sale, is final and appealable, though the main suit has not reached a final decree. Central Trust Co. *v.* Madden, 70 Fed. 451, 25 U. S. App. 430, 17 C. C. A. 236. See also Thornton *v.* Highland Ave., etc., R. Co., 94 Ala. 353, 10 So. 442.

Orders finally dismissing interpleaders, and an auxiliary petition by plaintiff to enjoin them from enforcing a judgment, and vacating an injunction previously granted thereunder, embody final decisions as to such interpleaders, and are appealable, although the suit between the original parties is still pending. Standley *v.* Roberts, 59 Fed. 836, 19 U. S. App. 407, 8 C. C. A. 305.

Striking out cross-bill.— In Iowa an order striking out a cross-bill is appealable. Mahaska County State Bank *v.* Christ, 82 Iowa 56, 47 N. W. 886.

18. Dodsworth *v.* Hopple, 33 Ohio St. 16; Taylor *v.* Leith, 26 Ohio St. 426. See also Grant *v.* East, etc., R. Co., 50 Fed. 795, 2 U. S. App. 182, 1 C. C. A. 681, wherein it was held that a decree dismissing an auxiliary bill, but retaining the cause, and referring it to a master to ascertain the priority and validity of certain liens, and marshaling conflicting claims to bonds in question, is final as to the auxiliary complainants.

19. *Arkansas.*— Beene *v.* State, 22 Ark. 149.

Connecticut.— Matter of Westcott, 86 Conn. 585, 34 Atl. 505.

Illinois.— Winkelman *v.* People, 50 Ill. 449.

Indiana.— *Ex p.* Trippe, 66 Ind. 531; Walls *v.* Palmer, 64 Ind. 493.

Iowa.— An order overruling a motion for the appointment of an attorney to conduct proceedings for disbarment does not affect any substantial rights, and is therefore not appealable. Byington *v.* Moore, 70 Iowa 206, 30 N. W. 485.

Kentucky.— See Rice *v.* Com., 18 B. Mon. (Ky.) 472.

Massachusetts.— See Randall, Petitioner, 11 Allen (Mass.) 472.

Missouri.— Strother *v.* State, 1 Mo. 605.

New York.— Matter of Eldridge, 82 N. Y. 161, 37 Am. Rep. 558.

North Carolina.— Remedy is by writ of certiorari in the nature of a writ of error. *Ex p.* Biggs, 64 N. C. 202.

Oklahoma.— Matter of Brown, 2 Okla. 590, 39 Pac. 469.

Pennsylvania.— The supreme court will not grant relief to an attorney who has been stricken off the rolls of the district court, either by certiorari, appeal, mandamus, or any other proceeding. Com. *v.* Judges, 5 Watts & S. (Pa.) 272.

South Dakota.— *In re* Houghton, 5 S. D. 537, 59 N. W. 733.

Tennessee.— Brooks *v.* Fleming, 6 Baxt. (Tenn.) 331, holding, however, that no appeal lies from the action of the court discharging a motion to strike an attorney from the roll.

Texas.— Casey *v.* State, 25 Tex. 380. But no appeal lies to the supreme court from a judgment in a district court for defendant in a proceeding charging an attorney with dishonorable conduct. State *v.* Tunstall, 51 Tex. 81.

Wisconsin.— *In re* Orton, 54 Wis. 379, 11 N. W. 584.

United States.— Mandamus is a proper remedy to restore an attorney at law disbarred by a subordinate court. *Ex p.* Robinson, 19 Wall. (U. S.) 513, 22 L. ed. 205; *Ex p.* Bradley, 7 Wall. (U. S.) 364, 19 L. ed. 214.

See, generally, Attorney and Client; and 2 Cent. Dig. tit. "Appeal and Error," § 625.

20. Numerous authorities sustain the text, among which may be cited the following cases:

Alabama.— Hubbard *v.* Baker, 48 Ala. 491; Duncan *v.* Hargrove, 22 Ala. 150.

Arkansas.— *Compare* Yell *v.* Outlaw, 14 Ark. 621.

California.— No appeal lies from a judgment of nonsuit. Kimple *v.* Conway, 69 Cal. 71, 10 Pac. 189.

Colorado.— Corning Tunnel Co. *v.* Pell, 4 Colo. 184.

Connecticut.— Woodruff *v.* Bacon, 34 Conn. 181. But an appeal does not lie from a judgment of nonsuit for not complying with an interlocutory order. Hoyt *v.* Brooks, 10 Conn. 188.

Florida.— Cook *v.* Cook, 18 Fla. 634.

Idaho.— Lalande *v.* McDonald, 2 Ida. 283, 13 Pac. 347.

Illinois.— Bourke *v.* Chicago Sanitary Dist., 92 Ill. App. 333.

Indiana.— Koons *v.* Williamson, 90 Ind. 599.

Kansas.— Moore *v.* Toennisson, 28 Kan. 608.

Kentucky.— Wood *v.* Downing, (Ky. 1901) 62 S. W. 487.

Louisiana.— State *v.* Judge, 9 La. Ann. 353; Heath *v.* Vaught, 16 La. 515.

Maine.— White *v.* Bradley, 66 Me. 254; Perley *v.* Little, 3 Me. 97

Maryland.— Henderson *v.* Maryland Home F. Ins. Co., 90 Md. 47, 44 Atl. 1020.

(II) *Refusal to Grant Dismissal or Nonsuit.* No appeal lies from the refusal of the trial court to dismiss or nonsuit plaintiff.[21]

Massachusetts.— Snell *v.* Dwight, 121 Mass. 348; Wentworth *v.* Leonard, 4 Cush. (Mass.) 414.

Minnesota.— An appeal will not lie from an order dismissing an action for want of prosecution. Gottstein *v.* St. Jean, 79 Minn. 232, 82 N. W. 311. See also Thorp *v.* Lorenz, 34 Minn. 350, 25 N. W. 712; Searles *v.* Thompson, 18 Minn. 316.

Mississippi.— Gill *v.* Jones, 57 Miss. 367.

Missouri.— Bowie *v.* Kansas City, 51 Mo. 454.

Montana.— Holter Lumber Co. *v.* Fireman's Fund Ins. Co., 18 Mont. 282, 45 Pac. 207; Kleinschmidt *v.* McAndrews, 4 Mont. 8, 223, 2 Pac. 286, 5 Pac. 281.

Nebraska.— Rogers *v.* Russell, 11 Nebr. 361, 9 N. W. 547.

New Jersey.— Voorhees *v.* Combs, 33 N. J. L. 482; Central R. Co. *v.* Moore, 24 N. J. L. 284.

New York.— Van Wormer *v.* Albany, 18 Wend. (N. Y.) 169; Schemerhorn *v.* Jenkins, 7 Johns. (N. Y.) 373; Smith *v.* Sutts, 2 Johns. (N. Y.) 9.

North Carolina.—Mobley *v.* Watts, 98 N. C. 284, 3 S. E. 677.

North Dakota.— An order dismissing an action for failure of proof is not an appealable order. Hanberg *v.* National Bank, 8 N. D. 328, 79 N. W. 336; Cameron *v.* Great Northern R. Co., 8 N. D. 124, 77 N. W. 1016.

Ohio.— Phillips *v.* Mustard, 2 Ohio Dec. 455; Seely *v.* Blair, Wright (Ohio) 677.

Pennsylvania.— Error does not lie to the entry of a compulsory nonsuit, but only to the refusal of the court to take off the nonsuit. Reed *v.* Fidelity, etc., Co., 189 Pa. St. 596, 42 Atl. 294; Scanlon *v.* Suter, 158 Pa. St. 275, 27 Atl. 963; Scranton *v.* Barnes, 147 Pa. St. 461, 29 Wkly. Notes Cas. (Pa.) 502, 23 Atl. 777; Haverly *v.* Mercur, 78 Pa. St. 257. See also Murdock *v.* Martin, 132 Pa. St. 86, 18 Atl. 1114.

South Dakota.— Lawrence County *v.* Meade County, 6 S. D. 626, 62 N. W. 957; Heegaard *v.* Dakota L. & T. Co., 3 S. D. 569, 54 N. W. 656.

Texas.—Parker *v.* Spencer, 61 Tex. 155.

Vermont.— Barber *v.* Ripley, 1 Aik. (Vt.) 80.

Virginia.— A nonsuit entered by plaintiff is not a final judgment from which an appeal lies. Mallory *v.* Taylor, 90 Va. 348, 18 S. E. 438.

Washington.—De Graf *v.* Seattle, etc., Nav. Co., 10 Wash. 468, 38 Pac. 1006.

Wisconsin.—Collins *v.* Waggoner, 20 Wis. 48.

United States.—Meehan *v.* Valentine, 145 U. S. 611, 12 S. Ct. 972, 36 L. ed. 835; Colorado Eastern R. Co. *v.* Union Pac. R. Co., 94 Fed. 312, 36 C. C. A. 263; Koons *v.* Bryson, 69 Fed. 297, 25 U. S. App. 368, 16 C. C. A. 227.

See 2 Cent. Dig. tit. "Appeal and Error," § 721.

As to dismissal as to one party, see *supra*, III, D, 1, c, (II).

21. *Alabama.*—South, etc., Alabama R. Co. *v.* Highland Ave., etc., R. Co., 104 Ala. 233, 16 So. 112; Mabry *v.* Dickens, 31 Ala. 243.

California.— Matter of Wierbitzky, 96 Cal. 310, 31 Pac. 115; Christie *v.* Christie, 53 Cal. 26.

Connecticut.— Clapp *v.* Hartford, 35 Conn. 220.

Delaware.— Truxton *v.* Fait, etc., Co., 1 Pennew. (Del.) 483, 42 Atl. 431, 73 Am. St. Rep. 81.

Georgia.— Augusta R. Co. *v.* Tennant, 98 Ga. 156, 26 S. E. 481.

Illinois.— Newman *v.* Dick, 23 Ill. 338.

Kansas.— Simpson *v.* Rothschild, 43 Kan. 33, 22 Pac. 1019; Brown *v.* Kimble, 5 Kan. 80.

Maine.— Cutler *v.* Currier, 54 Me. 81; Stephenson *v.* Piscataqua F. & M. Ins. Co., 54 Me. 55; Bragdon *v.* Appleton Mut. F. Ins. Co., 42 Me. 259.

Massachusetts.— Priest *v.* Wheeler, 101 Mass. 479; Wentworth *v.* Leonard, 4 Cush. (Mass.) 414; Lamphear *v.* Lamprey, 4 Mass. 107.

Minnesota.— Pillsbury *v.* Foley, 61 Minn. 434, 63 N. W. 1027.

Nebraska.— Troup *v.* Horbach, 57 Nebr. 644, 78 N. W. 286; Grimes *v.* Chamberlain, 27 Nebr. 605, 43 N. W. 395.

New Jersey.— If the trial court erroneously refuses to nonsuit plaintiff for want of evidence of defendant's responsibility for the injury complained of, and exception is thereupon sealed, and the defect in proof be not subsequently remedied, error may be assigned upon the exception, and the judgment may be reversed. Rochat *v.* North Hudson County R. Co., 49 N. J. L. 445, 9 Atl. 688; New Jersey Express Co. *v.* Nichols, 33 N. J. L. 434, 97 Am. Dec. 722.

New York.— Tyrone, etc., R. Co. *v.* Schenck, 18 How. Pr. (N. Y.) 275.

North Carolina.— Cooper *v.* Wyman, 122 N. C. 784, 29 S. E. 947, 65 Am. St. Rep. 731; Farris *v.* Richmond, etc., R. Co., 115 N. C. 600, 20 S. E. 167; Kellogg *v.* Gay Mfg. Co., 112 N. C. 191, 16 S. E. 902; Joyner *v.* Roberts, 112 N. C. 111, 16 S. E. 917; Mullen *v.* Norfolk, etc., Canal Co., 112 N. C. 109, 16 S. E. 901; Luttrell *v.* Martin, 111 N. C. 528, 16 S. E. 325; Crawley *v.* Woodfin, 78 N. C. 4; Clark's Code Civ. Proc. N. C. (1900), p. 738.

Ohio.— Ridenour *v.* Saffin, 1 Handy (Ohio) 464.

Pennsylvania.— Wray *v.* Spence, 145 Pa. St. 399, 22 Atl. 693; Kelly *v.* Bennett, 132 Pa. St. 218, 19 Atl. 69, 19 Am. St. Rep. 594, 7 L. R. A. 120; Easton *v.* Neff, 102 Pa. St. 474, 48 Am. Rep. 213.

South Carolina.— Agnew *v.* Adams, 24 S. C. 86.

Tennessee.— Kernodle *v.* Tatum, 4 Heisk. (Tenn.) 312.

Wisconsin.— Raymond *v.* Keseberg, 98 Wis. 317, 73 N. W. 1010; Reed *v.* Lueps, 30 Wis. 561; Waldo *v.* Rice, 18 Wis. 404.

See 2 Cent. Dig. tit. "Appeal and Error," § 723.

(III) *Refusal to Set Aside Nonsuit.* And no appeal will lie from a judgment or order refusing to set aside a voluntary nonsuit.[22]

j. Evidence — (I) *Admission or Exclusion of Evidence.* An order or ruling of the court admitting or excluding evidence is interlocutory only.[23]

(II) *Depositions.* An order granting an application for the taking of a deposition is not appealable.[24] Otherwise, however, of an order denying a motion for a commission to take testimony of a foreign witness.[25]

(III) *Discovery.* In some states rulings on an order for the production or inspection, by the opposite party, of books and papers are appealable.[26] In other states a contrary view obtains.[27]

22. *Alabama.*— Hurst *v.* Bell, 72 Ala. 336; Amerson *v.* Montgomery, etc., R. Co., 50 Ala. 497.

Colorado.— Green *v.* Hughes, 9 Colo. App. 61, 47 Pac. 401.

District of Columbia.— Smith *v.* May, 20 D. C. 97.

Florida.— Anderson *v.* Gainesville Presb. Church, 13 Fla. 592.

Georgia.— Jones *v.* Mobile, etc., R. Co., 64 Ga. 446; Kent *v.* Hunter, 9 Ga. 207.

Illinois.— Brown *v.* Malledy, 19 Ill. 290; People *v.* Browne, 8 Ill. 87.

Indiana.— Montgomery *v.* Jones, 5 Ind. 526; Wilson *v.* Ætna Ins. Co., 3 Ind. 557.

Maryland.— Boyd *v.* Kienzle, 46 Md. 294.

Massachusetts.— Horton *v.* Wead, 9 Allen (Mass.) 537.

Mississippi.— Greenlee *v.* McCoy, 30 Miss. 588; Ewing *v.* Glidwell, 3 How. (Miss.) 332, 34 Am. Dec. 96.

Missouri.— Williams *v.* Finks, 156 Mo. 597, 57 S. W. 732; Chouteau *v.* Rowse, 90 Mo. 191, 2 S. W. 209; State *v.* Gaddy, 83 Mo. 138.

New Jersey.— Dunkle *v.* Rotholz, (N. J. 1890) 19 Atl. 260; Central R. Co. *v.* Moore, 24 N. J. L. 824.

New York.— O'Dougherty *v.* Aldrich, 5 Den. (N. Y.) 385; Van Wormer *v.* Albany, 18 Wend. (N. Y.) 169.

North Carolina.— Where plaintiff submits to a nonsuit at the trial, but no judgment for costs is entered against him, no appeal lies. Rosenthal *v.* Roberson, 114 N. C. 594, 19 S. E. 667.

Ohio.— Jackson *v.* Jackson, 16 Ohio St. 163; Bradley *v.* Sneath, 6 Ohio 490.

Tennessee.— Sayers *v.* Holmes, 2 Coldw. (Tenn.) 259; Union Bank *v.* Carr, 2 Humphr. (Tenn.) 344.

United States.— Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55.

See 2 Cent. Dig. tit. "Appeal and Error," § 722.

23. *Georgia.*— Young *v.* Jones, 89 Ga. 390, 15 S. E. 488; Harrell *v.* Tift, 70 Ga. 730.

Iowa.— Richards *v.* Burden, 31 Iowa 305.

Kansas.— Hockett *v.* Turner, 19 Kan. 527.

Massachusetts.— Noble *v.* Boston, 111 Mass. 485.

Minnesota.— Hulett *v.* Matteson, 12 Minn. 349.

New York.— Carter *v.* Werner, 27 How. Pr. (N. Y.) 385.

See 2 Cent. Dig. tit. "Appeal and Error," §§ 371, 712.

24. *Alabama.*— Robinson *v.* Craig, 16 Ala. 50.

District of Columbia.— Lamon *v.* McKee, 7 Mackey (D. C.) 446.

Louisiana.— McDonogh *v.* Rogers, 6 Mart. N. S. (La.) 212.

Maryland.— Heath *v.* Irelan, 11 Md. 388.

New York.—Jemison *v.* Citizens' Sav. Bank, 24 Hun (N. Y.) 350; Treadwell *v.* Pomeroy, 2 Thomps. & C. (N. Y.) 470; Wallace *v.* American Linen Thread Co., 46 How. Pr. (N. Y.) 403, 2 Thomps. & C. (N. Y.) 574.

Wisconsin.— Noonan *v.* Orton, 5 Wis. 60.

See, generally, Depositions; and 2 Cent. Dig. tit. "Appeal and Error," § 713.

Appeal does not lie to review a refusal of a judge to pass upon exceptions taken to a deposition before the trial. Wallington *v.* Montgomery, 74 N. C. 372.

25. Wallace *v.* American Linen Thread Co., 46 How. Pr. (N. Y.) 403, 2 Thomps. & C. (N. Y.) 574. See also Uline *v.* New York Cent., etc., R. Co., 79 N. Y. 175.

26. *Kentucky.*—Marion Nat. Bank *v.* Abell, 88 Ky. 428, 10 Ky. L. Rep. 980, 11 S. W. 300.

Louisiana.—State *v.* Judge, 26 La. Ann. 57.

New York.— Thompson *v.* Erie R. Co., 9 Abb. Pr. N. S. (N. Y.) 212, 230; Broderick *v.* Shelton, 18 Abb. Pr. (N. Y.) 213; Julio *v.* Ingalls, 17 Abb. Pr. (N. Y.) 448 note; Woods *v.* De Figaniere, 25 How. Pr. (N. Y.) 522; La Farge *v.* La Farge F. Ins. Co., 14 How. Pr. (N. Y.) 26.

Wisconsin.— Noonan *v.* Orton, 28 Wis. 386.

United States.— See Potter *v.* Beal, 50 Fed. 860, 5 U. S. App. 49, 2 C. C. A. 60.

See 2 Cent. Dig. tit. "Appeal and Error," § 716.

Examination of party before trial.— In New York it has been held that an order for the examination before trial of a party to the action affects a substantial right, and is appealable. Berdell *v.* Berdell, 86 N. Y. 519; Heishon *v.* Knickerbocker L. Ins. Co., 77 N. Y. 278; Matter of Slingerland, 36 Hun (N. Y.) 575; Green *v.* Wood, 6 Abb. Pr. (N. Y.) 277. In North Carolina it has been held that a defendant cannot appeal from the order to appear before the trial to be examined under oath concerning the matters set out in the pleadings. Pender *v.* Mallett, 122 N. C. 163, 30 S. E. 324. See also Holt *v.* Southern Finishing, etc., Co., 116 N. C. 480, 21 S. E. 919.

27. *Georgia.*— Hill *v.* Tift, 37 Ga. 564.

Illinois.— Lester *v.* Berkowitz, 125 Ill. 307, 17 N. E. 706.

k. Injunctions. An order granting, refusing, dissolving, or refusing to dissolve an injunction is, as a rule, appealable, but the appeal does not suspend the grant or refusal or dissolution of the injunction.[28]

Indiana.— An order by the trial court requiring the production of documents and books at the trial cannot be appealed from, apart from the final judgment. Cleveland, etc., R. Co. *v.* Closser, 126 Ind. 348, 26 N. E. 159, 22 Am. St. Rep. 593, 9 L. R. A. 754. See also Western Union Tel. Co. *v.* Locke, 107 Ind. 9, 7 N. E. 579.

Iowa.— Cook *v.* Chicago, etc., R. Co., 75 Iowa 169, 39 N. W. 253.

Maryland.— Magraw *v.* Munnikhuysen, 35 Md. 291.

Pennsylvania.— Logan *v.* Pennsylvania R. Co., 132 Pa. St. 403, 19 Atl. 137.

28. *Arizona.*— Bogan *v.* Pignataro, (Ariz. 1892) 29 Pac. 652; Putnam *v.* Putnam, (Ariz. 1887) 14 Pac. 356.

Arkansas.— Miller *v.* O'Bryan, 36 Ark. 200.

California.— Where a preliminary injunction is granted and is afterward made perpetual on full hearing, an appeal lies only from the final judgment. Sheward *v.* Citizens' Water Co., 90 Cal. 635, 27 Pac. 439.

District of Columbia.— Hurst *v.* Saunders, 5 App. Cas. (D. C.) 66.

Georgia.— Cook *v.* Houston County, 54 Ga. 163.

Idaho.— An order restraining respondent from disposing of his property pending the litigation is appealable. Wyatt *v.* Wyatt, 2 Ida. 219, 10 Pac. 228.

Illinois.— Greve *v.* Goodson, 142 Ill. 355, 31 N. E. 677.

Iowa.— An order dissolving an injunction is appealable where the order affects the merits of the case or involves an adjudication upon any of the material questions in the principal controversy. Iowa College *v.* Davenport, 7 Iowa 213.

Kansas.— An order allowing an injunction as a provisional remedy may be reviewed by the supreme court on appeal before final judgment in the action. Andrews *v.* Love, 46 Kan. 264, 26 Pac. 746.

Kentucky.— An appeal lies from a judgment dissolving an injunction, where it is rendered on final hearing and is part of a judgment dismissing the petition. Pendergest *v.* Heekin, 94 Ky. 384, 15 Ky. L. Rep. 180, 22 S. W. 605.

Louisiana.— When an interlocutory judgment dissolving an injunction may work irreparable injury, an appeal will lie. State *v.* Judge, 23 La. Ann. 151.

Maryland.— An appeal lies from an order denying an injunction or denying the dissolution of an injunction. Conner *v.* Groh, 90 Md. 674, 45 Atl. 1024.

Michigan.— An order allowing an injunction, giving substantially all the relief prayed for, operates as a final decree, and is appealable. Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 61 Mich. 9, 27 N. W. 715.

Minnesota.—An *ex parte* order granting an injunction is not appealable. State *v.* First Judicial Dist. Ct., 52 Minn. 283, 53 N. W. 1157; Schurmeier *v.* First Div. St. Paul, etc., R. Co., 12 Minn. 351.

Mississippi.—An order overruling a motion to dissolve is appealable. O'Conner *v.* Starke, 59 Miss. 481.

Montana.— An appeal lies from an order dissolving an injunction. Bennett Bros. Co. *v.* Congdon, 20 Mont. 208, 50 Pac. 556.

Nebraska.— Meng *v.* Coffee, 52 Nebr. 44, 71 N. W. 975.

New Jersey.— An appeal will lie from all orders either granting, refusing, sustaining, or dissolving injunctions. Morgan *v.* Rose, 22 N. J. Eq. 583.

New York.— An appeal cannot be taken from an order granting a temporary injunction, when no motion to vacate has been made. Aldinger *v.* Pugh, 57 Hun (N. Y.) 181, 19 N. Y. Civ. Proc. 91, 10 N. Y. Suppl. 684, 32 N. Y. St. 513.

North Carolina.— An order which merely continues in force a former restraining order does not involve the merits; and is not appealable. Childs *v.* Martin, 68 N. C. 307. An appeal lies from an order granting or refusing an injunction but does not have the effect to suspend such order. James *v.* Markham, 125 N. C. 145, 34 S. E. 241; Fleming *v.* Patterson, 99 N. C. 404, 6 S. E. 396; Green *v.* Griffin, 95 N. C. 50.

Ohio.— An order of the court of common pleas overruling a motion to dissolve an injunction is an order affecting a substantial right, made in a special proceeding, which may be reviewed on error by the circuit court. Burke *v.* Railway Co., 45 Ohio St. 631, 17 N. E. 557.

Oklahoma.— An appeal lies from an order, made in chambers, modifying a temporary injunction. Herring *v.* Wiggins, 7 Okla. 312, 54 Pac. 483.

Oregon.— An order denying a preliminary injunction to restrain the collection of a judgment until final hearing is not appealable. Fowle *v.* House, 26 Oreg. 587, 39 Pac. 5.

Pennsylvania.— Bennett *v.* Hunt, 148 Pa. St. 257, 23 Atl. 1121.

South Carolina.— An appeal will not lie from an interlocutory order of injunction. South Bound R. Co. *v.* American Telephone, etc., Co., 58 S. C. 21, 35 S. E. 797. But refusal of an interlocutory order of injunction on the ground of want of jurisdiction is appealable. Salinas *v.* Aultman, 49 S. C. 325, 27 S. E. 385.

Tennessee.—Belcher *v.* Steele, 97 Tenn. 406, 37 S. W. 135.

Utah.— North Point Consol. Irrigation Co. *v.* Utah, etc., Canal Co., 14 Utah 155, 46 Pac. 824.

Virginia.— An appeal lies from an order overruling a motion to dissolve an injunction, and adjudicating the principles of the cause. Kahn *v.* Kerngood, 80 Va. 342.

l. Judgment Non Obstante Veredicto. It has been held that an order denying a motion for the entry of judgment, notwithstanding the verdict, is not appealable.[29]

m. Mandamus. An order granting or refusing a mandamus is final and, hence, subject to an appeal.[30]

n. New Trial.[31] At common law errors set out on a motion for a new trial were grounds for writ of error, and this rule is still followed in some jurisdictions. In other jurisdictions errors of the trial court on such rulings are reviewable only on appeal from the final judgment rendered in the cause.[32] There are, however,

Washington.—An appeal may be taken from an order granting or denying a motion for a temporary injunction, or from an order vacating or refusing to vacate a temporary injunction. Rockford Watch Co. *v.* Rumpf, 12 Wash. 647, 42 Pac. 213.

West Virginia.— An appeal lies from a decree or order dissolving or refusing to dissolve an injunction. Robrecht *v.* Wharton, 29 W. Va. 746, 2 S. E. 793.

Wisconsin.— An appeal lies when an order grants, refuses, continues, or dissolves an injunction. Rossiter *v.* Ætna L. Ins. Co., 96 Wis. 466, 71 N. W. 898.

United States.— A preliminary injunction made on a *prima facie* showing is an interlocutory order of injunction, from which an appeal to the circuit court of appeals will lie. Andrews *v.* National Foundry, etc., Works, 61 Fed. 782, 18 U. S. App. 458, 24 U. S. App. 81, 10 C. C. A. 60.

See, generally, INJUNCTIONS; and 2 Cent. Dig. tit. "Appeal and Error," §§ 394, 673–675.

29. St. Paul Sav. Bank *v.* St. Paul Plow Co., 76 Minn. 7, 78 N. W. 873; Oelschlegel *v.* Chicago Great Western R. Co., 71 Minn. 50, 73 N. W. 631. See also St. Anthony Falls Bank *v.* Graham, 67 Minn. 318, 69 N. W. 1077, wherein it was held that where plaintiff moves in the alternative, for judgment notwithstanding the verdict, or for a new trial, and a new trial is granted, he cannot appeal from the denial of the judgment. And see Atchison, etc., R. Co. *v.* Brown, 57 Kan. 785, 48 Pac. 31, wherein it was held that an order overruling defendant's motion for judgment on the special findings of the jury, notwithstanding the general verdict, where such findings simply show non-liability to plaintiff, is not final, and is reviewable only in the event of a judgment against him on the general verdict in plaintiff's favor.

A refusal to enter judgment on special findings after a verdict has been set aside and a new trial granted is not an appealable judgment or order. Atchison, etc., R. Co. *v.* Todd, 4 Kan. App. 740, 46 Pac. 545.

30. *Alabama.*— Withers *v.* State, 36 Ala. 252.

Colorado.— Bean *v.* People, 6 Colo. 98.

Louisiana.— State *v.* Richardson, 37 La. Ann. 261.

Maryland.— Harwood *v.* Marshall, 9 Md. 83.

Minnesota.—State *v.* Webber, 31 Minn. 211, 17 N. W. 339.

Missouri.—State *v.* Sutterfield, 54 Mo. 391. *Compare* Shrever *v.* Livingston County, 9 Mo. 196.

New York.— People *v.* Haws, 34 Barb. (N. Y.) 69; People *v.* Schoonmaker, 19 Barb. (N. Y.) 657.

North Dakota.— Oliver *v.* Wilson, 8 N. D. 590, 80 N. W. 757, 73 Am. St. Rep. 784.

South Carolina.— Pinckney *v.* Henegan, 2 Strobh. (S. C.) 250, 49 Am. Dec. 592.

United States.— Davies *v.* Corbin, 112 U. S. 36, 5 S. Ct. 4, 28 L. ed. 627; Hartman *v.* Greenhow, 102 U. S. 672, 26 L. ed. 271.

See, generally, MANDAMUS; and 2 Cent. Dig. tit. "Appeal and Error," § 453.

Alternative mandamus.— In New York it has been held that an order of the general term, reversing a special-term order quashing a writ of alternative mandamus, and directing a peremptory one, with leave to relator to demur to, or take issue on, the return, is not appealable to the court of appeals, as it is a matter of discretion. People *v.* Clyde, 69 N. Y. 603. See also People *v.* Mitchell, 61 Hun (N. Y.) 618, 15 N. Y. Suppl. 305, 39 N. Y. St. 767.

31. As to right to appeal pending motion for new trial see *supra*, I, D, 2, c.

32. *District of Columbia.*— Brown *v.* Bradley, 6 App. Cas. (D. C.) 207.

Georgia.— Nunez *v.* Southern Express Co., 45 Ga. 314.

Illinois.—Williams *v.* La Valle, 64 Ill. 110; J. W. Reedy Elevator Mfg. Co. *v.* Pitvowsky, 35 Ill. App. 364.

Kentucky.— Christman *v.* Chess, 102 Ky. 230, 19 Ky. L. Rep. 1243, 43 S. W. 426; Kennery *v.* Louisville, etc., R. Co., 21 Ky. L. Rep. 532, 51 S. W. 804.

Louisiana.—Wheeler *v.* Maillot, 15 La. Ann. 659.

Maryland.— Sittig *v.* Birkestack, 38 Md. 158.

Michigan.— People *v.* Judge, 41 Mich. 5, 2 N. W. 180.

Nebraska.— Johnson *v.* Parrotte, 46 Nebr. 51, 64 N. W. 363; Artman *v.* West Point Mfg. Co., 16 Nebr. 572, 20 N. W. 873.

New Jersey.— Black *v.* Lamb, 12 N. J. Eq. 108.

New York.— Engel *v.* Dicter, 31 Misc. (N. Y.) 793, 65 N. Y. Suppl. 296.

Ohio.— Young *v.* Shallenberger, 53 Ohio St. 291, 41 N. E. 518; Hoyt Dry Goods Co. *v.* Thomas, 19 Ohio Cir. Ct. 638.

Oregon.— Kearney *v.* Snodgrass, 12 Oreg. 311, 7 Pac. 309.

Pennsylvania.— Cathcart *v.* Com., 37 Pa. St. 108.

Tennessee.— Louisville, etc., R. Co. *v.* Conley, 10 Lea (Tenn.) 531; State *v.* Perry, 4 Baxt. (Tenn.) 438.

jurisdictions, where, by express provisions of statute, rulings of the trial court on such motions are appealable.[33]

o. Orders After Judgment—(I) *In General.* By statute in some states special orders after final judgment, or orders on a summary application after judgment, are appealable.[34]

(II) *Vacation of Judgment or Order*—(A) *In General.* But an order of the court vacating a judgment, order, or decree theretofore rendered in the cause,[35]

Utah.— Bear River Valley Orchard Co. *v.* Hanley, 15 Utah 506, 50 Pac. 611; White *v.* Pease, 15 Utah 170, 49 Pac. 416.

Vermont.— Bloss *v.* Kittridge, 5 Vt. 28.

Wisconsin.— Brown *v.* Edward P. Allis Co., 98 Wis. 120, 73 N. W. 656; Welbes *v.* Dieter, 97 Wis. 166, 72 N. W. 352, 65 Am. St. Rep. 106.

United States.— Deering Harvester Co. *v.* Kelly, 103 Fed. 261, 43 C. C. A. 225; McCutcheon *v.* Hall Capsule Co., 101 Fed. 546, 41 C. C. A. 494; Neidlinger *v.* Yoost, 99 Fed. 240, 39 C. C. A. 494; Waterhouse *v.* Rock Island Alaska Min. Co., 97 Fed. 466, 38 C. C. A. 281.

See, generally, New Trials; and 2 Cent. Dig. tit. "Appeal and Error," § 741.

33. *Alabama.*— Karter *v.* Peck, 121 Ala. 636, 25 So. 1012.

Connecticut.— Husted *v.* Mead, 58 Conn. 55, 19 Atl. 233.

Idaho.— Schultz *v.* Keeler, 2 Ida. 305, 13 Pac. 481.

Indiana.— A judgment overruling a motion for a new trial as of right is a final judgment, from which an appeal will lie. Atkinson *v.* Williams, 151 Ind. 431, 51 N. E. 721.

Iowa.— Baldwin *v.* Foss, 71 Iowa 389, 32 N. W. 389.

Kansas.— Ottawa *v.* Washabaugh, 11 Kan. 124.

Minnesota.— McCord *v.* Knowlton, 76 Minn. 391, 79 N. W. 397; Ashton *v.* Thompson, 28 Minn. 330, 9 N. W. 876; Chittenden *v.* German-American Bank, 27 Minn. 143, 6 N. W. 773; Schuek *v.* Hagar, 24 Minn. 339.

Mississippi.— Terry *v.* Robins, 5 Sm. & M. (Miss.) 291.

Missouri.— Ormiston *v.* Trumbo, 77 Mo. App. 310.

North Carolina.— An appeal lies only when it involves the question whether, in law, the party was entitled to a new trial as a matter of right. Braid *v.* Lukins, 95 N. C. 123.

South Carolina.— A judgment on a motion for a new trial in a case at law is final as to all questions of fact involved in the motion. For alleged error of law therein involved, an appeal lies. Boyd *v.* Munro, 32 S. C. 249, 10 S. E. 963; Hyrne *v.* Erwin, 23 S. C. 226, 55 Am. Rep. 15.

South Dakota.— Williams *v.* Chicago, etc., R. Co., 11 S. D. 463, 78 N. W. 949.

West Virginia.— Gwynn *v.* Schwartz, 32 W. Va. 487, 9 S. E. 880.

34. *California.*— Thompson *v.* Alford, 128 Cal. 227, 60 Pac. 686; Wells *v.* Anthony, 35 Cal. 696.

Indian Territory.— Hart *v.* Hiatt, (Indian Terr. 1899) 48 S. W. 1038.

Kansas.— Kœhler *v.* Ball, 2 Kan. 160, 83 Am. Dec. 451.

Minnesota.—Aitkin County *v.* Morrison, 25 Minn. 295; Ives *v.* Phelps, 16 Minn. 451.

Missouri.— McAnaw *v.* Matthis, 129 Mo. 142, 31 S. W. 344.

Montana.— Beach *v.* Spokane Ranch, etc., Co., 21 Mont. 7, 52 Pac. 560; Granite Mountain Min. Co. *v.* Weinstein, 7 Mont. 346, 17 Pac. 108.

Nebraska.— State *v.* Baker, 45 Nebr. 39, 63 N. W. 139.

New York.— Sherman *v.* Felt, 2 N. Y. 186, 3 How. Pr. (N. Y.) 425; Ward *v.* Syme, 9 How. Pr. (N. Y.) 16.

Ohio.—Braden *v.* Hoffman, 46 Ohio St. 639, 22 N. E. 930; State *v.* Kelley, 25 Ohio St. 29.

South Carolina.— Lowndes *v.* Miller, 25 S. C. 119.

South Dakota.— Bailey *v.* Scott, 1 S. D. 337, 47 N. W. 286; Weber *v.* Tschetter, 1 S. D. 205, 46 N. W. 201.

Wisconsin.— Lewis *v.* Chicago, etc., R. Co., 97 Wis. 368, 72 N. W. 976.

See 2 Cent. Dig. tit. "Appeal and Error," § 521.

35. *Alabama.*— An order vacating a judgment, and taxing costs, is a final judgment, from which an appeal will lie. *Ex p.* Morris, 44 Ala. 361.

Colorado.— An order merely vacating an order reinstating a case which had been dismissed, since it does not have the effect to revive the judgment of dismissal, is not final. Wheeler *v.* Garrett, 13 Colo. 140, 21 Pac. 1021.

Illinois.— Dunkelmann *v.* Brunnell, 44 Ill. App. 438; Dean *v.* Gerlach, 34 Ill. App. 233.

Indiana.— Branham *v.* Ft. Wayne, etc., R. Co., 7 Ind. 524.

Iowa.— An order expunging an order discharging a trustee from the record is appealable, since it virtually grants a new trial. Guthrie *v.* Guthrie, 71 Iowa 744, 30 N. W. 779.

Kansas.— List *v.* Jockheck, 45 Kan. 349, 748, 27 Pac. 184.

Kentucky.— Breading *v.* Taylor, 6 Dana (Ky.) 226.

Maryland.— Glenn *v.* Allison, 58 Md. 527; McLaughlin *v.* Ogle, 53 Md. 610.

Michigan.— An order denying a petition to correct a decree in a foreclosure suit is a final order. Tucker *v.* Stone, 92 Mich. 298, 52 N. W. 302.

Missouri.— An appeal lies from an order setting aside a nonsuit. State *v.* Missouri Pac. R. Co., 149 Mo. 104, 50 S. W. 278.

Nebraska.— Merle, etc., Mfg. Co. *v.* Wallace, 48 Nebr. 886, 67 N. W. 883; Cockle Separator Mfg. Co. *v.* Clark, 23 Nebr. 702, 37 N. W. 628.

or refusing to vacate[36] a judgment, order, or decree theretofore rendered, is not, as a rule, appealable.

(B) *Judgment by Default.* In some states no appeal lies from an order denying a motion to set aside a default.[37] In other states such orders are appealable.[38] No appeal, however, lies from an order setting aside a judgment by default.[39]

(III) *Motions Relating to Execution or Judicial Sale.*[40] Rulings of the trial court on a motion to award an execution on the judgment rendered in the cause,[41]

Nevada.—An appeal lies from an order setting aside a judgment. Ballard *v.* Purcell, 1 Nev. 342.

North Carolina.— An order setting aside a nonsuit, and reinstating the case for trial, is not final. Bain *v.* Bain, 106 N. C. 239, 11 S. E. 327.

Oregon.— An order of a circuit court vacating a judgment, in a case in which it has not power to do so, is a final judgment. Deering *v.* Quivey, 26 Oreg. 556, 38 Pac. 710.

Pennsylvania.— English's Appeal, 119 Pa. St. 533, 13 Atl. 479, 4 Am. St. Rep. 656; Citizens' Bldg., etc., Assoc. *v.* Hoagland, 87 Pa. St. 326.

South Carolina.— An order that a judgment be vacated and set aside is an order final in its nature. Thew *v.* Porcelain Mfg. Co., 8 Rich. (S. C.) 286.

Washington.— Greene *v.* Williams, 6 Wash. 260, 33 Pac. 588.

West Virginia.— Pumphry *v.* Brown, 3 W. Va. 9.

Wisconsin.— An appeal lies from orders of the circuit court which set aside judgments. Carney *v.* La Crosse, etc., R. Co., 15 Wis. 503.

United States.— Riddle *v.* Hudgins, 58 Fed. 490, 7 C. C. A. 335.

See 2 Cent. Dig. tit. "Appeal and Error," § 379.

36. *California.*— Matter of Gregory, 122 Cal. 483, 55 Pac. 144; Symons *v.* Bunnell, 101 Cal. 223, 35 Pac. 770; Matter of Get Young, 90 Cal. 77, 27 Pac. 158.

District of Columbia.—Babbington *v.* Washington Brewery Co., 13 App. Cas. (D. C.) 527.

Nebraska.— Whiteley *v.* Davis, 20 Nebr. 504, 31 N. W. 74.

New York.— Foote *v.* Lathrop, 41 N. Y. 358.

North Dakota.— Travelers' Ins. Co. *v.* Weber, 2 N. D. 239, 50 N. W. 703.

Pennsylvania.— Blockley, etc., Turnpike Co.'s Petition, 140 Pa. St. 177, 21 Atl. 257; Gaskill *v.* Crawford, 130 Pa. St. 28, 18 Atl. 524.

South Dakota.— Vert *v.* Vert, 3 S. D. 619, 54 N. W. 655. But an order refusing to set aside an appealable order is appealable, where the first order was made without jurisdiction. Thompson, etc., Mfg. Co. *v.* Guenthner, 5 S. D. 504, 59 N. W. 727. See also Weber *v.* Tschetter, 1 S. D. 205, 46 N. W. 201.

Washington.— National Christian Assoc. *v.* Simpson, 21 Wash. 16, 56 Pac. 844; Hibbard *v.* De Lanty, 20 Wash. 539, 56 Pac. 34.

Wisconsin.— An order of the county court refusing to vacate an order, made in chambers, changing the place of trial, is appealable. Wolcott *v.* Wolcott, 32 Wis. 63. See also Purcell *v.* Kleaver, 98 Wis. 102, 73 N. W. 322.

See 2 Cent. Dig. tit. "Appeal and Error," § 760.

Vacation of non-appealable order.— No appeal lies from an order denying a motion to vacate an order which is not itself appealable. Harper *v.* Hildreth, 99 Cal. 265, 33 Pac. 1103.

37. Haygood *v.* Tait, (Ala. 1900) 27 So. 842; White *v.* Coulter, 59 N. Y. 629.

As to appeal from judgment by default see *infra*, III, E, 3.

38. *California.*— McCormick *v.* Belvin, 96 Cal. 182, 31 Pac. 16.

Connecticut.— Schoonmaker *v.* Albertson, etc., Mach. Co., 51 Conn. 387.

Maryland.— An appeal lies from an order overruling a motion to strike out, for cause, a verdict of a jury of inquisition on default, and judgment thereon. Walsh *v.* State, 53 Md. 539.

Nebraska.— Steele *v.* Haynes, 20 Nebr. 316, 30 N. W. 63.

Utah.—Blyth, etc., Co. *v.* Swenson, 15 Utah 345, 49 Pac. 1027.

Washington.— Myers *v.* Landrum, 4 Wash. 762, 31 Pac. 33.

Wisconsin.— Smith *v.* Lawrence, 3 Wis. 779.

39. *Colorado.*—Thomas *v.* Thomas, 10 Colo. App. 170, 50 Pac. 211.

District of Columbia.— Meloy *v.* Grant, 4 Mackey (D. C.) 486.

Illinois.— People *v.* Neal, 3 Ill. App. 181.

Indiana.— Spaulding *v.* Thompson, 12 Ind. 477, 74 Am. Dec. 221; Masten *v.* Indiana Car, etc., Co., 19 Ind. App. 633, 49 N. E. 981.

Kansas.— Kermeyer *v.* Kansas Pac. R. Co., 18 Kan. 215; McCulloch *v.* Dodge, 8 Kan. 476.

Louisiana.— Fortin *v.* Randolph, 11 Mart. (La.) 268.

Maine.— Woodcock *v.* Parker, 34 Me. 593.

Minnesota.— An order vacating a judgment on default, and granting defendant leave to answer, is appealable. People's Ice Co. *v.* Schlenker, 50 Minn. 1, 52 N. W. 219.

Nebraska.— Roh *v.* Vitera, 38 Nebr. 333, 56 N. W. 977.

New York.—Muldenor *v.* McDonogh, 2 Hilt. (N. Y.) 46; Bolton *v.* Depeyster, 3 Code Rep. (N. Y.) 141.

Ohio.— See Braden *v.* Hoffman, 46 Ohio St. 639, 22 N. E. 930.

Washington.— J. F. Hart Lumber Co. *v.* Rucker, 17 Wash. 600, 50 Pac. 484; Reitmeir *v.* Siegmund, 13 Wash. 624, 43 Pac. 878.

See 2 Cent. Dig. tit. "Appeal and Error," § 766.

40. As to orders in proceedings supplementary to execution see EXECUTIONS.

41. *Arkansas.*—Smith *v.* Dudley, 2 Ark. 60.

Colorado.— Hoehne *v.* Trugillo, 1 Colo. 161, 91 Am. Dec. 703.

or on a motion to quash an execution,[42] or on a motion to confirm[43] or to vacate an execution or judicial sale,[44] are, as a rule, appealable.

Minnesota.— Entrop *v.* Williams, 11 Minn. 381.

Missouri.— State *v.* Woerner, 33 Mo. 216; McGinnis *v.* McCarty, 15 Mo. App. 595.

New York.— Where application is made for the issuing of execution, and is refused on the ground of a counter-judgment, without opportunity given to test the right to have the application granted, an appeal will lie from the decision. Betts *v.* Garr, 26 N. Y. 383.

Pennsylvania.— Harger *v.* Washington County, 12 Pa. St. 251.

Tennessee.— An appeal will not lie to the supreme court from an order for a venditioni exponas intended to carry into effect a final decree not appealed from. Pond *v.* Trigg, 5 Heisk. (Tenn.) 532. See also Welsh *v.* Marshall, 6 Yerg. (Tenn.) 455.

Virginia.— Com. *v.* Hewitt, 2 Hen. & M. (Va.) 181.

West Virginia.— Rader *v.* Adamson, 37 W. Va. 582, 16 S. E. 808.

United States.— A writ of error will not lie to a circuit court of the United States for refusing to grant a writ of venditioni exponas issued on a judgment obtained in that court. Boyle *v.* Zacharie, 6 Pet. (U. S.) 648, 8 L. ed. 532.

See 2 Cent. Dig. tit. "Appeal and Error," § 787.

42. *Alabama.*— Braley *v.* Clarke, 18 Ala. 436; Page *v.* Coleman, 9 Port. (Ala.) 275; Tombeckbee Bank *v.* Strong, 1 Stew. & P. (Ala.) 187, 21 Am. Dec. 657.

California.— Bond *v.* Pacheco, 30 Cal. 530. But an order, entered in the probate court, refusing to quash an execution, cannot be appealed from. Blum *v.* Brownstone, 50 Cal. 293.

Illinois.— Sloo *v.* State Bank, 2 Ill. 428.

Indiana.— Wright *v.* Rogers, 26 Ind. 218.

Minnesota.— Tillman *v.* Jackson, 1 Minn. 183.

Mississippi — U. S. Bank *v.* Patton, 5 How. (Miss.) 200, 35 Am. Dec. 428.

Missouri.— Gale *v.* Michie, 47 Mo. 326.

Montana.— Orr *v.* Haskell, 2 Mont. 350.

New York.— No appeal to the court of appeals lies from an order denying a motion to set aside an execution. Underwood *v.* Green, 56 N. Y. 247. And an order of the supreme court refusing to set aside an execution because issued after five years without leave does not affect a substantial right, and is not appealable. Genesee Bank *v.* Spencer, 18 N. Y. 150.

Pennsylvania.— Packer *v.* Owens, 164 Pa. St. 185, 35 Wkly. Notes Cas. (Pa.) 423, 30 Atl. 314; Feagley *v.* Norbeck, 127 Pa. St. 238, 17 Atl. 900; Pontius *v.* Nesbit, 40 Pa. St. 309.

Texas.— Scott *v.* Allen, 1 Tex. 508; Laclede Nat. Bank *v.* Betterton, 5 Tex. Civ. App. 355, 24 S. W. 326.

Virginia.— Moss *v.* Moss, 4 Hen. & M. (Va.) 293.

Wisconsin.— Cooley *v.* Gregory, 16 Wis. 303.

United States.— An order of the court below to quash an execution is not a final judgment, to which a writ of error will lie. Loeber *v.* Schroeder, 149 U. S. 580, 13 S. Ct. 934, 37 L. ed. 856; McCargo *v.* Chapman, 20 How. (U. S.) 555, 15 L. ed. 1021.

See 2 Cent. Dig. tit. "Appeal and Error," § 381.

An order made on a motion to amend the return on execution is interlocutory merely. Kemp *v.* Porter, 6 Ala. 172; Russell *v.* Dyer, 39 N. H. 528.

43. *District of Columbia.*— Edwards *v.* Maupin, 7 Mackey (D. C.) 39.

Kansas.— Kœhler *v.* Ball, 2 Kan. 160, 83 Am. Dec. 451.

Kentucky.— Dawson *v.* Litsey, 10 Bush (Ky.) 408.

Michigan.— Benedict *v.* Thompson, 2 Dougl. (Mich.) 299.

Nebraska.— State Bank *v.* Green, 8 Nebr. 297, 1 N. W. 210.

North Dakota.— Dakota Invest. Co. *v.* Sullivan, 9 N. D. 303, 83 N. W. 233.

Ohio.— Kern *v.* Foster, 16 Ohio 274.

Oregon.— Dell *v.* Estes, 10 Oreg. 359.

West Virginia.— Marling *v.* Robrecht, 13 W. Va. 440.

United States.— Sage *v.* Central R. Co., 96 U. S. 712, 24 L. ed. 641.

See 2 Cent. Dig. tit. "Appeal and Error," § 794.

An order made by the chancellor, denying a motion for a permanent stay of sale under a decree of foreclosure, and vacating a temporary order staying the sale until such motion could be heard and disposed of, is not such a decree or final order as can be appealed from. Romeyn *v.* Hale, 1 Mich. 93.

An order of a court of equity suspending a sale, and operating as a continuation and renewal of the former order of sale, is not a final decree. Dorsey *v.* Thompson, 37 Md. 25.

44. *Illinois.*— An order in a chancery cause, overruling a motion to set aside a sale made under a former decree in the cause, is interlocutory only. Racine, etc., R. Co. *v.* Farmers' L. & T. Co., 70 Ill. 249.

Michigan.— Perkins *v.* Perkins, 16 Mich. 162; Bullard *v.* Green, 9 Mich. 222.

Minnesota.— Hutchins *v.* Carver County, 16 Minn. 13.

Missouri.— McAnaw *v.* Matthis, 129 Mo. 142, 31 S. W. 344.

New Jersey.— Mutual L. Ins. Co. *v.* Sturges, 33 N. J. Eq. 328; National Bank *v.* Sprague, 21 N. J. Eq. 458.

New York.— Fisher *v.* Hersey, 78 N. Y. 387.

Pennsylvania.— An appeal does not lie from a judgment of the court setting aside a sheriff's sale. Hoffar *v.* Morter, 82 Pa. St. 297. But see Mackaness *v.* Long, 85 Pa. St. 158, wherein it was held that the setting aside of a sale of personal property is a final order and therefore appealable.

Texas.— Vernon *v.* Montgomery, (Tex. Civ. App. 1895) 33 S. W. 606.

p. Parties. An order permitting or refusing an amendment as to parties,[45] or permitting or refusing intervention,[46] is not appealable.

q. Partition. A judgment or decree appointing commissioners to make a partition and report the same to the court is interlocutory only.[47] But a judgment,

West Virginia.—Kable *v.* Mitchell, 9 W. Va. 492.

Wisconsin.— Jesup *v.* Racine City Bank, 15 Wis. 604, 82 Am. Dec. 703; Carney *v.* La Crosse, etc., R. Co., 15 Wis. 503.

United States.— A decree setting aside a judicial sale, and ordering a resale, is not final, and is not reviewable on appeal. Butterfield *v.* Usher, 91 U. S. 246, 23 L. ed. 318.

See 2 Cent. Dig. tit. "Appeal and Error," § 794.

45. *California.*— Grant *v.* Los Angeles, etc., R. Co., 116 Cal. 71, 47 Pac. 872; Welsh *v.* Allen, 54 Cal. 211.

Kansas.— Chicago, etc., R. Co. *v.* Butts, 55 Kan. 660, 41 Pac. 948.

Minnesota.—Bennett *v.* Whitcomb, 25 Minn. 148.

Missouri.— Harrison *v.* Scott, 72 Mo. App. 658.

Nebraska.— Hall *v.* Vanier, 7 Nebr. 397.

New York.— St. John *v.* West, 4 How. Pr. (N. Y.) 329.

North Carolina.— Emry *v.* Parker, 111 N. C. 261, 16 S. E. 236; White *v.* Utley, 94 N. C. 511.

North Dakota.— An interlocutory order bringing in an additional defendant is appealable. Bolton *v.* Donavan, (N. D. 1900) 84 N. W. 357.

Pennsylvania.— Bossler *v.* Johns, 2 Penr. & W. (Pa.) 331.

Texas.— Childress *v.* State Trust Co., (Tex. Civ. App. 1895) 32 S. W. 330.

Wisconsin.— Cook *v.* Menasha, 95 Wis. 215, 70 N. W. 289.

United States.— *Ex p.* Cutting, 94 U. S. 14, 24 L. ed. 49.

See 2 Cent. Dig. tit. "Appeal and Error," § 368.

46. *Colorado.*—The denial of an application to intervene is a final judgment as to the petitioner, and may be reviewed on writ of error. Henry *v.* Travelers' Ins. Co., 16 Colo. 179, 26 Pac. 318.

District of Columbia.— Lamon *v.* McKee, 7 Mackey (D. C.) 446.

Illinois.— Young *v.* Matthiesen, etc., Zinc Co., 105 Ill. 26.

Iowa.— An appeal will lie from an order of the court refusing to strike a petition of intervention from the files. Leon First Nat. Bank *v.* Gill, 50 Iowa 425.

Kentucky.— Fairthorne *v.* Wigginton, 11 B. Mon. (Ky.) 368.

Missouri.— Roberts *v.* Patton, 18 Mo. 485.

Nebraska.— An order overruling a petition to intervene is, so far as the intervener is concerned, a final order, and reviewable on error. Harman *v.* Barhydt, 20 Nebr. 625, 31 N. W. 488. But an order striking a petition of intervention because not filed within the time allowed therefor is not a final order. Whitney *v.* Spearman, 50 Nebr. 617, 70 N. W. 240.

New York.— An order allowing a receiver of defendants to intervene and defend is one affecting the final judgment and is appealable. Honegger *v.* Wettstein, 94 N. Y. 252.

Texas.— Stewart *v.* State, 42 Tex. 242.

Utah.— Jones *v.* New York L. Ins. Co., 11 Utah 401, 40 Pac. 702.

Wisconsin.— An order denying leave to intervene in an action is appealable as to the petioner. National Distilling Co. *v.* Seidel, 103 Wis. 489, 79 N. W. 744.

United States.— Buel *v.* Farmers' L. & T. Co., 104 Fed. 839, 44 C. C. A. 213; Toledo, etc., R. Co. *v.* Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155; Credits Commutation Co. *v.* U. S., 91 Fed. 570, 62 U. S. App. 728, 34 C. C. A. 12; Lewis *v.* Baltimore, etc., R. Co., 62 Fed. 218, 8 U. S. App. 645, 10 C. C. A. 446.

47. *Florida.*—Putnam *v.* Lewis, 1 Fla. 455.

Illinois.— A decree denying partition of part of the land, and appointing commissioners to partition the residue thereof, is a final decree. Ames *v.* Ames, 148 Ill. 321, 36 N. E. 110.

Indiana.— An interlocutory order in partition proceedings, demanding a sale of lands, is appealable. Benefiel *v.* Aughe, 93 Ind. 401. See also Jackson *v.* Myers, 120 Ind. 504, 22 N. E. 90, 23 N. E. 86; Fleenor *v.* Driskill, 97 Ind. 27.

Iowa.— A decree declaring that plaintiff is entitled to one undivided third, and appointing commissioners to make partition, is a final decree. Williams *v.* Wells, 62 Iowa 740, 16 N. W. 513.

Kentucky.— Talbot *v.* Todd, 7 J. J. Marsh. (Ky.) 456.

Louisiana.— Stokes *v.* Stokes, 6 Mart. N. S. (La.) 350.

Massachusetts.— See Lowd *v.* Brigham, 154 Mass. 107, 26 N. E. 1004.

Michigan.— A decree which fixes the respective rights of the parties, although it contains an order of reference to take an accounting as to rents and profits, and to ascertain whether an actual partition is practicable, or whether a sale and distribution of proceeds is necessary, is a final decree. Damouth *v.* Klock, 28 Mich. 163.

Mississippi.— Gilleylen *v.* Martin, 73 Miss. 695, 19 So. 482.

Missouri.— Buller *v.* Linzee, 100 Mo. 95, 13 S. W. 344; Turpin *v.* Turpin, 88 Mo. 337; Murray *v.* Yates, 73 Mo. 13; Gudgell *v.* Mead, 8 Mo. 53, 40 Am. Dec. 120.

New York.— Beebe *v.* Griffing, 6 N. Y. 465; Lawrence *v.* Fowler, 20 How. Pr. (N. Y.) 407.

Ohio.— The final appealable judgment in a proceeding for partition between tenants in common is not an order made in confirming or setting aside the proceedings of the commissioners, or of the sheriff in aparting or selling the premises, but is that which finds the parties entitled to partition, declares the

entered upon the confirmation of the report of commissioners making a partition, is a final judgment.[48]

r. Payment of Money. An order of court directing the payment of money is generally held to be such an order as will support an appeal therefrom;[49]

portion of each, and orders the shares to be aparted. McRoberts *v.* Lockwood, 49 Ohio St. 374, 34 N. E. 734.

Pennsylvania.— Gesell's Appeal, 84 Pa. St. 238; Robinson's Appeal, 1 Wkly. Notes Cas. (Pa.) 239.

South Carolina.— An interlocutory order, framing and submitting to a jury an issue as to the title, is appealable. Capell *v.* Moses, 36 S. C. 559, 15 S. E. 711.

Tennessee.— See Cawthon *v.* Searcy, 12 Lea (Tenn.) 649.

Texas.— White *v.* Mitchell, 60 Tex. 164.

Virginia.— A decree of sale in partition is appealable. Stevens *v.* McCormick, 90 Va. 735, 19 S. E. 742.

Wisconsin.— An order in partition, directing a sale of the premises instead of an actual partition, affects a substantial right, and is appealable. Vesper *v.* Farnsworth, 40 Wis. 357.

United States.— Green *v.* Fisk, 154 U. S. 668, 14 S. Ct. 1193, 26 L. ed. 486, 103 U. S. 518, 26 L. ed. 485; Elder *v.* McClaskey, 70 Fed. 529, 37 U. S. App. 199, 17 C. C. A. 251.

See, generally, PARTITION; and 2 Cent. Dig. tit. "Appeal and Error," § 450.

48. Peck *v.* Vandenberg, 30 Cal. 11; Bull *v.* Pyle, 41 Md. 419; Papin *v.* Blumenthal, 41 Mo. 439; Christy's Appeal, 110 Pa. St. 538, 5 Atl. 205.

49. Randolph *v.* People, 130 Ill. 533, 22 N. E. 615; People *v.* Prendergast, 117 Ill. 588, 6 N. E. 695; Nevitt *v.* Woodburn, 45 Ill. App. 417; Matter of Hill, 7 Wash. 421, 35 Pac. 131.

See 2 Cent. Dig. tit. "Appeal and Error," § 350.

Payment of alimony.— An order directing the payment of alimony is appealable.

Arkansas.— Glenn *v.* Glenn, 44 Ark. 46; Hecht *v.* Hecht, 28 Ark. 92.

California.— Sharon *v.* Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709. And an order denying alimony *pendente lite* is appealable. White *v.* White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799.

Colorado.— Daniels *v.* Daniels, 9 Colo. 133, 10 Pac. 657.

Idaho.— Order for alimony *pendente lite* not appealable. Wyatt *v.* Wyatt, 2 Ida. 219, 10 Pac. 228.

Illinois.— Dow *v.* Blake, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156. But see Hunter *v.* Hunter, 100 Ill. 519; Blake *v.* Blake, 80 Ill. 523; Knowlton *v.* Knowlton, 40 Ill. App. 588.

Indiana.— Sellers *v.* Sellers, 141 Ind. 305, 40 N. E. 699.

Iowa.— Blair *v.* Blair, 74 Iowa 311, 37 N. W. 385.

Kentucky.— A judgment denying the wife's motion for an allowance pending suit is a final order, from which she may appeal. Campbell *v.* Campbell, 21 Ky. L. Rep. 19, 50 S. W. 849.

Louisiana.— An order refusing to grant alimony *pendente lite* is appealable. Carroll *v.* Carroll, 48 La. Ann. 835, 19 So. 872.

Maryland.—A *nisi* order, directing plaintiff in divorce proceedings to show cause why certain counsel fees and allowance of alimony should not be directed to be paid, is merely interlocutory. Hayward *v.* Hayward, (Md. 1893) 26 Atl. 357.

Michigan.— An order for alimony *pendente lite* not appealable. Lapham *v.* Lapham, 40 Mich. 527.

Missouri.— State *v.* Seddon, 93 Mo. 520, 6 S. W. 342.

Nebraska.— An order for alimony *pendente lite* not appealable. Aspinwall *v.* Aspinwall, 18 Nebr. 463, 25 N. W. 623. *Compare* O'Brien *v.* O'Brien, 19 Nebr. 584, 27 N. W. 640.

Nevada.— See Lake *v.* King, 16 Nev. 215.

New York.— An order for alimony *pendente lite* not appealable. Leslie *v.* Leslie, 6 Abb. Pr. N. S. (N. Y.) 193; Moncrief *v.* Moncrief, 10 Abb. Pr. (N. Y.) 315; Griffin *v.* Griffin, 23 How. Pr. (N. Y.) 189; Abbey *v.* Abbey, 6 How. Pr. (N. Y.) 340 note. *Compare* Collins *v.* Collins, 71 N. Y. 269.

Ohio.— King *v.* King, 38 Ohio St. 370. *Compare* Taylor *v.* Taylor, 25 Ohio St. 71.

South Dakota.— Order for alimony *pendente lite* not appealable. Williams *v.* Williams, 6 S. D. 284, 61 N. W. 38.

Utah.— Order for alimony *pendente lite* not appealable. Matter of Kelsey, 12 Utah 393, 43 Pac. 106; Thomson *v.* Thomson, 5 Utah 401, 16 Pac. 400.

See, generally, DIVORCE; and 2 Cent. Dig. tit. "Appeal and Error," § 361.

Payment of money into court.— An order directing the payment of money into court is interlocutory and not appealable.

Arkansas.—Hamlett *v.* Simms, 44 Ark. 141.

Florida.— Bellamy *v.* Bellamy, 4 Fla. 242. *Compare* Whitaker *v.* Sparkman, 30 Fla. 347, 11 So. 542.

Illinois.—*Compare* McCormick *v.* West Chicago Park Com'rs, 118 Ill. 655, 8 N. E. 818.

Indiana.— An order requiring the bringing of money into court is appealable. Cook *v.* Citizens Nat. Bank, 73 Ind. 256; McKnight *v.* Knisely, 25 Ind. 336, 87 Am. Dec. 364.

Kentucky.— *Compare* Woolley *v.* Louisville, (Ky. 1901) 62 S. W. 517; Louisville *v.* Kaye, 10 Ky. L. Rep. 160, 8 S. W. 869.

Louisiana.— Delancy *v.* Grymes, 7 Mart. N. S. (La.) 457; Kenner *v.* Young, 7 Mart. N. S. (La.) 53. But an appeal will lie from an interlocutory order on a party to deposit in court a sum of money, the right to which is in contestation between the other parties to the suit. Thompson's Succession, 14 La. Ann. 810.

and this is true even though such order is a mere interlocutory one, made in the trial of the cause.[50]

s. Pleadings — (I) *Amendments.* No appeal lies from an interlocutory order allowing or refusing amendments to the pleadings before final judgment.[51]

(II) *Demurrers.* An order overruling or sustaining a demurrer, without further action by the court, is not appealable.[52] An appeal, however, may be

Maryland.— Burroughs *v.* Gaither, 66 Md. 171, 7 Atl. 243; Dillon *v.* Connecticut Mut. L. Ins. Co. 44 Md. 386; Henry *v.* Kaufman, 24 Md. 1, 87 Am. Dec. 591; Richardson *v.* Jones, 3 Gill & J. (Md.) 163, 22 Am. Dec. 293; McKim *v.* Thompson, 1 Bland (Md.) 150.

New York.— See Whittaker *v.* Stebbins, 36 N. Y. Super. Ct. 192.

Pennsylvania.— See Aurentz *v.* Porter, 48 Pa. St. 335.

Tennessee.— A decree directing a custodian of funds to pay the same into court by a time stated, otherwise an execution to issue, is a final decree, on which a bill of review will lie. Saunders *v.* Gregory, 3 Heisk. (Tenn.) 567.

United States.— Louisiana Nat. Bank *v.* Whitney, 121 U. S. 284, 7 S. Ct. 897, 30 L. ed. 961; U. S. *v.* Canoe, 5 Hughes (U. S.) 490, 25 Fed. Cas. No. 14,718. *Compare* Wabash, etc., Canal Co. *v.* Beers, 1 Black (U. S.) 54, 17 L. ed. 41.

See 2 Cent. Dig. tit. "Appeal and Error," § 351.

50. Lewis *v.* Miller, 13 Sm. & M. (Miss.) 110.

51. *Delaware.*— Thompson *v.* Thompson, 6 Houst. (Del.) 225.

District of Columbia.— Lamon *v.* McKee, 7 Mackey (D. C.) 446.

Georgia.— Jackson *v.* Green, 58 Ga. 460.

Illinois.— Harding *v.* Fuller, 40 Ill. App. 643.

Kansas.— Stebbins *v.* Laird, 10 Kan. 229.

Maine.— Gilman *v.* Emery, 54 Me. 460; Moor *v.* Shaw, 47 Me. 88.

Maryland.— State *v.* Brown, 64 Md. 199, 1 Atl. 54, 6 Atl. 172.

Massachusetts.— George *v.* Reed, 101 Mass. 378; Gwynn *v.* Globe Locomotive Works, 5 Allen (Mass.) 317.

Minnesota.— Winona *v.* Minnesota R. Constr. Co., 25 Minn. 328; Brisbin *v.* American Express Co., 15 Minn. 43.

Mississippi.— Miss. Code (1880), § 1581, permits an appeal from an order allowing or refusing an amendment. Metcalfe *v.* McCutchen, 60 Miss. 145.

Montana.— Owen *v.* McCormick, 5 Mont. 255, 5 Pac. 280.

Nebraska.— Troup *v.* Horbach, 57 Nebr. 644, 78 N. W. 286.

New Jersey.— U. S. Watch Co. *v.* Learned, 36 N. J. L. 429.

New York.— New York Ice Co. *v.* North Western Ins. Co., 23 N. Y. 357.

North Carolina.— Parker *v.* Harden, 122 N. C. 111, 28 S. E. 962; Tillery *v.* Candler, 118 N. C. 888, 24 S. E. 709. But where an amendment is of such a nature as renders a corresponding amendment necessary on the part of the adverse party, a refusal to allow the latter is appealable. Brooks *v.* Brooks, 90 N. C. 142.

South Carolina.— Pickett *v.* Fidelity, etc., Co., 52 S. E. 584, 30 S. E. 614; Mason *v.* Johnson, 13 S. C. 20.

Vermont.— Bates *v.* Harrington, 51 Vt. 1.

United States.— *Ex p.* Bradstreet, 7 Pet. (U. S.) 634, 8 L. ed. 810; Columbia Bank *v.* Sweeny, 1 Pet. (U. S.) 567, 7 L. ed. 265; Chirac *v.* Reinicker, 11 Wheat. (U. S.) 280, 6 L. ed. 474.

See 2 Cent. Dig. tit. "Appeal and Error," §§ 582, 706.

52. Numerous authorities sustain the text, among which may be cited the following cases:

Alabama.— Throne Franklin Shoe Co. *v.* Gunn, 123 Ala. 640, 26 So. 198.

Arkansas.— Benton County *v.* Rutherford, 30 Ark. 665.

California.— Ashley *v.* Olmstead, 54 Cal. 616.

Colorado.— Thomas *v.* Thomas, 10 Colo. App. 170, 50 Pac. 211.

Connecticut.— An appeal in which the only error assigned is the overruling of a general demurrer to the complaint is proper, though defendant declined to avail himself of his right to plead over. O'Donnell *v.* Sargent, 69 Conn. 476, 38 Atl. 216.

Delaware.— Norfolk Lumber Co. *v.* Simmons, 2 Marv. (Del.) 317, 43 Atl. 163.

District of Columbia.— Edelin *v.* Lyon, 1 App. Cas. (D. C.) 87.

Florida.— Johnson *v.* Polk County, 24 Fla. 28, 3 So. 414.

Georgia.— A writ of error will lie to a judgment overruling a general demurrer to the declaration, though the action is still pending in the court below. Augusta *v.* Lombard, 86 Ga. 165, 12 S. E. 212.

Illinois.— Maguire *v.* Woods, 33 Ill. App. 638.

Indiana.— Foster *v.* Lindley, 20 Ind. App. 155, 50 N. E. 367.

Indian Territory.— Case *v.* Ingle, (Indian Terr. 1899) 51 S. W. 958.

Iowa.— Goldsmith *v.* Wilson, 82 Iowa 720, 47 N. W. 1016.

Kansas.— Union Pac. R. Co. *v.* Estes, 37 Kan. 229, 15 Pac. 157.

Kentucky.— Ferguson *v.* Mason, 20 Ky. L. Rep. 1702, 50 S. W. 15.

Maine.— Exceptions to the sustaining of a demurrer to a plea in abatement cannot be brought to the law court until a disposal of the action on the merits. Copeland *v.* Hewett, 93 Me. 554, 45 Atl. 824.

Maryland.— Tawes *v.* Tyler, 71 Md. 506, 18 Atl. 887.

Massachusetts.— Kellogg *v.* Kimball, 122 Mass. 163.

taken from a judgment dismissing the action on sustaining a demurrer to the declaration or complaint, or overruling a demurrer to the plea or answer.[53] It has also been held in equity that an appeal lies from an order overruling a demurrer to the bill where the demurrer goes to the entire bill.[54]

(III) *Election Between Counts.* An order refusing to compel plaintiff to elect on which cause of action he will rely is not appealable.[55]

(IV) *Judgment on Pleadings.* An order granting or refusing judgment

Michigan.— An appeal lies from an order overruling a general demurrer. Ideal Clothing Co. *v.* Hazle, (Mich. 1901) 85 N. W. 735; Daeschke *v.* Schellenberg, (Mich. 1900) 82 N. W. 665.

Minnesota.— Wakefield *v.* Spencer, 8 Minn. 376.

Mississippi.— An order sustaining a demurrer to a declaration, though not expressly dismissing the action, is a final judgment, and appealable, when leave to amend is not obtained during the term. Jacobs *v.* New York L. Ins. Co., 71 Miss. 656, 15 So. 639.

Missouri.—Plattsburg *v.* Allen, 84 Mo. App. 432.

Nebraska.— Yager *v.* Lemp, 39 Nebr. 93, 58 N. W. 285.

Nevada.— Keyser *v.* Taylor, 4 Nev. 435.

New Jersey.— Warren R. Co. *v.* Belvidere, 35 N. J. L. 584.

New York.— Clowes *v.* Berckmanns, 58 N. Y. App. Div. 488, 69 N. Y. Suppl. 340.

North Carolina.— An appeal lies from an order overruling a demurrer. Pender *v.* Mallett, 122 N. C. 163, 30 S. E. 324; Wake County *v.* Magnin, 78 N. C. 181. But an appeal from a judgment sustaining a demurrer to a counter-claim is premature. Bazemore *v.* Bridgers, 105 N. C. 191, 10 S. E. 888. And no appeal lies from a refusal to adjudge a demurrer frivolous. Abbott *v.* Hancock, 123 N. C. 89, 31 S. E. 271.

Ohio.— Holbrook *v.* Connelly, 6 Ohio St. 199.

Pennsylvania.— Richardson *v.* Richardson, 193 Pa. St. 279, 44 Atl. 445.

Rhode Island.— Taylor *v.* Loomis, 21 R. I. 277, 43 Atl. 180.

South Carolina.— Cureton *v.* Hutchinson, 3 S. C. 606.

South Dakota.— An appeal lies from an order sustaining or overruling a demurrer. Greeley *v.* Winsor, 1 S. D. 618, 48 N. W. 214.

Tennessee.— Gurley *v.* Newport News, etc., R. Co., 91 Tenn. 486, 19 S. W. 571.

Texas.— State *v.* Trilling, (Tex. Civ. App. 1900) 57 S. W. 311.

Utah.— Smith *v.* McEvoy, 8 Utah 58, 29 Pac. 1030.

Vermont.— Durkee *v.* Mayo, 1 Aik. (Vt.) 129.

Virginia.—Gillespie *v.* Coleman, 98 Va. 276, 36 S. E. 377.

Washington.— Old Nat. Bank *v.* O. K. Gold Min. Co., 19 Wash. 194, 52 Pac. 1065.

West Virginia.— Parsons *v.* Snider, 42 W. Va. 517, 26 S. E. 285.

Wisconsin.— An appeal will lie from an order denying a motion to strike out a demurrer as frivolous, where it also sustains the demurrer. Scott *v.* Armstrong, 103 Wis. 280, 79 N. W. 239.

United States.— De Armas *v.* U. S., 6 How. (U. S.) 103, 12 L. ed. 361.

See 2 Cent. Dig. tit. "Appeal and Error," § 369.

53. *Alabama.*— James *v.* Moseley, 47 Ala. 299.

Iowa.— Wilson *v.* Shorick, 21 Iowa 298.

Kentucky.— Com. *v.* Peters, 4 Bush (Ky.) 403.

New York.— Richards *v.* Brice, 13 N. Y. 728.

Oklahoma.— Farris *v.* Henderson, 1 Okla. 384, 33 Pac. 380.

Oregon.— Scheiffelin *v.* Weatherred, 19 Oreg. 172, 23 Pac. 898.

Washington.— Van Horne *v.* Watrous, 10 Wash. 525, 39 Pac. 136.

Demurrer to counter-claim.— When defendant files an answer and a declaration in set-off, to which last plaintiff demurs, no appeal lies from a judgment upon the demurrer until after trial on the answer. Maher *v.* Dougherty, 11 Gray (Mass.) 16; Stetson *v.* Exchange Bank, 7 Gray (Mass.) 425. See also Bazemore *v.* Bridgers, 105 N. C. 191, 10 S. E. 888.

54. *Georgia.*— Lowe *v.* Burke, 79 Ga. 164, 3 S. E. 449; Mechanics', etc., Bank *v.* Harrison, 68 Ga. 463.

Maryland.— Hecht *v.* Colquhoun, 57 Md. 563; Chappell *v.* Funk, 57 Md. 465.

Mississippi.— Canton Cotton Warehouse Co. *v.* Potts, 68 Miss. 637, 10 So. 59; Wilkinson *v.* Wingate, 46 Miss. 280; Nesbit *v.* Rodewald, 43 Miss. 304; Brown *v.* Troup, 33 Miss. 35; Lewis *v.* Miller, 13 Sm. & M. (Miss.) 110; Heckingbottom *v.* Shell, 3 Sm. & M. (Miss.) 588; Montgomery *v.* Norris, 1 How. (Miss.) 499.

Nebraska.— Arnold *v.* Baker, 6 Nebr. 134.

Tennessee.— See Barksdale *v.* Butler, 6 Lea (Tenn.) 450.

Dismissal of cross-bill.— An appeal will lie from a decree dismissing a cross-bill on demurrer before the final determination of the original bill. Clutton *v.* Clutton, 106 Mich. 690, 64 N. W. 744. See also Peoria, etc., R. Co. *v.* Pixley, 15 Ill. App. 283.

55. Jones *v.* Johnson, 10 Bush (Ky.) 649; Milbauer *v.* Schotten, 95 Wis. 28, 69 N. W. 984.

Separating causes of action.— An appeal will not lie from an order denying a motion that plaintiff should separate his several causes of action, where defendant, after denial of the motion, serves an answer. Sixth Ave. R. Co. *v.* Manhattan R. Co., 54 N. Y. Super. Ct. 323.

on the pleadings is not appealable, and is only reviewable on appeal from the final judgment.[56]

(v) *Making Pleadings More Definite and Certain.* An order granting or denying a motion to make a pleading more definite and certain is not appealable before final judgment.[57]

(vi) *Pleas in Abatement.* As a general rule a judgment on a plea in abatement is not final in the sense that it may be reviewed before the final determination of the cause.[58]

(vii) *Striking Out.* An order striking out a pleading, or matter therein, is, as a rule, reviewable only on appeal from the final judgment.[59] Numerous authori-

56. *California.*— Holton *v.* Noble, 83 Cal. 7, 23 Pac. 58.

Minnesota.— McMahon *v.* Davidson, 12 Minn. 357.

Montana.—Nelson *v.* Donovan, 14 Mont. 78, 35 Pac. 227.

New York.— Commercial Bank *v.* Spencer, 76 N. Y. 155.

North Carolina.— Cameron *v.* Bennett, 110 N. C. 277, 14 S. E. 779.

See 2 Cent. Dig. tit. "Appeal and Error," § 420.

57. *California.*— Since a motion to make a complaint more definite will not lie, no appeal can be taken from an order granting such a motion. McFarland *v.* Holcomb, 123 Cal. 84, 55 Pac. 761.

Minnesota.— American Book Co. *v.* Kingdom Pub. Co., 71 Minn. 363, 73 N. W. 1089. *Compare* Pugh *v.* Winona, etc., R. Co., 29 Minn. 390, 13 N. W. 189.

New York.— Hanover F. Ins. Co. *v.* Tomlinson, 58 N. Y. 651; Hughes *v.* Chicago, etc., R. Co., 45 N. Y. Super. Ct. 114; Faulks *v.* Kamp, 40 N. Y. Super. Ct. 70; Dudley *v.* Grissler, 37 N. Y. Super. Ct. 412; Geis *v.* Loew, 15 Abb. Pr. N. S. (N. Y.) 94, 36 N. Y. Super. Ct. 190; Field *v.* Stewart, 41 How. Pr. (N. Y.) 95, 2 Sweeny (N. Y.) 193. *Compare* Eisner *v.* Eisner, 89 Hun (N. Y.) 480, 35 N. Y. Suppl. 393, 69 N. Y. St. 779; Jeffras *v.* McKillop, etc., Co., 2 Hun (N. Y.) 351; Garfield Nat. Bank *v.* Kirchwey, 17 Misc. (N. Y.) 148, 39 N. Y. Suppl. 333.

South Carolina.— Fladger *v.* Beckman, 42 S. C. 547, 20 S. E. 790.

Wisconsin.— An order denying a motion to make a complaint more definite and certain can be reviewed only by an appeal from the final judgment. O'Connell *v.* Smith, 101 Wis. 68, 76 N. W. 1116. See also Crowley *v.* Hicks, 98 Wis. 566, 74 N. W. 348; Lusk *v.* Galloway, 52 Wis. 164, 8 N. W. 608.

See 2 Cent. Dig. tit. "Appeal and Error," § 703.

Bill of particulars.— An order requiring a bill of particulars to be made more specific is not appealable. Van Zandt *v.* S. H. Wood Produce Co., 54 Minn. 202, 55 N. W. 863.

58. *Connecticut.*— Dunham *v.* Braiman, 1 Root (Conn.) 551.

Louisiana.— Ponsony *v.* Debaillon, 7 Mart. N. S. (La.) 204.

Massachusetts.—Rutland County Nat. Bank *v.* Johnson, 155 Mass. 43, 29 N. E. 59; Houghton *v.* Ware, 113 Mass. 49.

Missouri.—Duncan *v.* Forgery, 25 Mo. App. 310.

Nebraska.— Bartels *v.* Sonnenschein, 54 Nebr. 68, 74 N. W. 417.

North Carolina.— An appeal will not lie from a judgment of *respondeat ouster* given on demurrer to a plea in abatement. State Bank *v.* Raiford, 8 N. C. 189 note.

Tennessee.— Joslyn *v.* Sappington, 1 Overt. (Tenn.) 222.

United States.— Fitzpatrick *v.* Flannagan, 106 U. S. 648, 1 S. Ct. 369, 27 L. ed. 211; Piquignot *v.* Pennsylvania R. Co., 16 How. (U. S.) 104, 14 L. ed. 863.

See 2 Cent. Dig. tit. "Appeal and Error," § 709.

A plea of another action pending is a plea in abatement, and a ruling thereon is not subject to revision by the appellate court. Stephens *v.* Monongahela Nat. Bank, 111 U. S. 197, 4 S. Ct. 336, 28 L. ed. 399.

Though the supreme court has no jurisdiction of an appeal from a judgment on a plea in abatement, it has jurisdiction of an appeal from judgment on a plea which, though in the form of abatement, sets up matter in bar showing that the court had no jurisdiction of the subject-matte . Allin *v.* Connecticut River Lumber Co., 150 Mass. 560, 23 N. E. 581, 6 L. R. A. 416.

59. *California.*—Swain *v.* Burnette, 76 Cal. 299, 18 Pac. 394; Beach *v.* Hodgdon, 66 Cal. 187, 5 Pac. 77; Sutter *v.* San Francisco, 36 Cal. 112.

District of Columbia.— An order striking out a plea of the statute of limitations in ejectment is not one involving the merits, as the same facts can be shown under the general issue. Morris *v.* Wheat, 1 App. Cas. (D. C.) 237. See also Taylor *v.* Duncanson, 20 D. C. 505.

Iowa.— An order striking out material portions of an answer is appealable. Mast *v.* Wells, 110 Iowa 128, 81 N. W. 230. But an order striking out part of a pleading as surplusage is not appealable as an intermediate order involving the merits. Allen *v.* Church, 101 Iowa 116, 70 N. W. 127.

Louisiana.— An interlocutory decree sustaining a motion to strike out of defendant's answer a reconventional demand is not appealable. Harris *v.* Stockett, 35 La. Ann. 387.

Michigan.— An order striking a bill in equity from the files is appealable. McMann *v.* Westcott, 47 Mich. 177, 10 N. W. 190; Webster *v.* Hitchcock, 11 Mich. 56.

ties hold that the rule is the same as to an order refusing to strike out a pleading, or matter therein.[60]

t. Proceedings After Remand. A judgment, entered by the trial court in conformity with the mandate of the appellate court, is not appealable,[61] but if the trial court renders a judgment or decree different from that directed by the appellate court,[62] or if such judgment or decree determines questions not covered by

Minnesota.—An order striking out portions of an answer is appealable. Kingsley *v.* Gilman, 12 Minn. 515; Starbuck *v.* Dunklee, 10 Minn. 168, 88 Am. Dec. 68; Wolf *v.* Banning, 3 Minn. 202.

Missouri.— Pearce *v.* McClanahan, 50 Mo. 267.

Montana.— Owen *v.* McCormick, 5 Mont. 255, 5 Pac. 280.

Nebraska.—Welch *v.* Calhoun, 22 Nebr. 166, 34 N. W. 348.

New Jersey.— *Compare* Cooper *v.* Vanderveer, 47 N. J. L. 178.

New York.—*Compare* Rice *v.* Ehele, 55 N. Y. 518; Rapalee *v.* Stewart, 27 N. Y. 310; Briggs *v.* Bergen, 23 N. Y. 162; Webster *v.* Bainbridge, 13 Hun (N. Y.) 180; Lindon *v.* Beach. 6 Hun (N. Y.) 200; Hanover F. Ins. Co. *v.* Tomlinson, 37 N. Y. Super. Ct. 221; Potter *v.* Carreras, 4 Rob. (N. Y.) 629; Penn Yan *v.* Forbes, 8 How. Pr. (N. Y.) 285; Otis *v.* Ross, 8 How. Pr. (N. Y.) 193.

Ohio.— *Compare* Henry *v.* Jeans, 48 Ohio St. 443, 28 N. E. 672.

Washington.—McElwain *v.* Huston, 1 Wash. 359, 25 Pac. 465. *Compare* Snohomish County *v.* Ruff, 15 Wash. 637, 47 Pac. 35, 441.

Wisconsin.— *Compare* Adamson *v.* Raymer, 94 Wis. 243, 68 N. W. 1000; Noonan *v.* Orton, 30 Wis. 609; Kewaunee County *v.* Decker, 28 Wis. 669. *Compare* Carpenter *v.* Reynolds, 58 Wis. 666, 17 N. W. 300.

United States.— An order striking out an answer is a final order. Fuller *v.* Claflin, 93 U. S. 14, 23 L. ed. 785.

See 2 Cent. Dig. tit. "Appeal and Error," § 704.

60. *Indiana.*— Zimmerman *v.* Gaumer, 152 Ind. 552, 53 N. E. 829; Brown *v.* Summers, 91 Ind. 151.

Iowa.— Specht *v.* Spangenberg, 70 Iowa 488, 30 N. W. 875. But an order overruling a motion to strike out an amendment to a petition of intervention, being an intermediate order, involving the merits of the case, and materially affecting the final decision, is appealable. Bicklin *v.* Kendall, 72 Iowa 490, 34 N. W. 283. See also Seiffert, etc., Lumber Co. *v.* Hartwell, 94 Iowa 576, 63 N. W. 333, 58 Am. St. Rep. 413.

Minnesota.— National Albany Exch. Bank *v.* Cargill, 39 Minn. 477, 40 N. W. 570; Rice *v.* First Div. St. Paul, etc., R. Co., 24 Minn. 447.

New Jersey.— Cooper *v.* Vanderveer, 47 N. J. L. 178.

New York.— Carpenter *v.* Adams, 34 Hun (N. Y.) 429; Parker *v.* Warth, 5 Hun (N. Y.) 417; Morehouse *v.* Yeager, 38 N. Y. Super. Ct. 50; Hughes *v.* Mercantile Mut. Ins. Co., 10 Abb. Pr. N. S. (N. Y.) 37, 41 How. Pr. (N. Y.) 253; Joseph Dixon Crucible Co. *v.* New York City Steel Works, 9 Abb. Pr. N. S. (N. Y.) 195; Fillette *v.* Hermann, 8 Abb. Pr. N. S. (N. Y.) 193 note; Murphy *v.* Dickinson, 40 How. Pr. (N. Y.) 66; Commercial Bank *v.* Spencer, 19 Alb. L. J. (N. Y.) 158.

North Carolina.— Walters *v.* Starnes, 118 N. C. 842, 24 S. E. 713; Lane *v.* Richardson, 101 N. C. 181, 7 S. E. 710; Best *v.* Clyde, 86 N. C. 4; Turlington *v.* Williams, 84 N. C. 125.

Utah.— Jones *v.* New York L. Ins. Co., 11 Utah 401, 40 Pac. 702.

Wisconsin.— Dewald *v.* Dewald, 89 Wis. 353, 62 N. W. 175; Fisher *v.* Schuri, 73 Wis. 370, 41 N. W. 527; Noonan *v.* Orton, 30 Wis. 609; Kewaunee County *v.* Decker, 28 Wis. 669.

61. *California.*— Heinlen *v.* Beans, 73 Cal. 240, 14 Pac. 855.

Colorado.— Wilson *v.* Bates, 21 Colo. 115, 40 Pac. 351.

Illinois.— Rising *v.* Carr, 70 Ill. 596.

Maine.— Mitchell *v.* Smith, 69 Me. 66.

Maryland.—Stonebraker *v.* Stonebraker, 34 Md. 444; Graff *v.* Barnum, 33 Md. 283.

Minnesota.—Lough *v.* Bragg, 19 Minn. 357.

Nevada.— Vansickle *v.* Haines, 8 Nev. 164.

Oregon.— Apex Transp. Co. *v.* Garbade, 32 Oreg. 582, 52 Pac. 573, 54 Pac. 367, 882.

South Carolina.— State *v.* Levelle, 36 S. C. 600, 15 S. E. 380; State *v.* Merriman, 34 S. C. 576, 13 S. E. 898.

Utah.— Krantz *v.* Rio Grande Western R. Co., 13 Utah 1, 43 Pac. 623, 32 L. R. A. 828.

Wisconsin.— Patten Paper Co. *v.* Green Bay, etc., Canal Co., 93 Wis. 283, 66 N. W. 601, 67 N. W. 432.

United States.—Aspen Min., etc., Co. *v.* Billings, 150 U. S. 31, 14 S. Ct. 4, 37 L. ed. 986; Texas, etc., R. Co. *v.* Anderson, 149 U. S. 237, 13 S. Ct. 843, 37 L. ed. 717.

See 2 Cent. Dig. tit. "Appeal and Error," § 814.

62. Vail *v.* Arkell, 43 Ill. App. 466; State *v.* Pilsbury, 35 La. Ann. 408; *Re* Sandford Fork, etc., Co., 160 U. S. 247, 16 S. Ct. 291, 40 L. ed. 414; U. S. *v.* Frémont, 18 How. (U. S.) 30, 15 L. ed. 302. See also Randall *v.* Duff, 107 Cal. 33, 40 Pac. 20, wherein it was held that where there is a question whether or not the lower court has entered the judgment directed on remand, an appeal lies.

An appeal will lie to correct a mistake of the court below in executing a mandate. Perkins *v.* Fourniquet, 14 How. (U. S.) 313, 14 L. ed. 435.

Refusal to obey mandate.— If, after the decision of an appeal, the lower court refuses to obey the mandate, an appeal cannot be again had, for there is no question to be reviewed, but the party aggrieved must apply for a mandamus. Ray *v.* Ray, 34 N. C. 24.

the mandate,[63] an appeal will lie from the judgment or decree entered by the trial court.

u. Process. An order overruling a motion to quash the writ or summons is a mere interlocutory order from which an appeal will not lie.[64] But an order quashing the writ or summons is appealable, since it determines the action.[65]

v. Prohibition. A judgment dismissing an application for a writ of prohibition is a final one, from which an appeal lies.[66]

w. Provisional Remedies — (1) *Arrest and Bail.* An order vacating an order of arrest has been held to be an order affecting a substantial right from which an appeal will lie.[67] It has also been held that an order allowing bail to surrender

63. Selz *v.* Ft. Atkinson First Nat. Bank, 60 Wis. 246, 19 N. W. 43; *In re* Carroll, 53 Wis. 228, 10 N. W. 375; Metcalf *v.* Watertown, 68 Fed. 859, 16 C. C. A. 37.

64. *Kansas.*— Kansas Rolling Mill Co. *v.* Bovard, 34 Kan. 21, 7 Pac. 622; Potter *v.* Payne, 31 Kan. 218, 1 Pac. 617.

Maryland.— Welch *v.* Davis, 7 Gill (Md.) 364.

Michigan.— Brady *v.* Toledo, etc., R. Co., 73 Mich. 457, 41 N. W. 503.

New York.— McCoun *v.* New York Cent., etc., R. Co., 50 N. Y. 176; Hammond *v.* Tillotson, 18 Barb. (N. Y.) 332.

South Dakota.—Ryan *v.* Davenport, 5 S. D. 203, 58 N. W. 568.

Virginia.— Roger *v.* Bertha Zinc Co., (Va. 1894) 19 S. E. 782.

Washington.— Prussian Nat. Ins. Co. *v.* Northwest F. & M. Ins. Co., 19 Wash. 281, 53 Pac. 158.

Wisconsin.— Welsher *v.* Libby, 106 Wis. 291, 82 N. W. 143.

See 2 Cent. Dig. tit. "Appeal and Error," § 368.

An order denying a motion to set aside a complaint for failing to conform to the summons as to the relief prayed does not determine the action, and is not appealable. Sibley County *v.* Young, 21 Minn. 335.

Rulings on a motion to amend a summons or the return thereon are not appealable. Techen *v.* Hoffmeyer, 77 Ill. App. 203; Cooper *v.* Kinney, 2 Hilt. (N. Y.) 12; Nelson *v.* Brown, 59 Vt. 600, 10 Atl. 721.

65. *Arkansas.*— State Bank *v.* Bates, 10 Ark. 631.

Indiana.— Cole *v.* Peniwell, 5 Blackf. (Ind.) 175.

Iowa.— Elliott *v.* Corbin, 4 Iowa 564.

Kansas.— Newberry *v.* Arkansas, etc., R. Co., 52 Kan. 613, 35 Pac. 210.

Kentucky.— Quashing the summons and return thereon is not a judgment or final order from which an appeal will lie. Winn *v.* Carter Dry Goods Co., 102 Ky. 370, 19 Ky. L. Rep. 1418, 43 S. W. 436; Wearen *v.* Smith, 80 Ky. 216.

Maryland.— An order quashing the sheriff's return of service of the summons is not appealable. Oland *v.* Watertown Agricultural Ins. Co., 69 Md. 248, 14 Atl. 669.

Nebraska.— An order quashing the service of a summons cannot be reviewed before final judgment is rendered in the action. Lewis *v.* Barker, 46 Nebr. 662, 65 N. W. 778; Standard Distilling Co. *v.* Freyhan, 34 Nebr. 434, 51 N. W. 976; Persinger *v.* Tinkle, 34 Nebr. 5, 51 N. W. 299; Brown *v.* Rice, 30 Nebr. 236, 46 N. W. 489.

Ohio.—Cowden *v.* Stevenson, Wright (Ohio) 116.

Washington.— Embree *v.* McLennan, 18 Wash. 651, 52 Pac. 241; Carstens *v.* Leidigh, etc., Lumber Co., 18 Wash. 450, 51 Pac. 1051, 63 Am. St. Rep. 906, 39 L. R. A. 548.

Wisconsin.— State *v.* Lincoln, 67 Wis. 274, 30 N. W. 360.

66. Fayerweather *v.* Monson, 61 Conn. 431, 23 Atl. 878; Singer Mfg. Co. *v.* Spratt, 20 Fla. 122. See, generally, PROHIBITION.

An order granting a writ of prohibition is but the commencement of the proceeding, from which a writ of error will not lie. Lawless *v.* Reese, 3 Bibb (Ky.) 479. See also Healy *v.* Loofbourrow, 2 Okla. 458, 37 Pac. 823.

67. Raisin Fertilizer Co. *v.* Grubbs, 114 N. C. 470, 19 S. E. 597. See also State *v.* Judge, 15 La. 531, wherein it was held that an order on a rule discharging a debtor from arrest and imprisonment, though interlocutory, causes irreparable injury, and is appealable. But see Com. *v.* Fielder, 8 Ky. L. Rep. 353, wherein it was held that an appeal does not lie from an order quashing a capias, where no rights had been secured to plaintiff which did not exist under the judgment independent of the writ of execution. And see Clarke *v.* Lourie, 82 N. Y. 580, wherein it was held that from a decision of the general term, affirming an order of the special term vacating an order of arrest, no appeal lies if, upon any view of the facts, the decision can be upheld, the order being discretionary.

See 2 Cent. Dig. tit. "Appeal and Error," §§ 388, 660.

In New Jersey it has been held that an order setting aside proceedings on a bail bond, and ordering that it be canceled, may be brought to the supreme court by writ of error. Atkinson *v.* Prine, 46 N. J. L. 28.

In New York it has been held that, in an action for recovery of chattels, an order is appealable which illegally discharges from custody at the end of six months a defendant who had been imprisoned for concealing such chattels, as such order deprives plaintiffs of a remedy given by statute. Levy *v.* Solomon, 105 N. Y. 529, 12 N. E. 53, 19 Abb. N. Cas. (N. Y.) 52, 12 N. Y. Civ. Proc. 125.

In Washington it has been held that an order of arrest before final judgment in civil actions, is not appealable. Cline *v.* Harmon, 2 Wash. 155, 26 Pac. 191, 269.

the principal in their exoneration is appealable as affecting a substantial right and determining the action.[68]

(II) *ATTACHMENT* — (A) *In General.* As the procedure in attachment proceedings is largely governed by statute, reference should be had to the statutes of the particular state to determine the appealability of orders dissolving or refusing to dissolve an attachment.[69]

Order overruling motion to set aside order of arrest.— A petition in error will lie to an order overruling a motion to set aside an order of arrest in a civil action. Peyton *v.* Mullins, 4 Cinc. L. Bul. 1037; Pratt *v.* Page, 18 Wis. 337.

A refusal to forfeit a recognizance is not a final judgment from which an appeal can be taken. State *v.* Butler, 38 Tex. 560.

A refusal to quash a capias or to discharge from arrest is not a final order, and is not appealable. Casey *v.* Curtis, 41 Ill. App. 236; Peterborough First Nat. Bank *v.* Barker, 58 N. H. 185. See also Burch *v.* Adams, 40 Kan. 639, 20 Pac. 476, wherein it was held that the supreme court cannot review a ruling of the district court refusing to vacate an order of arrest before final judgment has been rendered.

68. Geneva Bank *v.* Reynolds, 33 N. Y. 160; Hall *v.* Emmons, 8 Abb. Pr. N. S. (N. Y.) 451.

69. *Arkansas.*— An appeal will lie from a judgment quashing a writ of attachment and giving defendant costs. Hatheway *v.* Jones, 20 Ark. 109.

California.— An appeal lies from an order dissolving or refusing to dissolve an attachment. Risdon Iron, etc., Works *v.* Citizens' Traction Co., 122 Cal. 94, 54 Pac. 529, 68 Am. St. Rep. 25.

Colorado.— No appeal lies from an order dissolving an attachment. Bogert *v.* Adams, 5 Colo. App. 510, 39 Pac. 351.

Kansas.— An order refusing to discharge attachments is not appealable. Realty Invest. Co. *v.* Porter, 58 Kan. 817, 50 Pac. 879.

Kentucky.— An order directing a specific attachment to issue upon execution of a bond is not such a final order as is appealable. Brashears *v.* Holcomb, 19 Ky. L. Rep. 1286, 43 S. W. 226.

Louisiana.— An appeal lies from the order dismissing an attachment, and may be taken and heard prior to an appeal on the merits. Bayne *v.* Cusimano, 50 La. Ann. 361, 23 So. 361.

Minnesota.— An order vacating an attachment is appealable. Davidson *v.* Owens, 5 Minn. 69. But an appeal does not lie, from an order refusing to dissolve an attachment, after the attachment levy has been released on a bond. Thomas *v.* Craig, 60 Minn. 501, 62 N. W. 1133.

Missouri.— An appeal cannot be taken directly from the judgment on a plea in abatement in an action by attachment, and the proceedings can be reviewed only on appeal from the final judgment. Crawford *v.* Armstrong, 58 Mo. App. 214; Springfield Milling Co. *v.* Ramey, 57 Mo. App. 33; Hauser *v.* Andersch, 56 Mo. App. 485.

Nebraska.— An order discharging an attachment is reviewable on error. Adams County Bank *v.* Morgan, 26 Nebr. 148, 41 N. W. 993.

New Mexico.— When an affidavit in attachment is traversed, and trial is had on the issues raised, an appeal cannot be taken from the judgment until final judgment is entered in the main case to which the attachment is auxiliary. Schofield *v.* American Valley Co., 9 N. M. 485, 54 Pac. 753.

New York.— An order refusing or vacating an order granting an attachment is not appealable to the court of appeals in any case, unless the order shows that it was refused or vacated for want of power; and an order granting an attachment is not appealable unless it presents a question of law or absolute legal right. Allen *v.* Meyer, 73 N. Y. 1.

North Carolina.— An appeal lies from an order refusing to dismiss an attachment. Judd *v.* Crawford Gold-Min. Co., 120 N. C. 397, 27 S. E. 81; Sheldon *v.* Kivett, 110 N. C. 408, 14 S. E. 970.

North Dakota.— An order vacating an attachment is an appealable order. Red River Valley Bank *v.* Freeman, 1 N. D. 196, 46 N. W. 36.

Ohio.—An order overruling a motion to dissolve or discharge an attachment is a final judgment. Young *v.* Gerdes, 42 Ohio St. 102.

Oregon.— An intermediate order dissolving an attachment is not appealable. Farmers' Bank *v.* Key, 33 Oreg. 443, 54 Pac. 206.

Pennsylvania.— No appeal will lie from an order dissolving an attachment, as it is merely interlocutory. Slingluff *v.* Sisler, 193 Pa. St. 264, 44 Atl. 423.

South Dakota.— An order dismissing an attachment is appealable. Wyman *v.* Wilmarth, 1 S. D. 35, 44 N. W. 1151; Quebec Bank *v.* Carroll, 1 S. D. 1, 44 N. W. 723.

Virginia.— Where, in an attachment, an order is entered adjudging the rights of the parties, but afterward intervening creditors file petitions, and defendant moves to quash the attachment, the order entered on the motion to quash is a final order. Offtendinger *v.* Ford, 86 Va. 917, 12 S. E. 1.

Washington.— Wash. Laws (1893), c. 61, authorizing an appeal from an order refusing to dissolve an attachment, does not make an order dissolving an attachment appealable. Jensen *v.* Hughes, 12 Wash. 661, 42 Pac. 127.

Wisconsin.— An order refusing to set aside proceedings under a writ of attachment continues a provisional remedy within Wis. Laws (1895), c. 212, § 1, subd. 3, granting appeals from such orders. Shakman *v.* Koch, 93 Wis. 595, 67 N. W. 925.

Wyoming.— An order dissolving an attach-

(B) *Intervention.* A judgment in favor of interpleading claimants in an attachment suit is final and appealable.[70]

(C) *Sale of Property.* Where goods taken in attachment are sold, an order distributing the proceeds of the sale is final, as it disposes of the fund.[71]

(III) *GARNISHMENT.* An order discharging a garnishee is final and appealable,[72] and the same is true of an order formally directing a garnishee to pay the funds in his hands to plaintiff or into court.[73]

X. Receivers — (I) *APPOINTMENT.* Orders appointing, removing, refusing to appoint, or refusing to remove receivers are generally deemed to be interlocutory, and hence not appealable unless the statute authorizes an appeal.[74]

ment may be reviewed without bringing up the whole case after final judgment. C. D. Smith Drug Co. *v.* Casper Drug Co., 5 Wyo. 510, 40 Pac. 979, 42 Pac. 213.

United States.— An order dissolving an attachment, made prior to the determination of the case on the merits, is not a final judgment from which a writ of error lies. Atlantic Lumber Co. *v.* L. Bucki, etc., Lumber Co., 92 Fed. 864, 63 U. S. App. 382, 35 C. C. A. 59.

See, generally, ATTACHMENTS; and 2 Cent. Dig. tit. "Appeal and Error," §§ 389–391, 661–664.

70. Doane *v.* Glenn, 1 Colo. 417.

71. Gumbel *v.* Pitkin, 113 U. S. 545, 5 S. Ct. 616, 28 L. ed. 1128.

72. *Alabama.*— Steiner *v.* Birmingham First Nat. Bank, 115 Ala. 379, 22 So. 30.

Iowa.— National Bank *v.* Chase, 71 Iowa 120, 32 N. W. 202; Bebb *v.* Preston, 1 Iowa 460.

Kansas.— Reighart *v.* Harris, 5 Kan. App. 461, 49 Pac. 336; Bradley *v.* Byerley, 3 Kan. App. 357, 42 Pac. 930.

Minnesota.— McConnell *v.* Rakness, 41 Minn. 3, 42 N. W. 539.

Nebraska.— Turpin *v.* Coates, 12 Nebr. 321, 11 N. W. 300.

Vermont.—Page *v.* Hurd, 1 Aik. (Vt.) 105.

See, generally, GARNISHMENT; and 2 Cent. Dig. tit. "Appeal and Error," § 667.

In Rhode Island it has been held that under R. I. Pub. Laws, c. 597, providing that a person aggrieved by the judgment of a district court in a civil action may appeal therefrom to the court of common pleas for a final hearing of said action, plaintiff, in an action begun by foreign attachment, cannot appeal when the district court renders judgment in his favor, but discharges the trustee. Clapp *v.* Smith, 16 R. I. 368, 16 Atl. 246.

73. Furstenheim *v.* Adams, 42 Ark. 283; Deering *v.* Richardson-Kimball Co., 109 Cal. 73, 41 Pac. 801; Forepaugh *v.* Appold, 17 B. Mon. (Ky.) 625.

Order for judgment.— In Minnesota it has been held that no appeal will lie from an order of the district court entering judgment against a garnishee. Croft *v.* Miller, 26 Minn. 317, 4 N. W. 45.

74. *District of Columbia.*—Emmons *v.* Garnett, 7 Mackey (D. C.) 52.

Georgia.— An interlocutory order appointing a receiver is reviewable. Mathis *v.* Weaver, 94 Ga. 730, 19 S. E. 709.

Idaho.— Jones *v.* Quayle, (Ida. 1893) 32 Pac. 1134.

Illinois.— Farson *v.* Gorham, 117 Ill. 137, 7 N. E. 104; Matter of Eichenbaum Plumbing Co., 77 Ill. App. 363; Brachtendorf *v.* Kehm, 72 Ill. App. 228.

Indiana.— An order appointing a receiver is appealable. State *v.* Union Nat. Bank, 145 Ind. 537, 44 N. E. 585, 57 Am. St. Rep. 209; Buchanan *v.* Berkshire L. Ins. Co., 96 Ind. 510.

Iowa.— An appeal lies from an order appointing or refusing to appoint a receiver. Callanan *v.* Shaw, 19 Iowa 183.

Kansas.— Boyd *v.* Cook, 40 Kan. 675, 20 Pac. 477.

Maryland.— An appeal lies from an order appointing a receiver, but an order refusing to rescind the order of appointment, not being in the nature of a final decree, is not appealable. R. Frank Williams Co. *v.* U. S. Baking Co., 86 Md. 475, 38 Atl. 990.

Michigan.— Orders appointing receivers, whereby the possession of property is devested are appealable. Mardian *v.* Wayne Cir. Judge, 118 Mich. 353, 76 N. W. 497.

Minnesota.— An order appointing a receiver is an order granting a provisional remedy, and hence is appealable. State *v.* Egan, 62 Minn. 280, 64 N. W. 813. See also *In re* Graeff, 30 Minn. 358, 16 N. W. 395.

Mississippi.— An order discharging a receiver appointed on *ex parte* showing is appealable. Pearson *v.* Kendrick, 74 Miss. 235, 21 So. 37.

Missouri.— An order appointing a receiver, and directing the delivery to him of property in suit pending an accounting, is not a final judgment from which an appeal will lie. Greeley *v.* Missouri Pac. R. Co., 123 Mo. 157, 27 S. W. 613.

Montana.— Forrester *v.* Boston, etc., Consol. Copper, etc., Min. Co., 22 Mont. 430, 56 Pac. 868.

Nebraska.— An order appointing a receiver is appealable, in advance of the final disposition of the cause. M. A. Seeds Dry-Plate Co. *v.* Heyn Photo-Supply Co., 57 Nebr. 214, 77 N. W. 660.

New York.— Dawson *v.* Parsons, 137 N. Y. 605, 33 N. E. 482, 51 N. Y. St. 930.

North Carolina.— An appeal lies from an order granting or refusing the appointment of a receiver (Jones *v.* Thorne, 80 N. C. 72); but an order to show cause why a receiver should not be appointed is a mere notice, and is not appealable (Gray *v.* Gaither, 71 N. C. 55).

Ohio.— An order annulling an order of a

(II) *Compensation.* An order fixing the compensation of a receiver, and directing him to appropriate in payment a fund in his hands as receiver, is appealable.[75]

(III) *Leave to Sue.* An order granting or denying leave to sue a receiver is an order affecting a substantial right, and is therefore appealable.[76]

(IV) *Management of Property.* An order directing a receiver to pay a certain rate of wages to his employees is final and appealable.[77]

y. Reference — (I) *Awarding or Refusing Reference.* An order merely directing or refusing a reference to state an account is interlocutory only.[78] It

judge at chambers vacating the appointment of a receiver is a final order, affecting a substantial right in a special proceeding, and appealable. Cincinnati, etc., R. Co. *v.* Sloan, 31 Ohio St. 1.

Oregon.— An appeal will not lie from an order overruling a motion to vacate an order appointing a receiver. Basche *v.* Pringle, 21 Oreg. 24, 26 Pac. 863.

Tennessee.— Enochs *v.* Wilson, 11 Lea (Tenn.) 228.

Texas.— An appeal lies from an interlocutory order appointing a receiver to take charge of property involved in a suit. Stone *v.* Stone, 18 Tex. Civ. App. 80, 43 S. W. 567.

Utah.— An order appointing a receiver is appealable. Ogden City *v.* Bear Lake, etc., Waterworks, etc., Co., 16 Utah 440, 52 Pac. 697, 41 L. R. A. 305.

Virginia.— A decree of the circuit court in equity, appointing a receiver, is appealable. Shannon *v.* Hanks, 88 Va. 338, 13 S. E. 437.

Washington.— An appeal lies from any order appointing or removing, or refusing to appoint or remove, a receiver. Armstrong *v.* Ford, 10 Wash. 64, 38 Pac. 866.

West Virginia.— An order or decree refusing to appoint a receiver to take possession and control of property is not appealable. Robrecht *v.* Robrecht, 46 W. Va. 738, 34 S. E. 801.

Wisconsin.— Nash *v.* Meggett, 89 Wis. 486, 61 N. W. 283.

Wyoming.— An order appointing a receiver in a foreclosure suit is a final order affecting substantial rights, from which an appeal will lie. Anderson *v.* Matthews, (Wyo. 1899) 57 Pac. 156.

United States.— Milwaukee, etc., R. Co. *v.* Soutter, 154 U. S. 540, 14 S. Ct. 1158, 17 L. ed. 604.

See, generally, Receivers; and 2 Cent. Dig. tit. "Appeal and Error," §§ 400, 683.

75. Grant *v.* Los Angeles, etc., R. Co., 116 Cal. 71, 47 Pac. 872; Hanover Ins. Co. *v.* Germania Ins. Co., 46 Hun (N. Y.) 308; Ogden City *v.* Bear Lake, etc., Waterworks, etc., Co., 18 Utah 279, 55 Pac. 385; Union Nat. Bank *v.* Mills, 103 Wis. 39, 79 N. W. 20. See also Battery Park Bank *v.* Western Carolina Bank, 127 N. C. 432, 36 S. E. 39, wherein it was held that an appeal may be taken from an order allowing a receiver of an insolvent bank, before final settlement, commissions and charges objected to by the creditors. But see State *v.* Alabama, etc., R. Co., 54 Ala. 139, wherein it was held that a chancellor's decretal order, ascertaining and declaring the compensation of a receiver appointed in the case, and his solicitor, and directing its taxation as costs against the complainant, without settling the equities of the case, is not a final decree from which an appeal will lie.

76. Matter of Commercial Bank, 35 N. Y. App. Div. 224, 54 N. Y. Suppl. 722; Miller *v.* Loeb, 64 Barb. (N. Y.) 454; Meeker *v.* Sprague, 5 Wash. 242, 31 Pac. 628.

See, generally, Receivers.

Leave to defend.— An order allowing a receiver to defend an action affects the final judgment, and is appealable. Honegger *v.* Wettstein, 13 Abb. N. Cas. (N. Y.) 393.

Leave to intervene.— A judgment refusing to permit a creditor to intervene in proceedings in which a receiver has been appointed is appealable. Voorhees *v.* Indianapolis Car, etc., Co., 140 Ind. 220, 39 N. E. 738.

Suing federal receiver in state court.— An order made by a federal court, granting leave to sue its receiver in a state court, is discretionary and administrative, and is not appealable. New York Security, etc., Co. *v.* Illinois Transfer R. Co., 104 Fed. 710, 44 C. C. A. 161.

77. Guarantee Trust, etc., Co. *v.* Philadelphia, etc., R. Co., 69 Conn. 709, 38 Atl. 792, 38 L. R. A. 804.

Approval of contract.— An order, in railroad foreclosure proceedings, approving, on certain conditions, a contract by the receiver for the erection of a bridge, is not appealable. La Crosse R. Bridge, 2 Dill. (U. S.) 465, 14 Fed. Cas. No. 7,969.

Issuance of certificates.— An order authorizing a receiver to issue receiver's certificates, which shall be a first lien on the property in the hands of the court, and to expend the proceeds in the maintenance of the property, is appealable. State *v.* Port Royal, etc., R. Co., 45 S. C. 464, 23 S. E. 380. See also Crosby *v.* Morristown, etc., R. Co. (Tenn. Ch. 1897) 42 S. W. 507.

78. *Alabama.*— Richardson *v.* Peagler, 111 Ala. 478, 20 So. 434; Jackson County *v.* Gullatt, 84 Ala. 243, 3 So. 906.

Illinois.— C. & C. Electric Motor Co. *v.* Lewis, 47 Ill. App. 576; Anderson *v.* Lundburg, 41 Ill. App. 248.

Kansas.— Savage *v.* Challiss, 4 Kan. 319.

Kentucky.— Dengler *v.* Dengler, 8 Ky. L. Rep. 344, 1 S. W. 645; Farmers Bank *v.* Rankin, 8 Ky. L. Rep. 530.

Louisiana.— Junek *v.* Hezeau, 12 La. Ann. 248.

has been held, however, that an order of reference in a case where a reference is not authorized by law is an appealable order.[79]

(II) *Decision on Report of Referee* — (A) *In General.* An interlocutory judgment entered on the report of a referee is not appealable.[80] But a decree overruling exceptions to a report, distinctly adjudicating the question raised by such exceptions, is as to such questions a final decree, from which an appeal will lie.[81] It has also been held that an order setting aside a report of a referee, and ordering a jury trial, is appealable.[82]

(B) *Recommitting Report.* An order recommitting, or refusing to recommit, a report or a part thereof to a referee is not appealable.[83]

z. Special Proceedings — (I) *In General.* By statute in some states, orders made in a special proceeding, affecting a substantial right, are appealable.[84]

Maryland.— Hungerford *v.* Bourne, 3 Gill & J. (Md.) 133; Snowden *v.* Dorsey, 6 Harr. & J. (Md.) 114.

Minnesota.—Bond *v.* Welcome, 61 Minn. 43, 63 N. W. 3.

Mississippi.— Ames *v.* Williams, 73 Miss. 772, 19 So. 673.

New Jersey.— Schnitzius *v.* Bailey, (N. J. 1889) 18 Atl. 192.

New York.— Cruger *v.* Douglass, 2 N. Y. 571, 4 How. Pr. (N. Y.) 215; Cosgriff *v.* Dewey, 89 Hun (N. Y.) 4, 34 N. Y. Suppl. 999, 69 N. Y. St. 111.

North Carolina.— Williams *v.* Walker, 107 N. C. 334, 12 S. E. 43; Blackwell *v.* McCaine, 105 N. C. 460, 11 S. E. 360. But in an action wherein defendant pleads a plea in bar, an order referring the cause, made, contrary to defendant's objection, prior to the disposition of the plea in bar, is appealable. Austin *v.* Stewart, 126 N. C. 525, 36 S. E. 37.

Pennsylvania.— Offerle *v.* Reynolds Lumber Co., 170 Pa. St. 29, 32 Atl. 540; Beitler *v.* Zeigler, 1 Penr. & W. (Pa.) 135.

South Carolina.— Devereux *v.* McCrady, 49 S. C. 423, 27 S. E. 467. But where, in a suit to foreclose a mortgage, defendant sets up usury and a counter-claim for usurious interest, an order refusing a reference, and requiring the issues of usury and counter-claim to be tried by a jury, though interlocutory, is appealable. McLaurin *v.* Hodges, 43 S. C. 187, 20 S. E. 991.

South Dakota.— An order appointing a referee to hear and determine all the issues is appealable. Russell *v.* Whitcomb, (S. D. 1901) 85 N. W. 860.

Tennessee.— Berryhill *v.* McKee, 3 Yerg. (Tenn.) 156.

Virginia.— Penn *v.* Chesapeake, etc., R. Co., (Va. 1895) 23 S. E. 3.

West Virginia.— Buehler *v.* Cheuvront, 15 W. Va. 479.

Wisconsin.— A writ of error lies in a case in which the court has power to award, and does award, a compulsory reference. Buttrick *v.* Roy, 72 Wis. 164, 39 N. W. 345.

United States.— Grant *v.* Phœnix Mut. L. Ins. Co., 121 U. S. 118, 7 S. Ct. 849, 30 L. ed. 909; Pittsburgh, etc., R. Co. *v.* Baltimore, etc., R. Co., 61 Fed. 705, 22 U. S. App. 359, 10 C. C. A. 20.

See, generally, REFERENCES; and 2 Cent. Dig. tit. "Appeal and Error," §§ 377, 473.

79. St. Paul, etc., R. Co. *v.* Gardner, 19 Minn. 132, 18 Am. Rep. 334; Whitaker *v.* Desfosse, 7 Bosw. (N. Y.) 678; Kain *v.* Delano, 11 Abb. Pr. N. S. (N. Y.) 29; Cram *v.* Bradford, 4 Abb. Pr. (N. Y.) 193.

80. *California.*— Peck *v.* Courtis, 31 Cal. 207.

Idaho.— Jones *v.* Quayle, (Ida. 1893) 32 Pac. 1134.

Michigan.— Bewick *v.* Alpena Harbor Imp. Co., 39 Mich. 700.

New York.— Garczynski *v.* Russell, 75 Hun (N. Y.) 512, 27 N. Y. Suppl. 461, 57 N. Y. St. 669; People *v.* Kent, 58 How. Pr. (N. Y.) 407.

Tennessee.— Brandon *v.* Crouch, 11 Heisk. (Tenn.) 605.

See 2 Cent. Dig. tit. "Appeal and Error," §§ 736–739.

81. Garrett *v.* Bradford, 28 Gratt. (Va.) 609.

82. Stevenson *v.* Felton, 99 N. C. 58, 5 S. E. 399.

83. *Kentucky.*— Vinson *v.* Freese, 8 Ky. L. Rep. 350, 1 S. W. 478.

New York.— An order denying a motion to send back a cause tried by a referee to him for further findings will not be reviewed in the court of appeals save upon appeal from the judgment. Quincey *v.* Young, 53 N. Y. 504. See also Hunt *v.* Chapman, 62 N. Y. 333; Matter of Post, 64 Hun (N. Y.) 635, 19 N. Y. Suppl. 18, 46 N. Y. St. 129.

North Carolina.— Alexander *v.* Alexander, 120 N. C. 472, 27 S. E. 121; Warren *v.* Stancill, 117 N. C. 112, 23 S. E. 216; Torrence *v.* Davidson, 90 N. C. 2; Jones *v.* Call, 89 N. C. 188; Barrett *v.* Henry, 85 N. C. 321; State *v.* Magnin, 85 N. C. 114.

South Carolina.— McCrady *v.* Jones, 36 S. C. 136, 15 S. E. 430; Symmes *v.* Symmes, 18 S. C. 601.

Tennessee.— Matter of Johnson, 9 Lea (Tenn.) 625; Porter *v.* Burton, 10 Heisk. (Tenn.) 584.

West Virginia.— Hooper *v.* Hooper, 29 W. Va. 276, 1 S. E. 280.

See 2 Cent. Dig. tit. "Appeal and Error," § 738.

84. *California.*— Brown *v.* Starr, 75 Cal. 163, 16 Pac. 760; Adams *v.* Woods, 18 Cal. 30.

Idaho.— Curtis *v.* Richards, (Ida. 1895) 40 Pac. 57.

(II) *Contempt Proceedings.* An order which is absolute in adjudging defendant in contempt, and prescribing a punishment, is appealable.[85] But an order adjudging a contempt, and prescribing a punishment conditional upon the action of the party in contempt, is not a final order, and is therefore not appealable.[86] It has also been held that an order punishing a person for contempt in disobeying an injunction is not appealable, where the contempt proceeding was not, and could not be, used as a remedy to enforce obedience to the injunction, or to indemnify the party injured.[87]

E. Dependent on Rendition, Form, or Entry of Judgment or Order — 1. Necessity of Formal Judgment or Order — a. In General. The existence of a judgment or an appealable order being a jurisdictional fact,[88] an appeal or writ of error will not lie unless there has been such a judgment or order in the court below.[89] A judgment must be complete and certain in itself, and must appear to

Iowa.— Dryden *v.* Wyllis, 51 Iowa 534, 1 N. W. 703.

Minnesota.— Gurney *v.* St. Paul, 36 Minn. 163, 30 N. W. 661; Turner *v.* Holleran, 11 Minn. 253.

Nebraska.— Baldwin *v.* Foss, 14 Nebr. 455, 16 N. W. 480.

New York.— Matter of King, 130 N. Y. 602, 29 N. E. 1096, 42 N. Y. St. 726; Matter of Delaware, etc., Canal Co., 69 N. Y. 209; Matter of Livingston, 34 N. Y. 555; Hyatt *v.* Seeley, 11 N. Y. 52.

Ohio.— Powers *v.* Reed, 19 Ohio St. 189; Lehman *v.* McBride, 15 Ohio St. 573; Hettrick *v.* Wilson, 12 Ohio St. 136, 80 Am. Dec. 337.

South Carolina.— Lowndes *v.* Miller, 25 S. C. 119.

Wisconsin.— Ellis *v.* Southwestern Land Co., 94 Wis. 531, 69 N. W. 363; Morse *v.* Stockman, 65 Wis. 36, 26 N. W. 176; Milwaukee, etc., R. Co. *v.* Strange, 63 Wis. 178, 23 N. W. 432.

See 2 Cent. Dig. tit. "Appeal and Error," § 619.

As to orders in condemnation proceedings see Eminent Domain. In supplementary proceedings see Execution.

85. *Illinois.*—Lester *v.* People, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. Rep. 375. But an appeal will not lie from an order directing that an attachment be issued against defendant for his failure to pay temporary alimony. McEwen *v.* McEwen, 55 Ill. App. 340.

Indiana.— McKinney *v.* Frankfort, etc., R. Co., 140 Ind. 95, 38 N. E. 170, 39 N. E. 500.

New York.— Brinkley *v.* Brinkley, 47 N. Y. 40; Erie R. Co. *v.* Ramsey, 45 N. Y. 637; Boon *v.* McGucken, 67 Hun (N. Y.) 251, 22 N. Y. Suppl. 424, 50 N. Y. St. 901; Newell *v.* Cutler, 19 Hun (N. Y.) 74.

Wisconsin.— Witter *v.* Lyon, 34 Wis. 564.

United States.— Butler *v.* Fayerweather, 91 Fed. 458, 63 U. S. App. 120, 33 C. C. A. 625.

See, generally, Contempt; and 2 Cent. Dig. tit. "Appeal and Error," § 526.

Order made in action.— An order adjudging a defendant guilty of contempt in disobeying the judgment in an action, and appointing a referee to ascertain and report plaintiff's loss and injury, is not appealable to the court of appeals, since such order is interlocutory, and not final, and is made in the action, and not in a special proceeding. Ray *v.* New York Bay Extension R. Co., 155 N. Y. 102, 49 N. E. 662.

An order refusing to set aside a previous order, granting an attachment against defendant as for a contempt in refusing to appear in proceedings supplementary to a judgment, is appealable. Lamonte *v.* Pierce, 34 Wis. 483.

86. Semrow *v.* Semrow, 26 Minn. 9, 46 N. W. 446; Brinkley *v.* Brinkley, 47 N. Y. 40; New York, etc., R. Co. *v.* Ketchum, 3 Abb. Dec. (N. Y.) 347.

87. State *v.* Davis, 2 N. D. 461, 51 N. W. 942.

88. See *supra*, III, D.

89. Baldwin *v.* Roman, (Ala. 1900) 28 So. 40; Weissinger *v.* State, 11 Ala. 540, holding that a statement of the questions arising in a case does not supply the place of the judgment.

Delaware.—Hession *v.* Wilmington, 2 Marv. (Del.) 1, 42 Atl. 422.

Georgia.— Buford *v.* Kennedy, 85 Ga. 212, 11 S. E. 561.

Illinois.— Hutchinson *v.* Ayers, 117 Ill. 558, 7 N. E. 476.

Iowa.— Warder *v.* Schwartz, 65 Iowa 170, 21 N. W. 502.

Kansas.— Jones *v.* Carter, 60 Kan. 855, 55 Pac. 345.

Louisiana.—Frazier *v.* Vance, 6 Rob. (La.) 271 (an appeal by an intervener); Whittemore *v.* Watts, 4 Rob. (La.) 47.

Maine.— Butterfield *v.* Briggs, 92 Me. 49, 42 Atl. 229.

Maryland.— Phillips *v.* Pearson, 27 Md. 242, where it was held that the record entry: "Viewing the whole case as it is presented, this appeal cannot be sustained, and must be dismissed with costs as to the defendant," must be regarded simply as an opinion of the judge.

Mississippi.— Wharton *v.* State, 41 Miss. 680.

Montana.— Murphy *v.* King, 6 Mont. 30, 9 Pac. 585; Beattie *v.* Hoyt, 3 Mont. 140.

New Jersey.— Den *v.* Fen, 21 N. J. L. 700.

New York.— Boyd *v.* Cronkrite, 10 Hun (N. Y.) 574.

North Carolina.— Fisher *v.* Carroll, 46 N. C. 27; McKenzie *v.* Little, 31 N. C. 45.

be an adjudication of the court, and not a memorandum.[90] The form of the judgment is immaterial. The technical phraseology *consideratum est* is not necessary. It is sufficient if it is final and the party may be injured.[91] But, in substance, it must show intrinsically and distinctly, and not inferentially, that the matters in the record have been determined in favor of one of the litigants, or that the rights of the parties in litigation have been adjudicated.[92] Error will not lie on a

Ohio.— Wilson *v.* Holeman, 2 Ohio 253; Reed *v.* De Wolf, Wright (Ohio) 418.

Texas.— Ewing *v.* Kinnard, 9 Tex. 105.

See 2 Cent. Dig. tit. "Appeal and Error," § 875 *et seq.*

A division of opinion in the court, though it operates as a denial of the prayer of the petition, if not followed by any judgment does not amount to an action of the court from which either party could appeal or prosecute error. Graham *v.* Doe, 4 Ind. 615. See *supra*, III, A, B.

A peremptory writ of mandamus was regarded at common law as the final determination of the rights of the parties. But it was necessary to enter a formal judgment before the case could be reviewed by an appellate court. People *v.* Throop, 12 Wend. (N. Y.) 183. In Rex *v.* Dean and Chapter of Dublin, 1 Str. 536, it was held that it was against the nature of a writ of error to lie on any judgment but in causes where an issue might be joined and tried, or where a judgment might be had on demurrer, and that it would not lie on an award of a peremptory mandamus, and in Pender *v.* Herle, 3 Bro. P. C. 505 [*cited* in People *v.* Brooklyn, 13 Wend. (N. Y.) 130], the house of lords made a similar ruling on the ground that the granting or denying of a mandamus was a mere award of the court, and not a strict formal judgment. See also Rex *v.* Oundle, 1 A. & E. 283, 28 E. C. L. 147.

But in Connecticut, where the relator may demur to the return, the award is a formal judgment and writ of error will lie. New Haven, etc., Co. *v.* State, 44 Conn. 376. And in South Dakota a formal judgment must be rendered, as the basis for the peremptory writ, before the writ can issue, and no appeal will lie from a peremptory writ as such. State *v.* Young, 6 S. D. 406, 61 N. W. 165. See also State *v.* Delafield, 64 Wis. 218, 24 N. W. 905.

See *supra*, III, D, 3, m.

An award of arbitrators entered by prothonotary, but not by the court, will not support a writ of error. Wilson *v.* Colwell, 3 Watts (Pa.) 212.

Recitals or memoranda of the clerk do not constitute a formal entry of the judgment within the rule. Birmingham R., etc., Co. *v.* Baker, (Ala. 1900) 28 So. 87; McDonald *v.* Alabama Midland R. Co., 123 Ala. 227, 26 So. 165; Metzger *v.* Morley, 184 Ill. 81, 56 N. E. 299 [*affirming* 83 Ill. App. 113]. See *infra*, III, E, 12.

Report of referee.— An appeal cannot be taken from the action of a referee, but only from the judgment of the court entered on his report. Kille *v.* Reading Iron Works, 134 Pa. St. 225, 26 Wkly. Notes Cas. (Pa.) 1, 19 Atl. 547, construing the Pennsylvania act of May 4, 1889.

See *supra*, III, D, 3, y.

90. Bell *v.* Otts, 101 Ala. 186, 13 So. 43, 46 Am. St. Rep. 117, where the record showed a verdict giving damages to plaintiff, and that "judgment is rendered against defendants, Mace and Edwards, for the land sued for, together with all the costs in this behalf, for which execution may issue," and it was held that this was not a judgment that would support an appeal.

91. Johnson *v.* Gillett, 52 Ill. 358 (where it was recited that "The court this day, after due deliberation, rejects the claim"); Wells *v.* Hogan, 1 Ill. 337 (where the order of the court was absolute that a writ of restitution should issue unless defendant executed a bond within a certain time, and it did not appear that the bond was executed, and the judgment was held to be sufficiently formal).

In Brown *v.* Parker, 97 Fed. 446, 38 C. C. A. 261, which was an action by an assignee for the conversion of property claimed to have passed under the assignment, it was held that a judgment against plaintiff for blank costs, stated to have been entered on a verdict returned for the defendant by the direction of the court, determines the right of the property and may be reviewed on error.

92. *Colorado.*— Skinner *v.* Beshoar, 2 Colo. 383.

Idaho.— In Gray *v.* Cederholm, 2 Ida. 41, 3 Pac. 12, wherein the probate court docket entry showed that complaint was filed, summons issued and served, demurrer to complaint filed, and also entry of fees for overruling demurrer in entering default, for entering final judgment, certifying copy for roll, docketing judgment, making judgment-roll, and sheriff's fees and damages. The court refused to entertain the appeal.

Missouri.— Rubey *v.* Shain, 51 Mo. 116, wherein it was held that the appeal was not supported by an entry that "the demurrer was by the court overruled, to which ruling the defendant at the time excepted, and defendants filing no further pleadings, judgment is rendered for plaintiff."

Nebraska.— Bradford *v.* Higgins, 31 Nebr. 192, 47 N. W. 749.

New York.— Farrington *v.* O'Conner, 6 Daly (N. Y.) 209; Swarthout *v.* Custis, 4 N. Y. 415; Howland *v.* Coffin, 47 Barb. (N. Y.) 653, 32 How. Pr. (N. Y.) 300, in which last case it was held that an appeal would lie from a direction that plaintiff recover a specified amount, and defendant a like amount, and that they offset each other. *Compare* Central Trust Co. *v.* New York City, etc., R. Co., 42 Hun (N. Y.) 602.

rule to ascertain what amount of money is due on a previous judgment.[93] The judgment must show against whom it is rendered.[94] Costs are an incident or appendage of the judgment, but a judgment for their recovery is not a decision of the matter in issue, and is therefore no such final judgment as can by law come within the revisory power of the appellate court.[95] When a writ of error is sued out, the court to which it is directed will return the facts truly, and the reviewing court will determine whether there is any judgment which can be reviewed.[96]

b. Based on Findings or Verdict. A writ of error or appeal will not lie from the verdict of a jury without an entry of judgment thereon,[97] nor from the finding of facts or conclusions of law by the court not followed by judgment.[98] Hence, the opinion of the court, no order being entered in accordance therewith, is not reviewable.[99]

Texas.— Scott *v.* Burton, 6 Tex. 322, 55 Am. Dec. 782.

93. Stockley *v.* Bewley, 6 Houst. (Del.) 14.

A finding of the jury upon a feigned issue to fix the amount due on a judgment by confession is not the subject of a writ of error. Brewer *v.* Ware, 18 N. J. L. 370. See also *infra*, III, E, 1, b.

94. Gray *v.* Cederholm, 2 Ida. 41, 3 Pac. 12; Robinson *v.* Tousey, 6 Blackf. (Ind.) 256.

95. Scott *v.* Burton, 6 Tex. 322, 55 Am. Dec. 782; Warren *v.* Shuman, 5 Tex. 441. See also Reid *v.* Vanderheyden, 5 Cow. (N. Y.) 719.

See *supra*, II, A, 6; III, D, 3, e.

96. Jessup *v.* Cook, 1 N. J. L. 124.

97. *Alabama.*— Little *v.* Fitts, 33 Ala. 343.

Florida.— Rain *v.* Savage, 14 Fla. 201.

Georgia.— McGowan *v.* Lufburrow, 81 Ga. 358, 7 S. E. 314; Roach *v.* Sulter, 51 Ga. 169.

Illinois.— Evanston *v.* Dowden, 55 Ill. App. 217.

Iowa.— Clark *v.* Van Loon, 108 Iowa 250, 79 N. W. 88, 75 Am. St. Rep. 219; Jones *v.* Givens, 77 Iowa 173, 41 N. W. 608.

Kentucky.— Rule *v.* Hayden, 3 B. Mon. (Ky.) 319.

Missouri.— Sperling *v.* Stubblefield, 83 Mo. App. 266.

Nebraska.— Seven Valleys Bank *v.* Smith, 43 Nebr. 237, 61 N. W. 606.

New York.— Benkard *v.* Babcock, 27 How. Pr. (N. Y.) 391.

South Carolina.— Whitesides *v.* Barber, 22 S. C. 47.

98. *Arkansas.*— Reynolds *v.* Craycraft, 26 Ark. 468.

California.— Miller *v.* Sharpe, 54 Cal. 590; Lorenz *v.* Jacobs, 53 Cal. 24.

Connecticut.— Tweedy *v.* Nichols, 27 Conn. 518; Robinson *v.* Mason, 27 Conn. 270.

Florida.— Demens *v.* Poyntz, 25 Fla. 654, 6 So. 261.

Indiana.— Northcutt *v.* Buckles, 60 Ind. 577.

Iowa.— Andrew *v.* Concannon, 76 Iowa 251, 41 N. W. 8.

Kansas.— Steele *v.* Newton, 41 Kan. 512, 21 Pac. 644; Callen *v.* Junction City, 41 Kan. 466, 21 Pac. 647.

Massachusetts.— Robinson *v.* Mutual L. Ins. Co., 170 Mass. 369, 49 N. E. 645.

Minnesota.— Johnson *v.* Northern Pac., etc., R. Co., 39 Minn. 30, 38 N. W. 804; Von Glahn *v.* Sommer, 11 Minn. 203.

Missouri.— Philips *v.* Ward, 51 Mo. 295; Bybee *v.* Maxwell, 43 Mo. 209.

New York.— Drew *v.* Rearick, 3 Thomps. & C. (N. Y.) 337; Weston *v.* Ketcham, 39 N. Y. Super. Ct. 54.

Ohio.— Reynolds *v.* Rogers, 5 Ohio 169.

Washington.— Bartlett *v.* Reichennecker, 5 Wash. 369, 32 Pac. 96.

Wisconsin.— Webster-Glover Lumber, etc., Co. *v.* St. Croix County, 63 Wis. 647, 24 N. W. 417.

See 2 Cent. Dig. tit. "Appeal and Error," § 877.

99. *Arkansas.*— Moss *v.* Ashbrooks, 15 Ark. 169.

Kentucky.— Smith *v.* Wilson, 4 Ky. L. Rep. 719.

Maryland.— Chappell *v.* Chappell, 82 Md. 647, 33 Atl. 650.

Minnesota.— Thompson *v.* Howe, 21 Minn. 1; Wilson *v.* Bell, 17 Minn. 61.

New York.— Troy Waste Mfg. Co. *v.* Harrison, 73 Hun (N. Y.) 528, 26 N. Y. Suppl. 109, 56 N. Y. St. 183 (where it was said that "courts do not act as advisory tribunals"); Matter of Callahan, 66 Hun (N. Y.) 118, 20 N. Y. Suppl. 824, 49 N. Y. St. 425; Snyder *v.* Beyer, 3 E. D. Smith (N. Y.) 235 (where there was an expression of opinion that "the plaintiffs are entitled to costs"); Starr *v.* Silverman, 25 Misc. (N. Y.) 784, 55 N. Y. Suppl. 611; Wright *v.* Delafield, 11 How. Pr. (N. Y.) 465.

North Carolina.— Baum *v.* Currituck Shooting Club, 94 N. C. 217 (where the court expressed the opinion that plaintiff could not recover, and directed the issue to be found for defendant); Taylor *v.* Bostic, 93 N. C. 415.

Pennsylvania.— Harper *v.* Roberts, 22 Pa. St. 194.

United States.— Herrick *v.* Cutcheon, 55 Fed. 6, 5 U. S. App. 250, 5 C. C. A. 21, holding that the words "opinion — decree for complainant," did not constitute the decree for an injunction.

See 2 Cent. Dig. tit. "Appeal and Error," §§ 878, 879; and *supra*, III, A.

A mere oral decision is of no avail without an order making it of record. Maas *v.* Ellis, 12 N. Y. Civ. Proc. 323; Smith *v.* Spalding, 30 How. Pr. (N. Y.) 339; Wilkins *v.* Lee, 42 S. C. 31, 19 S. E. 1016.

c. Necessity of Signature. No appeal in chancery will be heard until the decree has been drawn up and signed.[1] But a writ of error may be sued out before the judgment is actually signed.[2]

d. Where Judgment Has Been Set Aside or Arrested. While an appeal may be taken from a judgment notwithstanding the fact that such judgment has been set aside on an *ex parte* application,[3] error will not lie where judgment has been arrested for the insufficiency of the declaration.[4]

2. Judgments by Confession. While in some jurisdictions an appeal will lie from a judgment by confession,[5] the general rule is that no appeal or writ of error will lie from such a judgment.[6]

3. Judgments by Default — a. In General. The oetter rule seems to be that no appeal lies from an order entering a default, on proof of service, no application being made to the lower court for a correction of the entry.[7] But in some

1. Brown *v.* Mead, 16 Vt. 148.

An entry in the transcript of the docket entries of the chancellor: "April 18, 1893. Submitted for decree on demurrers to the bill, and demurrers sustained," is not a decree. Mann *v.* Hyams, 101 Ala. 431, 13 So. 681, construing Ala. Civ. Code, § 3612.

2. It is not the signing of the judgment-roll but the rendition of the judgment which forms the test. It is sufficient if the judgment be given before the return of the writ. Arnold *v.* Sanford, 14 Johns. (N. Y.) 417; Richardson *v.* Backus, 1 Johns. (N. Y.) 493.

See 2 Cent. Dig. tit. "Appeal and Error," § 880.

By the practice in Louisiana, however, a judgment not signed by the judge cannot be enforced, and so, before signature, a writ of error cannot issue to enforce it. Nicholls *v.* Maddox, 52 La. Ann. 496, 26 So. 994; Lahargue *v.* Waggaman, 28 La. Ann. 904; Consolidated Assoc. *v.* Mason, 24 La. Ann. 518; New York L., etc., Ins. Co. *v.* Wilson, 8 Pet. (U. S.) 291, 8 L. ed. 949. This applies to a judgment dissolving an injunction (State *v.* Wharton, 25 La. Ann. 2) and to one making an injunction perpetual after the trial on the merits (Carondelet Canal Nav. Co. *v.* New Orleans, 44 La. Ann. 394, 10 So. 871). But in those courts where it is the practice to sign judgments only at the end of the term, an appeal may be taken between the rendition of the judgment and the signing thereof. Vicksburg, etc., R. Co. *v.* Hamilton, 15 La. Ann. 521.

3. Florsheim Bros. Dry Goods Co. *v.* Williams, 45 La. Ann. 1196, 14 So. 120. In Davis *v.* Barr, 5 Serg. & R. (Pa.) 516, judgment had been entered on a bond and warrant, and the parties agreed to proceed as if upon a feigned issue, and that the court should give judgment on the facts stated in the case as if there had been a special verdict. The judgment was set aside, and it was held that writ of error would not lie.

4. Horne *v.* Barney, 19 Johns. (N. Y.) 247; and see 2 Cent. Dig. tit. "Appeal and Error," § 881.

5. Easter *v.* Snelling, 30 Ga. 503 (where it is said that the confession stands in the place of, and has the effect of, a verdict); Melins *v.* Horne, 29 Ga. 536; Nisbet *v.* Lawson, 1 Ga. 275; Troxel *v.* Clark, 9 Iowa 201; Burge *v.* Burns, 1 Morr. (Iowa) 287; Hugg *v.* Camden, 20 N. J. L. 583 [*citing* Bacon Abr. tit. Error].

6. **The reason of the rule** is that the errors are considered as having been released.

Delaware.—Gum *v.* Adams, 9 Houst. (Del.) 200, 31 Atl. 895.

Illinois.— Hall *v.* Hamilton, 74 Ill. 437; Caruthers *v.* Niblack, 73 Ill. App. 197; Boyles *v.* Chytraus, 66 Ill. App. 592; Werkmeister *v.* Beaumont, 46 Ill. App. 369. *Compare* also Hinds *v.* Hopkins, 28 Ill. 344.

Louisiana.— Skinner *v.* Dameron, 5 Rob. (La.) 447; Williams *v.* Duer, 14 La. 523 (holding that La. Prac. Code, art. 567, denying the appeal, does not apply to a judgment *pro confesso* taken wrongly upon an answer admitting a conditional indebtedness); State *v.* Judge, McGloin (La.) 11.

North Carolina.—Rush *v.* Halcyon, 67 N. C. 47.

Ohio.— Shorb *v.* Lair, Tappan (Ohio) 339.

Pennsylvania.— Hawk *v.* Jones, 24 Pa. St. 127, holding that an act authorizing a writ of error upon a judgment *quod partitio fiat* does not extend to a case where such judgment is entered by confession. The Pennsylvania act of April 4, 1877, giving a right to appeal from a judgment entered on a warrant of attorney or on a judgment note, applies to a case where judgment is entered in a warrant contained in a lease (Times Pub. Co. *v.* Siebrecht, 11 Wkly. Notes Cas. (Pa.) 339), but does not cover the case of a refusal to open a judgment confessed in a suit commenced by amicable scire facias. (Jones' Appeal, 1 Walk. (Pa.) 355.)

Tennessee.— Williams *v.* Neil, 4 Heisk. (Tenn.) 279, construing Tenn. Code, § 3107.

Texas.— Garner *v.* Burleson, 26 Tex. 348.

See 2 Cent. Dig. tit. "Appeal and Error," § 882; and *infra*, IV, B, 2, d, (II).

Attorney acting for both parties cannot confess judgment.— In *In re* New Orleans, 10 La. Ann. 311, it was held that a judgment rendered on the motion of one who was acting as attorney for both parties was not a judgment by confession.

7. *California.*—Ricketson *v.* Torres, 23 Cal. 636.

states, by statute, if a greater sum is awarded than the amount claimed in the declaration, the defendant may have the judgment by default corrected on appeal.[8] However, questions of jurisdiction and of the sufficiency of the complaint upon the point whether the facts stated constitute a cause of action are never waived in any case.[9] Whether the default was, or was not, properly entered is a question

Florida.— Megin *v.* Filor, 4 Fla. 203.

Georgia.— Clifton *v.* Livor, 24 Ga. 91.

Idaho.—But see, *contra,* Hardiman *v.* South Chariot Min. Co., 1 Ida. 704.

Illinois.— Hess *v.* People, 84 Ill. 247.

Indiana.— Bell *v.* Corbin, 136 Ind. 269, 36 N. E. 23.

Iowa.— But see, *contra,* Woodward *v.* Whitescarver, 6 Iowa 1; Doolittle *v.* Shelton, 1 Greene (Iowa) 271.

Minnesota.— Thompson *v.* Haselton, 34 Minn. 12, 24 N. W. 199 (an order setting aside service by publication made upon an order to show cause why the relief should not be granted); Dols *v.* Baumhoefer, 28 Minn. 387, 10 N. W. 420. But see, *contra,* White *v.* Iltis, 24 Minn. 43; Grant *v.* Schmidt, 22 Minn. 1; Kennedy *v.* Williams, 11 Minn. 314; Karns *v.* Kunkle, 2 Minn. 313, construing Minn. Rev. Stat. c. 81, §§ 2, 22.

Mississippi.—Winn *v.* Levy, 2 How. (Miss.) 902, a judgment on *nihil dicit,* between which and a judgment by default, the court said, there was little, if any difference.

Missouri.— Andrew County *v.* Owens, 46 Mo. 386.

New York.— Hawkins *v.* Smith, 91 Hun (N. Y.) 299, 36 N. Y. Suppl. 333, 71 N. Y. St. 117; Edelson *v.* Epstein, 27 Misc. (N. Y.) 543, 58 N. Y. Suppl. 334 — this last case construing Consol. Act. § 1367, in a case arising in the New York city municipal court. For the New York practice under the various statutes see Henderson *v.* McNally, 48 N. Y. App. Div. 134, 62 N. Y. Suppl. 582; Beebe *v.* Nassau Show Case Co., 41 N. Y. App. Div. 456, 58 N. Y. Suppl. 769; Dreyfus *v.* Carroll, 28 Misc. (N. Y.) 222, 58 N. Y. Suppl. 1116; Empire Hardware Co. *v.* Young, 27 Misc. (N. Y.) 226, 57 N. Y. Suppl. 753; and 2 Cent. Dig. tit. "Appeal and Error," § 885.

Oregon.—Fassman *v.* Baumgartner, 3 Oreg. 469, construing Oreg. Code, § 526, allowing an appeal from a judgment for want of answer.

South Carolina.— Washington *v.* Hesse, 56 S. C. 28, 33 S. E. 787; Odom *v.* Burch, 52 S. C. 305, 29 S. E. 726.

Vermont.— But see, *contra,* Smith *v.* Langworthy, 1 Aik. (Vt.) 106.

Washington.— But see, *contra,* Baker *v.* Prewett, 3 Wash. Terr. 474, 19 Pac. 149; Garrison *v.* Cheeney, 1 Wash. Terr. 489.

See 2 Cent. Dig. tit. "Appeal and Error," § 885; and *infra,* IV, B, 2, c, d.

An interlocutory judgment by default against some of several defendants.— Under a statutory provision providing that "where there are several defendants in a suit, and some of them appear and plead, and others make default, the cause may proceed against the others, but only one final judgment shall be given in the action," no appeal lies from an interlocutory judgment by default against some of the defendants less than the whole number where the others have answered. Lee *v.* Black, 27 Ark. 336, construing Gould's Dig. Ark. c. 133, § 80. See also Lenow *v.* Lenow, 8 Gratt. (Va.) 349, a case for an attachment, where the absent defendant did not appear.

From a default judgment entered by consent there can be no appeal. Port *v.* Parfit, 4 Wash. 369, 30 Pac. 328. See also Patten *v.* Starrett, 20 Me. 145.

Default judgment of affirmance, rendered by the general term, is not reviewable by the court of appeals. Stevens *v.* Glover, 83 N. Y. 611. It is not an "actual determination." McMahon *v.* Rauhr, 47 N. Y. 67, construing N. Y. Code, § 352. And see Elkinton *v.* Fennimore, 13 Pa. St. 173.

Judgment affirming a default judgment is not appealable. Keller *v.* Feldman, 2 Misc. (N. Y.) 179, 29 Abb. N. Cas. (N. Y.) 426, 23 N. Y. Civ. Proc. 37, 21 N. Y. Suppl. 581, 49 N. Y. St. 718.

8. Northern Trust Co. *v.* Albert Lea College, 68 Minn. 112, 71 N. W. 9. And see Reidy *v.* Bleistift, 31 Misc. (N. Y.) 181, 63 N. Y. Suppl. 974 [*affirming* 30 Misc. (N. Y.) 203, 61 N. Y. Suppl. 915].

Variance between summons and declaration. — In Thompson *v.* Turner, 22 Ill. 389, the damages claimed in the summons with which the defendants were served were one hundred dollars, but the declaration laid the damages at six hundred dollars, and judgment by default was given accordingly. It was held that the defendants could not take advantage of the variance on error.

9. Sanderson, J., in Hallock *v.* Jaudin, 34 Cal. 167. See also Hurry *v.* Coffin, 2 N. Y. Civ. Proc. 319; Rhode Island Mortg., etc., Co. *v.* Spokane, 19 Wash. 616, 53 Pac. 1104, construing 2 Hill's Code Wash., § 193, which provides that if no objection be taken by demurrer or answer, the defendant waives the same except as to jurisdiction of the court, or that the complaint does not state a cause of action. This latter case *distinguished* State *v.* Superior Ct., 12 Wash. 548, 41 Pac. 895, which was an appeal from a justice court and governed by the practice peculiar to such appeals, and Port *v.* Parfit, 4 Wash. 369, 30 Pac. 328.

No appeal from a voidable judgment.— Hill's Code Oreg., § 71, is similar to the provision of the Washington code just referred to. Construing this section together with section 536, it has been held that while a party failing to demur or answer may appeal from a void judgment rendered against him — that is, when the court has no jurisdiction — he cannot appeal from a judgment that is merely voidable by reason of a defective statement of the cause of action. Askren *v.* Squire, 29 Oreg. 228, 45 Pac. 779 [*distinguishing* Trul-

which may be adjudicated upon an appeal from the final judgment rendered in the cause.[10]

b. Damages Assessed Upon Default. If, after a judgment by default, damages are assessed by an inquisition, this being the means of perfecting the judgment rendered in the exercise of ordinary jurisdiction, an appeal may be taken from a judgment entered upon the inquisition.[11]

c. Decrees Pro Confesso. The decree which follows a bill taken *pro confesso* in chancery corresponds to a judgment by default, or *nil dicit*, in a court of law, and from it no appeal lies,[12] such decree being considered as binding and as conclusive as any decree rendered in the most solemn manner, concluding defendant so far at least as the decree is supported by the allegations of the bill, taking the same to be true.[13] But where the dismissal of an appeal is asked on the ground

lenger *v.* Todd, 5 Oreg. 36, where there was no proper service].

10. Hallock *v.* Jaudin, 34 Cal. 167; Stevens *v.* Ross, 1 Cal. 94; Kidd *v.* Four-Twenty Min. Co., 3 Nev. 381 [*disapproving dictum* in Paul *v.* Armstrong, 1 Nev. 82]; Maples *v.* Geller, 1 Nev. 233; Schwartz *v.* Schendel, 24 Misc. (N. Y.) 733, 53 N. Y. Suppl. 829; Allison *v.* T. A. Snider Preserve Co., 20 Misc. (N. Y.) 367, 45 N. Y. Suppl. 923; Williamson *v.* Nicklin, 34 Ohio St. 123.

Discontinuance as to one defendant — Default against the other.— Where neither defendant appeared, and plaintiff discontinued as to one without sufficient cause shown, and took judgment by default against the other, it was held that there was a right to appeal. Kendall *v.* Lassiter, 68 Ala. 181.

11. *Connecticut.*—Mead *v.* Coggshall, Kirby (Conn.) 17.

Illinois.— Chicago, etc., R. Co. *v.* Ward, 16 Ill. 522.

Maryland.— Forrester *v.* Sisco, 49 Md. 586 [*distinguishing* Wilmington, etc., R. Co. *v.* Condon, 8 Gill & J. (Md.) 443, which was a condemnation proceeding in which a special jurisdiction was conferred].

Michigan.—Wells *v.* Booth, 35 Mich. 424.

Minnesota.— See Kent *v.* Bown, 3 Minn. 347, where, however, the answer was withdrawn, and it was said there was no default.

See 2 Cent. Dig. tit. "Appeal and Error," § 888.

12. *Maryland.*— Ringgold's Case, 1 Bland (Md.) 5 [*citing* Maynard *v.* Pomfret, 3 Atk. 468; Davis *v.* Davis, 2 Atk. 21; Carew *v.* Johnson, 2 Sch. & Lef. 300; Ogilvie *v.* Herne, 13 Ves. Jr. 563; Geary *v.* Sheridan, 8 Ves. Jr. 192; Jopling *v.* Stuart, 4 Ves. Jr. 619; Heyn *v.* Heyn, Jac. 49, 4 Eng. Ch. 49].

New Jersey.— Barber *v.* West Jersey Title, etc., Co., 52 N. J. Eq. 287, 29 Atl. 486; Townsend *v.* Smith, 12 N. J. Eq. 350, 72 Am. Dec. 403 [*citing* Vowles *v.* Young, 9 Ves. Jr. 172; Cunningham *v.* Cunningham, 1 Ambl. 89], where it was said that if the absence was involuntary or accidental, and it was intended to make a defense, the chancellor should be petitioned for a rehearing, which in practice would be freely granted.

New York.— Murphy *v.* American L. Ins., etc., Co., 25 Wend. (N. Y.) 249; Kane *v.* Whittick, 8 Wend. (N. Y.) 219; Sands *v.* Hildreth, 12 Johns. (N. Y.) 493.

Virginia.— See Davis *v.* Com., 16 Gratt. (Va.) 134.

West Virginia.— Baker *v.* Western Min., etc., Co., 6 W. Va. 196, where it was said that an application should have first been made to the judge rendering a decree to correct the errors.

See 2 Cent. Dig. tit. "Appeal and Error," § 889.

Contra.— Woodward *v.* Whitescarver, 6 Iowa 1. And in Florida, from a final decree rendered upon a decree *pro confesso* made absolute under the rule, an appeal may be taken, and upon such an appeal the legality of all the proceedings prior to the default is open for review. Garvin *v.* Watkins, 29 Fla. 151, 10 So. 818; Hart *v.* Stribling, 21 Fla. 136; Betton *v.* Williams, 4 Fla. 11.

Neglect to answer.— In Hart *v.* Strong, 15 Vt. 377, defendant appeared but neglected to answer, and the bill was taken as confessed and referred to a master to ascertain the amount due, and a decree made on the report. It was held that there could be no appeal. In Blanchard *v.* Cooke, 144 Mass. 207, 11 N. E. 83, defendant having appeared, and the bill having, for want of an answer, been taken for confessed against him, it was held that he had still the right to be heard upon the form of the decree, and to appeal from it.

13. Thompson *v.* Wooster, 114 U. S. 104, 5 S. Ct. 788, 29 L. ed. 105 [*citing* Ogilvie *v.* Herne, 13 Ves. Jr. 563, 1 Smith Ch. Pr. 153, 1 Daniels Ch. Pr. (1st ed.) 696].

Practice in the United States supreme court.— Under the rules and practice of the supreme court of the United States, a decree *pro confesso* is not a decree as of course, according to the prayer of the bill, nor merely such as complainant chooses to make it; but is made by the court according to what is proper to be decreed upon the statements of the bill assumed to be true. If the allegations are distinct and positive, they may be taken as true without proof; but if they are indefinite, or the demand of complainant is in its nature uncertain, the requisite certainty must be afforded by proof. But in either event, although defendant may not be allowed on appeal from a subsequent decree — as from a decree confirming a sale — to question the want of testimony or the insufficiency or amount of the evidence, he is not precluded from contesting the sufficiency of the bill, or

of the default of appellant in the court below, the decree must recite all those facts which, by the rules and practice of chancery courts, entitle a party to default his adversary.[14]

d. Refusal to Enter Default or Decree Pro Confesso. Under a statute allowing an appeal where a substantial right is denied, which right plaintiff might lose if the order is not reviewed before final judgment, an appeal will lie from the refusal of a judgment by default, final upon a verified complaint, for a sum certain, when no verified answer is filed, there being no extension of time allowed for the filing of such answer.[15] A statute authorizing a writ of error to a refusal to enter judgment for want of the sufficiency of an affidavit of defense is intended to reach only clear cases of errors in law, and thus to prevent the delay of a trial.[16]

4. Judgments on Consent.[17] A judgment, order, or decree entered by consent, in a case where the court has jurisdiction, will not support an appeal or writ of error.[18] But in order to amount to a waiver of error it must plainly appear that

from insisting that the averments contained in it do not justify the decree. Ohio Cent. R. Co. *v.* Central Trust Co., 133 U. S. 83, 10 S. Ct. 235, 33 L. ed. 561; Masterson *v.* Howard, 18 Wall. (U. S.) 99, 21 L. ed. 764.

14. Stevens *v.* Townsend, 1 Dougl. (Mich.) 77, where it was held that the fact that no one appeared to argue the cause was not a default that would deprive the party of his right of appeal.

15. Griffin *v.* Asheville Light Co., 111 N. C. 434, 16 S. E. 423, construing Clark's Code Civ. Proc. N. C. (1900), § 548. But see Clement *v.* Foster, 99 N. C. 255, 6 S. E. 186, where the appeal was held premature.

See 2 Cent. Dig. tit. "Appeal and Error," § 887.

16. Griffith *v.* Sitgreaves, 81* Pa. St. 378, 33 Leg. Int. (Pa.) 281, 2 Wkly. Notes Cas. (Pa.) 707.

17. See *infra*, IV, B, 2, c.

18. *Arkansas.*— Salski *v.* Boyd, 32 Ark. 74.

California.— Matter of Lorenz, 124 Cal. 495, 57 Pac. 381; Erlanger *v.* Southern Pac. R. Co., 109 Cal. 395, 42 Pac. 31.

Florida.— White *v.* Walker, 5 Fla. 478.

Georgia.— Zorn *v.* Lamar, 71 Ga. 80.

Illinois.— Frank *v.* Bruck, 4 Ill. App. 627.

Indiana.— Floyd County *v.* Scott, (Ind. 1898) 49 N. E. 395; Indianapolis, etc., R. Co. *v.* Sands, 133 Ind. 433, 32 N. E. 722.

Kentucky.— Duncan *v.* Louisville, 13 Bush (Ky.) 378, 26 Am. Rep. 201.

Louisiana.— Brand *v.* Jones, 15 La. 449.

Maryland.— Gable *v.* Williams, 59 Md. 46. See, *contra*, remarks of chancellor in Chesapeake Bank *v.* McClellan, 1 Md. Ch. 328.

Michigan.— Brick *v.* Brick, 65 Mich. 230, 31 N. W. 907, 33 N. W. 761.

Nebraska.—Anderson *v.* Carson, 54 Nebr. 678, 74 N. W. 1072; Weander *v.* Johnson, 42 Nebr. 117, 60 N. W. 353.

New Jersey.— Pemberton *v.* Pemberton, 41 N. J. Eq. 349, 7 Atl. 642 [*affirming* Matter of Pemberton, 40 N. J. Eq. 520, 4 Atl. 770].

New York.— Bolles *v.* Cantor, 6 N. Y. App. Div. 365, 39 N. Y. Suppl. 652.

Ohio.— But see, *contra*, Brewer *v.* Connecticut, 9 Ohio 189.

South Carolina.— Varn *v.* Varn, 32 S. C. 77, 10 S. E. 829.

Tennessee.— Jones *v.* McKenna, 4 Lea (Tenn.) 630; Williams *v.* Neil, 4 Heisk. (Tenn.) 279; House *v.* Wakefield, 2 Coldw. (Tenn.) 325.

Virginia.— Bransford *v.* Karn, 87 Va. 242, 12 S. E. 404, where there was a stipulation that judgment should be entered in accordance with the decision in another case.

West Virginia.— Rose *v.* Brown, 17 W. Va. 649, holding that a decree ordering that certain property shall be rented, where defendant "asks that it be rented instead of sold," and complainant "assented thereto," is a consent decree.

United States.— But see Pacific R. Co. *v.* Ketchum, 101 U. S. 289, 25 L. ed. 932, 935, construing U. S. Rev. Stat. (1878), § 692, wherein Waite, C. J., said: "If, when the case gets here, it appears that the decree appealed from was assented to by the appellant, we cannot consider any errors that may be assigned which were in law waived by the consent, but we must still receive and decide the case. If all the errors complained of come within the waiver, the decree below will be affirmed, but only after hearing."

See 2 Cent. Dig. tit. "Appeal and Error," § 883.

Application of the rule has been made to a decree which was procured by fraud, the only remedy in such a case being by an independent proceeding to have it set aside. Jones *v.* McKenna, 4 Lea (Tenn.) 630; Jones *v.* Williamson, 5 Coldw. (Tenn.) 371; Rose *v.* Brown, 17 W. Va. 649.

Consent to appeal.— Such a decree or order cannot be appealed from, though, by the consent of both parties, either may appeal. Jarvis *v.* Palmer, 1 Barb. Ch. (N. Y.) 379. See also *supra*, II, B.

Correction of order by consent.— An order which, by stipulation, is corrected so as to truthfully show the ground on which it is based, is not an order entered by consent so as to prevent appeal. Matter of Glenside Woolen Mills, 92 Hun (N. Y.) 188, 36 N. Y. Suppl. 593, 71 N. Y. St. 646.

Order made by consent before instead of after judgment.— In an action to dissolve a partnership, an order, directing the partners to join with the receiver in a conveyance of

the decree was in fact agreed to be final and conclusive.[19] Thus the asking a court to make a formal ruling upon a proceeding which has been fully considered in that court, so as to enable the party feeling aggrieved to appeal, is an entirely different thing from consent to the conditions on which a controversy is to be determined, adjusted, or settled.[20] The judgment must conform to the consent.[21]

5. JUDGMENTS ON EX PARTE PROCEEDINGS. No appeal lies from an *ex parte* order.[22]

6. JUDGMENTS ON MOTION OR SUMMARY PROCEEDINGS. The rule is that decisions on summary applications cannot be thrown into the shape of records, and become the subject of revision in any other court.[23]

the property on the sale, may by consent be entered before, as well as after, judgment, and is not appealable. Dawson *v.* Parsons, 74 Hun (N. Y.) 221, 26 N. Y. Suppl. 327, 56 N. Y. St. 372.

19. San Francisco Sav. Union *v.* Myers, 72 Cal. 161, 13 Pac. 403; Olmstead *v.* Webb, 5 App. Cas. (D. C.) 38 [*citing* Morris *v.* Davies, 5 Cl. & F. 163, 7 Eng. Reprint 365]; Emery *v.* Seavey, 144 Mass. 403, 11 N. E. 654.

20. Wastl *v.* Montana Union R. Co., 13 Mont. 500, 34 Pac. 844, where defendant, knowing that his time for appeal was about to expire, consented to submit to the court, without argument, his motion for a new trial.

Procuring entry of judgment does not amount to consent. Skinner *v.* Quin, 43 N. Y. 99. See also Vincent *v.* McNamara, 70 Conn. 332, 39 Atl. 444; Stevenson *v.* Matteson, 13 Mont. 108, 32 Pac. 291. Where the party against whom a verdict and judgment had been rendered applies for a new trial, but, on the filing of a written consent thereto by the opposite party, requests the court to overrule his motion, stating that it was made *pro forma* in order to obtain an appeal, he will not thereby preclude himself from relief on the appeal where the circumstances of the case show that his object was to prevent the delay which would result from a new trial, and to obtain, as soon as possible, a final decision by the appellate court. Watt *v.* Rice, 1 La. Ann. 280. See also *infra*, IV, B, 2, d.

An agreement in a mortgage authorizing a decree in case of default is only a consent to dispense with the intermediate proceedings in order to facilitate a decree — not that the decree shall be binding at all hazards. "It is certainly his privilege to see that the decree adopts the terms of the mortgage." If it were not so, the mortgagor would be precluded from showing that no decree ought to pass upon a case made by the petition and mortgage, however defectively the allegations and the case may be stated. Williams *v.* Williams, 7 Gill (Md.) 302, 306, construing Md. Acts (1883), c. 181.

21. **The rule does not apply** in the case of an appeal from a judgment which was not rendered as authorized by the agreement. Sprowl *v.* Stewart, 19 La. Ann. 433. Nor does the general rule apply to a case where such agreement and judgment are in contravention of the positive provisions of a statute. Thus, a judgment for plaintiff for the entire sum due on a usurious contract, though entered on stipulation of the parties, is appealable under a statute which imposes upon the court in such a case the duty of rendering judgment for the principal sum, less payments already made, and for a penalty of a certain percentage for the use of the state. Ocobock *v.* Nixon, (Ida. 1899) 57 Pac. 309, construing Ida. Rev. Stat. § 1266.

22. **The proper method** is to apply to have such order set aside, and, if the application is denied, then to take an appeal. State *v.* First Judicial Dist. Ct., 52 Minn. 283, 53 N. W. 1157; Matter of Reddish, 47 N. Y. App. Div. 187, 62 N. Y. Suppl. 261; Kelly *v.* Jay, 79 Hun (N. Y.) 535, 29 N. Y. Suppl. 933, 61 N. Y. St. 552; Matter of Dunn, 59 Hun (N. Y.) 626, 14 N. Y. Suppl. 14, 37 N. Y. St. 802; Brown *v.* Georgi, 26 Misc. (N. Y.) 128, 56 N. Y. Suppl. 923; Brast *v.* Kanawha Oil Co., 46 W. Va. 613, 33 S. E. 302. And see Ramsour *v.* Young, 26 N. C. 133, where the court, on the *ex parte* application of a sheriff, gave him advice as to how he should distribute funds raised by sale of property seized in behalf of creditors, and it was held that there could be no appeal by a creditor.

See 2 Cent. Dig. tit. "Appeal and Error," § 892.

In Gibson *v.* Martin, 8 Paige (N. Y.) 481, it was held that an *ex parte* order of the vice-chancellor, which was merely irregular, could be corrected on application to the vice-chancellor, and that therefore no appeal would lie. But in Hyslop *v.* Powers, 9 Paige (N. Y.) 322, an erroneous decree was held appealable, though the party did not appear to argue the case below.

23. See 2 Cent. Dig. tit. "Appeal and Error," § 893.

Forfeiture of forthcoming bond.— Writ of error will not lie to a statutory judgment upon the forfeiture of a forthcoming bond. Smiser *v.* Robertson, 16 Ark. 599. *Compare*, however, Smith *v.* Basinger, 12 Tex. 227.

Motion to amerce a sheriff for negligence in the service of process is a motion in the cause within the meaning of Clark's Code Civ. Proc. N. C. (1900), § 547, and an appeal will lie from its refusal. Swain *v.* Phelps, 125 N. C. 43, 34 S. E. 110.

Order to set off judgments.— In Scott *v.* Rivers, 1 Stew. & P. (Ala.) 24, 28, 21 Am. Dec. 646, which was an order of a court of law directing one judgment to be set off against another, the proposition of the text was adopted as the correct rule of practice, the court conceiving that "no serious injury can result from it, as the summary proceed-

7. Judgments on Proceedings at Chambers or in Vacation. No appeal lies from an order made at chambers.[24] So, the finding of a judge in vacation is not a final judgment from which an appeal can be taken,[25] unless it is to be regarded as final upon stipulation of the parties to that effect.[26]

8. Judgments on Submission of Controversy or Agreed Case.[27] A writ of error will not lie upon a judgment rendered on a case stated by the parties for the opinion of the court, there being no reservation of the right to appeal.[28] But it has

ing cannot be regarded as *res adjudicata* which will conclude either party from the benefit of any equity to which he would otherwise have been entitled. The propriety of this rule is further sustained from the consideration that the power of setting one judgment against another is a matter more appropriately due to chancery." See also Simson *v.* Hart, 14 Johns. (N. Y.) 63; Wellock *v.* Cowan, 16 Serg. & R. (Pa.) 318.

24. *Dakota.*— Bostwick *v.* Knight, 5 Dak. 305, 40 N. W. 344, construing Dak. Laws (1887), c. 20, § 23, subd. 5.

Iowa.— Judd *v.* Ferguson, 39 Iowa 397, stating the rule as it was prior to Sept. 1, 1873.

Nebraska.— But see, *contra,* Porter *v.* Flick, (Nebr. 1900) 84 N. W. 262, citing earlier cases, and holding that in Nebr. Code Civ. Proc., § 582, providing for review of judgments of the district court, the word "court" means not only the tribunal over which the judge presides, but the judge himself, when exercising at chambers judicial power conferred by statute.

New York.— But see Palen *v.* Bushnell, 68 Hun (N. Y.) 554, 22 N. Y. Suppl. 1044, 52 N. Y. St. 556, construing N. Y. Code Civ. Proc., § 2433.

North Dakota.— But see, *contra,* Travelers' Ins. Co. *v.* Mayer, 2 N. D. 234, 50 N. W. 706, construing special statute.

Ohio.— Atwood *v.* Whipple, 5 Ohio Cir. Ct. 118.

Oklahoma.— Allen *v.* Reed, (Okla. 1900) 60 Pac. 782.

South Carolina.— Carmand *v.* Wall, 1 Bailey (S. C.) 209.

Wisconsin.— Whereatt *v.* Ellis, 68 Wis. 61, 30 N. W. 520, 31 N. W. 762.

United States.— Lambert *v.* Barrett, 157 U. S. 697, 15 S. Ct. 722, 39 L. ed. 865; Carper *v.* Fitzgerald, 121 U. S. 87, 7 S. Ct. 825, 30 L. ed. 882 (where it was held that a direction of the judge that his order of discharge in habeas corpus proceedings should be reported in the circuit court, and that the other papers should be filed, did not make the order appealable); Hentig *v.* Page, 102 U. S. 219, 26 L. ed. 159; *In re* King, 51 Fed. 434 (order denying application for writ of habeas corpus).

England.— Dowson *v.* Drosophore Co., 12 Reports 138, 1 Mews Eng. Dig. tit. "Appeal," pp. 466–474.

See 2 Cent. Dig. tit. "Appeal and Error," § 895; and *supra,* III, A, 2.

Under Tenn. Code, § 3760, the proceedings in a habeas corpus case, including all the papers and the final order, are required to be returned to the nearest court of the trial judge, there to become a record. Under this provision, a judgment discharging a prisoner made at chambers is appealable. Vanvabry *v.* Staton, 88 Tenn. 334, 12 S. W. 786.

25. Post *v.* Carpenter, 2 Fla. 441; Hook *v.* Richeson, 106 Ill. 392 (construing Ill. Rev. Stat. c. 37, § 65, providing that, if such a judgment be not set aside or modified at the next succeeding term, it shall become final); Marshall *v.* Yoos, 17 Ill. App. 298; James *v.* Fellowes, 23 La. Ann. 523; Abrahams *v.* Com., 11 Leigh (Va.) 707. *Contra,* see Moore *v.* Ferrell, 1 Ga. 6; Pinckney *v.* Henegan, 2 Strobh. (S. C.) 250, 49 Am. Dec. 592; Anderson *v.* Matthews, (Wyo. 1889) 57 Pac. 156 (construing Wyo. Laws (1895), c. 21, §§ 1, 2, providing that district court shall be open at all times for the entry of judgments, and that judgments entered in vacation shall be of the same force as if rendered in term-time).

Under Miss. Code (1880), §§ 151, 2608, 2309, there is a right of appeal from a judgment rendered in vacation on the trial of an issue in a case of a contested election. Perkins *v.* Carraway, 59 Miss. 222.

26. King *v.* Green, 2 Stew. (Ala.) 133, 19 Am. Dec. 46; Olney Nat. Bank *v.* Cope, 3 Ill. App. 203.

27. See *supra,* II, and *infra,* IV.

28. Com. *v.* Callahan, 153 Pa. St. 625, 25 Atl. 1000; Chase *v.* Miller, 41 Pa. St. 403.

See 2 Cent. Dig. tit. "Appeal and Error," § 884.

Agreement as for a special verdict.— Where the right to a writ of error was not reserved, the right is not preserved by a declaration in the agreement for a case stated that it shall be in the nature of a special verdict. Altoona *v.* Irvin, 3 Pennyp. (Pa.) 115.

"The principle established is, that, when the parties have agreed that a certain judgment shall be rendered for either of them, according to the opinion of the judges, on a case stated, the Court of Errors cannot rescind that agreement, and enter a different judgment. It is the same in principle as if they had agreed that judgment should be entered according to the opinion of any other individuals; or that it should depend on any other collateral event. When the opinion is given, or the other event happens, and the judgment is entered accordingly, it is so entered by the consent and agreement of the parties, in like manner as if they had in any other mode ascertained what was right and just between them, and had afterward come into court and consented to a judgment accordingly." Wellington *v.* Stratton, 11 Mass. 394, 395, per Jackson, J. See also the following cases:

been held that this rule does not apply where mixed questions of law and fact are presented, if the court is called upon to decide questions of law, or where questions of law arise necessarily out of the facts and are distinctly presented to the court, the decision of which questions must control the determination of the merits of the cause.[29]

9. Judgments on Trial of Issues. When questions of law arising upon the facts are decided by the court without a jury, and are raised in the proper mode, they will be considered on appeal; but on such appeal the facts will be considered only so far as is necessary to understand and apply the law.[30] The fact that an issue has been awarded and the verdict of a jury rendered in a cause upon which the decree of a court of equity is based does not take away or limit the control of the appellate court over the decree.[31] By statute, in some states, an appeal lies upon the judgment in certain actions wherein any issue has been joined.[32] The finding of an issue of fact by the court upon the evidence, either with or without the con-

Delaware.— Elliott *v.* Montell, 7 Houst. (Del.) 194, 30 Atl. 854.

Georgia.— Harrington *v.* Harrington, 15 Ga. 561.

Massachusetts.— Johnson *v.* Shed, 21 Pick. (Mass.) 225.

New Jersey.— Pray *v.* Jersey City, 33 N. J. L. 506.

Pennsylvania.— Gwynn *v.* O'Hern, 72 Pa. St. 29; Hughes *v.* Peaslee, 50 Pa. St. 257.

Tennessee.— *Compare,* however, Memphis Freight Co. *v.* Memphis, 3 Coldw. (Tenn.) 249.

Wisconsin.— Walworth County Bank *v.* Farmers' L. & T. Co., 22 Wis. 231.

See 2 Cent. Dig. tit. "Appeal and Error," § 884.

A change in the constitution of the court by legislative enactment, between the time of agreement to submit the case to the decision of the court and the time of argument, will not operate to invalidate the agreement where no application is made for the modification of it. Galbreath *v.* Colt, 4 Yeates (Pa.) 551.

The United States supreme court will, however, review a judgment rendered in a case submitted to a state court under a statutory provision by voluntary agreement of the parties, without any compulsory proceeding of any kind against defendant. Aldrich *v.* Ætna Ins. Co., 8 Wall. (U. S.) 491, 19 L. ed. 473.

29. *Arkansas.*—Johnson *v.* Reed, 8 Ark. 202 [*distinguishing* Campbell *v.* Thurston, 6 Ark. 441]; Real Estate Bank *v.* Rawdon, 5 Ark. 558. In these cases the court was required to decide the law arising upon facts admitted, and there was said to be no possible distinction between facts established to be true by the special finding of the jury, or facts admitted to be true upon an agreed case.

Florida.— Holbrook *v.* Allen, 4 Fla. 87, 101.

Maine.— Warren *v.* Coombs, 44 Me. 88; Mason *v.* Currier, 43 Me. 355. A submission to the judge to determine the controversy waives objections interposed during the trial to the competency of evidence. Exceptions in such a case do not lie to rulings of the judge in matters of law any more than to his conclusions in those of fact. Hersey *v.* Verrill, 39 Me. 271 [*distinguishing* Ministerial. etc., Fund *v.* Reed, 39 Me. 41, where the right to except was reserved]. See also Roxbury *v.* Huston, 37 Me. 42.

Massachusetts.— By Mass. Gen. Stat. c. 114, § 10, an appeal may be taken from a judgment rendered by the superior court on an agreed statement of facts, if no inference of facts is to be drawn by the court in order to render judgment on the case stated. Com. *v.* Cutter, 95 Mass. 393 [*distinguishing* Cochrane *v.* Boston, 1 Allen (Mass.) 480, a case where the appeal was dismissed]. See also Furlong *v.* Leary, 8 Cush. (Mass.) 409; Hovey *v.* Crane, 10 Pick. (Mass.) 440. In Hutchinson *v.* Tucker, 121 Mass. 402, it was held that no appeal would lie from judgment entered on an auditor's report, submitted to the court, but not agreed on as a statement of facts.

Ohio.— Franklin Bank *v.* Buckingham, 12 Ohio 482; Mason *v.* Embree, 5 Ohio 277.

Vermont.— Noble *v.* Jewett, 2 D. Chipm. (Vt.) 36.

See 2 Cent. Dig. tit. "Appeal and Error," § 884.

Compare, however, Brown *v.* Galesburg Pressed Brick, etc., Co., 32 Ill. App. 650; Prince *v.* Dulin, 32 Ill. App. 118; Washington *v.* McGee, 3 Dana (Ky.) 445; U. S. *v.* Eliason, 16 Pet. (U. S.) 291, 10 L. ed. 968.

Consent of one party only.— If the court takes the case as on a submission when only one party consents, an appeal will lie from the judgment rendered. Mills *v.* Noles, 1 Ohio 534.

30. Tinges *v.* Moale, 25 Md. 480, 90 Am. Dec. 73, construing Md. Const. (1864), art. 4, § 6.

See 2 Cent. Dig. tit. "Appeal and Error," § 897.

31. The office of a jury in a court of equity is not, as in a court of law, to definitely and finally settle questions of fact, but simply to inform the conscience of the chancellor where he has doubt. Freeman *v.* Staats, 9 N. J. Eq. 816.

32. Richards *v.* Allen, 8 Pick. (Mass.) 405, holding that in trust e process the trustee's denial of plaintiff's allegation that there are goods deposited with the trustee constitutes an issue within the meaning of Mass. Stat. (1820), c. 79, § 4.

sent of parties, was a proceeding unknown at the common law, and, in the absence of statute authorizing that mode of proceeding, no exception can be taken to any admission or rejection of testimony, or upon any other question of law which may grow out of the evidence where no jury is impaneled.[33]

10. Order for Judgment. An order for judgment is not a final judgment from which an appeal can be taken.[34] But an appeal from an order for judgment, instead of from a judgment, will not be dismissed if such order contains all the effective words of a judgment.[35]

11. Pro Forma Judgment. A judgment or decree entered *pro forma*, with the consent of the parties, is not such a final judgment or decree as will support an appeal or writ of error.[36]

33. Wear *v.* Mayer, 2 McCrary (U. S.) 172, 6 Fed. 658.

For the practice in the federal courts see Stringfellow *v.* Cain, 99 U. S. 610, 25 L. ed. 421; Cannon *v.* Pratt, 99 U. S. 619, 25 L. ed. 446 — both of these cases construing 18 U. S. Stat. at L. p. 27; Merrill *v.* Floyd, 53 Fed. 172, 5 U. S. App. 224, 3 C. C. A. 494, construing U. S. Rev. Stat. (1878), §§ 649, 700; Doty *v.* Jewett, 19 Fed. 337, construing U. S. Rev. Stat. (1878), § 566.

34. *Alabama.*— Morgan *v.* Flexner, 105 Ala. 356, 16 So. 716.

California.— Harris *v.* San Francisco Sugar Refining Co., 41 Cal. 393, an order confirming the report of a referee, and ordering the judgment for plaintiff.

Florida.— Gates *v.* Hayner, 22 Fla. 325, an entry upon a demurrer to a declaration, demurrer being sustained.

Idaho.— Hodgins *v.* Harris, (Ida. 1895) 43 Pac. 72 (an order written at the end of conclusions of law, directing the manner of distributing proceeds of sale in a foreclosure proceeding); Ah Kle *v.* McLean, 2 Ida. 812, 26 Pac. 937 (construing Ida. Rev. Stat., § 4807).

Minnesota.— State *v.* Bechdel, 38 Minn. 278, 37 N. W. 338; Shepard *v.* Pettit, 30 Minn. 119, 14 N. W. 511 (an order denying a motion to modify a conclusion of law); Hodgins *v.* Heaney, 15 Minn. 185 (construing Minn. Gen. Stat. (1866), c. 86, §§ 3–6, the court saying that the time within which an appeal can be taken begins to run from the date of the entry of judgment). *Compare* Kernan *v.* St. Paul City R. Co., 64 Minn. 312, 67 N. W. 71, construing Minn. Laws (1895), c. 320.

Nebraska.—Stone *v.* Neeley, 34 Nebr. 81, 51 N. W. 314.

New York.— Kilmer *v.* Bradley, 80 N. Y. 630; Clarke *v.* Brooks, 1 Abb. Dec. (N. Y.) 355; Curtis *v.* Barker, 24 N. Y. App. Div. 71, 48 N. Y. Suppl. 934; Unckles *v.* Hentz, 19 N. Y. App. Div. 165, 45 N. Y. Suppl. 894 [*affirming* 18 Misc. (N. Y.) 644, 43 N. Y. Suppl. 749]; Keene *v.* Tribune Assoc., 76 Hun (N. Y.) 488, 27 N. Y. Suppl. 1045, 58 N. Y. St. 484; Stokes *v.* Stokes, 76 Hun (N. Y.) 314, 28 N. Y. Suppl. 165, 59 N. Y. St. 187; Pasternaker *v.* Weiss, 29 Misc. (N. Y.) 314, 60 N. Y. Suppl. 494; Waltenberg *v.* Bernhard, 27 Misc. (N. Y.) 794, 58 N. Y. Suppl. 325 [*dismissing* appeal from 26 Misc. (N. Y.) 659, 56 N. Y. Suppl. 396].

North Carolina.— Dunns *v.* Batchelor, 20 N. C. 52, where the entry was "The defendant is entitled to a credit to be ascertained by M. Ferrall and J. H. Simmons, and the clerk is then authorized to enter a *remittitur*, judgment of the Court accordingly and for costs."

Wisconsin.— Dean *v.* Williams, 2 Pinn. (Wis.) 91, 1 Chandl. (Wis.) 22.

See 2 Cent. Dig. tit. "Appeal and Error," § 897.

35. Spehn *v.* Huebschen, 83 Wis. 313, 53 N. W. 550. See also New Orleans, etc., R. Co. *v.* Morgan, 10 Wall. (U. S.) 256, 19 L. ed. 892, a peculiar form of judgment held to be appropriate to the form of the process adopted in Louisiana, where the case arose.

36. *Alabama.*— Stone *v.* Lewin, 8 Ala. 395.

Florida.— Darden *v.* Lines, 2 Fla. 569.

Illinois.— Moody *v.* Peake, 13 Ill. 343.

Maine.— Milliken *v.* Morey, 85 Me. 340, 27 Atl. 188.

New York.— Wing *v.* New York, etc., R. Co., 1 Hilt. (N. Y.) 235; Gridley *v.* Daggett, Code Rep. N. S. (N. Y.) 386, 6 How. Pr. (N. Y.) 280.

North Carolina.— Hines *v.* Hines, 84 N. C. 122.

Pennsylvania.— Kerr *v.* Pittsburgh, 11 Serg. & R. (Pa.) 359; West's Appeal, 3 Serg. & R. (Pa.) 92.

Tennessee.— Read *v.* Robb, 4 Yerg. (Tenn.) 66.

Washington.— McMullen *v.* McGilvrey, 1 Wash. Terr. 513.

See 2 Cent. Dig. tit. "Appeal and Error," § 896; and *infra*, IV, B, 2, c, d.

But where points may be reserved for consideration of the appellate court on questions of law, *pro forma* rulings are sufficient to take the case up. Andrews *v.* King, 77 Me. 224. See *infra*, V, B, 4.

Allowing pro forma affirmances to expedite an appeal has not met with approval, such affirmances having been allowed only in extreme cases — never where explanation and argument are required. Ward *v.* Ward, 21 N. Y. Suppl. 795.

In cases of great importance, however, appeals have been allowed in the discretion of the court. Police Jury *v.* McDonogh, 8 La. Ann. 341. See also the remarks of Taney, C. J., in U. S. *v.* Stone, 14 Pet. (U. S.) 524, 10 L. ed. 572.

12. The Entry of Judgment. In order that a judgment may be reviewed by an appellate court it must be entered in permanent form as a record of the court.[37] The entry must be intended as an entry of judgment.[38] A docket memorandum of the judge, intended to operate merely as a direction to the clerk as to what judgment should be entered, will not support an appeal.[39] An erroneous entry by the clerk is not sufficient.[40] And an entry amounting to a mere memorandum or recital by the clerk, and not showing a consideration and judgment by the court, does not present anything for review.[41] An indorsement

37. *Alabama.*— Pickering *v.* Townsend, 118 Ala. 351, 23 So. 703.

California.— Matter of Sheid, 122 Cal. 528, 55 Pac. 328; Matter of Pearson, 119 Cal. 27, 50 Pac. 929.

Colorado.— But see Corning *v.* Ryan, 3 Colo. 525, construing Colo. Rev. Stat. § 134.

Illinois.— Metzger *v.* Morley, 184 Ill. 81, 56 N. E. 299 [*affirming* 83 Ill. App. 113].

Michigan.— People *v.* McCutcheon, 40 Mich. 244.

Nevada.— But see, *contra,* in this state, where it is held that judgment is as final when pronounced by the court as when it is entered and recorded by the clerk, as required by statute. Kehoe *v.* Blethen, 10 Nev. 445; California State Tel. Co. *v.* Patterson, 1 Nev. 150.

New York.— Daniels *v.* Southard, 36 N. Y. App. Div. 540, 55 N. Y. Suppl. 692, construing N. Y. Code Civ. Proc. § 1304.

North Dakota.— McTavish *v.* Great Northern R. Co., 8 N. D. 333, 79 N. W. 443.

Pennsylvania.— Dorscheimer's Estate, 9 Pa. Super. Ct. 422.

South Dakota.— McCarthy *v.* Speed, 12 S. D. 7, 80 N. W. 135, 50 L. R. A. 184, 190; Martin *v.* Smith, 11 S. D. 437, 78 N. W. 1001; McCormick Harvesting Mach. Co. *v.* Woulph, 11 S. D. 252, 76 N. W. 939; Sinkling *v.* Illinois Cent. R. Co., 10 S. D. 560, 74 N. W. 1029; Coburn *v.* Brown County, 10 S. D. 552, 74 N. W. 1026; Chamberlain *v.* Hedger, 10 S. D. 290, 73 N. W. 75; State *v.* Lamm, 9 S. D. 418, 69 N. W. 592.

See 2 Cent. Dig. tit. "Appeal and Error," § 898; and, generally, Judgments.

Failure to include costs.— An order for the dismissal of a complaint, with costs to be taxed, signed by the judge and entered by the clerk, leaves nothing further to be done to finally dispose of the action, and is a final appealable judgment though the costs be not taxed and inserted therein. Prescott, etc., R. Co. *v.* Atchison, etc., R. Co., 84 Fed. 213, 51 U. S. App. 599, 28 C. C. A. 481.

Necessity for entry of judgment in an intermediate court.— An appeal to the court of appeals, from an order of the general term affirming the judgment of the trial court, is not authorized, such an order being simply an authority for the entry of the judgment of affirmance. Derleth *v.* De Graff, 104 N. Y. 661, 10 N. E. 351; Kilmer *v.* Bradley, 80 N. Y. 630; McGregor *v.* McGregor, 32 N. Y. 479.

Objection to entry, by one of two judges.— There being a division of opinion on a motion for judgment, one of two judges directed that judgment be entered, and the other objected to the entry. The judgment was entered, and was held sufficient to support a writ of error. Cahill *v.* Benn, 6 Binn. (Pa.) 99.

Ruling on demurrer.— Error will lie to a ruling sustaining a demurrer to a petition on the ground that it does not state facts sufficient to constitute a cause of action, though the record fails to show that a final judgment for costs was entered. Williamson *v.* Kansas, etc., Coal Co., 6 Kan. App. 443, 50 Pac. 106.

38. Stevens *v.* Solid Muldoon Printing Co., 7 Colo. 86, 1 Pac. 904 (where the record recited that the action was dismissed at the plaintiff's cost); Alvord *v.* McGaughey, 5 Colo. 244.

What constitutes entry.— On the consideration of the question as to when the time allowed within which to perfect an appeal begins to run, the following rulings have been made as to when a judgment is to be considered entered:

California.— When it is "entered at length in the minute-book of the court." Matter of Pearson, 119 Cal. 27, 50 Pac. 929, construing Cal. Code Civ. Proc. §§ 1704, 1715.

New York.— When it is left with the clerk to be copied into the records. Gay *v.* Gay, 10 Paige (N. Y.) 369.

Ohio.— At the date of filing in accordance with a direction to counsel to prepare and file a decree on lines stated, and not at the time of such announcement and direction. State *v.* Seward, 16 Ohio Cir. Ct. 443, 9 Ohio Cir. Dec. 168.

Texas.— When it is entered on the minutes of the court. New Birmingham Iron, etc., Co. *v.* Blevens, 12 Tex. Civ. App. 410, 34 S. W. 828.

Wisconsin.— When it is entered in brief on the minute-book of the clerk, though not recorded at length upon the order-book. Uren *v.* Walsh, 57 Wis. 98, 14 N. W. 902, construing Wis. Rev. Stat. § 3042.

39. Morgan *v.* Flexner, 105 Ala. 356, 16 So. 716.

40. The appellate court cannot be compelled to decide an appeal from a judgment never rendered. The error must be corrected in the lower court. Kindel *v.* Beck, etc., Lithographing Co., 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311; Campbell *v.* Adams, 38 Barb. (N. Y.) 132.

A judgment "is what is considered and ordered by the court; and not necessarily what is entered by the clerk." Gaynor *v.* Clements, 16 Colo. 209, 26 Pac. 324.

41. Tennessee Coal, etc., Co. *v.* Hansford, 125 Ala. 349, 28 So. 45 (an entry that "whereupon the demurrers to the complaint are by

to the effect that a motion is granted, coupled with the direction that judgment should be entered accordingly without further entry, is not a final judgment from which an appeal can be taken.[42] But a slight informality in the entry of the judgment will not prevent a review by the appellate court.[43]

IV. RIGHT OF REVIEW.[44]

A. Persons Entitled — 1. General Principles — a. Appellant's Connection With Action Below — (I) *Must Have Been a Party or Privy.* According to the established practice, no one can appeal from a judgment or decree, or bring a writ of error to review it, unless he was a party to the action below, or was made so either by an express order of the court to that effect, or by being treated as such, or unless he is a legal representative of a party, or his privity of estate, title, or interest appears from the record.[45]

the court heard and overruled"); Blankenship *v.* Owens, (Ala. 1900) 27 So. 974, (a recital that plaintiff demurred to defendant's special plea, and the court overruled the demurrer). And to the same effect see Metzger *v.* Morley, 184 Ill. 81, 56 N. E. 299 [*affirming* 83 Ill. App. 113], where this recital appeared on the record: "And judgment on the verdict for $1,521.09." Discussing such a recital, the court, in Martin *v.* Barnhardt, 39 Ill. 9, 13, said: "It does not state, by implication even, that it was found, ordered, considered or adjudged by the court that the one or the other party should have or recover anything of the other. It does not state by whose or by what authority a judgment was rendered. It fails to state in whose favor or against whom it was rendered, nor does it even award execution."

42. Sedgwick *v.* Dawkins, 17 Fla. 811; Whitaker *v.* Desfosse, 7 Bosw. (N. Y.) 678; Com. *v.* Mitchell, 80 Pa. St. 57; Thornton *v.* Eaton, 45 Wis. 621, where a jury was waived and direction was given that judgment be entered in accordance with the finding of the court.

An order directing entry of judgment on a verdict is not appealable. Delaware, etc., R. Co. *v.* Burkard, 109 N. Y. 648, 16 N. E. 550, 15 N. Y. St. 517.

Indorsement by judge.— In Schlesinger *v.* Allen, 69 Ill. App. 137, however, it was held that an order that an injunction should issue, indorsed on the back of the bill, would support the appeal, though no further order was entered by the clerk.

43. Ætna Ins. Co. *v.* Swift, 12 Minn. 437 (where there was a failure to insert in the judgment that defendant go without day); Moody *v.* Deutsch, 85 Mo. 237, 244 (where the entry was as follows: "It is, therefore, ordered and adjudged by the court that this cause be dismissed, and that defendants recover of plaintiff, W. B. Moody, all costs accrued herein, and have thereof execution"); Rogers *v.* Gosnell, 51 Mo. 466 (where the judgment was "that defendant go hence, and that he recover his costs"); New Orleans, etc., R. Co. *v.* Morgan, 10 Wall. (U. S.) 256, 19 L. ed. 892 (where it was said that there "must be some variation from the form of a judgment as at common law to render it appropriate to the form of the process adopted" in the federal courts in Louisiana).

44. See 2 Cent. Dig. tit. "Appeal and Error," § 899 *et seq.*

As to parties on appeal see *infra*, VI.

45. *Alabama.*— McNeill *v.* Kyle, 86 Ala. 338, 5 So. 461; Hunt *v.* Houtz, 62 Ala. 36.

Arkansas.— Austin *v.* Crawford County, 30 Ark. 578. *Compare*, however, Cleburne County *v.* Morton, (Ark. 1900) 60 S. W. 307; Ouachita County *v.* Rolland, 60 Ark. 516, 31 S. W. 144 — decided under Sandels & H. Dig. Ark. (1894), § 1270.

California.— Norton *v.* Walsh, 94 Cal. 564, 29 Pac. 1109; Dunphy *v.* Potrero Co., (Cal. 1884) 4 Pac. 1171.

Colorado.— Fischer *v.* Hanna, 21 Colo. 9, 39 Pac. 420; Eyster *v.* Gaff, 2 Colo. 225.

Florida.— Hamberg *v.* Liverpool, etc., Ins. Co., (Fla. 1900) 27 So. 872; Pensacola *v.* Reese, 20 Fla. 437.

Georgia.— Swift *v.* Thomas, 101 Ga. 89, 28 S. E. 618; Pilotage Com'rs *v.* Tabbott, 72 Ga. 89; Townsend *v.* Davis, 1 Ga. 495, 44 Am. Dec. 675.

Illinois.— Matter of Sturms, 25 Ill. 390; Harwood *v.* Cox, 26 Ill. App. 374.

Iowa.— Ferguson *v.* Lucas County, 44 Iowa 701; State *v.* Jones, 11 Iowa 11.

Kentucky.— Rout *v.* Mountjoy, 3 B. Mon. (Ky.) 300; Stevens *v.* Stevens, 2 Dana (Ky.) 428.

Maine.— Reed *v.* Cumberland, etc., Canal Corp., 65 Me. 53; Merrill *v.* Suffolk Bank, 31 Me. 57, 50 Am. Dec. 649.

Maryland.— McKim *v.* Mason, 3 Md. Ch. 186.

Minnesota.— Hollinshead *v.* Banning, 4 Minn. 116.

Mississippi.—Starling *v.* Flash, (Miss. 1894) 16 So. 875; Beazley *v.* Prentiss, 13 Sm. & M. (Miss.) 97. *Compare* Flournoy *v.* Smith, 3 How. (Miss.) 62.

Missouri.— Thompson *v.* Northcott, 1 Mo. 224.

Nebraska.— Burlington, etc., R. Co. *v.* Martin, 27 Nebr. 56, 66 N. W. 15.

Nevada.— Virgin *v.* Brubaker, 4 Nev. 31.

New Hampshire.— Foss *v.* Lord, 59 N. H. 529.

New York.—People *v.* Railroad Com'rs, 160 N. Y. 202, 54 N. E. 697 [*affirming* 40 N. Y.

(II) *Statutes Extending Relief.* In some states statutes expressly confer the right of appeal upon "every person aggrieved by any final judgment or decree in any civil cause."[46] In other states the statutes confer this right of appeal, by persons other than parties to the action, only from an order, sentence, decree, or denial of a judge of probate or orphan's court.[47]

App. Div. 559, 58 N. Y. Suppl. 94]; People *v.* Sanborn, 46 N. Y. App. Div. 630, 61 N. Y. Suppl. 529; Matter of Griscom, 28 N. Y. App. Div. 72, 50 N. Y. Suppl. 893; Overseers of Poor *v.* Beedle, 1 Barb. (N. Y.) 11; Sheffield Farms Co. *v.* Burr, 13 Misc. (N. Y.) 51, 34 N. Y. Suppl. 74, 68 N. Y. St. 29; Martin *v.* Kanouse, 2 Abb. Pr. (N. Y.) 390.

North Carolina.—Parks *v.* Adams, 113 N. C. 473, 18 S. E. 665; Lowery *v.* Lowery, 64 N. C. 110; Clark's Code Civ. Proc. N. C. (1900), p. 733, and cases there cited.

Ohio.— Reid *v.* Quigley, 16 Ohio 445.

South Carolina.—Elkin *v.* Gregory, 30 S. C. 422, 9 S. E. 335; Witte *v.* Clarke, 17 S. C. 313.

Texas.— Stephenson *v.* Texas, etc., R. Co., 42 Tex. 162; Wood *v.* Yarbrough, 41 Tex. 540.

Virginia.— Wingfield *v.* Crenshaw, 3 Hen. & M. (Va.) 245.

Washington.— Nicol *v.* Skagit Boom Co., 12 Wash. 230, 40 Pac. 984.

Wisconsin.— State *v.* Milwaukee, 90 Wis. 487, 63 N. W. 751; McCarty *v.* Ashland County, 61 Wis. 1, 20 N. W. 654; White *v.* Sherry, 37 Wis. 225.

United States.— Hunt *v.* Oliver, 109 U. S. 177, 3 S. Ct. 114, 27 L. ed. 897; Indiana Southern R. Co. *v.* Liverpool, etc., Ins. Co., 109 U. S. 168, 3 S. Ct. 108, 27 L. ed. 895; J. H. *v.* Cockcroft, 104 U. S. 578, 26 L. ed. 856; Buel *v.* Farmers' L. & T. Co., 104 Fed. 839.

England.—2 Bacon Abr. 195; 2 Saund. 46*a*, note 6.

See 2 Cent. Dig. tit. "Appeal and Error," § 903 *et seq.*

A stranger to a garnishee proceeding cannot sue out a writ of error in the name of the garnishee defendant. Borgalthous *v.* Farmers', etc., Ins. Co., 36 Iowa 250; Hollinshead *v.* Banning, 4 Minn. 116.

Appeal from order granting writ of assistance.— One who is not a party to the record cannot appeal from an order granting a writ of assistance. Such person must move to vacate the order granting the writ, and in that way place himself on the record, and then, if the motion is denied, appeal from the order denying his motion; or, if the writ is executed, move to be restored to the possession, and if the motion be denied, take his appeal. People *v.* Grant, 45 Cal. 97.

Appellant of same name as defendant.—One not served with process, nor made a party, cannot appeal therefrom, although of the same name as the person sued. Rorke *v.* Goldstein, 86 Ill. 568.

Becoming party after final judgment.— One who was not a party to a suit will not be permitted, after final judgment rendered, to come in and prosecute an appeal. Johnson *v.* Williams, 28 Ark. 478; Shabanaw *v.* C. C. Thompson, etc., Co., 80 Wis. 621, 50 N. W. 781.

Persons for use not named.— In an action brought by A for the use of B and others not named, the persons not named are not entitled to appeal. Union Nat. Bank *v.* Barth, 179 Ill. 83, 53 N. E. 615 [*affirming* 74 Ill. App. 383]; Yarish *v.* Cedar Rapids, etc., R. Co., 72 Iowa 556, 34 N. W. 417; Fleming *v.* Mershon, 36 Iowa 413.

Privies, by law having an interest in the judgment or in the property affected by it, may bring error. Shirley *v.* Lunenburg, 11 Mass. 379; Porter *v.* Rummery, 10 Mass. 64.

46. It is obvious that in jurisdictions where such statutes exist it is not essential that appellant should be a party of record to the litigation in which the judgment is rendered, or privy thereto; it is sufficient if he be aggrieved thereby. Weer *v.* Gand, 88 Ill. 490 (construing Ill. Rev. Stat. (1874), c. 3, § 123); Henkleman *v.* Peterson, 40 Ill. App. 540; Nolan *v.* Johns, 108 Mo. 431, 18 S. W. 1107 (construing Mo. Rev. Stat. (1879), § 3710); Clark's Code Civ. Proc. N. C. (1900), § 547.

See *infra*, IV, A, 1, c, (v).

The Maryland act of 1864, c. 156, allowing an appeal from a final decree, or order in the nature of a final decree, passed by a court of equity, by a party to the suit, with or without the assent or joinder of co-plaintiffs or co-defendants in such appeal, was designed to extend and not to limit the right of appeal, and cannot be construed as restricting that right in all cases to such persons only as are technical parties to the suit. Hall *v.* Jack, 32 Md. 253.

Under the Louisiana code, any person, whether a party or stranger to the cause, may appeal from a final judgment if he alleges that he is aggrieved thereby, and from an interlocutory judgment when such judgment may cause him an irreparable injury, provided the amount or value in dispute is sufficient, and the party is not debarred by his own act from taking an appeal. Mutual L. Ins. Co. *v.* Houchins, 52 La. Ann. 1137, 27 So. 657; Bland *v.* Edwards, 52 La. Ann. 822, 27 So. 289; Fortier's Succession, 51 La. Ann. 1562, 26 So. 554; Dufossat *v.* Fontenot, 49 La. Ann. 898, 22 So. 46; Cooley *v.* Cooley, 38 La. Ann. 195; State *v.* Brown, 29 La. Ann. 861 (public officer); Keys *v.* Riley, 12 La. Ann. 19 (attaching creditors); Vignie *v.* Blache, 5 La. 108 (one injured by injunction). But one against whom the judgment cannot have the force of *res judicata* has no right to appeal therefrom (Sue *v.* Viola, 2 La. Ann. 986).

Where borough limits are changed by annexing new territory, under the Pennsylvania act of April 30, 1851, any person affected may appeal to the court. *In re* Edwardsville, 8 Kulp (Pa.) 339.

47. *Maine.*—Briard *v.* Goodale, 86 Me. 100, 29 Atl. 946, 41 Am. St. Rep. 526 (construing

b. Appellant Must Have Interest in Suit — (1) *In General.* A second requisite of a valid appeal is that appellant should have an interest in the subject-matter of the suit. If he has not such interest his appeal will be dismissed.[48]

Me. Rev. Stat. c. 63, § 23); Veazie Bank *v.* Young, 53 Me. 555; Deering *v.* Adams, 34 Me. 41; Sturtevant *v.* Tallman, 27 Me. 78.

Maryland.— Cecil *v.* Cecil, 19 Md. 72, 81 Am. Dec. 626; Stevenson *v.* Schriver, 9 Gill & J. (Md.) 324.

Massachusetts.— Farrar *v.* Parker, 3 Allen (Mass.) 556; Penniman *v.* French, 2 Mass. 140.

New Hampshire.— Shirley *v.* Healds, 34 N. H. 407; Bryant *v.* Allen, 6 N. H. 116.

Pennsylvania.— Garber *v.* Com., 7 Pa. St. 265.

Under Minn. Gen. Stat. (1878), c. 49, § 14, a party who has not appeared in the probate court can only appeal when he "had not due notice or opportunity to be heard." It has been held that "opportunity" as here used means such opportunity as the party is entitled to by law. Hence the mere fact that notice, duly served by publication, did not convey actual notice to a party does not amount to a want of opportunity within the meaning of the statute. Matter of Hause, 32 Minn. 155, 19 N. W. 973. On appeal to the district court by two contestants, A and B, from a judgment of a probate court admitting a will to probate, the appeal was dismissed as to A, but prosecuted to judgment in the district court by the contestant B. It was held that A was not a party to the judgment and had no right to appeal therefrom. Matter of Allen, 25 Minn. 39.

48. *California.*—Matter of Blythe, 108 Cal. 124, 41 Pac. 33; Speyer *v.* Ihmels, 21 Cal. 280, 81 Am. Dec. 157.

Connecticut.— Yudkin *v.* Gates, 60 Conn. 426, 22 Atl. 776; Alling *v.* Shelton, 16 Conn. 436.

District of Columbia.— Washington Brick Co. *v.* Belt, 13 App. Cas. (D. C.) 202.

Georgia.—Braswell *v.* Equitable Mortg. Co., 110 Ga. 30, 35 S. E. 322.

Illinois.— Winne *v.* People, 177 Ill. 268, 52 N. E. 377; Douglas *v.* Soutter, 52 Ill. 154; Coe *v.* Simmons Boot, etc., Co., 61 Ill. App. 602.

Indiana.— See Tipton County *v.* Pershing, 22 Ind. App. 147, 53 N. E. 297.

Kentucky.— Whaley *v.* Com., (Ky. 1901) 61 S. W. 35; Mullins *v.* Bullock, 14 Ky. L. Rep. 40, 19 S. W. 8.

Louisiana.— Guilbeau *v.* Detiege, 32 La. Ann. 909; State *v.* Jackson, 28 La. Ann. 30; State *v.* Markey, 21 La. Ann. 743; Arrowsmith *v.* Rappelge, 19 La. Ann. 327; Lafitte *v.* Duncan, 4 Mart. N. S. (La.) 622.

Maryland.— Glenn *v.* Reid, 74 Md. 238, 24 Atl. 155; Stewart *v.* Codd, 58 Md. 86.

Massachusetts.— Lewis *v.* Bolitho, 6 Gray (Mass.) 137; Northampton *v.* Smith, 11 Metc. (Mass.) 390.

Minnesota.— Burns *v.* Phinney, 53 Minn. 431, 55 N. W. 540.

Mississippi.— Dougherty *v.* Compton, 3 Sm. & M. (Miss.) 100.

Missouri.— Kinealy *v.* Macklin, 67 Mo. 95.

Nebraska.— Plattsmouth First Nat. Bank *v.* Gibson, (Nebr. 1900) 84 N. W. 259.

Nevada.— Sherman *v.* Clark, 4 Nev. 138, 97 Am. Dec. 516.

New York.— Bush *v.* Rochester City Bank, 48 N. Y. 659; Matter of New York, 52 N. Y. App. Div. 478, 65 N. Y. Suppl. 77.

North Carolina.— Faison *v.* Hardy, 118 N. C. 142, 23 S. E. 959.

Pennsylvania.—Lawrence County's Appeal, 67 Pa. St. 87.

South Carolina.— *Ex p.* Neal Loan, etc., Co., 58 S. C. 269, 36 S. E. 584; Emory *v.* Davis, 4 Rich. (S. C.) 23.

Virginia.— Elcan *v.* Lancasterian School, 2 Patt. & H. (Va.) 53.

Washington.— Kitsap County *v.* Carson, 1 Wash. Terr. 419.

Wisconsin.— McGregor *v.* Pearson, 51 Wis. 122, 8 N. W. 101; State *v.* Wolfrom, 25 Wis. 468; Strong *v.* Winslow, 3 Pinn. (Wis.) 27, 3 Chandl. (Wis.) 21.

United States.— Savannah *v.* Jesup, 106 U. S. 563, 1 S. Ct. 512, 27 L. ed. 276; Bayard *v.* Lombard, 9 How. (U. S.) 530, 13 L. ed. 245. New Orleans *v.* Peake, 52 Fed. 74, 2 U. S. App. 403, 2 C. C. A. 626.

See 2 Cent. Dig. tit. "Appeal and Error," § 934 *et seq.*; and *infra*, XIV, B, E, 8.

As to necessity of actual controversy to give jurisdiction on appeal see *supra*, II, A.

A party who is a mere stake-holder, liable for the payment of the money which he is ordered to bring into court for distribution, cannot be heard, on appeal, to object to the passage of the order, which, although passed unnecessarily or irregularly, in no manner affected his rights. Hall *v.* Jack, 32 Md. 253; Craig's Appeal, 38 Pa. St. 330.

In a controversy for office under the intrusion act, a third party, not holding or claiming the office in dispute, cannot appeal from the judgment of the court *a qua.* State *v.* Mount, 21 La. Ann. 755.

The fact that the party is interested in a representative capacity only — as an officer suing to recover public money, or an executor suing for assets — and not in his own right, does not deprive him of the right to appeal. State *v.* Judge, 22 La. Ann. 119.

Whether an appellant has such an interest in the estate as entitles him to appeal from a decree allowing the probate of a will is ordinarily a question for the court. Morey *v.* Sohier, 63 N. H. 507, 3 Atl. 636, 56 Am. Rep. 538. On writ of error to the circuit court, to review the decision of the probate court in the probate of a will, the circuit court will look into the will to determine whether plaintiff in error was so interested as to entitle him to prosecute the writ. Tibbatts *v.* Berry, 10 B. Mon. (Ky.) 473.

Objection, when to be taken.— An objection, that appellants from a judgment settling an administrator's account have no interest in

(II) *Nature of Interest* — (A) *In General.* The appellant's interest, to suffice, must be an immediate pecuniary interest in the particular cause.[49]

(B) *Decree for Costs.* A party against whom a judgment or decree for costs has been taken has such an interest in the suit as entitles him to appeal.[50]

(III) *Defendant as to Whom Suit Has Been Dismissed.* A defendant as to whom a suit has been dismissed or demurrer sustained cannot appeal, or join in an appeal, from a judgment or decree subsequently rendered against his co-defendant.[51]

the estate, cannot be raised by an objection by appellee to the introduction of evidence in the appellate court. *In re* Swan, 54 Mo. App. 17.

Who are interested parties.— The rule allowing interested parties to appeal has been applied to mortgagee required by decree to take a certain sum and release his mortgage (White *v.* Hampton, 13 Iowa 259), legatee under a will (King *v.* Middlesborough Town, etc., Co., 20 Ky. L. Rep. 1859, 50 S. W. 37; Warehime *v.* Graf, 83 Md. 98, 34 Atl. 364), representatives of an insolvent assignor (Kenton Ins. Co. *v.* First Nat. Bank, 93 Ky. 129, 14 Ky. L. Rep. 32, 19 S. W. 185), disinterested person required by order to produce his private books for inspection (Marion Nat. Bank *v.* Abell, 88 Ky. 428, 10 Ky. L. Rep. 980, 11 S. W. 300), fraudulent grantee of real estate (Allen *v.* Smith, 80 Me. 486, 15 Atl. 62), representatives of a lunatic (Moore *v.* White, 4 Harr. & J. (Md.) 548), state revenue agent in proceedings for the collection of back taxes (Adams *v.* Kuhn, 72 Miss. 276, 16 So. 598), owner of the reversion in land authorized to be sold by the decree of a judge of probate (Tilton *v.* Tilton, 41 N. H. 479), committee of lunatic (*In re* Olson, 10 S. D. 648, 75 N. W. 203), guardian (Orr *v.* Wright, (Tex. Civ. App. 1898) 45 S. W. 629), claimant of the informer's share in a forfeiture (Wheaton *v.* U. S., 8 Blatchf. (U. S.) 474, 29 Fed. Cas. No. 17,487), and a manufacturer under an infringing patent (Andrews *v.* Thum, 64 Fed. 149, 21 U. S. App. 459, 12 C. C. A. 77).

49. It is not sufficient that he be interested in the question litigated, or that, by the determination of the question litigated, he may be a party in interest to some other suit growing out of the decision of that question. State *v.* Markey, 21 La. Ann. 743; Raleigh *v.* Rogers, 25 N. J. Eq. 506; Swackhamer *v.* Kline, 25 N. J. Eq. 503; Morris *v.* Garrison, 27 Pa. St. 226; Elcan *v.* Lancasterian School, 2 Patt. & H. (Va.) 53. See also Zumwalt *v.* Zumwalt, 3 Mo. 269.

See 2 Cent. Dig. tit. "Appeal and Error," § 934.

Indirect interest.— A sheriff convicted of selling lottery tickets cannot appeal on the ground of danger of being suspended from his office. State *v.* Houston, 30 La. Ann. 1174. So, an allegation that plaintiffs' official jurisdiction is decreased as supervisors of a town does not give them any interest in a proceeding to divide the township, and set off a new town. Winne *v.* People, 177 Ill. 268, 52 N. E. 377. Nor has a servant of a corporation any appealable interest in the matter of the appointment of a receiver therefor, because of being in possession of its property as such servant, or because his salary may be cut by the receiver. McFarland *v.* Pierce, 151 Ind. 546, 45 N. E. 706, 47 N. E. 1.

Substantial interest.— A sole defendant, in an action for personal injuries, has such interest in an order bringing in a new defendant and directing service of a supplemental complaint as entitles him to appeal. Heffern *v.* Hunt, 8 N. Y. App. Div. 585, 40 N. Y. Suppl. 914, 75 N. Y. St. 307. So, a defendant in default has a substantial interest in having a judgment joint as to himself and a co-defendant who pleads, and, if the same be on a separate assessment of damages, he has the right of appeal therefrom. Waugh *v.* Suter, 3 Ill. App. 271.

50. Kingsley *v.* Delano, 172 Mass. 37, 51 N. E. 186; McCabe *v.* Farnsworth, 27 Mich. 52; Landa *v.* McGehee, (Tex. 1892) 19 S. W. 516. *Compare* Martin *v.* Porter, 84 Cal. 476, 479, 24 Pac. 109, wherein it was held that in replevin, where defendant denies possession or ownership, he is entitled to appeal from the judgment that "plaintiff do have and recover of and from the defendant the possession of all the personal property described in the complaint," although no costs were awarded, since, if the denials of his answer had been sustained, the proper judgment would have been that plaintiff take nothing, and that defendant recover his costs.

51. *California.*— Ramsey *v.* Flournoy, 58 Cal. 260.

Florida.—Witt *v.* Baars, 36 Fla. 119, 18 So. 330.

Illinois.— Harms *v.* Jacobs, 155 Ill. 221, 40 N. E. 488; Hedges *v.* Mace, 72 Ill. 472.

Maryland.—Hanson *v.* Worthington, 12 Md. 418.

Mississippi.— Barrett *v.* Carter, 69 Miss. 593, 13 So. 625.

Missouri.— Evans *v.* Menefee, 1 Mo. 442.

See 2 Cent. Dig. tit. "Appeal and Error," § 923.

As a discontinuance as to one defendant in a civil action abates a pending motion made by him, his co-defendants cannot appeal from a superfluous order denying such motion. White *v.* Sherry, 37 Wis. 225.

Compare also Ballard *v.* Kennedy, 34 Fla. 483, 16 So. 327, to the effect that where the heirs at law of a deceased mortgagor have been made parties defendant, along with the administrator, to a bill of foreclosure of a mortgage upon the lands of the deceased, and have had their pleadings to such bill stricken out, and the bill is subsequently dismissed as

(IV) *Nominal Parties.* A person who is merely a nominal party to an action, having no interest therein, cannot appeal;[52] but a nominal plaintiff for use in a garnishee proceeding may appeal upon the strength of the interest which he represents.[53]

(V) *Party Whose Interest Has Determined*—(A) *In General.* Though a party is interested at the commencement of a suit, he cannot prosecute an appeal from a judgment rendered therein after his interest has determined.[54] Yet it has been held that where a grantee *pendente lite* is not allowed to be made a party, the grantor may appeal although he has conveyed all his interest.[55]

(B) *Bankrupts.* It is very generally held that a defendant who receives his discharge in bankruptcy pending an action has no further interest therein, and cannot bring a writ of error to a judgment rendered against him prior to his discharge.[56] But whether the mere adjudication of bankruptcy, or the execution of an assignment for the benefit of creditors, thus deprives the bankrupt of such interest as is requisite to an appeal is a disputed question.[57]

(C) *Fraudulent Grantor.* A grantor by a deed adjudged fraudulent as to creditors has no such interest in the land conveyed as authorizes him to appeal from a decree setting the deed aside.[58]

to them, but is carried into final decree against the administrator alone, such heirs at law are so affected by such final decree as to give them the right to an appeal from such final decree, though they are not named the parties thereto.

Parties stricken out by amendment.— Defendants, who filed a cross-bill, and were afterward stricken out as parties by an amendment to the bill, had no standing in court after such dismissal, and, not being parties to the final decree, they had no right to appeal from it where it did not affect their rights. Vandeford *v.* Stovall, 117 Ala. 344, 23 So. 30.

52. R, discovering a defect in plaintiff's title, procured from the original owner of the premises a deed to himself, acting as agent of a corporation. In a suit against R and the corporation, plaintiff recovered judgment against both defendants for the possession of the land, and against the corporation for damages. It was held that R, being merely a nominal party, was not injured by the judgment and could not appeal. Hawley *v.* Whitaker, (Tex. Civ. App. 1895) 33 S. W. 688.

See 2 Cent. Dig. tit. "Appeal and Error," § 965; and *infra*, VI, B, 1, b.

53. Murphy *v.* Consolidated Tank Line Co., 32 Ill. App. 612.

54. *Georgia.*— Hicks *v.* Cohen, 72 Ga. 210.

Indiana.— Stauffer *v.* Salimonic Min., etc., Co., 147 Ind. 71, 46 N. E. 342.

Kentucky.— Crigler *v.* Conner, 12 Ky. L. Rep. 502, 14 S. W. 640.

Maryland.— Johns *v.* Caldwell, 60 Md. 259.

New York.— Idley *v.* Bowen, 11 Wend. (N. Y.) 227; Reid *v.* Vanderheyden, 5 Cow. (N. Y.) 719.

Pennsylvania.— Eichert's Estate, 155 Pa. St. 59, 25 Atl. 824.

South Carolina.—Martin *v.* Adams, 29 S. C. 597, 6 S. E. 860.

Texas.— Coupland *v.* Tullar, 21 Tex. 523.

See 2 Cent. Dig. tit. "Appeal and Error," § 935 *et seq.*; and *infra*, XIV, E, 4.

As to transfer or devolution of interest see *infra*, VI, F.

55. Moore *v.* Jenks, 173 Ill. 157, 50 N. E. 698 [*reversing* 68 Ill. App. 445].

56. Kelly *v.* Israel, 11 Paige (N. Y.) 147; Knox *v.* Exchange Bank, 12 Wall. (U. S.) 379, 20 L. ed. 287; and 2 Cent. Dig. tit. "Appeal and Error," § 938; and *infra*, VI, F. 2. But see Wheeless *v.* Fisk, 28 La. Ann. 731.

When court fails to notice plea.— Pending a suit to foreclose a deed of trust, defendant filed his petition and received his discharge in bankruptcy. It was held that he had the right of appeal from a final decree against him for plaintiff's demand in the foreclosure suit, the court having failed to notice his plea, notwithstanding the bankruptcy. Young *v.* Cardwell, 6 Lea (Tenn.) 195.

When defendant is not protected by discharge.— A tutor, against whom a judgment has been rendered for an amount due the minor, and who has subsequently been discharged under the bankrupt act, not being protected by the proceedings in bankruptcy, may appeal from the judgment against him. Collins *v.* Marshall, 10 Rob. (La.) 112.

57. That bankrupt or insolvent cannot appeal or bring error see:

Alabama.— Bailey *v.* McIntyre, 43 Ala. 664.

Dakota.— Sioux Falls Nat. Bank *v.* Sioux Falls First Nat. Bank, 6 Dak. 113, 50 N. W. 829.

Illinois.— Jenkins *v.* Greenbaum, 95 Ill. 11.

Kentucky.— Parks *v.* Doty, 13 Bush (Ky.) 727.

Louisiana.— Knight *v.* Callender, 10 La. 226.

See 2 Cent. Dig. tit. "Appeal and Error," § 938.

That bankrupt or insolvent may appeal or bring error see O'Neil *v.* Dougherty, 46 Cal. 575; Francis *v.* Burnett, 84 Ky. 23; Sanford *v.* Sanford, 58 N. Y. 67, 17 Am. Rep. 206; Thomson *v.* Fairfield, 21 N. Y. Suppl. 712, 50 N. Y. St. 472; Barger *v.* Buckland, 28 Gratt. (Va.) 850.

See 2 Cent. Dig. tit. "Appeal and Error," § 938.

58. Hunt *v.* Childress, 5 Lea (Tenn.) 247.

(D) *Mortgagor Who Has Disposed of Equity of Redemption.* A mortgagor who has disposed of his equity of redemption cannot appeal from a decree passed for the sale of the mortgaged premises.[59]

(E) *Resignation or Removal from Office.* An unsuccessful party who occupies a fiduciary relation as administrator[60] or guardian[61] cannot prosecute an appeal after he has resigned or been removed from office.[62]

(F) *Vendor Pendente Lite.* A complainant who has parted with all his interests in the subject of litigation *pendente lite* cannot appeal from a judgment even though it injuriously affects such interest.[63]

(VI) *Unnecessary Party.* It has been held that persons having no interest in the proceedings, and who are not entitled to be made parties, but who are inadvertently made so, have no right to appeal;[64] but there are decisions to the contrary.[65]

c. Appellant Must Be Prejudiced — (I) *In General.* A third requisite of a valid appeal is that appellant should have been aggrieved by the judgment or decree complained of.[66]

See also 2 Cent. Dig. tit. "Appeal and Error," § 936.

A assigned a claim which he held against an estate to his wife, in consideration, as he testified, of money due from him to her; but, on a proceeding against him in the nature of a creditors' bill, the assignment was declared void as against creditors. A receiver was appointed, and the transfer to A of the money due to him from the estate, or any interference with it by A or his wife, was enjoined. It was held that A could appeal from this order, as it would not protect him from proceedings by his wife to enforce her rights under the assignment. Reed *v.* Baker, 42 Mich. 272, 3 N. W. 959.

59. McDonald *v.* Workmen's Bldg. Assoc., 60 Md. 589; Rau *v.* Robertson, 58 Md. 506; Kiefer *v.* Winkens, 39 How. Pr. (N. Y.) 176.

Interposing defense of usury.— But a mortgagor who, having sold his equity of redemption, is made a party, and sets up the defense of usury on a foreclosure proceeding, has a right to appeal from a decree against him, because the decree would bar him from setting up the same defense to a suit on the bond. Andrews *v.* Stelle, 22 N. J. Eq. 478.

Wife's inchoate right of dower.— A party to a decree of foreclosure and sale, who has parted with his interest subsequent to the commencement of the suit, but prior to the entry of the decree, cannot, in his own right, maintain an appeal from the decree. But where his wife, who is also a party to the suit, still has an inchoate right of dower in the subject of the suit he may unite with her in such an appeal. Kiefer *v.* Winkens, 3 Daly (N. Y.) 191.

60. McCormick Harvesting Mach. Co. *v.* Snedigar, 3 S. D. 302, 53 N. W. 83; Graham *v.* Blackburn, 10 Tex. 314.

61. Hamilton *v.* Moore, 32 Miss. 205.

62. See *infra*, VI, F, 5; and 2 Cent. Dig. tit. "Appeal and Error," § 937.

But see Printup *v.* Cherokee R. Co., 45 Ga. 365, wherein it was held that a writ of error, brought to review a judgment enjoining a certain person, as agent of the state, will not be dismissed on the ground that, after suing out the writ of error, and before the hearing, he was removed from such agency.

63. Gordon *v.* Gibbs, 3 Sm. & M. (Miss.) 473; Hackley *v.* Hope, 4 Keyes (N. Y.) 123; Reid *v.* Vanderheyden, 5 Cow. (N. Y.) 719; Card *v.* Bird, 10 Paige (N. Y.) 426.

See 2 Cent. Dig. tit. "Appeal and Error," § 936.

As to right of purchaser *pendente lite* to appeal see *infra*, IV, A, 2, a, (VIII).

Where a party, against whom a final decree has been made, sells his right to the subject-matter of the suit, an appeal from such decree, in the name of the party against whom the same was made, cannot be sustained. But if the purchaser is entitled to appeal he must make himself a party to the suit, and bring the appeal in his own name. Mills *v.* Hoag, 7 Paige (N. Y.) 18, 31 Am. Dec. 271.

64. McMurray *v.* State Bank, 74 Mo. App. 394; McClure *v.* Mauperture, 29 W. Va. 633, 2 S. E. 761; and 2 Cent. Dig. tit. "Appeal and Error," § 905.

65. Ricketson *v.* Torres, 23 Cal. 636. See also Bowlus *v.* Shanabarger, 19 Ohio Cir. Ct. 137, 10 Ohio Cir. Dec. 167.

Proper party.— An owner of property may appeal from a judgment subjecting the property to the lien of a subcontractor, although he was only a proper, and not a necessary, party to the action. Hilliker *v.* Francisco, 65 Mo. 598.

66. *Alabama.*— Hunt *v.* Houtz, 62 Ala. 36.

Colorado.— Fischer *v.* Hanna, 21 Colo. 9, 39 Pac. 420.

Connecticut.— Alling *v.* Shelton, 16 Conn. 436.

Georgia.— Collier *v.* Hyatt, 110 Ga. 317, 35 S. E. 271; Bowen *v.* Groover, 76 Ga. 101; Townsend *v.* Davis, 1 Ga. 495, 44 Am. Dec. 675.

Illinois.—Hedges *v.* Mace, 72 Ill. 472; Pope *v.* North, 33 Ill. 440.

Indiana.— Emmons *v.* Keller, 39 Ind. 178; Pierse *v.* West, 29 Ind. 266.

Iowa.— Bremer County Bank *v.* Bremer County, 42 Iowa 394.

Kansas.— Craft *v.* Bent, 8 Kan. 328.

Kentucky.— Miller *v.* Pryse, 20 Ky. L. Rep.

(II) *Decree Prejudicial in Part.* It is not necessary, however, that a party should be entirely defeated in order that he may have a right to appeal.[67]

(III) *Judgment in Appellant's Favor.* While, as a rule, a plaintiff has no right to appeal from a judgment in his own favor,[68] it has been held that, if

1544, 49 S. W. 776; Williams *v.* Tyler, 13 Ky. L. Rep. 392, 17 S. W. 276.

Louisiana.— New Orleans *v.* Dufossat, 46 La. Ann. 398, 14 So. 884; Williams *v.* Trepagnier, 4 Mart. N. S. (La.) 342.

Maryland.— Ringgold *v.* Barley, 5 Md. 186, 59 Am. Dec. 107.

Michigan.—Besancon *v.* Brownson, 39 Mich. 388.

Minnesota.— Commonwealth Ins. Co. *v.* Pierro, 6 Minn. 569.

Mississippi.—See Southern Pine Co. *v.* Mitchell, (Miss. 1896) 19 So. 583.

Missouri.— State *v.* Talty, 139 Mo. 379, 40 S. W. 942; Othenin *v.* Brown, 66 Mo. App. 318.

Nebraska.— B. F. Sturtevant Co. *v.* Bohn Sash, etc., Co., 59 Nebr. 82, 80 N. W. 273; Cowherd *v.* Kitchen, 57 Nebr. 426, 77 N. W. 1107.

New Jersey.— Black *v.* Kirgan, 15 N. J. L. 45, 28 Am. Dec. 394.

North Carolina.— Hoke *v.* Carter, 34 N. C. 327.

Ohio.— Munger *v.* Jeffries, 7 Ohio N. P. 55.

Pennsylvania.— Morris *v.* Garrison, 27 Pa. St. 226.

South Carolina.— Globe Phosphate Co. *v.* Pinson, 52 S. C. 185, 29 S. E. 549.

South Dakota.— Woods *v.* Pollard, (S. D. 1900) 84 N. W. 214.

Virginia.— Edmund *v.* Scott, 78 Va. 720; Little *v.* Bowen, 76 Va. 724.

West Virginia.— Miller *v.* Rose, 21 W. Va. 291.

Wisconsin.—Bragg *v.* Blewett, 99 Wis. 348, 74 N. W. 807; Herndon *v.* Bock, 97 Wis. 548, 73 N. W. 39.

See 2 Cent. Dig. tit. "Appeal and Error," § 947 *et seq.*; and *infra*, XIV, E, 8.

Beneficiary under a will, not injuriously affected by a decree confirming a devise to another person, cannot complain of such decree. Decker *v.* Decker, 121 Ill. 341, 12 N. E. 750.

Defendant not served with process.— One, named as a defendant in the pleadings, but neither served with process nor appearing, nor mentioned in the decree, cannot assign error. Moffett *v.* Hanner, 154 Ill. 649, 39 N. E. 474.

This rule has been so applied as to prevent an appeal merely for the purpose of having a decree in appellant's favor affirmed. Green *v.* Blackwell, 32 N. J. Eq. 768.

Nor can a party appeal from a decision, which decision is correct so far as his interests are concerned, because the rights of other persons are violated by it.

Arkansas.— Daniel *v.* Daniel, 39 Ark. 266; Porter *v.* Singleton, 28 Ark. 483.

California.— Rankin *v.* Central Pac. R. Co., 73 Cal. 93, 15 Pac. 57; Scotland *v.* East Branch Min. Co., 56 Cal. 625.

Colorado.— McRobbie *v.* Higginbotham, 11 Colo. 312, 18 Pac. 31.

Georgia.— Hudson *v.* Hudson, 84 Ga. 611, 10 S. E. 1098.

Illinois.— Lagger *v.* Mutual Union Loan, etc., Assoc., 146 Ill. 283, 33 N. E. 946; Chicago *v.* Cameron, 120 Ill. 447, 11 N. E. 899; Ransom *v.* Henderson, 114 Ill. 528, 4 N. E. 141.

Indiana.— Iles *v.* Cox, 83 Ind. 577.

Louisiana.— Sompayrac *v.* Hyams, 23 La. Ann. 273.

Maryland.— Simms *v.* Lloyd, 58 Md. 477.

Nebraska.— Hoops *v.* McNichols, 38 Nebr. 76, 56 N. W. 721.

New York.— Hyatt *v.* Dusenbury, 106 N. Y. 663, 12 N. E. 711; Faxon *v.* Mason, 90 Hun (N. Y.) 426, 35 N. Y. Suppl. 950, 70 N. Y. St. 624; Bullard *v.* Kenyon, 78 Hun (N. Y.) 26, 29 N. Y. Suppl. 772, 61 N. Y. St. 58.

Pennsylvania.— Lyon *v.* Allison, 1 Watts (Pa.) 161.

South Carolina.— Dauntless Mfg. Co. *v.* Davis, 22 S. C. 584.

Virginia.— Cunningham *v.* Smithson, 12 Leigh (Va.) 32.

Wisconsin.— McGregor *v.* Pearson, 51 Wis. 122, 8 N. W. 101.

United States.— Crawshay *v.* Souter, 6 Wall. (U. S.) 739, 18 L. ed. 845.

See 2 Cent. Dig. tit. "Appeal and Error," § 947 *et seq.*; and *infra*, XIV, E, 8.

67. That a party defeats a part of the relief asked for does not deprive him of the right to appeal from so much of the order as grants relief against him. McIntyre *v.* German Sav. Bank, 59 Hun (N. Y.) 536, 13 N. Y. Suppl. 674, 37 N. Y. St. 545.

Limits of the rule.— But a party who is aggrieved by one part only of a decree cannot, by appeal, call in question another part thereof which has no bearing or effect upon his rights or interests — he can appeal only from such parts of the decree as affect him. Idley *v.* Bowen, 11 Wend. (N. Y.) 227; Cuyler *v.* Moreland, 6 Paige (N. Y.) 273; Sage *v.* Central R. Co., 93 U. S. 412, 23 L. ed. 933.

68. Watkins *v.* Martin, 24 Ark. 14, 81 Am. Dec. 59; Fischer *v.* Hanna, 21 Colo. 9, 39 Pac. 420; Northrop *v.* Jenison, 12 Colo. App. 523, 56 Pac. 187; Sutton *v.* Jones, 9 Colo. App. 36, 47 Pac. 400; Raymond *v.* Barker, 2 Root (Conn.) 370; Holton *v.* Ruggles, 1 Root (Conn.) 318; Hayden *v.* Stone, 112 Mass. 346; and 2 Cent. Dig. tit. "Appeal and Error," § 947 *et seq.* But see, *contra*, Miller *v.* Martin, 8 N. J. L. 201; Lenoir *v.* South, 32 N. C. 237.

Thus, where, upon two charges of fraud filed by a judgment creditor against his debtor pending such debtor's application to take the oath for the relief of poor debtors, the latter is convicted on one charge and acquitted on the other, and sentenced to jail, the creditor cannot appeal to the supreme court. Smith *v.* Dickinson, 140 Mass. 171, 3 N. E. 40. But

such a party has been injured by such a judgment, he may sue out a writ of error to reverse it.[69]

(IV) *Necessary Parties Not Served With Process.* One who is a necessary party to a suit, and against whom process is prayed, may prosecute a writ of error to the judgment although process was not served upon him and he did not appear in the court below.[70]

(V) *Parties Aggrieved May Appeal.* Most of the appeal statutes declare that any party aggrieved by a judgment or decree may appeal therefrom. This embraces parties who are subsequently brought into the action,[71] as well as those by or against whom it was originally instituted.[72] In legal acceptation a party is aggrieved by a judgment or decree when it operates on his rights of property, or bears directly upon his interest.[73]

defendant is not affected by a declaration in the judgment that it is in his favor when in reality it is against him. He has the right to appeal from it to correct any errors. Hewes *v.* Baxter, 45 La. Ann. 1049, 13 So. 817. So, if a bill in equity be dismissed as insufficient in law, one aggrieved, though a defendant in form, may appeal from the decree of dismissal. Atkinson *v.* McCormick, 76 Va. 791.

69. *Connecticut.*— Seymour *v.* Belden, 28 Conn. 443.

Florida.— Hale *v.* Crowell, 2 Fla. 534, 50 Am. Dec. 301.

Illinois.— Hartman *v.* Belleville, etc., R. Co., 64 Ill. 24; Fisk *v.* Carbonized Stone Co., 67 Ill. App. 327.

Kentucky.—Gentry *v.* Barnett, 6 T. B. Mon. (Ky.) 113.

New York.— Parker *v.* Newland, 1 Hill (N. Y.) 87; Ingalls *v.* Lord, 1 Cow. (N. Y.) 240.

United States.— Capron *v.* Van Noorden, 2 Cranch (U. S.) 126, 2 L. ed. 229.

England.— Johnson *v.* Jebb, 3 Burr 1772.

See 2 Cent. Dig. tit. "Appeal and Error," § 949 *et seq.*

70. State *v.* Jacksonville, etc., R. Co., 15 Fla. 201; Hansen *v.* Klicka, 78 Ill. App. 177; Moore *v.* Guest, 8 Tex. 117; and 2 Cent. Dig. tit. "Appeal and Error," § 906.

A person whom the record shows to be a party and aggrieved may appeal, though he has not previously appeared in the case. *In re* Meade, (Cal. 1897) 49 Pac. 5.

71. *Alabama.*—Wheeler *v.* Kennedy, 1 Ala. 292.

California.— Jones *v.* Thompson, 12 Cal. 191.

Illinois.— Woodburn *v.* Woodburn, 123 Ill. 608, 14 N. E. 58, 16 N. E. 209.

New Mexico.— Santa Fé Pac. R. Co. *v.* Bossut, (N. M. 1900) 62 Pac. 977.

New York.— Atty.-Gen. *v.* North America L. Ins. Co., 77 N. Y. 297, 6 Abb. N. Cas. (N. Y.) 293 [*overruling* People *v.* North America L. Ins. Co., 15 Hun (N. Y.) 18]; Locke *v.* Mabbett, 3 Abb. Dec. (N. Y.) 68.

North Carolina.— Loven *v.* Parson, 127 N. C. 301, 37 S. E. 271 [*distinguishing* Clark *v.* Deloach Mills Mfg. Co., 110 N. C. 111, 14 S. E. 518].

Pennsylvania.— Hessel *v.* Fritz, 124 Pa. St. 229, 23 Wkly. Notes Cas. (Pa.) 299, 16 Atl. 853.

See 2 Cent. Dig. tit. "Appeal and Error," § 947 *et seq.*

Parties aggrieved within this rule are garnishees (Sheldon *v.* Hinton, 6 Ill. App. 216; Santa Fé Pac. R. Co. *v.* Bossut, (N. M. 1900) 62 Pac. 977), and persons not parties to the action, who specially appear for the purpose of appealing from a judgment rendered against them (Loven *v.* Parson, 127 N. C. 301, 37 S. E. 271 [*distinguishing* Clark *v.* Deloach Mills Mfg. Co., 110 N. C. 111, 14 S. E. 518]).

72. *Alabama.*— Scholze *v.* Steiner, 100 Ala. 148, 14 So. 552.

Kentucky.— Wilson *v.* Percival, 1 Dana (Ky.) 419.

Louisiana.—State *v.* Echeveria, 33 La. Ann. 709; State *v.* Miltenberger, 33 La. Ann. 263.

Maine.— Bridgton *v.* Bennett, 23 Me. 420.

New Jersey.— McIntyre *v.* Easton, etc., R. Co., 26 N. J. Eq. 425.

United States.—*Ex p.* South, etc., Alabama R. Co., 95 U. S. 221, 24 L. ed. 355.

See 2 Cent. Dig. tit. "Appeal and Error," § 947 *et seq.*

Decree affecting rights of defendants inter se.— A decree may be made determining the rights of co-defendants in a controversy between themselves, in which complainant has no interest; and, it seems, the party aggrieved may appeal from such decree. Vanderveer *v.* Holcomb, 17 N. J. Eq. 547. And the same is true in any action, under the reformed procedure. Clark's Code Civ. Proc. N. C. (1900), pp. 570–572, 733. But in an action of ejectment, where all that is claimed is recovered, one lessor of plaintiff cannot bring a writ of error against another because more was recovered on the demise of the latter, and less on that of the former, than should have been. The rights of each can only be determined in a suit between themselves. Fortune *v.* Center, 2 Ohio St. 537. So, an order of the court, directing a verdict in favor of one of several joint tort-feasors sued together, is not the subject of exception by the other defendants when, by the pleadings, no question is raised among themselves of the liability of such defendant. Warren *v.* Boston, etc., R. Co., 163 Mass. 484, 40 N. E. 895.

73. Ely *v* Frisbie, 17 Cal. 250; McFarland *v.* Pierce, 151 Ind. 546, 45 N. E. 706, 47 N. E. 1; Briard *v.* Goodale, 86 Me. 100, 29 Atl. 946, 41 Am. St. Rep. 526; Veazie Bank *v.* Young, 53 Me. 555; Deering *v.* Adams, 34 Me. 41;

d. Deprivation of Right[74]— (i) *Absence from State.* The fact that an appellant has resided out of the state several years is no ground for denying him the right to appeal from a judgment rendered against him.[75]

(ii) *Contempt of Court.* So, where an appeal or writ of error is a matter of right, the party aggrieved by a judgment or decree is not deprived of the privilege of having it reviewed by the fact that he is in contempt of court.[76]

(iii) *Denial of Interest.* In certain actions relating to real property, a person made defendant will not be heard to complain of a decree affecting merely the land, when he has, by his answer, disclaimed any interest therein.[77]

(iv) *Failure of Co-Party to Appeal.* A defendant who is injured by a judgment against a co-defendant may appeal therefrom, although the defendant against whom the judgment is rendered does not do so.[78]

State *v.* Talty, 139 Mo. 379, 40 S. W. 942. See also 2 Cent. Dig. tit. "Appeal and Error," § 947 *et seq.*

The test in determining who is the party aggrieved is found in the question: "Would the party have had the thing if the erroneous judgment had not been given?" If yes, then he is the party aggrieved. But his right to do the thing must be immediate, and not the remote consequence of the judgment had it been differently given. Adams *v.* Woods, 8 Cal. 306. If, in his pleading, a party states a valid cause of action, he may appeal from a judgment therein against him, whether he has a valid cause of action, sustainable by proof, or not. Bowlus *v.* Shanabarger, 19 Ohio Cir. Ct. 137, 10 Ohio Cir. Dec. 167.

74. Failure to give security.— Although a party against whom judgment is rendered be unable to give security to prevent its execution, he may appeal, if he judge it for his interest, to prevent the decision from passing into *rem judicatam.* Hyde *v.* Jenkins, 6 La. 427.

Failure to file exceptions to a master's report is no ground for dismissing the appeal of one of two co-administrators from a final decree. French *v.* Peters, (Mass. 1901) 59 N. E. 449, construing the Massachusetts statute.

Fault of co-appellant.— Where the surety on an injunction bond, who has neither appeared nor answered, has not been notified of the judgment, his right to appeal is not affected by defects in the transcript occurring through the fault of the other appellant. Verges *v.* Gonzales, 33 La. Ann. 410.

Fault of public officer.— The rule that a party having the right of appeal cannot be deprived thereof by the wilful or accidental acts of public officers applies to an appeal by a taxpayer from an audit of township accounts. Plains Tp. Audit, 15 Pa. Co. Ct. 408, 7 Kulp (Pa.) 406.

75. Ricketson *v.* Torres, 23 Cal. 636; Fine *v.* Pitner, 1 Overt. (Tenn.) 299, holding that an absent party may appeal by attorney. And see 2 Cent. Dig. tit. "Appeal and Error," § 901 *et seq.*

Fugitive from justice.— Nor does the fact that a party is a fugitive from justice affect his right of appeal from a judgment on his recognizance. State *v.* Plazencia, 6 Rob. (La.) 441, 41 Am. Dec. 271. If an appellant escapes from custody pending appeal, the appellate court in its discretion may either dismiss the appeal, or hear and determine the cause, or continue it. State *v.* Cody, 119 N. C. 908, 26 S. E. 252, 56 Am. St. Rep. 692.

76. *Florida.*— Palmer *v.* Palmer, 28 Fla. 295, 9 So. 657.

Illinois.—People *v.* Pendergast, 117 Ill. 588, 6 N. E. 695; People *v.* Horton, 46 Ill. App. 434, failure to pay alimony and counsel fee.

Missouri.— State *v.* Field, 37 Mo. App. 83, assignee for creditors continuing to act after his removal.

Rhode Island.— Hazard *v.* Durant, 11 R. I. 195.

West Virginia.— Ruhl *v.* Ruhl, 24 W. Va. 279, commissioner for sale of land failing to pay over proceeds.

See 2 Cent. Dig. tit. "Appeal and Error," § 902.

77. *California.*— People *v.* Wilson, 26 Cal. 127, an action to recover delinquent taxes assessed against land.

Iowa.— Palmer *v.* Merrill, 70 Iowa 227, 30 N. W. 494, foreclosure of mechanic's lien.

Kansas.— Page *v.* Havens, 9 Kan. App. 888, 60 Pac. 1096, foreclosure of mortgage.

Nebraska.— Myers *v.* Mahoney, 43 Nebr. 208, 61 N. W. 580, foreclosure of mortgage.

Wyoming.— Hinton *v.* Winsor, 2 Wyo. 206, foreclosure of mortgage.

United States.— Brigham City *v.* Toltec Ranch Co., 101 Fed. 85, 41 C. C. A. 222, an ejectment suit.

78. McDaniel *v.* Correll, 19 Ill. 226, 68 Am. Dec. 587 (holding that, where the proceedings in a suit to set aside a will are irregular as to some of the parties, an appeal will lie, from the decree for such irregularities, by the other parties as to whom such proceedings were regular, though the parties as to whom they were irregular do not complain); French *v.* Peters, (Mass. 1901) 59 N. E. 449. So, where the owner of property and several lien-claimants are defendants to an action, the fact that the owner does not appeal from an erroneous judgment does not prevent the lien-claimants from doing so if they are aggrieved thereby. Murray *v.* Guse, 10 Wash. 25, 38 Pac. 753.

Failure to join in appeal.— Where co-defendants answer separately, basing their defense upon independent grounds, and judgment goes against all, a separate appeal by one defendant does not affect the right of the

2. Application to Particular Litigants — a. Persons in Individual Capacity — (i) *Claimants of Property.*[79] A claimant who is permitted to appear in a suit and maintain his title to the property involved is to be regarded as a party, and is entitled to appeal.[80] But it is generally held that one who is not a party to a suit, but who claims the property by title paramount, and whose title would not be affected by the decree, has no appealable interest therein.[81] If two claimants interplead to recover the possession of money paid into court by a third person, and the money is awarded to one of them, the other may appeal from such judgment although he is not named therein.[82]

(ii) *Creditors of Defendant.* A judgment creditor of a defendant against whom a judgment is rendered, not being a party to the action, cannot appeal or sue out a writ of error;[83] but where the creditor has been made a party[84] or a quasi-party to the action or proceeding this rule does not apply.[85]

other defendants to subsequently appeal from the judgment as to them. State *v.* King, 6 S. D. 297, 60 N. W. 75.

Failure to join in appeal to intermediate court.— One who has not taken or joined in an appeal to an intermediate court cannot appeal from the decision of such intermediate court. Jackson *v.* Hosmer, 14 Mich. 88.

79. See 2 Cent. Dig. tit. "Appeal and Error," § 929.

80. Jones *v.* Calloway, 56 Ala. 46; Bass *v.* Fontleroy, 11 Tex. 698; Hutchinson *v.* Bigelow, 23 Vt. 504; and see also Clark's Code Civ. Proc. N. C. (1900), § 547.

81. Raleigh *v.* Rogers, 25 N. J. Eq. 506; Swackhamer *v.* Kline, 25 N. J. Eq. 503; Hemmenway *v.* Corey, 16 Vt. 225. But there are decisions to the contrary. Herd *v.* Cist, 14 Ky. L. Rep. 644, 20 S. W. 1035; Pillot *v.* Cooper, 7 La. Ann. 656.

82. Brooks *v.* Doxey, 72 Ind. 327; and see State *v.* Rightor, 35 La. Ann. 515.

Extent of rule.— The party instituting the interpleader, however, has no interest in the determination of the question of ownership, and cannot appeal from the judgment (Crawford *v.* Shriver, 139 Pa. St. 239, 21 Atl. 518) unless his personal interests are affected by the decree. If they are he may appeal; and the fact that one of the parties called on by the bill to litigate their rights does not appeal does not impair or destroy the right of complainants in the bill of interpleader (Cooper *v.* Jones, 24 Ga. 473).

83. *Alabama.*— Roden *v.* Jasper, 122 Ala. 374, 25 So. 198.

Illinois.— McIntyre *v.* Sholty, 139 Ill. 171, 29 N. E. 43; India-Rubber Co. *v.* C. J. Smith, etc., Co., 75 Ill. App. 222.

Iowa.— Phillips *v.* Shelton, 6 Iowa 545.

Louisiana.— But see Payne *v.* Ferguson, 23 La. Ann. 581; State *v.* Judge, 13 La. Ann. 199; Livingston *v.* White, 2 La. Ann. 902; Compton *v.* Compton, 6 Rob. (La.) 154; Rutherford *v.* Cole, 5 Mart. (La.) 217 — for the rule in this state.

New Jersey.— Sherer *v.* Collins, 17 N. J. L. 181; Black *v.* Kirgan, 15 N. J. L. 45, 28 Am. Dec. 394.

Pennsylvania.— Hauer's Appeal, 5 Watts & S. (Pa.) 473.

South Dakota.— See also Gales *v.* Plankinton Bank, 13 S. D. 622, 84 N. W. 192.

See 2 Cent. Dig. tit. "Appeal and Error," § 930.

Suspending right to execution.— Where plaintiff obtains judgment against a company whose property is in the hands of a receiver, the fact that the court suspends plaintiff's right to an execution, and requires the judgment to be certified to the court having control of the receivership, is not ground for appeal by defendant. International, etc., R. Co. *v.* McRae, 82 Tex. 614, 18 S. W. 672, 27 Am. St. Rep. 926.

84. *Louisiana.*— Dalton *v.* Viosca, 22 La. Ann. 251, holding that a plaintiff in a rule, by alleging that a third party is an attaching creditor, and making such party a defendant in the rule, is estopped from denying that he is a creditor, and such creditor, therefore, can appeal from the judgment on the rule.

New Hampshire.— Barker *v.* Barker, 39 N. H. 408.

New York.—Atty.-Gen. *v.* North America L. Ins. Co., 77 N. Y. 297, 6 Abb. N. Cas. (N. Y.) 293.

Ohio.— Bowlus *v.* Shanabarger, 19 Ohio Cir. Ct. 137, 10 Ohio Cir. Dec. 167, action to set aside a fraudulent conveyance.

Vermont.— Chaffee *v.* Malarkee, 26 Vt. 242, where subsequent attaching creditors came in and defended the suit.

85. Quasi-parties within this rule are creditors, who, in the progress of the settlement of an estate, are required to come in and prove their debts (Pearson *v.* Darrington, 32 Ala. 227); creditors, coming in before a master in chancery, to whom a creditor's bill has been referred to take proofs of all claims against the estate of defendant, having claims disallowed on exceptions to the report (Derrick *v.* Lamar Ins. Co., 74 Ill. 404); and persons interested in the allowance or distribution of funds the control of which is involved in the suit (Zinn *v.* Dzialynski, 14 Fla. 187; Adkins *v.* Baker, 7 Ga. 56; Swift *v.* Martin, 20 Ill. App. 515; Columbia Finance, etc., Co. *v.* Morgan, 19 Ky. L. Rep. 1761, 44 S. W. 389, 628, 45 S. W. 65; Hayward *v.* Graham Book, etc., Co., 59 Mo. App. 453, 1 Mo. App. Rep. 44; Blake *v.* Domestic Mfg. Co., (N. J. 1897) 38 Atl. 241; National Bank *v.* Sprague, 21 N. J. Eq. 458; Harland *v.* Newcombe, 2 Ohio Cir. Ct. 330; Feamster *v.* Withrow, 9

(III) *GARNISHEES.* A garnishee cannot reverse or avoid a judgment on account of mere errors or irregularities in the proceedings in the principal action.[86]

(IV) *INTERVENERS.* One allowed, by order of the court, to intervene in a cause may appeal from the decree.[87] But one whose claim to intervene in a suit has been rejected by the court cannot appeal from the final judgment rendered in the suit;[88] he may, however, immediately appeal from the order or decree dismissing his petition,[89] without waiting for the final decree in the cause.[90]

(V) *PARTNERS.* It has been held that a partner may appeal from an order overruling a motion to quash the garnishment of a debt, due the firm, to satisfy a judgment against the partner individually, although he would be individually benefited by such order.[91]

(VI) *PRIVATE CORPORATIONS.* A corporation, a party defendant to an action, may appeal from any judgment, order, or decree by which its corporate interests are aggrieved,[92] or which is prejudicial to the interests of stock-holders[93] who are not parties to the suit.[94]

W. Va. 296; Williams *v.* Morgan, 111 U. S. 684, 4 S. Ct. 638, 28 L. ed. 559).

Pennsylvania act of June 16, 1836, relating to the distribution of the proceeds of sheriffs' sales, embraces only judgment or lien creditors of defendant in execution. His contract creditors, who have acquired no judgment or lien, are strangers to questions of distribution, and have no right to be admitted or heard, and are not entitled to a writ of error. Smith *v.* Reiff, 20 Pa. St. 364.

The mortgagee of a testatrix, who, without filing pleadings or statement, introduced his mortgage in evidence at the hearing of the petition for distribution, is not entitled to appeal from the decree of distribution in his own name. Matter of Crooks, 125 Cal. 459, 58 Pac. 89.

86. A garnishee has no concern with the merits of the controversy further than to see that there is a judgment which is so far free from invalidity as not to be void.

Georgia.— Exchange Bank *v.* Freeman, 89 Ga. 771, 15 S. E. 693.

Indiana.— Earl *v.* Matheney, 60 Ind. 202.

Louisiana.—Germania Sav. Bank *v.* Peuser, 40 La. Ann. 796, 5 So. 75; Hanna *v.* Lauring, 10 Mart. (La.) 568, 13 Am. Dec. 339.

Maine.— Veazie Bank *v.* Young, 53 Me. 555.

New York.— Hall *v.* Brooks, 89 N. Y. 33.

Texas.— Alamo Ice Co. *v.* Yancey, 66 Tex. 187, 18 S. W. 499.

See 2 Cent. Dig. tit. "Appeal and Error," § 944.

87. Tuttle *v.* Claflin, 88 Fed. 122, 31 C. C. A. 419. See also 2 Cent. Dig. tit. "Appeal and Error," §§ 921, 928, 933.

As to intervention or addition of new parties on appeal see *infra,* VI, E.

88. People *v.* Pfeiffer, 59 Cal. 89; Lorber *v.* Connor, 82 Iowa 739, 47 N. W. 1006; Field *v.* Mathison, 3 Rob. (La.) 38; Shackleford *v.* Gates, 35 Tex. 781. *Contra,* Phelps *v.* Long, 31 N. C. 226.

89. Thornton *v.* Highland Ave., etc., R. Co., 94 Ala. 353, 10 So. 442.

Sureties, whose application to intervene in an action on an undertaking in replevin has been denied, can appeal to the supreme court. Coburn *v.* Smart, 53 Cal. 742.

Where a debt has been assigned by a creditor, and the debtor is summoned as his trustee, and the assignment is disclosed, and the court of common pleas refuses to let the assignee become a party, he may bring the question before the supreme court by a bill of exceptions. Ammidown *v.* Wheelock, 8 Pick. (Mass.) 470.

Where a person was sued as casual ejector, and the court improperly refused him permission to plead, on the ground that he was bound to give a bond, under N. C. Rev. Stat. c. 31, § 51, and thereupon entered judgment by default against him, he was entitled to an appeal. Phelps *v.* Long, 31 N. C. 226.

Where an application is made to a court to appoint a trustee, any person who claims the property alleged to be trust property as his own has a right to appear and become a party, and to resist the appointment, and, if the decree be against him, to appeal. Bass *v.* Fontleroy, 11 Tex. 698.

90. Stich *v.* Dickinson, 38 Cal. 608; Hall *v.* Jack, 32 Md. 253; Keathly *v.* Branch, 84 N. C. 202; Clark's Code Civ. Proc. N. C. (1900), § 189, and cases there cited.

91. Rich *v.* Solari, 6 Mackey (D. C.) 371. But, under the Missouri administration law, a surviving partner cannot appeal from judgment of a county or probate court allowing a demand against the effects of a firm in the hands of the deceased partner's administrator. Asbury *v.* McIntosh, 20 Mo. 278.

As to designation and description of partners see *infra,* VI, G, 3.

92. St. Louis, etc., Coal, etc., Co. *v.* Edwards, 103 Ill. 472; Sherman *v.* Beacon Constr. Co., 58 Hun (N. Y.) 143, 11 N. Y. Suppl. 369, 33 N. Y. St. 881.

93. Republic L. Ins. Co. *v.* Swigert, 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328. But in Dennis *v.* Table Mountain Water Co., 10 Cal. 369, where a decree, rendered in a suit against a corporation, contained a direction for the sale of the interest of individuals not parties to the suit, it was held that the corporation could not appeal from the decree for error in embracing individuals. See 2 Cent. Dig. tit. "Appeal and Error," §§ 920, 952.

94. Where the stock-holders are parties to the action the corporation has no right to appeal from a judgment by which it is not ag-

(VII) *PURCHASERS AT JUDICIAL SALE.* A purchaser at a judicial sale who complies with the terms thereof has the right to appeal from an order setting aside the sale.[95]

(VIII) *PURCHASERS PENDENTE LITE.* Although it has been held that the purchase of land pending suit concerning it gives to the purchaser such a privity of interest as will authorize him to prosecute a writ of error,[96] it is generally held that such purchaser is a stranger to the record and cannot appeal merely because he has succeeded to the interests of the party against whom judgment is entered.[97]

(IX) *STOCK-HOLDERS.* An individual stock-holder cannot prosecute an appeal from a judgment against the corporation by which he is only indirectly affected.[98]

grieved, but which is merely prejudicial to stock-holders. Board of Liquidation *v.* New Orleans Waterworks Co., 39 La. Ann. 202, 1 So. 445.

95. *California.*— Boland's Estate, 55 Cal. 310.

Illinois.— Comstock *v.* Purple, 49 Ill. 158.

Mississippi.— Flournoy *v.* Smith, 3 How. (Miss.) 62.

Missouri.— Wauchope *v.* McCormick, 158 Mo. 660, 59 S. W. 970.

Nebraska.—Penn Mut. L. Ins. Co. *v.* Creighton Theatre Bldg. Co., 51 Nebr. 659, 71 N. W. 279.

New Jersey.— Conover *v.* Walling, 15 N. J. Eq. 167.

New York.— Mortimer *v.* Nash, 17 Abb. Pr. (N. Y.) 229 note; Delaplaine *v.* Lawrence, 10 Paige (N. Y.) 602.

North Carolina.— Murphrey *v.* Wood, 47 N. C. 63.

Texas.— Davis *v.* Stewart, 4 Tex. 223.

Virginia.—Todd *v.* Gallego Mills Mfg. Co., 84 Va. 586, 5 S. E. 676.

Washington.— Wood *v.* Seattle, (Wash. 1900) 62 Pac. 135.

United States.— Kneeland *v.* American L. & T. Co., 136 U. S. 89, 10 S. Ct. 950, 34 L. ed. 379; Blossom *v.* Milwaukee, etc., R. Co., 1 Wall. (U. S.) 655, 17 L. ed. 673; Magann *v.* Segal, 92 Fed. 252, 34 C. C. A. 323.

See 2 Cent. Dig. tit. "Appeal and Error," § 931.

Assignee of a purchaser at chancery sale does not become a party, so as to entitle him to appeal from a subsequent decree affecting his rights, unless such assignment is reported by the master or authorized by the court. Newland *v.* Gaines, 1 Heisk. (Tenn.) 720.

Purchaser who refused to comply with the terms of sale, and at a resale attempted to bid through an agent in disregard of the terms of the sale, has no standing to appeal from a decree confirming the sale to another person. Hildreth *v.* Turner, 89 Va. 858, 17 S. E. 471.

Extent and limits of rule.— It has also been held that a purchaser may appeal from an order confirming the sale over his objections. Matter of Pearsons, 98 Cal. 603, 33 Pac. 451. But he cannot bring a writ of error to reverse the judgment on which the sale was made. U. S. Bank *v.* White, Wright (Ohio) 574.

A purchaser at a sale under an order of the county court has no right of appeal from such order, although it should be obtained by an improper party, unless such purchaser should be a party required by statute to be made a party to such proceeding. Levy *v.* Riley, 4 Oreg. 392.

96. Mosier *v.* Flanner-Miller Lumber Co., 66 Ill. App. 630.

An assignee of a mortgage on land, who sues to restrain a mechanic's lienor from removing a building erected thereon by the mortgagor, has such an interest as entitles him to appeal from the judgment rendered against him on the merits, though he has obtained judgment of foreclosure, bid in the land for the full amount thereof, received a certificate of purchase, and the order of sale, as to him, has been returned fully satisfied. Logan *v.* Sult, 152 Ind. 434, 53 N. E. 456.

In California, under Code Civ. Proc. (1897), § 385, if real property is conveyed during the pendency of litigation in regard to it, the grantee may thereunder continue to prosecute or defend the action in the name of his grantor, or may cause himself to be substituted in his place. Hence a grantee may appeal from an order refusing relief from a judgment taken against the grantor by default, and an objection that there was no judgment as to the grantee is untenable. Malone *v.* Big Flat Gravel Min. Co., 93 Cal. 384, 28 Pac. 1063.

In Kentucky, it seems that the writ of error must be brought in the name of the original party, although the purchaser need not show any express power. Marr *v.* Hanna, 7 J. J. Marsh. (Ky.) 642, 23 Am. Dec. 449; Mason *v.* Peck, 7 J. J. Marsh. (Ky.) 300.

97. *Florida.*—State *v.* Florida Cent. R. Co., 15 Fla. 690.

Illinois.— Louisville, etc., Consol. R. Co. *v.* Surwald, 150 Ill. 394, 37 N. E. 909.

Massachusetts.— Leonard *v.* Bryant, 11 Metc. (Mass.) 370.

Texas.— Ferris *v.* Streeper, 59 Tex. 312; Clarke *v.* Koehler, 32 Tex. 679.

West Virginia.— Stout *v.* Philippi Mfg., etc., Co., 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843.

See 2 Cent. Dig. tit. "Appeal and Error," § 927.

As to right of vendor *pendente lite* to appeal see *supra*, IV, A, 1, b. (V). (F).

98. State *v.* Florida Cent. R. Co., 15 Fla. 690; McFarland *v.* Pierce, 151 Ind. 546, 45 N. E. 706, 47 N. E. 1; People *v.* Commercial Bank, 6 N. Y. App. Div. 194, 39 N. Y. Suppl.

(x) *Sureties.* The sureties on an official bond become parties to the record by a judgment against the principal on the bond, and may appeal from such judgment.[99]

b. Persons in Representative Capacity — (i) *Assignees in Insolvency.*[1] An assignee of an insolvent debtor may maintain a writ of error to reverse a judgment rendered against the bankrupt,[2] or to reverse an order removing the assignee and directing him to turn over the assets to a successor.[3] But it has been held

1000; Dunbar *v.* American Casket Co., 19 Ohio Cir. Ct. 585. See also 2 Cent. Dig. tit. "Appeal and Error," §§ 920, 952.

But see State *v.* Judge, 31 La. Ann. 823 (holding that a stock-holder may suspensively appeal from an interlocutory decree ordering a sale of corporate property to be made by persons without legal power to sell, irreparable injury being threatened); and Henry *v.* Jeanes, 47 Ohio St. 116, 24 N. E. 1077 (holding that a judgment ordering the cancellation of the lease of a railroad, such lease being executed by its owner to another company, is a judgment directly affecting the stock-holders of the lessor; and that when the company refuses to appeal from the decree, any one of the stock-holders, on behalf of himself and other stock-holders, may appeal therefrom under the provisions of Ohio Rev. Stat. § 5226, as a "person directly affected" thereby, when there is reason to believe that the officers of the company have an interest in common with the plaintiffs in the case, and that in refusing, or neglecting, to appeal, they are acting in, and controlled by, that interest). And it has been held in Maine, under an act making the private property of stock-holders in a bank liable to attachment or levy in a suit by a holder of its bills, that, where property of a stock-holder has been levied on under a judgment against the bank, the seizure makes him privy in law to the judgment, though he was not a party to the action, and he may maintain a writ of error for its reversal without joining any other stock-holders. Rankin *v.* Sherwood, 33 Me. 509; Merrill *v.* Suffolk Bank, 31 Me. 57, 50 Am. Dec. 649.

99. The reason assigned for this is that, in the absence of fraud or collusion, a judgment against a principal is conclusive as against his surety.

Illinois.— Weer *v.* Gand, 88 Ill. 490, surety on guardian's bond.

Kentucky.— Boyd County *v.* Ross, 95 Ky. 167, 15 Ky. L. Rep. 520, 25 S. W. 8, 44 Am. St. Rep. 210, surety on sheriff's county levy-bond.

Massachusetts.— Farrar *v.* Parker, 3 Allen (Mass.) 556, surety on bond of deceased insolvent guardian.

Mississippi.— Patterson *v.* Gathings, 48 Miss. 639, surety on forthcoming bond.

Missouri.— Nolan *v.* Johns, 108 Mo. 431, 18 S. W. 1107; Loehner *v.* Hill, 19 Mo. App. 141 — sureties on injunction bonds.

Pennsylvania.— Garber *v.* Com., 7 Pa. St. 265, surety on administrator's bond.

Rhode Island.— Belcher *v.* Branch, 11 R. I. 226, surety on administrator's bond.

See 2 Cent. Dig. tit. "Appeal and Error," § 944.

Exceptions and limits to rule.— A surety upon a guardian's bond has no right of appeal from the decree of a judge of probate allowing a guardianship account filed by the administratrix of the deceased guardian. Tuxbury's Appeal, 67 Me. 267; Woodbury *v.* Hammond, 54 Me. 332. Sureties on an injunction bond are not parties to the judgment in the original suit, and have no right to appeal therefrom. St. Louis Zinc Co. *v.* Hesselmeyer, 50 Mo. 180. They have no appealable interest in a judgment dismissing the case for want of jurisdiction (Lake Bisteneau Lumber Co. *v.* Mimms, 49 La. Ann. 1294, 22 So. 735), or in an order dissolving the injunction, where no damages were assessed against them (Richardson *v.* Chevalley, 26 La. Ann. 551). A surety on a replevin undertaking who, after judgment for defendant in that action, successfully defends in another state a suit upon the undertaking, on the ground that the erroneous entry of judgment in the replevin suit discharged him from liability on his undertaking, cannot afterward contest a motion by defendant for the amendment of the judgment in the replevin suit by appeal from the order granting it. Berthold *v.* Fox, 21 Minn. 51.

But *compare* Hotchkiss *v.* Platt, 7 Hun (N. Y.) 56, which was a reference to ascertain damages sustained by defendant in consequence of an injunction, wherein it was held that, the sureties on the injunction bond having appeared before the referee and opposed the confirmation of the report, they might appeal from the order confirming the report although they were not regularly made parties to the action by service of the proper notice.

1. See 2 Cent. Dig. tit. "Appeal and Error," § 910.

As to designation and description of persons in representative capacity see *infra*, VI, G, 4.

2. Johnson *v.* Thaxter, 12 Gray (Mass.) 198; Day *v.* Laflin, 6 Metc. (Mass.) 280. *Contra*, Johnson *v.* Louisville City Nat. Bank, (Ky. 1900) 56 S. W. 710.

3. Teackle *v.* Crosby, 14 Md. 14; State *v.* Field, 37 Mo. App. 83.

A provisional syndic may appeal from a judgment denying him the right to render his account through the channel of the court, after public notification to all concerned, instead of presenting it directly to the definitive syndic. Wood *v.* His Creditors, 35 La. Ann. 257.

that he has no standing, either in his own right as assignee, or on behalf of the general creditors, to appeal from a decree distributing the fund.[4]

(II) *Attorneys.* An attorney has no right, in his own name and on his own motion, to appeal from an order or judgment of the court below affecting the interests of his client.[5]

(III) *Guardians and Next Friends.* His guardian,[6] a guardian *ad litem*,[7] or his next friend when he has no guardian or guardian *ad litem*, may appeal on behalf of an infant whenever it is necessary to protect the infant's interests.[8]

(IV) *Heirs.* It has been held that the heirs at law of a decedent have an appealable interest in a judgment or decree affecting the possession or title of real estate belonging to such decedent;[9] but the heirs of a decedent have no

4. Graff's Estate, 146 Pa. St. 415, 23 Atl. 397; Mellon's Appeal, 32 Pa. St. 121. *Compare* Salmon *v.* Pierson, 8 Md. 297, wherein it was held that a trustee in insolvency, being the representative of the creditors, may appeal where the decision affects the interests of all the creditors, or when he has an interest, as trustee, in reference to his allowance. But a conventional trustee, appointed to sell property and distribute the proceeds among creditors, has no right of appeal from an order fixing the amount of a particular claim preferred by a creditor. McColgan *v.* McLaughlin, 58 Md. 499; Frey *v.* Shrewsbury Sav. Inst., 58 Md. 151.

In a controversy between creditors, in which the syndic is without interest, the latter cannot appeal. Beer *v.* Their Creditors, 12 La. Ann. 774. So, the assignee of an insolvent estate, who was the losing party in the trial before a referee, of certain issues between him and the creditors, could not complain of a judgment whereby the costs of reference were divided equally between him and such creditors, as he could have been adjudged to pay all such costs. Perdew *v.* Coffin, 11 Colo. App. 157, 52 Pac. 747.

5. Cook *v.* Adams, 27 Ala. 294; Riddle *v.* Hanna, 25 Ala. 484; Matter of Blythe, 103 Cal. 350, 37 Pac. 392; National Park Bank *v.* Lanahan, 60 Md. 477; Besancon *v.* Brownson, 39 Mich. 388. See also 2 Cent. Dig. tit. "Appeal and Error," § 909.

But *compare* Green *v.* Stringfellow, 50 Ga. 486, holding that where an instrument is produced, signed by plaintiff in error, stating that the case was carried to the supreme court without authority from him, and consenting to its dismissal, his counsel will not be permitted to proceed with the litigation for the recovery of fees except upon showing that the case had been settled by defendants in error with notice of the contract under which the counsel was to be compensated.

An attorney appointed by the court to represent unknown heirs has authority to prosecute a writ of error. Russell *v.* Randolph, 11 Tex. 460.

A person appearing as attorney in fact for certain creditors of the intestate, and opposing the grant of administration, may appeal, though not interested in any other respect in the subject of controversy. Bohn *v.* Sheppard, 4 Munf. (Va.) 403.

Where counsel fees in divorce cases are involved.— Under the New York code the solicitor of a petitioner for divorce, though not a party to the action, may appeal from an order refusing him a counsel fee, upon a discontinuance of the proceedings (Louden *v.* Louden, 65 How. Pr. (N. Y.) 411); but in other jurisdictions it has been held that the provision of the divorce act concerning the wife's solicitor's fees is for the wife's benefit, and, if she refuses to appeal from an order disallowing such fees, her solicitor has no standing to do so (Steger *v.* Steger, 165 Ill. 579, 46 N. E. 888; Pereyra's Appeal, 126 Pa. St. 220, 24 Wkly. Notes Cas. (Pa.) 42, 17 Atl. 602); although, in Illinois, it seems that the solicitor may bring a writ of error (Anderson *v.* Steger, 173 Ill. 112, 50 N. E. 665).

6. Matter of Johnson, 87 Iowa 130, 54 N. W. 69 (guardian appointed by will of adopting parent); Baumgarden's Succession, 35 La. Ann. 675 (tutor of minor).

7. Thomas *v.* Safe-Deposit, etc., Co., 73 Md. 451, 21 Atl. 367, 28 Atl. 3; Loftis *v.* Loftis, 94 Tenn. 232, 28 S. W. 1091.

Curator ad hoc.— Under the Louisiana code a curator *ad hoc*, appointed to defend a nonresident, has the right of appeal. Langley *v.* Burrows, 15 La. Ann. 392.

8. Cook *v.* Adams, 27 Ala. 294; Riddle *v.* Hanna, 25 Ala. 484. See also 2 Cent. Dig. tit. "Appeal and Error," §§ 912, 941.

Next friend has no standing to prosecute an appeal where the interests of the minor are protected by a guardian or guardian *ad litem*. Lawless *v.* Reagan, 128 Mass. 592; E. B. *v.* E. C. B., 28 Barb. (N. Y.) 299.

Next friend of insane person.— The next friend of an insane petitioner may appeal from a judgment of the circuit court remanding petitioner to an insane asylum, and may prosecute the appeal until a guardian *ad litem* is appointed. King *v.* McLean Asylum, 64 Fed. 325, 21 U. S. App. 407, 12 C. C. A. 139, 26 L. R. A. 784. But an uncle and next friend of a *non compos* cannot, as such, sustain an appeal from the probate court against the guardian without showing himself to be heir, next of kin, or creditor. Penniman *v.* French, 2 Mass. 140.

9. *Illinois.*—Bower *v.* Grayville, etc., R. Co., 92 Ill. 223.

Kentucky.— Callaghan *v.* Carr, 2 Litt. (Ky.) 153.

Louisiana.— Boutté *v.* Boutté, 30 La. Ann. 177.

appealable interest in a mere personal judgment or decree against the estate of their intestate ancestor.[10]

(v) *Personal Representatives.*[11] An executor or administrator may appeal[12] or bring error from a judgment against the decedent, in an action brought by or against the latter, in the same manner as the decedent might have done.[13] An executor has an appealable interest in an order of court affecting the property and the trusts of the testator's will.[14] But an executor or administrator cannot appeal from a decree affecting the title to land which has vested in the heirs,[15] nor can an executor or administrator appeal from an order of distribution where the court had jurisdiction.[16] But an executor or administrator may appeal from a judgment rendered in an action brought by him;[17]

Maine.— Bates *v.* Sargent, 51 Me. 423, construing Me. Rev. Stat. c. 71, § 17.

Wisconsin.— Betts *v.* Shotton, 27 Wis. 667.

10. Andat *v.* Gilly, 12 Rob. (La.) 323. See also 2 Cent. Dig. tit. "Appeal and Error," § 946.

And this rule applies although the estate be insolvent and real property will have to be sold to create assets to discharge the judgment appealed from. McIntyre *v.* Sholty, 139 Ill. 171, 29 N. E. 43.

In a proceeding to determine heirship, parties who do not except to or attack a finding that they are not akin to decedent are not parties, within Cal. Code Civ. Proc., §§ 657, 938, providing that such party may appeal in certain cases. Blythe *v.* Ayres, 102 Cal. 254, 36 Pac. 522, 588; Blythe *v.* Savage, (Cal. 1894) 36 Pac. 844.

One made a party to a creditors' bill against an administrator and heirs, who makes defense, and against whom a decree is rendered as an heir, may appeal therefrom although he was not designated as an heir in the bill. White *v.* Kennedy, 23 W. Va. 221.

11. See 2 Cent. Dig. tit. "Appeal and Error," §§ 911, 941.

As to revival on death of party see *infra*, VI, D.

12. Davies *v.* Nichols, 52 Ark. 554, 13 S. W. 129; *Ex p.* Trapnall, 29 Ark. 60; O'Connor *v.* O'Connor, 45 W. Va. 354, 32 S. E. 276. *Contra*, Goldschmid *v.* Meline, 86 Md. 370, 38 Atl. 783.

Executor must be made a party, hence the mere filing of letters testamentary, after a final judgment against her testator, does not enable an executrix to prosecute an appeal from the judgment. State *v.* Florida Cent. R. Co., 15 Fla. 690.

Executor of residuary legatee.— An appeal from a decree of the judge of probate, allowing the account of an executor, should be made by the executor or administrator of a residuary legatee, where such a one is named in the will, and not by one entitled to a distributive share of the estate of such residuary legatee. Downing *v.* Porter, 9 Mass. 386.

Executor or administrator whose letters have been revoked cannot appeal from a judgment rendered in an action wherein he was a party when such revocation took place. Edney *v.* Baum, 53 Nebr. 116, 73 N. W. 454.

One who has qualified in another state as executrix of a person against whom a judgment by default had been rendered in New York before his death, but which executrix has not so qualified in the latter state, cannot appeal from an order denying a motion to reopen the judgment. Philipe *v.* Levy, 15 N. Y. Civ. Proc. 68, 56 N. Y. Super. Ct. 606, 3 N. Y. Suppl. 664, 16 N. Y. St. 889.

13. Headon *v.* Turner, 6 Ala. 66; Webster *v.* Hastings, 56 Nebr. 245, 76 N. W. 565. *Compare*, also, generally, Abatement and Revival, III.

14. Levy *v.* Williams, 9 Rich. (S. C.) 153; *In re* Luscombe, (Wis. 1901) 85 N. W. 341.

Decree construing will.— An executor or trustee, representing the interests of persons who are otherwise unrepresented in the cause, is entitled to appeal from a decree construing a will which injuriously affects those interests. Green *v.* Blackwell, 32 N. J. Eq. 768. So, an executor who is directed to administer an estate in conformity to a will may appeal from a judgment recognizing the rights of the survivor in community. McKenna's Succession, 23 La. Ann. 369.

Order requiring executor to redeem land.— Executors of an estate may appeal from an order requiring them to redeem decedent's land from a foreclosure sale. Matter of Heydenfeldt, 117 Cal. 551, 49 Pac. 713.

15. Bower *v.* Grayville, etc., R. Co., 92 Ill. 223; and to the same effect see Turner *v.* Waters, 14 Md. 62.

Order directing sale to pay debts.— An administrator cannot appeal from an order directing him to institute proceedings for the sale of the land of his intestate in order to pay debts, since such administrator has no interest in the matter. McCollister *v.* Greene County Nat. Bank, 171 Ill. 608, 49 N. E. 734.

When there is a deficiency of assets.— The executors of an estate have such interest that they can appeal from a judgment for foreclosure of a mortgage given by testatrix, providing that judgment for deficiency be rendered against the heirs and devisees to the extent of the estate which shall have descended or been devised to them. Reinig *v.* Hecht, 58 Wis. 212, 16 N. W. 548.

16. Matter of Williams, 122 Cal. 76, 54 Pac. 386; Gosslin *v.* Her Legitimate Heirs, 2 La. 141; Chew's Appeal, 3 Grant (Pa.) 208.

But, when such order is prematurely made, it seems he may appeal therefrom. Matter of Smith, 117 Cal. 505, 49 Pac. 456.

17. Bliss *v.* Fosdick, 76 Hun (N. Y.) 508, 27 N. Y. Suppl. 1053, 58 N. Y. St. 498 [*reversing* 24 N. Y. Suppl. 939].

and an administrator who is aggrieved,[18] by an order fixing his compensation at less than he was entitled to, may appeal.[19]

(VI) *Receivers.*[20] The receiver of a corporation may appeal or sue out a writ of error from a judgment in a suit brought by[21] or against him.[22] But it has been held that a receiver, appointed pending an action against the party for whose effects he was appointed, cannot enter an appeal in the action in his own name, as receiver, without first having himself made a party thereto,[23] nor can he appeal from an order removing him or vacating his appointment unless he is a party to the action in which he was appointed.[24] A trustee or receiver, appointed by a court of equity to sell real estate, cannot appeal from an order setting aside a sale which he had reported for ratification,[25] nor can a receiver appeal from an order for the payment or distribution of the funds in his hands,[26] nor from a decree which settles his accounts and directs him to pay a balance into court,[27] unless the decree denies him the right to compensation for his services, or fixes the amount at less than it should be.[28]

(VII) *Trustees of Property.* It has been held that a trustee of property has such concern in a judgment or decree affecting the interest of his *cestuis que trustent* as entitles him, in behalf of the *cestius que trustent*, to appeal therefrom.[29]

So, an administrator de bonis non may bring a writ of error on a judgment against the previous executor or administrator. Stoutz *v.* Huger, 107 Ala. 248, 18 So. 126; Dale *v.* Roosevelt, 8 Cow. (N. Y.) 333. *Contra,* Grout *v.* Chamberlin, 4 Mass. 611.

18. **Unless aggrieved** by an order or decree, an administrator cannot appeal therefrom. Decoux's Succession, 5 La. Ann. 140 (a decree in his favor appointing him administrator, which could be avoided by refusal to accept appointment); Sherer *v.* Sherer, 93 Me. 210, 44 Atl. 899, 74 Am. St. Rep. 339. See also, generally, *supra,* IV, A, 1, c.

19. Parker *v.* Gwynn, 4 Md. 423.

20. See 2 Cent. Dig. tit. "Appeal and Error," §§ 910, 940.

21. Rust *v.* United Waterworks Co., 70 Fed. 129, 36 U. S. App. 167, 17 C. C. A. 16.

22. Thom *v.* Pittard, 62 Fed. 232, 8 U. S. App. 597, 10 C. C. A. 352.

A receiver of a firm which has been dissolved by decree may appeal from a judgment against one or more members of the firm, though no judgment is entered against him, the only disposition of defenses interposed by him being by rulings made during the trial. Honegger *v.* Wettstein, 47 N. Y. Super. Ct. 125.

23. Dupree *v.* Drake, 94 Ga. 456, 19 S. E. 242.

Authority of court necessary.— A receiver, being the mere servant or agent of the court, cannot appeal from an order in the action unless authorized so to do by the court. McKinnon *v.* Wolfenden, 78 Wis. 237, 47 N. W. 436.

In supplementary proceedings a receiver may not be substituted for the debtor whose estate he represents, in an action against the latter, against plaintiff's will. He may not, therefore, appeal, under N. Y. Code Civ. Proc. § 1296, providing that one aggrieved, who is entitled to be substituted, may appeal. Ross *v.* Wigg, 100 N. Y. 243, 3 N. E. 180.

24. *In re* Premier Cycle Mfg. Co., 70 Conn. 473, 39 Atl. 800; L'Engle *v.* Florida Cent. R. Co., 14 Fla. 266; Ellicott *v.* Warford, 4 Md. 80; Conner *v.* Belden, 8 Daly (N. Y.) 257.

A clerk and master in equity is no such party to a suit pending in his court as to entitle him, under N. C. Rev. Code, c. 4, § 23, to appeal from an interlocutory order appointing another than himself a commissioner to sell real estate. Green *v.* Harrison, 59 N. C. 253, 82 Am. Dec. 415.

25. Hallam *v.* Oppenheimer, 3 App. Cas. (D. C.) 329; Haskie *v.* James, 75 Md. 568, 23 Atl. 1030; Lurman *v.* Hubner, 75 Md. 268, 23 Atl. 646.

26. The receiver, being the agent of the court, is not, ordinarily, in the absence of statute, authorized to appeal from a decree of the court directing the application or distribution of the funds in his hands. Battery Park Bank *v.* Western Carolina Bank, 127 N. C. 432, 37 S. E. 461. But see, *contra,* Ellicott *v.* Ellicott, 6 Gill & J. (Md.) 35; and People *v.* St. Nicholas Bank, 77 Hun (N. Y.) 159, 28 N. Y. Suppl. 407, 59 N. Y. St. 881, wherein it is said that, by statute in New York, a receiver may appeal from an order directing him to pay out money in his hands to claimants thereof.

27. Dorsey *v.* Sibert, 93 Ala. 312, 9 So. 288; Hinckley *v.* Gilman, etc., R. Co., 94 U. S. 467, 24 L. ed. 166. But *compare* Ruhl *v.* Ruhl, 24 W. Va. 279, wherein it is held that a commissioner to make sale of realty, ordered imprisoned for alleged contempt in failing to pay over money under what was a void decree, is entitled to have the order reviewed. So, where the claimants of a fund, the proceeds of a sale, acquiesce in the decree distributing it, the receiver or trustee appointed to make the sale has no appealable interest. Stewart *v.* Codd, 58 Md. 86; Battery Park Bank *v.* Western Carolina Bank, 127 N. C. 432, 37 S. E. 461.

28. Herndon *v.* Hurter, 19 Fla. 397; Hobart *v.* Hobart, 23 Hun (N. Y.) 484. *Contra,* Fredeldey *v.* Diserens, 26 Ohio St. 312.

29. Woodside *v.* Grafflin, 91 Md. 422, 46 Atl. 968; Ellicott *v.* Ellicott, 6 Gill & J. (Md.) 35; Bockes *v.* Hathorn, 78 N. Y. 222; Hall *v.* Virginia Bank, 14 W. Va. 584.

So too it has been held that a mortgage trustee may appeal from a decree affecting his commissions.[30]

c. States.[31] A state, like an individual, has a right to appeal from a judgment to which it is a party and by which it has been aggrieved;[32] but it cannot appeal from one to which it is not a party.[33]

d. United States.[34] Under the act of congress of March 3, 1887, authorizing suits against the United States, the latter may appeal from any judgment, for any amount, rendered against it.[35]

See 2 Cent. Dig. tit. "Appeal and Error," §§ 913, 942.

A trustee in a railroad mortgage who intervenes, with leave of the court, as a party complainant in a suit by one of the bondholders and certain creditors of the railroad company, claiming superior liens on the mortgaged property, represents all the bondholders, and may appeal from a decree rendered in such suit. Hassall *v.* Wilcox, 115 U. S. 598, 6 S. Ct. 189, 29 L. ed. 504. But where it does not appear from the record what interest or right appellant styling himself "trustee" had in the proceedings, for whom he was trustee, or that the moneys out of which the claim was paid were a part of any fund in which he had an interest, his appeal should be dismissed. Fitzgerald *v.* Evans, 49 Fed. 426, 4 U. S. App. 154, 1 C. C. A. 307.

Trustees to execute trusts in a will are such parties in interest as may prosecute a writ of error or appeal from a decision of the county court against the validity of the will. Tibbatts *v.* Berry, 10 B. Mon. (Ky.) 473. See also Matter of Stevens, 53 Hun (N. Y.) 637, 6 N. Y. Suppl. 635, 957, 25 N. Y. St. 989, 993, where trustees under a will, having interest similar to the interests of the executors, were allowed to appear and appeal from an order denying motion for stay of proceedings, the motion having been made by the executors alone. But from a decree of the judge of probate, appointing a guardian to a minor child, the trustees of a fund bequeathed for the benefit of such child have no authority to appeal. Deering *v.* Adams, 34 Me. 41.

Extent and limits of rule.— It has been held that the fact that the *cestui que trust* is a party to the action, and might appeal in his own name, does not impair the trustee's power, in a proper case, to appeal in his own name for the reversal of a judgment adverse to the *cestui* (Bockes *v.* Hathorn, 78 N. Y. 222); but the contrary has been held (Press *v.* Woodley, 160 Ill. 433, 43 N. E. 718). Thus, in Ratliff *v.* Patton, 37 W. Va. 197, 16 S. E. 464, it was held that where, after an appeal was obtained and perfected by a trustee, the *cestui que trust* appeared and dismissed the appeal, so far as she was concerned, and the trustee did not appear to have any private interest in the controversy, the appeal should have been dismissed as to the trustee also. See also Bryant *v.* Thompson, 128 N. Y. 426, 28 N. E. 522, 40 N. Y. St. 439, 13 L. R. A. 745, to the effect that where executors and trustees under a will bring an action to determine which of two parties are entitled to a certain fund in the trustee's hands, and the judgment rendered is acquiesced in by both of the alleged claimants to the fund, who are parties and are of age, the trustees are not entitled to appeal. See also, generally, *supra*, IV, A, 1, c.

30. White *v.* Malcolm, 15 Md. 529.

31. See 2 Cent. Dig. tit. "Appeal and Error," §§ 914, 943.

32. State *v.* Eves, (Ida. 1898) 53 Pac. 543, holding that a state is a party aggrieved by a judgment upon an usurious contract which fails to enforce the penalty provided for by statute, and may appeal from the denial of a motion for the modification of such judgment.

The territory of Montana, being a corporation and having the right to make contracts and sue thereon, was allowed, in a civil action, to bring appeal to review a judgment by which it is aggrieved. Territory *v.* Hildebrand, 2 Mont. 426.

Who should take appeal.— An appeal from a judgment against the state, in an action in its name to recover a forfeiture, can be taken only by the district attorney or, possibly, by the attorney-general. State *v.* Duff, 83 Wis. 291, 53 N. W. 446. But in Louisiana it has been held that where the attorney-general is absent from the state, or neglects or declines to take the appeal, the governor may appeal. State *v.* Graham, 25 La. Ann. 629; State *v.* Dubuclet, 22 La. Ann. 602. *Compare* Smith *v.* New Orleans, 43 La. Ann. 726, 9 So. 773 (holding that suit having been brought against a state tax-collector for revocation of a tax-title made by him to the state, and judgment having been rendered annulling it, he is competent *quod hoc* to prosecute an appeal for the state); and Lawson *v.* Hart, 40 W. Va. 52, 20 S. E. 819 (wherein it is held that the commissioner of school lands, not being a proper party in an action by the state, under W. Va. Acts (1893), c. 24, § 6, for the sale of such lands which have been forfeited by nonpayment of the purchase-price or taxes, is not entitled to appeal from a decree in such action); and State *v.* Wertzel, 84 Wis. 344, 346, 54 N. W. 579 (holding that, under Wis. Rev. Stat. § 3298, providing that, in actions to recover forfeitures, "no appeals shall be taken . . . from a judgment against the state, unless directed by the attorney-general or district attorney," an appeal in an action to recover a forfeiture for an encroachment on a town road is properly taken, by the attorney for the town, by written direction of the district attorney of the county).

33. Fry *v.* Britton, 2 Heisk. (Tenn.) 606; South Carolina *v.* Wesley, 155 U. S. 542, 15 S. Ct. 230, 39 L. ed. 254.

34. See 2 Cent. Dig. tit. "Appeal and Error," §§ 914, 943.

35. 24 U. S. Stat. at L. c. 359, U. S. Rev. Stat. Suppl. (1891), p. 559, c. 359.

B. Waiver of Right[36] — **1. Express Waiver — a. Before Trial.** In some jurisdictions an agreement of parties, entered into before the trial, that the judgment of the trial court shall be a final determination, will not deprive either party of his right of appeal.[37]

b. Subsequent to Trial. If, for a legal and valid consideration,[38] a party who has prayed an appeal from a judgment against him agrees to withdraw it, and not thereafter to appeal, such an agreement will be enforced by the appellate tribunal by dismissing the appeal.[39] So too it has been held that a release of errors

Under the act of congress of May 15, 1820 [U. S. Rev. Stat. (1878), § 3636], the government has no appeal in summary proceedings against a delinquent officer. U. S. *v.* Davis, 131 U. S. 36, 9 S. Ct. 657, 33 L. ed. 93; U. S. *v.* Nourse, 6 Pet. (U. S.) 470, 8 L. ed. 467; U. S. *v.* Yukers, 60 Fed. 641, 23 U. S. App. 292, 9 C. C. A. 171.

From a decision by the court of private land claims in favor of the petitioner, the United States may appeal, for, while the government may have no interest in the result, it is a proper and necessary party to the suit. U. S. *v.* De Conway, 175 U. S. 60, 20 S. Ct. 13, 44 L. ed. 72.

36. See 2 Cent. Dig. tit. "Appeal and Error," § 953 *et seq.*

37. Sanders *v.* White, 22 Ga. 103; Brown *v.* Galesburg Pressed Brick, etc., Co., 132 Ill. 648, 24 N. E. 522; Fahs *v.* Darling, 82 Ill. 142; Weir *v.* Stephenson, 13 Ill. 374; State *v.* Judge, 14 La. Ann. 323; Runnion *v.* Ramsay, 93 N. C. 410; Falkner *v.* Hunt, 68 N. C. 475; Binford *v.* Alston, 15 N. C. 351.

See 2 Cent. Dig. tit. "Appeal and Error," § 1008 *et seq.*

But agreement to waive right of appeal does not take away the power of the court to review the proceedings on writ of error. Putnam *v.* Churchill, 4 Mass. 516; Wynn *v.* Bellas, 34 Pa. St. 160.

Such agreements, however, are enforceable in some jurisdictions. Oliver *v.* Blair, (Cal. 1885) 5 Pac. 917; Cole *v.* Thayer, 25 Mich. 212; Townsend *v.* Masterson, etc., Stone Dressing Co., 15 N. Y. 587; Saling *v.* German Sav. Bank, 15 Daly (N. Y.) 527, 8 N. Y. Suppl. 469, 28 N. Y. St. 880; New *v.* Fisher, 11 Daly (N. Y.) 308; Canarie *v.* Knowles, 11 N. Y. Civ. Proc. 418; Com. *v.* Johnson, 6 Pa. St. 136.

Compare, however, Meekin *v.* Brooklyn Heights R. Co., 51 N. Y. App. Div. 1, 64 N. Y. Suppl. 291 [*affirmed* in 164 N. Y. 145, 58 N. E. 50], holding that, when an appeal is taken to the appellate court from an order, reviving an action against defendant in which there is a stipulation for judgment absolute against it in the event of affirmance, defendant can appeal to the court of appeals on a question of law involved; and see Hall *v.* Wolcott, 10 Mass. 218, where, in an action pending, defendant demurred, reserving the right of waiving his demurrer in the supreme court, and agreeing that plaintiff should have the benefit of a verdict. It was held this waived defendant's right of review, but not the plaintiff's, who, obtaining a verdict in the supreme court with which he was dissatisfied, had the right to a writ of review.

Submission to referees.— A party, by consenting to a reference of the cause, with an agreement that the award of the referees shall be final and that judgment shall be entered thereon, waives his right of review. Parsons *v.* Hilliard, 61 N. H. 642; Carroll *v.* Locke, 58 N. H. 163; Cuncle *v.* Dripps, 3 Penr. & W. (Pa.) 291, 23 Am. Dec. 84; Andrews *v.* Lee, 3 Penr. & W. (Pa.) 99; Gorman *v.* Falkner, 2 Pearson (Pa.) 316; Shainline's Appeal, 2 Walk. (Pa.) 325; and 2 Cent. Dig. tit. "Appeal and Error," §§ 1010, 1011. But a stipulation that a temporary injunction should be vacated, that the issues be referred to a referee named, and that, if the issues should be finally determined in favor of plaintiff, defendant should do certain things, does not preclude an appeal from the referee's determination. Laney *v.* Rochester R. Co., 81 Hun (N. Y.) 346, 24 N. Y. Civ. Proc. 156, 30 N. Y. Suppl. 893, 63 N. Y. St. 148.

Waiver in instrument sued on.— In Pennsylvania a waiver of the right of appeal, contained in a note sued upon, will be enforced where the only defense pleaded existed at the time the note was given (Soden *v.* Wheaton, 6 Pa. Co. Ct. 416; Snyder *v.* Halter, 6 Pa. Co. Ct. 418); but will be inoperative to prevent an appeal when the defense arose subsequent to the delivery of the note (Wells *v.* Wilson, 6 Pa. Co. Ct. 417; Minich *v.* Basom, 2 Pa. Dist. 709). So of waiver of right of appeal contained in a lease. Strojny *v.* Merofchinski, 9 Kulp (Pa.) 444. See also 2 Cent. Dig. tit. "Appeal and Error," § 1013.

A waiver should be insisted on in the court below at the time the appeal was prayed. It is too late to make the objection in the appellate court. Morris *v.* Palmer, 32 Miss. 278.

38. *Maryland.*— Ward *v.* Collins, 14 Md. 158, sufficiency of consideration.

Massachusetts.— Powell *v.* Turner, 139 Mass. 97, 28 N. E. 453, validity of consideration.

Nebraska.— Clark *v.* Strong, 14 Nebr. 229, 15 N. W. 236. failure of consideration.

Nevada.— Wheeler *v.* Floral Mill, etc., Co., 10 Nev. 200, sufficiency of consideration.

New York.— Hill *v.* Hermans, 59 N. Y. 396, validity of consideration.

Virginia.—Southern R. Co. *v.* Glenn, 98 Va. 309, 36 S. E. 395, necessity of consideration.

39. *Maryland.*— Mackey *v.* Daniel, 59 Md. 484; Lester *v.* Howard, 24 Md. 233; Ward *v.* Hollins, 14 Md. 158.

New York.— Ogdensburgh, etc., R. Co. *v.* Vermont, etc., R. Co., 63 N. Y. 176.

Ohio.— Emerick *v.* Armstrong, 1 Ohio 513.

Texas.—Johnson *v.* Halley, 8 Tex. Civ. App. 137, 27 S. W. 750.

England.— Cates *v.* West, 2 T. R. 183; Camden *v.* Edie, 1 H. Bl. 21.

for a valuable consideration[40] will estop the party from prosecuting a writ of error.[41]

2. Implied Waiver — a. Acquiescence in Judgment or Order — (1) *In General.* If a party to an action acquiesces in a judgment or order against him he thereby waives his right to have such judgment or order reviewed by an appellate court.[42]

See 2 Cent. Dig. tit. "Appeal and Error," § 1008 *et seq.*

As to dismissal of appeal on consent of parties see *infra*, XIV, C.

But a stipulation, entered into after an appeal is taken, providing for a distribution of a portion of the fund in controversy, will not deprive appellants of the benefit of their appeal when the stipulation itself shows that it was not intended as an abandonment of the appeal. Seattle *v.* Liberman, 9 Wash. 276, 37 Pac. 433.

Attorney-general may waive his right to appeal in an action brought by him under the provisions of the act authorizing him to institute certain actions. People *v.* Stephens, 52 N. Y. 306.

40. Forbearance is a sufficient consideration for a release of errors. Barnes *v.* Moody, 5 How. (Miss.) 636, 37 Am. Dec. 172.

41. *Alabama.*— Cotton *v.* Wilson, Minor (Ala.) 118, holding that a release of errors, to be effective, must be under seal.

Arkansas.— Martin *v.* Hawkins, 20 Ark. 150, an agreement under seal.

Indiana.—Millar *v.* Farrar, 2 Blackf. (Ind.) 219. If a release of errors, filed under the statute to obtain an injunction, be not sealed it is of no validity. Clark *v.* Goodwin, 1 Blackf. (Ind.) 74.

Kentucky.—March *v.* Talbott, 1 Dana (Ky.) 443, an agreement under seal "to waive all exceptions to the decree as it now stands."

Massachusetts.—But see Goodridge *v.* Ross, 6 Metc. (Mass.) 487, holding that, where a writ of error is brought to reverse a judgment recovered on a note against an infant, who appeared by attorney, a promise made by him after he comes of age, to pay the note is neither a release, nor a waiver of the error, nor a bar to a writ of error.

Mississippi.— Barnes *v.* Moody, 5 How. (Miss.) 636, 37 Am. Dec. 172.

Pennsylvania.— Ulshafer *v.* Stewart, 71 Pa. St. 170.

United States.—Elwell *v.* Fosdick, 134 U. S. 500, 10 S. Ct. 598, 33 L. ed. 998, holding that, where a decree has been entered, and a sale made and confirmed, in a suit to foreclose a first mortgage on a railroad, in which suit the trustee under a second mortgage was a party, a release of errors in the proceedings, executed by such trustee in good faith and at the instance of a majority of the second-mortgage bondholders, will prevent a subsequent appeal in the name of the trustee by others of such bondholders who were not parties to the suit, they having declined to contribute to the cost of the litigation.

See 2 Cent. Dig. tit. "Appeal and Error," § 1002 *et seq.*

Errors cured by release.— A judgment rendered on a nine-days' service of summons, though reversible for insufficient service, is valid, and such service is cured by a release of errors. Helphenstine *v.* Vincennes Nat. Bank, 65 Ind. 582, 32 Am. Rep. 86.

Release by one of several joint defendants. — A release of errors, executed by one of several co-defendants to an action, estops him from bringing a writ of error (Clark *v.* Goodwin, 1 Blackf. (Ind.) 74); but does not bind the other defendants (Blanchard *v.* Gregory, 14 Ohio 413). In Van Houten *v.* Ellison, 2 N. J. L. 220, where one of two plaintiffs in error released the error, the judgment of the court was that the other plaintiff have leave to prosecute alone. A release of error by one joint plaintiff may be pleaded in bar of a writ of error by the other; but such rule does not apply to joint defendants. Genin *v.* Ingersoll, 2 W. Va. 558. *Contra*, Cole *v.* Thayer, 25 Mich. 212. An error which is personal to one of several defendants may be released by him (Henrickson *v.* Van Winkle, 21 Ill. 274); and such release precludes a co-defendant from maintaining a writ because of such error (Ellis *v.* Bullard, 11 Cush. (Mass.) 496). See also 2 Cent. Dig. tit. "Appeal and Error," § 1007.

Release by partner.— A release of errors by one partner in an action against the firm will bind his copartner. Wood *v.* Goss, 21 Ill. 604; Hull *v.* Garner, 31 Miss. 145.

42. Treadwell's Estate, 111 Cal. 189, 43 Pac. 584; Roman Catholic Church *v.* Perche, 40 La. Ann. 201, 3 So. 542; State *v.* Strong, 32 La. Ann. 173; De Egana's Succession, 18 La. Ann. 59; Genety *v.* Davenport, 59 N. Y. 648; People *v.* Rochester, etc., R. Co., 15 Hun (N. Y.) 188.

See 2 Cent. Dig. tit. "Appeal and Error," § 957 *et seq.*; and cases cited *infra*, notes 43–55.

As to recognition of validity of judgment see *infra*, IV, B, 2, f.

Acquiescence must be unconditional, voluntary, and absolute. Jackson *v.* Michie, 33 La. Ann. 723.

Acquiescence by one of several appellants, or his attorney, cannot prejudice the right of appeal of another appellant who was not a party to the act of acquiescence. State *v.* Marks, 30 La. Ann. 70.

As to what circumstances constitute acquiescence under the Louisiana practice see Randall *v.* New Orleans, etc., R. Co., 45 La. Ann. 778, 13 So. 166; Chaffe *v.* Mackenzie, 43 La. Ann. 1062, 10 So. 369; Ware *v.* Morris, 42 La. Ann. 760, 7 So. 712; New Orleans City R. Co. *v.* Crescent City R. Co., 33 La. Ann. 1273; State *v.* Brown, 29 La. Ann. 861 (merely submitting to the execution of a judgment); Bougere's Succession, 28 La. Ann. 743 (omission to apply for a suspensive appeal).

(II) *Acceptance of Terms or Conditions.* If a trial court imposes terms as the condition upon which a continuance [43] or amendment will be allowed,[44] or upon which an order will be granted,[45] or other thing will be done or not done,[46] and the party upon whom the terms are imposed accepts them, he will be deemed to have acquiesced in the ruling and cannot afterward question its validity in the appellate court.[47]

(III) *Amendment of Pleadings.* If a party, after judgment upon demurrer to pleadings is given against him, under leave of court, amends the pleading demurred to he acquiesces in the judgment upon the demurrer, and will not be permitted to assign it for error in the appellate court.[48] But the election of

Where the same person is interested in a double capacity — namely, as receiver in the action, and also as entitled to a share in the distribution — he cannot sustain an appeal, taken as receiver, from an order directing the receiver to turn over the assets in his hands, on the ground that the order does not properly protect his interests as distributee, when he did not appeal as distributee. Witherbee *v.* Witherbee, 55 N. Y. App. Div. 151, 66 N. Y. Suppl. 1039. So, where the husband appealed, in right of his wife as one of the next of kin of the testator, it was held that he could not appeal in his own right. Foster *v.* Foster, 7 Paige (N. Y.) 48.

Where the subjects of a judgment are distinct, acquiescence in one will not defeat the appeal as to the judgment on another and distinct demand. Kaiser's Succession, 48 La. Ann. 973, 20 So. 184; Liles *v.* New Orleans Canal, etc., Co., 6 Rob. (La.) 273.

43. Lewis *v.* Wood, 42 Ala. 502. But see Kennedy *v.* Wood, 54 Hun (N. Y.) 14, 7 N. Y. Suppl. 90, 26 N. Y. St. 34, holding that the rule does not apply where the party performed the conditions under protest.

44. Logeling *v.* New York El. R. Co., 5 N. Y. App. Div. 198, 38 N. Y. Suppl. 1112.

But *compare* De Camp *v.* McIntire, 115 N. Y. 258, 22 N. E. 215, 26 N. Y. St. 266, which was an action on a note. On motion for nonsuit on the ground that the note was barred, plaintiff asked leave to amend the complaint and substitute as his cause of action a claim for lumber sold. An order was entered permitting him to withdraw a juror, and move at special term for amendment, and provided that, if the motion should be denied, the complaint should be dismissed, "as moved by defendant at the trial." The motion was denied, and judgment ordered dismissing the complaint. It was held that plaintiff was not debarred from appealing from the judgment, as the order was intended to place the parties, if the motion should be denied, in their original position.

45. Flanders *v.* Merrimac, 44 Wis. 621.

46. Matter of O'Brien, 145 N. Y. 379, 40 N. E. 18, 64 N. Y. St. 829, holding that, where a decree provides for the revocation of letters testamentary unless the executors file a bond, and such executors file a bond and continue to act, they cannot thereafter appeal from the decree.

Qualified conditions.— A bill in equity was dismissed as to specific performance, but retained for compensation on condition that the complainants, within the time prescribed, filed the original contract in court for the purpose of cancellation — otherwise the bill to stand dismissed. It was held that unqualified affirmation of this conditional decree was not required, and that complainants might deliver up the contract and appeal from that portion of the decree, although they retain the benefit of the other portion of the decree. Rider *v.* Gray, 10 Md. 282, 69 Am. Dec. 135.

47. See 2 Cent. Dig. tit. "Appeal and Error," § 961.

48. *Alabama.*— Sheppard *v.* Shelton, 34 Ala. 652.

Connecticut.— Goodrich *v.* Alfred, 72 Conn. 257, 43 Atl. 1041.

Florida.— Hooker *v.* Johnson, 8 Fla. 453; Ellison *v.* Allen, 8 Fla. 206.

Maryland.— Stoddert *v.* Newman, 7 Harr. & J. (Md.) 251.

Maine.— Simpson *v.* Norton, 45 Me. 281.

New York.— Austin *v.* Wauful, 59 Hun (N. Y.) 620, 13 N. Y. Suppl. 184, 36 N. Y. St. 779; McElwain *v.* Willis, 9 Wend. (N. Y.) 548.

South Dakota.—Boucher *v.* Clark Pub. Co., (S. D. 1900) 84 N. W. 237.

United States.— Northern Pac. R. Co. *v.* Murray, 87 Fed. 648, 59 U. S. App. 487, 31 C. C. A. 183.

See 2 Cent. Dig. tit. "Appeal and Error," § 960.

But leave to amend not acted on does not bar an appeal. Brasfield *v.* French, 59 Miss. 632.

Electing to stand by original complaint.— Where, after the granting of a nonsuit, plaintiffs, on their request, are given leave to amend, but, within the time allowed, elect to stand by their complaint, and request the court to vacate orders made subsequent to the order of nonsuit, this is not inviting or consenting to the nonsuit in such a way as to preclude them from having the action of the trial court reviewed in a higher court. Bingel *v.* Brown, (Colo. App. 1900) 61 Pac. 435.

Misjoinder of parties.— A suit against four defendants was dismissed on demurrer for a misjoinder apparent, as was alleged, on the face of the proceedings, but the court permitted plaintiff to amend a declaration by striking out three of the defendants and retaining the suit against the fourth. It was held that the judgment sustaining the demurrer might be appealed from, notwithstanding the amendment, because it was final as to those three, though the amended declaration had not yet

a plaintiff to strike out, under protest, one of two causes of action has been held to be no waiver of the right to appeal from the erroneous order of the court requiring him to make the election.[49]

(IV) *Answering Over.* A defendant, by answering over after his demurrer to the complaint has been overruled,[50] or the plaintiff's demurrer to a plea in abatement has been sustained,[51] or after the denial of a motion to require an amendment of the complaint on account of the alleged inclusion of irrelevant and redundant matter,[52] or because of a defective verification,[53] will be considered as having acquiesced in the decision, and cannot afterward assign the ruling of the court as error.[54]

(V) *Proceeding With Trial.* A party who has appealed from, or entered an exception to, an interlocutory order or decree will not be held to have acquiesced in such order or decree, so as to waive his appeal, by proceeding with, or participating in, the subsequent steps in the trial.[55]

gone to final judgment against the fourth. Sutherlin *v.* Underwriters' Agency, 53 Ga. 442.

Stipulation to contrary.— A plaintiff in ejectment who, under permission of the court, files an amended complaint for damages, waives the right to appeal from the ruling that he could not maintain the action in its original form, and is not aided by a stipulation agreeing that such question shall be submitted to the court of appeals. Northern Pac. R. Co. *v.* Murray, 87 Fed. 648, 59 U. S. App. 487, 31 C. C. A. 183.

Striking out amended petition.— In general, a plaintiff waives error in sustaining a demurrer to his petition by filing an amended petition. But when the amended petition has been stricken from the files, because substantially the same as the original, he may, by proceedings in error, review the ruling of the court in striking the amended petition from the files. Wheeler *v.* Barker, 51 Nebr. 846, 71 N. W. 750.

49. Jones *v.* Johnson, 10 Bush. (Ky.) 649.

50. *Alabama.*— Winn *v.* Dillard, 60 Ala. 369.

Florida.—Garlington *v.* Priest, 13 Fla. 559; Robinson *v.* L'Engle, 13 Fla. 482.

Illinois.—Platt *v.* Curtiss, 89 Ill. App. 575; McDavid *v.* Ellis, 89 Ill. App. 182.

Indiana.— Meredith *v.* Lackey, 16 Ind. 1.

Michigan.— Griffin *v.* Wattles, 119 Mich. 346, 78 N. W. 122.

Missouri.— Jefferson City Sav. Assoc. *v.* Morrison, 48 Mo. 273.

New York.— Brady *v.* Donnelly, 1 N. Y. 126.

Contra, Kennedy *v.* Moore, 91 Iowa 39, 58 N. W. 1066; Missouri Pac. R. Co. *v.* Webster, 3 Kan. App. 106, 42 Pac. 845; Whaley *v.* Lawton, 57 S. C. 256, 35 S. E. 558; Douglas County *v.* Walbridge, 36 Wis. 643.

See 2 Cent. Dig. tit. "Appeal and Error," § 959.

51. Parks *v.* Greening, Minor (Ala.) 178; Griffin *v.* Wattles, 119 Mich. 346, 78 N. W. 122. See Prosser *v.* Chapman, 29 Conn. 515, where the court compelled defendant to plead to the merits after judgment against him on a plea in abatement, refusing to allow him to appeal. It was held that by his so doing he waived his right to appeal on the plea in abatement, because the court had no right to refuse to allow such appeal, and defendant could have enforced his right thereto by mandamus.

Motion to quash writ overruled.— Defendant moved to quash the writ because not properly served. The motion to quash being overruled, defendants, after noting their exception, filed an answer. It was held that they did not thereby waive the objection though it would have been waived if they had proceeded without entering their exception. Converse *v.* Warren, 4 Iowa 158; Moody *v.* Moody, 118 N. C. 926, 23 S. E. 933. *Contra,* Schaeffer *v.* Waldo, 7 Ohio St. 309.

An appeal from an order denying a motion to set aside the service of a summons is not waived by service of an answer setting up, as a plea to the jurisdiction, the same facts relied on in support of the motion. McNamara *v.* Canada Steamship Co., 11 Daly (N. Y.) 297, 16 N. Y. Wkly. Dig. 86.

52. Stover Mfg. Co. *v.* Millane, 89 Ill. App. 532; Barkley *v.* Barkley Cemetery Assoc., 153 Mo. 300, 54 S. W. 482; Franke *v.* Nunnenmacher, 23 Wis. 297.

53. German Sav., etc., Soc. *v.* Kern, (Oreg. 1900) 62 Pac. 788.

54. **An order of court striking out a judgment by default** being appealable, the right to appeal is waived by pleadings and joinder of issue subsequently thereto. Henderson *v.* Gibson, 19 Md. 234.

Taking an order for leave to plead in the district court, after an erroneous reversal of a judgment of a justice of the peace, the order being afterward vacated, is not a waiver of the error, nor does it estop the party from prosecuting an appeal to the supreme court. Raymond *v.* Strine, 14 Nebr. 236, 15 N. W. 350.

55. Stokes *v.* Stokes, 87 Hun (N. Y.) 152, 33 N. Y. Suppl. 1024, 67 N. Y. St. 760; Dey *v.* Walton, 2 Hill (N. Y.) 403; Post *v.* Wallace, 110 Pa. St. 121, 2 Atl. 409; and see 2 Cent. Dig. tit. "Appeal and Error," § 963.

In Love *v.* Johnston, 34 N. C. 367, it was held that if the parties proceeded to try the cause pending an appeal from an interlocutory judgment, such appeal would be dismissed. *Compare* Jordan *v.* Wickham, 21 Mo.

(VI) *Submission to New Trial.* If a party, instead of appealing from an order vacating a judgment in his favor and awarding a new trial, submits to have the case retried, he cannot afterward appeal from the order vacating the judgment and granting the new trial.[56]

b. Compliance With Judgments or Orders — (I) *Involuntary Payment or Performance of Judgment.* The involuntary payment or performance of a judgment does not affect the right of appeal.[57]

(II) *Voluntary Payment or Performance of Judgment.* The voluntary payment or performance of a judgment is generally held to be no bar to an appeal or writ of error for its reversal,[58] unless such payment was by way of com-

App. 536, wherein it was held that under the provisions of a statute giving an appeal from a judgment on a plea of abatement, in attachment, a plaintiff who voluntarily goes to trial on the merits, without demanding an appeal from the judgment against him on the plea in abatement, waives his right of appeal therefrom.

Rule applied.— Thus, a party, by taking judgment against one defendant after a demurrer as to a co-defendant has been sustained (Ernst *v.* Hollis, 89 Ala. 638, 8 So. 122), or by appearing before a commissioner in condemnation proceedings and cross-examining witnesses (Matter of New York, etc., R. Co., 126 N. Y. 632, 26 N. E. 1100, 36 N. Y. St. 459), or proceeding with an accounting before a receiver (Davidge *v.* Coe, 54 N. Y. Super. Ct. 360) or a trial before a court (Curtis *v.* Moore, 3 Minn. 29; Leverson *v.* Zimmerman, 31 Misc. (N. Y.) 642, 64 N. Y. Suppl. 723), or referee (Barker *v.* White, 58 N. Y. 204; Read *v.* Lozin, 31 Hun (N. Y.) 286; Doyle *v.* Metropolitan El. R. Co., 29 Abb. N. Cas. (N. Y.) 272, 1 Misc. (N. Y.) 376, 20 N. Y. Suppl. 865, 49 N. Y. St. 118 [*affirmed* in 136 N. Y. 505, 32 N. E. 1008, 49 N. Y. St. 746]; but see, *contra*, Porter *v.* Parmly, 38 N. Y. Super. Ct. 490; Ubsdell *v.* Root, 1 Hilt. (N. Y.) 173, 3 Abb. Pr. (N. Y.) 142), will not be deemed to have acquiesced in the judgment on demurrer, the order appointing the commissioners or receiver, the refusal of an application for the removal of the cause to another court, or in the order of reference.

But see, for limits of this rule, Turner *v.* Indianapolis, 96 Ind. 51 (relating to the effect of appearance at special term); New Orleans *v.* Seixas, 35 La. Ann. 36; Howard *v.* Southern R. Co., 122 N. C. 944, 29 S. E. 778; Carson *v.* Hyatt, 118 U. S. 279, 6 S. Ct. 1050, 30 L. ed. 167; Stone *v.* South Carolina, 117 U. S. 430, 6 S. Ct. 799, 29 L. ed. 962 (relating to effect of appearance before federal court); and Humes *v.* Shillington, 22 Md. 346 (wherein it was held that caveators to the probate of a will under the facts of the case did not waive their right of appeal by submitting to an interlocutory order and proceeding with the hearing).

56. *Kentucky.*—Tyler *v.* Wigginton, 12 Ky. L. Rep. 46.

Missouri.—Helm *v.* Bassett, 9 Mo. 52; Trundle *v.* Providence Washington Ins. Co., 54 Mo. App. 188.

New York.—Schlesinger *v.* Springfield F. & M. Ins. Co., 58 N. Y. Super. Ct. 112, 9 N. Y. Suppl. 727, 31 N. Y. St. 169; Grunberg *v.* Blumenlahl, 66 How. Pr. (N. Y.) 62.

Ohio.— Andrews *v.* Youngstown, 35 Ohio St. 218; Collins *v.* Davis, 33 Ohio St. 567.

Wisconsin.— Kayser *v.* Hartnett, 67 Wis. 250, 30 N. W. 363.

See 2 Cent. Dig. tit. "Appeal and Error," § 965.

In McLendon *v.* Darden, 53 Ala. 67, a new trial was granted without warrant of law. The appellant, forced to trial, appealed on the ground that the subsequent proceedings were unauthorized and void. It was held that he was not barred of the right of appeal because of his involuntary participation in the second trial.

57. *California.*—Ramsbottom *v.* Fitzgerald, (Cal. 1898) 55 Pac. 984; Kenney *v.* Parks, 120 Cal. 22, 52 Pac. 40.

Iowa.— Burrows *v.* Stryker, 45 Iowa 700; Grim *v.* Semple, 39 Iowa 570.

Louisiana.—Verges *v.* Gonzales, 33 La. Ann. 410; Johnson *v.* Clark, 29 La. Ann. 762.

Nebraska.— Green *v.* Hall, 43 Nebr. 275, 61 N. W. 605, 47 Am. St. Rep. 761.

New York.— Brown *v.* New York, 9 Hun (N. Y.) 587.

Tennessee.— Peabody *v.* Fox Coal, etc., Co., (Tenn. Ch. 1899) 54 S. W. 128.

Wisconsin.— Hixon *v.* Oneida County, 82 Wis. 515, 52 N. W. 445.

See 2 Cent. Dig. tit. "Appeal and Error," § 971 *et seq.*

Payment of fine for contempt.— No appeal lies from a judgment imposing a fine for contempt, after the fine is paid, though it be paid under protest. State *v.* Conkling, 54 Kan. 108, 37 Pac. 992, 45 Am. St. Rep. 270.

58. *Alabama.*— Brown *v.* Peters, 94 Ala. 459, 10 So. 261.

Florida.— Burrows *v.* Mickler, 22 Fla. 572, 1 Am. St. Rep. 217.

Georgia.— Richmond, etc., R. Co. *v.* Buice, 88 Ga. 180, 14 S. E. 205.

Illinois.—Page *v.* People, 99 Ill. 418; Richeson *v.* Ryan, 14 Ill. 74, 56 Am. Dec. 493.

Indiana.— Belton *v.* Smith, 45 Ind. 291; Hill *v.* Starkweather, 30 Ind. 434.

Kentucky.— Figg *v.* Richardson, 5 Ky. L. Rep. 510.

Michigan.— Watson *v.* Kane, 31 Mich. 61.

New Jersey.— Peer *v.* Cookerow, 14 N. J. Eq. 361.

New York.— Hayes *v.* Nourse, 107 N. Y.

promise and agreement to settle the controversy,[59] or unless the payment or performance of the judgment was under peculiar circumstances which amounted to a confession of its correctness.[60] There are, however, courts which hold that such voluntary payment of the judgment is a waiver of defendant's right of appeal.[61] But, where an order appealed from is of such a nature that its execution has left nothing upon which a judgment of reversal can operate, the appeal will be dismissed,[62]

577, 14 N. E. 508, 1 Am. St. Rep. 891; Schermerhorn *v.* Wheeler, 5 Daly (N. Y.) 472; Wells *v.* Danforth, Code Rep. N. S. (N. Y.) 415; Perry *v.* Woodbury, 17 N. Y. Suppl. 530, 44 N. Y. St. 287.

Ohio.— Pittsburgh, etc., R. Co. *v.* Martin, 53 Ohio St. 386, 41 N. E. 690; Alban *v.* Evans, 2 Ohio Dec. 298.

Oregon.— Edwards *v.* Perkins, 7 Oreg. 149.

Texas.— People's Cemetery Assoc. *v.* Oakland Cemetery Assoc., (Tex. Civ. App. 1901) 60 S. W. 679; Cravens *v.* Wilson, 48 Tex. 321.

Washington.— Hartson *v.* Dale, 9 Wash. 379, 37 Pac. 475; Chambers *v.* Hoover, 3 Wash. Terr. 20, 13 Pac. 905.

Wisconsin.— Chapman *v.* Sutton, 68 Wis. 657, 32 N. W. 683; Sloane *v.* Anderson, 57 Wis. 123, 13 N. W. 684, 15 N. W. 21; Pratt *v.* Page, 18 Wis. 337.

United States.— O'Hara *v.* McConnell, 93 U. S. 150, 23 L. ed. 840.

See 2 Cent. Dig. tit. "Appeal and Error," § 971 *et seq.*

Payment by co-party.— A judgment was recovered against three partners, only two of whom were served. Pending appeal by defendants, one of them paid the judgment. It was held that, though the matter in controversy be settled as to plaintiff and defendants, still, as the judgment would fix a liability on the defendant not served to contribute toward the payment made by his co-defendants, the court will retain the case, and decide it on the merits. Ferguson *v.* Millender, 32 W. Va. 30, 9 S. E. 38. See also, on this point, Thompson *v.* Rogers, 8 Ky. L. Rep. 875, and *compare* Sager *v.* Moy, 15 R. I. 528, 9 Atl. 847.

Payment of the costs in the court below by the unsuccessful party is not such an acquiescence in the judgment as will preclude him from appealing therefrom. State *v.* Martland, 71 Iowa 543, 32 N. W. 485; Meyer *v.* Schurbruck, 37 La. Ann. 373; Cuny *v.* Dudley, 6 Rob. (La.) 77; Brinkerhoff *v.* Elliott, 43 Mo. App. 185; Champion *v.* Plymouth Cong. Soc., 42 Barb. (N. Y.) 441; Burch *v.* Newbury, 4 How. Pr. (N. Y.) 145. See also 2 Cent. Dig. tit. "Appeal and Error," § 976.

But see Dambmann *v.* Schulting, 6 Hun (N. Y.) 29. In that case plaintiff had leave to discontinue upon the payment of defendant's costs and an extra allowance. He paid the costs and allowance under protest, and then appealed from that part of the order allowing the one hundred dollars extra allowance. It was held that plaintiff's compliance with the conditions of the order was a waiver of the right of appeal.

The promise of the unsuccessful party to pay the amount of money for which he was found liable does not estop him from appealing from the judgment. Hatch *v.* Jacobson, 94 Ill. 584; Parks *v.* Doty, 13 Bush (Ky.) 727; Goodridge *v.* Ross, 6 Metc. (Mass.) 487; Dyett *v.* Pendleton, 8 Cow. (N. Y.) 325.

59. Garner *v.* Prewitt, 32 Ala. 13; Martinez Bank *v.* Jahn, 104 Cal. 238, 38 Pac. 41; Friedlander *v.* Avondale, 8 Ohio Cir. Ct. 608; Little *v.* Bowers, 134 U. S. 547, 10 S. Ct. 620, 33 L. ed. 1016.

So, where, after judgment against the assignee of an insolvent debtor, in an action by him to set aside a mortgage given by the debtor, the assignee, in good faith, and upon the advice of counsel, sold the mortgaged property by permission of the mortgagee, and applied the proceeds on the mortgage debt, and the mortgagee was then discharged, it was held that the right of appeal was thereby waived by the assignee and the creditors whom he represented. Ray *v.* Hixon, 90 Wis. 39, 62 N. W. 922, 48 Am. St. Rep. 899.

Conclusive proof that settlement was voluntary is necessary. Plano Mfg. Co. *v.* Rasey, 69 Wis. 246, 34 N. W. 85.

Right of attorney to costs.— An appeal from a judgment which has been subsequently settled, and of which satisfaction has been acknowledged, will not be heard by the court merely to protect the rights of the respondent's attorney to costs. Cock *v.* Palmer, 1 Rob. (N. Y.) 658.

60. Plogstart *v.* Rothenbucher, 37 Mo. 452. See also Gilstrap *v.* Felts, 50 Mo. 428.

61. *Iowa.*— Sanford *v.* Belle Plaine First Nat. Bank, 94 Iowa 680, 63 N. W. 459; Hintrager *v.* Mahoney, 78 Iowa 537, 43 N. W. 522, 6 L. R. A. 50.

Louisiana.— Powell *v.* Hernsheim, 37 La. Ann. 581; David *v.* East Baton Rouge, 27 La. Ann. 230. *Compare* Kling *v.* Sejour, 4 La. Ann. 128. But the fact that a defendant has executed the judgment is no ground to dismiss an appeal taken by a third person. State *v.* Strong, 32 La. Ann. 173.

New Mexico.— Alarid *v.* Romero, 5 N. M. 522, 25 Pac. 788.

North Dakota.— Rolette County *v.* Pierce County, 8 N. D. 613, 80 N. W. 804.

United States.—San Mateo County *v.* Southern Pac. R. Co., 116 U. S. 138, 6 S. Ct. 317, 29 L. ed. 589.

62. *California.*—See San Diego School Dist. *v.* San Diego County, 97 Cal. 438, 32 Pac. 517.

Iowa.— Borgalthous *v.* Farmers, etc., Ins. Co., 36 Iowa 250.

Kansas.— Fenlon *v.* Goodwin, 35 Kan. 123, 10 Pac. 553.

Massachusetts.— Stone *v.* Davis, 14 Mass. 360.

Montana.— Barber *v.* Briscoe, 8 Mont. 214, 19 Pac. 589.

New Jersey.— Coryell *v.* Holcombe, 9 N. J. Eq. 650.

unless such right was specially reserved.[63] The partial execution of the judgment has been held to have the same effect.[64]

c. Consenting to Judgment or Order — (1) *Judgment.* Where a judgment or decree has been rendered by consent of parties, no errors in the proceedings will be considered on appeal.[65] So, if a plaintiff voluntarily submits to a nonsuit in consequence of the erroneous conclusion of his evidence, or for other reasons, he cannot appeal or bring error.[66] A judgment or decree

New York.— Negley *v.* Short, 18 N. Y. Civ. Proc. 45, 7 N. Y. Suppl. 674, 27 N. Y. St. 274.

Pennsylvania.— Allegheny Bank's Appeal, 48 Pa. St. 328.

Rhode Island.— Sager *v.* Moy, 15 R. I. 528, 9 Atl. 847.

As to what is not voluntary payment or performance see Gilbert *v.* Adams, 99 Iowa 519, 68 N. W. 883; Sample *v.* Collins, 81 Iowa 23, 46 N. W. 742; Prentice *v.* Chewning, 1 Rob. (La.) 71; Hanaw *v.* Bailey, 83 Mich. 24, 46 N. W. 1039, 9 L. R. A. 801.

Payment of a judgment to avoid its compulsory execution is not voluntary Burrows *v.* Stryker, 45 Iowa 700; Grim *v.* Semple, 39 Iowa 570; Verges *v.* Gonzales, 33 La. Ann. 410; Yale *v.* Howard, 24 La. Ann. 458.

63. Michel *v.* Sheriff, 23 La. Ann. 53. It was held, however, in Little *v.* Bowers, 134 U. S. 547, 10 S. Ct. 620, 33 L. ed. 1016, that the fact that a party at the time of making the payment files a written protest does not make the payment involuntary.

64. Stinson *v.* O'Neal, 32 La. Ann. 947; De Egana's Succession, 18 La. Ann. 59; Milliken *v.* Rowley, 3 Rob. (La.) 253; Williams *v.* Duer, 14 La. 523.

Partial satisfaction of a judgment, whether obtained by a levy or voluntary payment, does not operate as an extinguishment of the judgment or a release of errors, or take away or impair the jurisdiction of an appellate court to review the judgment. U. S. *v.* Dashiel, 3 Wall. (U. S.) 688, 18 L. ed. 268.

65. *Alabama.*— Garner *v.* Prewitt, 32 Ala. 13; Clements *v.* Johnson, 3 Stew. & P. (Ala.) 269. But see Reynolds *v.* Reynolds, 11 Ala. 1023.

Georgia.— McBride *v.* Hunter, 64 Ga. 655, holding that one who has consented to entering a verdict against him cannot except thereto, even though he has reserved the right.

Illinois.— People *v.* Land Owners, 108 Ill. 442.

Indiana.— Hudson *v.* Allison, 54 Ind. 215.

Iowa.— Warford *v.* Eads, 10 Iowa 592.

Kentucky.— Craycraft *v.* Duncan, 6 Ky. L. Rep. 651, holding that the fact that appellant's counsel may have prepared the judgment does not affect the right of appeal from it.

Louisiana.— Lallande *v.* Jones, 14 La. Ann. 714.

Maine.— Woodman *v.* Valentine, 22 Me. 401; Patten *v.* Starrett, 20 Me. 145.

New York.— Atkinson *v.* Manks, 1 Cow. (N. Y.) 691.

Pennsylvania.— Mintz *v.* Brock, 193 Pa. St. 294, 44 Atl. 417.

Texas.— Wells *v.* Houston, (Tex. Civ. App. 1900) 56 S. W. 233 (consenting to partition before trial); McDaniel *v.* Monday, 35 Tex. 39; Tait *v.* Matthews, 33 Tex. 112; Dunman *v.* Hartwell, 9 Tex. 495, 60 Am. Dec. 176.

Virginia.— Cooke *v.* Pope, 3 Munf. (Va.) 167.

United States.— U. S. *v.* Babbitt, 104 U. S. 767, 26 L. ed. 921. But the consent of a defendant in equity to a decree for a perpetual injunction and an account does not prevent him from appealing from a subsequent decree of the court as to the amount for which he shall account. Livingston *v.* Woodworth, 15 How. (U. S.) 546, 14 L. ed. 809.

See 2 Cent. Dig. tit. "Appeal and Error," § 969.

Judgment nil dicit only default.— Judgment by *nil dicit* is not a release of errors (Dinsmore *v.* Hand, Minor (Ala.) 126; Domestic Bldg. Assoc. *v.* Nelson, 66 Ill. App. 601); nor does the failure of a defendant in an equity case to answer in the court below preclude an appeal (Lippy *v.* Masonheimer, 9 Mo. 310). So, upon an appeal from the decision of a vice-chancellor, if appellant makes default at the hearing, the decree or order appealed from would be affirmed with costs; but if respondent makes default the cause must be heard *ex parte*, and if the decision of the vice-chancellor is reversed respondent is precluded from appealing to the court of errors. Stiles *v.* Burch, 5 Paige (N. Y.) 132. But the failure of a party demurring to a pleading to attend and argue the demurrer in the court below will not prevent his insisting upon his demurrer upon appeal from an order overruling the same. Hall *v.* Williams, 13 Minn. 260.

66. *Alabama.*— Mathis *v.* Oates, 57 Ala. 112; Tate *v.* McCrary, 21 Ala. 499.

California.— Sleeper *v.* Kelly, 22 Cal. 456; Imley *v.* Beard, 6 Cal. 666.

Colorado.— Corning Tunnel Co. *v.* Pell, 4 Colo. 184.

Georgia.— Jones *v.* Mobile, etc., R. Co., 64 Ga. 446.

Illinois.— Barnes *v.* Barber, 6 Ill. 401.

Indiana.—Vestal *v.* Burditt, 6 Blackf. (Ind.) 555; Kelsey *v.* Ross, 6 Blackf. (Ind.) 536.

Iowa.— Marsh *v.* Graham, 6 Iowa 76.

Kentucky.— Illinois Bank *v.* Hicks, 4 J. J. Marsh. (Ky.) 128.

Louisiana.—Brandt *v.* Shaumburgh, 1 Mart. N. S. (La.) 698.

Mississippi.— Ewing *v.* Glidwell, 3 How. (Miss.) 332, 34 Am. Dec. 96.

Missouri.— Atkinson *v.* Lane, 7 Mo. 403; Howell *v.* Pitman, 5 Mo. 246; Holdridge *v.* Marsh, 28 Mo. App. 283.

entered in conformity with facts admitted by appellant will not be revised on appeal.[67]

(II) *Orders.* A party cannot complain of an order as erroneous which was passed with his consent.[68]

d. Procuring Judgment or Order — (I) *In General.* It is the universal rule that a party upon whose motion an order is made cannot appeal therefrom.[69]

New York.— Van Wormer *v.* Albany, 18 Wend. (N. Y.) 169.

Ohio.— Bradley *v.* Sneath, 6 Ohio 490.

Tennessee.—Union Bank *v.* Carr, 2 Humphr. (Tenn.) 344; Trice *v.* Smith, 6 Yerg. (Tenn.) 319.

Texas.— Morgan *v.* Johnson, 4 Tex. 117.

Virginia.—Thornton *v.* Jett, 1 Wash. (Va.) 138.

United States.—Evans *v.* Phillips, 4 Wheat. (U. S.) 73, 4 L. ed. 516.

Contra, Collins *v.* Swanson, 121 N. C. 67, 28 S. E. 65; Tiddy *v.* Harris, 101 N. C. 589, 8 S. E. 227; Mobley *v.* Watts, 98 N. C. 284, 3 S. E. 677; Graham *v.* Tate, 77 N. C. 120.

Limits of rule.— A writ of error lies to a judgment of nonsuit where plaintiff suffers the judgment in consequence of an express instruction to the jury against his right to recover. English *v.* Devarro, 5 Blackf. (Ind.) 588. So, a consent to take a nonsuit, with leave to move to set it aside, is no waiver of exceptions. Natoma Water, etc., Co. *v.* Clarkin, 14 Cal. 544. In Ohio an appeal will lie from a voluntary nonsuit in an action of replevin. Reed *v.* Carpenter, 2 Ohio 79.

67. Oliver *v.* Oliver, 179 Ill. 9, 53 N. E. 304; Clarkson *v.* Graham, 21 Tex. Civ. App. 355, 52 S. W. 269; National Bank *v.* Kilgore, 17 Tex. Civ. App. 462, 43 S. W. 565; McCafferty *v.* Celluloid Co., 104 Fed. 305.

68. *Alabama.*— Winter *v.* Rose, 32 Ala. 447.

Iowa.—Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 91 Iowa 16, 58 N. W. 918.

Maine.— Thompson *v.* Perkins, 57 Me. 290.

Massachusetts.— Winchester *v.* Winchester, 121 Mass. 127.

Michigan.— Campau *v.* Campau, 19 Mich. 130.

New York.—Goldenson *v.* Lawrence. 1 Misc. (N. Y.) 1, 20 N. Y. Suppl. 616, 48 N. Y. St. 636; Smith *v.* Grant, 11 N. Y. Civ. Proc. 354.

See 2 Cent. Dig. tit. "Appeal and Error," § 967.

Applications of rule.— Thus, if a party consents to the amendment of a pleading (Florence Bank *v.* Gregg, 46 S. C. 169, 24 S. E. 64), the overruling of a demurrer (G. M. Williams Co. *v.* Mairs, 72 Conn. 430, 44 Atl. 729 [but the fact that appellant's demurrer was overruled by consent does not preclude him from attacking the judgment upon the ground that it rests upon a complaint inherently defective. Banbury *v.* Arnold, 91 Cal. 606, 27 Pac. 934]), the exclusion of his evidence (Wilson *v.* McAdams, 10 Iowa 590), the revival of an action in the name of an administrator (Townsend *v.* Jeffries, 24 Ala. 329), the dismissal of a motion to vacate a judgment (Marsden *v.* Soper, 11 Ohio St. 503), the appointment of a receiver (State *v.* King, 46 La. Ann. 110, 14 So. 902; Smith *v.* Lowery, 56 S. C. 493, 35 S. E. 129), or the confirmation of a sale (State *v.* Doane, 35 Nebr. 707, 53 N. W. 611; Ironton Second Nat. Bank *v.* Ewing, 21 W. Va. 208 [but the filing and affirming, by the court, of the report of a master in chancery, without objection by appellant's counsel, is not such an entry of decree by consent of parties as to estop him from appealing therefrom. Hershee *v.* Hershey, 15 Iowa 185]), he cannot afterward predicate an exception and assignment of error on the passage of such order.

So, consenting to an order of reference waives the right to appeal from an order refusing a motion for the dissolution of an injunction (Hinson *v.* Brooks, 67 Ala. 491); or consenting that a cause be transferred to another court for trial waives an appeal previously perfected (Lillie *v.* Skinner, 46 Iowa 329).

Refusing offer of new trial.— The fact that a proposal of plaintiff, to consent to set aside a verdict he has obtained, is refused by defendant does not in any manner affect the right of defendant as a litigant. Illinois Cent. R. Co. *v.* King, 69 Miss. 852, 13 So. 824. The fact that a party declines an offer of a new trial, on the terms that he pay the costs, does not estop him from prosecuting error to reverse the judgment on the ground of improper instructions. Wiley *v.* Brimfield, 59 Ill. 306.

Remittitur.— Where a motion for a new trial is granted, to go into effect unless plaintiff stipulates to reduce the verdict, in which event the motion is denied, plaintiff, by giving the stipulation and entering judgment thereon, waives his right to appeal from the judgment, although he entered the *remittitur* under protest, and although the court may have been wrong in finding that the judgment was excessive. Alabama, etc., R. Co. *v.* Davis, 69 Miss. 444, 13 So. 693; Lanman *v.* Lewiston R. Co., 18 N. Y. 493; Clarke *v.* Meigs, 10 Bosw. (N. Y.) 337; Sperry *v.* Hillman, 13 N. Y. Suppl. 271, 36 N. Y. St. 52; Iron R. Co. *v.* Mowery, 36 Ohio St. 418, 38 Am. Rep. 597.

69. *California.*— Storke *v.* Storke, 111 Cal. 514, 44 Pac. 173; Matter of Radovich, 74 Cal. 536, 16 Pac. 321, 5 Am. St. Rep. 466.

New Jersey.— Reading *v.* Reading, 24 N. J. L. 358.

New York.— Hooper *v.* Beecher, 109 N. Y. 609, 15 N. E. 742, 23 N. E. 1151, 14 N. Y. St. 40; Alleva *v.* Hagerty, 32 Misc. (N. Y.) 711, 65 N. Y. Suppl. 690, holding that plaintiff cannot appeal from a dismissal entered on his own request.

(11) *Judgments by Confession.* So a judgment by confession does not admit of an appeal, and cannot be reviewed on writ of error.[70]

e. Receiving Benefits Under Judgment or Order[71] — (1) *In General.* It is a rule well established that a party who obtains the benefit of an order or judgment, and accepts the benefit or receives the advantage, shall be afterward precluded from asking that the order or judgment be reviewed, or from denying the authority which granted it.[72]

Texas.—But see Rogers *v.* Burbridge, 5 Tex. Civ. App. 67, 24 S. W. 300, holding that where defendants are non-residents, and have not appeared, and the only ground of jurisdiction is an attachment of their land, plaintiffs may appeal from a judgment of dismissal entered at their own request after the court has quashed the attachment, and on such appeal they may allege as error the quashing of the attachment.

Washington.—Clallam County *v.* Clump, 15 Wash. 593, 47 Pac. 13, holding that neither party can appeal from an order setting aside the verdict, and awarding a new trial, where both moved therefor.

See 2 Cent. Dig. tit. "Appeal and Error," § 970.

Having obtained a confirmation of a commissioner's report of appraisal of the value of easements taken for its benefit, an elevated railway is not thereby estopped, under N. Y. Laws (1875), c. 606, prescribing proceedings to be taken by elevated railway companies to acquire title to lands, from taking an appeal from the order confirming such report, in order to obtain a further hearing. Matter of Metropolitan El. R. Co., 59 Hun (N. Y.) 622, 13 N. Y. Suppl. 367, 36 N. Y. St. 606.

70. *Alabama.*— Wilson *v.* Collins, 9 Ala. 127; McConnell *v.* White, Minor (Ala.) 112.

Illinois.— Hall *v.* Hamilton, 74 Ill. 437.

Indiana.— Lewis *v.* Brackenridge, 1 Blackf. (Ind.) 112, holding that a judgment by confession by the principal is conclusive against the bail.

Louisiana.— Stewart *v.* Betzer, 20 La. Ann. 137.

Missouri.— St. Louis, etc., R. Co. *v.* Evans, etc., Fire Brick Co., 15 Mo. App. 590.

New York.— Traffarn *v.* Getman, 49 Hun (N. Y.) 611, 3 N. Y. Suppl. 867, 19 N. Y. St. 295.

North Carolina.— State *v.* Griffis, 117 N. C. 709, 23 S. E. 164; Rush *v.* Halcyon Steamboat Co., 67 N. C. 47.

Texas.—Merritt *v.* Clow, 2 Tex. 582. Thus, in suits by attachment wherein the property attached has been replevied, a judgment by confession is as binding upon the sureties upon the replevin bond as it is upon their principal. Garner *v.* Burleson, 26 Tex. 348.

Virginia.— McRae *v.* Turnpike Co., 3 Rand. (Va.) 160 (holding that a confession of judgment on a forthcoming bond is a release of errors, if any, in the original judgment); Edmonds *v.* Green, 1 Rand. (Va.) 44; Cooke *v.* Pope, 3 Munf. (Va.) 167.

United States.— Catlett *v.* Cooke, 2 Cranch C. C. (U. S.) 9, 5 Fed. Cas. No. 2,515.

Confessions under warrant of attorney.— Ind. Rev. Stat. (1852), p. 152, § 384, providing that "the confession shall operate as a release of errors," was not intended to extend to judgments entered up by virtue of a warrant of attorney. McPheeters *v.* Campbell, 5 Ind. 107. But, where a warrant to confess judgment expressly contains a release of error and a waiver of the right of appeal, no appeal lies. Boyd *v.* Crary, 35 Ind. 363; Miller *v.* Macklot, 13 Ind. 217. But such a stipulation is held not binding in Illinois. Lake *v.* Cook, 15 Ill. 353.

In Wisconsin, it has been held that, where a judgment by confession is entered against a partnership on a warrant of attorney under seal, signed by one of the partners in the partnership name without consent of his copartner, a writ of error will not lie from the judgment by such copartner. The proper mode is for the partner who did not sign or authorize the signing of the warrant of attorney to make his motion to vacate the judgment, such motion being founded upon affidavits showing the facts. Remington *v.* Cummings, 5 Wis. 138.

The admission of the correctness of a claim is not a confession of judgment. Defendant may prove payment, a set-off, etc., and such admission will not deprive him of his right to appeal. Campbell *v.* Randolph, 13 Ill. 313.

Where the confession was made by mistake or procured by fraud it seems that a court of chancery will afford relief. Wilson *v.* Collins, 9 Ala. 127. But see Lawson *v.* Bruen, 29 La. Ann. 866, in which it was held that an appeal will not be dismissed on the ground that appellant confessed judgment in the court below, when he contests the confession, and the latter seems to be the only ground of the judgment.

71. See 2 Cent. Dig. tit. "Appeal and Error," § 979 *et seq.*

72. *Illinois.*— Holt *v.* Rees, 46 Ill. 181; Ruckman *v.* Alwood, 44 Ill. 183.

Indiana.— McGrew *v.* Grayston, 144 Ind. 165, 41 N. E. 1027 (selling lands allotted in partition); Sterne *v.* Vert, 111 Ind. 408, 12 N. E. 719, 108 Ind. 232, 9 N. E. 127.

Iowa.— Mississippi, etc., R. Co. *v.* Byington, 14 Iowa 572, where party accepted damages allowed in condemnation proceedings.

Kansas.— Cronkhite *v.* Evans-Snider-Buel Co., 6 Kan. App. 173, 51 Pac. 295.

New York.— Carll *v.* Oakley, 97 N. Y. 633; Canary *v.* Knowles, 41 Hun (N. Y.) 542; Glackin *v.* Zeller, 52 Barb. (N. Y.) 147; Hess *v.* Smith, 16 Misc. (N. Y.) 55, 37 N. Y. Suppl. 635, 73 N. Y. St. 85; Radway *v.* Graham, 4 Abb. Pr. (N. Y.) 468.

(II) *Accepting Payment*[73] — (A) *Of Money Paid Voluntarily.* It is the general rule that if the prevailing party obtains a judgment or decree which is so indivisible that it must be sustained or reversed as a whole, he cannot prosecute an appeal or writ of error to reverse it after having accepted money voluntarily tendered by the judgment debtor in discharge or partial satisfaction of it.[74]

(B) *Of Money Paid Into Court.* So, if money, deposited by defendant in court, be withdrawn by plaintiff in satisfaction of his judgment, he estops himself from seeking to have it reviewed.[75]

(C) *Of Money Paid Upon Execution.* And, for stronger reasons, if plaintiff sues out an execution and coerces payment of the judgment, he will be held

Oregon.— Moore *v.* Floyd, 4 Oreg. 260, holding that the right to proceed on a judgment and enjoy its fruits and the right of appeal are not concurrent — on the contrary, they are totally inconsistent. An election to take one of these courses is, therefore, a renunciation of the other.

Washington.—Lyons *v.* Bain, 1 Wash. Terr. 482.

Wisconsin.— McKinnon *v.* Wolfenden, 78 Wis. 237, 47 N. W. 436, holding that a party cannot appeal from an order after he has obtained the benefit of a subsequent order made at his request and based upon the order from which he attempts to appeal.

United States. — Crawshay *v.* Souter, 6 Wall. (U. S.) 739, 18 L. ed. 845; Chase *v.* Driver, 92 Fed. 780, 34 C. C. A. 668; Albright *v.* Oyster, 60 Fed. 644, 19 U. S. App. 651, 9 C. C. A. 173 (receiving conveyance of lands under a decree).

See 2 Cent. Dig. tit. "Appeal and Error," § 979.

A party cannot avail himself of that portion of a decree which is favorable to him, and secure its fruits, while prosecuting an appeal to reverse in the appellate court such portions as militate against him. Moore *v.* Williams, 29 Ill. App. 597; Bennett *v.* Van Syckel, 18 N. Y. 481.

Substantial benefit must accrue to the party. Wallace *v.* Castle, 68 N. Y. 370; Kelly *v.* Bloom, 17 Abb. Pr. (N. Y.) 229.

The only exceptions admitted are where the parts of the judgment or decree are separate and independent, and the receipt of a benefit from one part is not inconsistent with an appeal from another (Funk *v.* Mercantile Trust Co., 89 Iowa 264, 56 N. W. 496; Cocks *v.* Haviland, 55 Hun (N. Y.) 605, 7 N. Y. Suppl. 870, 28 N. Y. St. 622; Matter of Raber, 4 N. Y. St. 845; Wishek *v.* Hammond, (N. D. 1900) 84 N. W. 587); or where the right to the benefit is conceded by the opposite party, so that it could not be denied should the other portions of the decree granting it be reversed (see cases cited *infra*, IV, B, 2, e, (II) *et seq.*).

73. See 2 Cent. Dig. tit. "Appeal and Error," § 984 *et seq.*

74. *Alabama.*—Murphy *v.* Murphy, 45 Ala. 123.

Arkansas.— Bolen *v.* Cumby, 53 Ark. 514, 14 S. W. 926; Watkins *v.* Martin, 24 Ark. 14, 81 Am. Dec. 59.

California.— Matter of Baby, 87 Cal. 200, 25 Pac. 405, 22 Am. St. Rep. 239.

Illinois.— Corwin *v.* Shoup, 76 Ill. 246; Holt *v.* Rees, 46 Ill. 181; Morgan *v.* Ladd, 7 Ill. 414.

Indiana.— Newman *v.* Kiser, 128 Ind. 258, 26 N. E. 1006; State v. Kamp, 111 Ind. 56, 11 N. E. 960; Holman *v.* Stannard, 14 Ind. App. 146, 42 N. E. 645.

Iowa.—Indiana Dist. *v.* Delaware Dist. Tp., 44 Iowa 201. *Compare* Dudman *v.* Earl, 49 Iowa 37.

Kansas.— Stern *v.* Craig, 59 Kan. 771, 51 Pac. 782.

Kentucky.— But see Turner *v.* Johnson, 18 Ky. L. Rep. 202, 31 S. W. 1027, 35 S. W. 923, wherein it was held that, under Ky. Civ. Code, § 757, providing that, when a party recovers judgment for only part of his demand, the enforcement of such judgment shall not prevent him from prosecuting an appeal as to the part not recovered, an appeal should not be dismissed because appellant has collected a judgment rendered for part of his demand. See also Wills *v.* Weaver, 5 Ky. L. Rep. 600.

Louisiana.—Flowers *v.* Hughes, 46 La. Ann. 436, 15 So. 14.

Maryland.— Stuart *v.* Baltimore, 7 Md. 500.

Missouri.— Cassell *v.* Fagin, 11 Mo. 207, 47 Am. Dec. 151.

Nebraska.— Harte *v.* Castetter, 38 Nebr. 571, 57 N. W. 381; Gray *v.* Smith, 17 Nebr. 682, 24 N. W. 340.

New York.— Matter of New York, etc., R. Co., 39 Hun (N. Y.) 338. *Contra,* Clowes *v.* Dickenson, 8 Cow. (N. Y.) 328.

Ohio.— Matthews *v.* Davis, 39 Ohio St. 54; Neel *v.* Toledo, 5 Ohio Cir. Ct. 203.

Oregon.— Bush *v.* Mitchell, 28 Oreg. 92, 41 Pac. 155.

Pennsylvania.— Gibson's Appeal, 108 Pa. St. 244.

Virginia.— *Compare* Morriss *v.* Garland, 78 Va. 215.

Wisconsin.— Laird *v.* Giffin, 84 Wis. 286, 54 N. W. 584.

See 2 Cent. Dig. tit. "Appeal and Error," § 986.

75. *Indiana.*— Martin *v.* Bott, 17 Ind. App. 444, 46 N. E. 151.

Iowa.— McKelvey *v.* Burlington, etc., R. Co., (Iowa 1894) 58 N. W. 1068.

Kentucky.— Brown *v.* Vancleave, 86 Ky. 381, 9 Ky. L. Rep. 593, 6 S. W. 25.

New York.— Graham *v.* Sapery, 19 Misc. (N. Y.) 690, 44 N. Y. Suppl. 1109.

Wisconsin.— Webster-Glover Lumber, etc., Co. *v.* St. Croix County, 71 Wis. 317, 36 N. W. 864.

to have elected to take it as rendered, and cannot prosecute an appeal or writ of error.[76]

(D) *Rule Where Appeal Cannot Affect Appellant's Right to Sum Collected* — (1) APPELLANT ENTITLED TO SUM IN ANY EVENT. But this rule has no application to cases where the appellant is shown to be so absolutely entitled to the sum collected upon the judgment that the reversal of it will not affect his right to it.[77]

(2) APPEAL FOR PURPOSE OF MODIFYING JUDGMENT. So, an appellant, by the collection of a judgment in his favor, will not be estopped from appealing for the purpose of modifying the judgment so as to increase the amount of his recovery[78] — as where the judgment allows a counter-claim,[79] makes a deduction for usurious interest,[80] for the value of improvements,[81] or disallows certain items of account.[82]

76. *Alabama.*— Bradford *v.* Bush, 10 Ala. 274; Hall *v.* Hrabrowski, 9 Ala. 278.

Iowa.— Reichelt *v.* Seal, 76 Iowa 275, 41 N. W. 16; Buena Vista County *v.* Iowa Falls, etc., R. Co., 55 Iowa 157, 7 N. W. 474.

Kansas.— Merchants' Nat. Bank *v.* Quinton, 9 Kan. App. 882, 57 Pac. 261.

Kentucky.— Com. *v.* South, 80 Ky. 582; Paine *v.* Woolley, 80 Ky. 568; Meek *v.* Lacy, 6 Ky. L. Rep. 510.

Louisiana.— Campbell *v.* Orillion, 3 La. Ann. 115; State *v.* Judge, 4 Rob. (La.) 85.

Maryland.— Hay *v.* Jenkins, 28 Md. 564.

Massachusetts.— Jarvis *v.* Mitchell, 99 Mass. 530.

Missouri.— Waddingham *v.* Waddingham, 27 Mo. App. 596.

New York.— Knapp *v.* Brown, 45 N. Y. 207, 11 Abb. Pr. N. S. (N. Y.) 118.

Pennsylvania.— Hall *v.* Lacy, 37 Pa. St. 366; Smith *v.* Jack, 2 Watts & S. (Pa.) 101; Laughlin *v.* Peebles, 1 Penr. & W. (Pa.) 114.

Texas.— Fly *v.* Bailey, 36 Tex. 119; Matlow *v.* Cox, 25 Tex. 578.

Contra, see Bond *v.* Greenwald, 4 Heisk. (Tenn.) 453.

Causing a copy of a judgment to be served on plaintiff is not such an execution of it as deprives him of the right of appeal. Leggett *v.* Peet, 1 La. 288.

Execution issued without authority.— It is not a sufficient ground for a dismissal of the appeal that payment of the judgment has been enforced by execution, when it is shown to the court, by proper affidavits, that the execution was issued without instructions from either plaintiff or his attorney, and without their knowledge, and that plaintiff has refused to receive the money from the clerk. Chapman *v.* Lee, 51 Ala. 106; May *v.* Sharp, 49 Ala. 140.

Return of execution unsatisfied.—Where a plaintiff, who has perfected an appeal from a judgment in his own favor, causes an execution to issue on the judgment, which is returned unsatisfied, he does not thereby waive his right to prosecute his appeal. Hornish *v.* Peck, 53 Iowa 157, 1 N. W. 641, 4 N. W. 898.

The recovery of a judgment against one of two joint wrong-doers is not, until paid or satisfied, a bar to the prosecution of an appeal to review the trial as to the other. Hurley *v.* New York, etc., Brewing Co., 13 N. Y. App. Div. 167, 43 N. Y. Suppl. 259.

77. **In cases of this character** there can be no injustice or vexatious oppression to appellee in allowing appellant to receive that to which he is unquestionably entitled, and to confine future litigation only to so much of appellant's claim as may be *bona fide* disputed.

Alabama.— Phillips *v.* Towers, 73 Ala. 406; Tarleton *v.* Goldthwaite, 23 Ala. 346, 58 Am. Dec. 296; Gowen *v.* Jones, 20 Ala. 128.

Indiana.— Sills *v.* Lawson, 133 Ind. 137, 32 N. E. 875.

Iowa.— Mountain *v.* Low, 107 Iowa 403, 78 N. W. 55.

New York.— Mellen *v.* Mellen, 137 N. Y. 606, 33 N. E. 545, 51 N. Y. St. 73; Matter of Amsterdam Water Com'rs, 36 Hun (N. Y.) 534.

North Dakota.— Tyler *v.* Shea, 4 N. D. 377, 61 N. W. 468, 50 Am. St. Rep. 660.

Washington.— Utterback *v.* Meeker, 16 Wash. 185, 47 Pac. 428.

Wisconsin.— Fiedler *v.* Howard, 99 Wis. 388, 75 N. W. 163, 67 Am. St. Rep. 865.

United States.— Erwin *v.* Lowry, 7 How. (U. S.) 172, 12 L. ed. 655.

The collection of the uncontroverted part of his demand does not preclude appellant from appealing from a judgment dismissing the suit as to that part of the demand which is controverted. Campbell *v.* Cincinnati Southern R. Co., 80 Ky. 585; Haman *v.* Steele, 11 Ky. L. Rep. 287. And upon this point *compare* State *v.* Central Pac. R. Co., 21 Nev. 172, 26 Pac. 225, 1109; Embry *v.* Palmer, 107 U. S. 3, 2 S. Ct. 25, 27 L. ed. 346.

78. Farmers' Bank *v.* Calk. 4 Ky. L. Rep. 617; New Rochelle Gas, etc., Co. *v.* Van Benschoten, 47 N. Y. App. Div. 477, 62 N. Y. Suppl. 398; Merriam *v.* Victory Placer Min. Co., 37 Oreg. 321, 56 Pac. 75, 58 Pac. 37, 60 Pac. 997.

79. Benkard *v.* Babcock, 17 Abb. Pr. (N. Y.) 421; Monnet *v.* Merz, 60 N. Y. Super. Ct. 256, 17 N. Y. Suppl. 380, 43 N. Y. St. 59.

80. Beals *v.* Lewis, 43 Ohio St. 220, 1 N. E. 641.

81. Clay *v.* Miller, 4 Bibb (Ky.) 461.

82. Byram *v.* Polk County, 76 Iowa 75, 40 N. W. 102; Nicholas County *v.* McNew, 7 Ky. L. Rep. 364.

Where, in replevin of chattels, the judgment awarded a portion to plaintiff, and or-

This rule has also been applied where appellant accepted the amount decreed, though the decree failed to allow proper interest as damages[83] or as a penalty.[84]

(3) Receipt of Balance After Prior Liens Satisfied. So, the receipt by an appellant of the balance remaining after the satisfaction of prior liens does not estop him from appealing from that part of the decree adjudging the priority of those liens.[85]

(4) When Judgment Settles Distinct Controversies. When a judgment or decree settles two or more distinct controversies, the acceptance of a sum of money, to which appellant is declared to be entitled by one portion of the judgment or decree, does not estop him from appealing from another and independent adjudication therein.[86]

(E) *Rule Where Restitution Is Made.*[87] In some decisions it has been intimated that a restitution of the money collected upon a judgment restores the right to appeal or bring error;[88] but in those jurisdictions where the question has been directly passed upon it has been held otherwise.[89]

(F) *What Constitutes Acceptance* — (1) By Attorney. An acceptance, by an attorney of record, of money paid to him or into court, in satisfaction of a judgment or in compliance with a decree, is an acceptance by his client, and, generally, binds the latter.[90]

dered another portion thereof to be returned to defendant, defendant did not waive his right to appeal from the judgment by accepting such chattels, where he had claimed that the court was without jurisdiction. Jaynes *v.* Jaynes, 8 N. Y. Civ. Proc. 94.

83. McCalley *v.* Otey, 103 Ala. 469, 15 So. 954; Seymour *v.* Spring Forest Cemetery Assoc., 4 N. Y. App. Div. 359, 38 N. Y. Suppl. 726, 74 N. Y. St. 245.

84. Commonwealth's Appeal, 128 Pa. St. 603, 18 Atl. 386.

85. Funk *v.* Mercantile Trust Co., 89 Iowa 264, 56 N. W. 496; Reynes *v.* Dumont, 130 U. S. 354, 9 S. Ct. 486, 32 L. ed. 934. Thus, where property is sold under a decree foreclosing two mortgages, the receipt, by the party decreed to have the junior lien, of the proceeds remaining after satisfaction of the other mortgage will not estop such party to prosecute an appeal from the provisions of the decree which determine the priority of liens. Hinchman *v.* Point Defiance R. Co., 14 Wash. 349, 44 Pac. 867.

86. Upton Mfg. Co. *v.* Huiske, 69 Iowa 557, 29 N. W. 621 (where plaintiff sued on two promissory notes); Matter of Bogert, 25 Misc. (N. Y.) 466, 55 N. Y. Suppl. 751 (where a tax was assessable on distinct properties); Woeltz *v.* Woeltz, 93 Tex. 548, 57 S. W. 35 (a proceeding seeking both divorce and cancellation of a deed); Gilfillan *v.* McKee, 159 U. S. 303, 16 S. Ct. 6, 40 L. ed. 161 (where decree determined the rights of the parties in two distinct funds); Worthington *v.* Beeman, 91 Fed. 232, 63 U. S. App. 536, 33 C. C. A. 475 (where the judgment was upon two distinct counts).

87. See 2 Cent. Dig. tit. "Appeal and Error," § 983.

88. Thus, it has been held that a party who has collected the money upon a judgment will not be permitted to prosecute a writ of error until he has refunded the money (Murphy *v.* Murphy, 45 Ala. 123; Garner *v.* Prewitt, 32 Ala. 13; Riddle *v.* Hanna, 25 Ala. 484; Earle *v.* Reid, 25 Ala. 463; Knox *v.* Steele, 18 Ala. 815, 54 Am. Dec. 181; Bradford *v.* Bush, 10 Ala. 274); and that a judgment creditor who accepts a tender in satisfaction of the judgment cannot appeal without returning the money so received (Houck *v.* Swartz, 25 Mo. App. 17).

89. Paine *v.* Woolley, 80 Ky. 568; Portland Constr. Co. *v.* O'Neil, 24 Oreg. 54, 32 Pac. 764; Dunham *v.* Randall, etc., Co., 11 Tex. Civ. App. 265, 32 S. W. 720.

90. Ruckman *v.* Alwood, 44 Ill. 183; Newman *v.* Kiser, 128 Ind. 258, 26 N. E. 1006; McCracken *v.* Cabel, 120 Ind. 266, 22 N. E. 136; Seigel *v.* Metzger, 1 Ind. App. 367, 27 N. E. 647; Lyons *v.* Bain, 1 Wash. Terr. 482; 2 Cent. Dig. tit. "Appeal and Error," § 985; and see Shingler *v.* Martin, 54 Ala. 354, for a special application of this rule under the Alabama practice.

Refusal of attorney to accept sum tendered. —Where, in ejectment, there is coupled with a judgment for defendant an order that a certain sum be paid plaintiff, the leaving of this sum by defendant with plaintiff's attorney, which sum the attorney refuses to accept, is not a satisfaction of the judgment so as to prevent an appeal by plaintiff. Alexander *v.* Jackson, (Cal. 1890) 25 Pac. 415.

The fact that a statute allows plaintiff an attorney's fee does not make the acceptance of the same by the attorney the latter's individual act, but is, in effect, the act of plaintiff, and binds him. Root *v.* Heil, 78 Iowa 436, 43 N. W. 278.

When attorney files lien for his fee.— On the report of a referee the court decreed a certain sum to be paid to plaintiff by defendants, which sum was accordingly paid to the clerk. The latter paid a part of it to plaintiff's attorney, who had filed a lien for his fee, which amount was repaid to the clerk by plaintiff as soon as he heard of it. It was held that plaintiff had not waived his right of appeal. Jewell *v.* Reddington, 57 Iowa 92, 10 N. W. 306.

(2) By Co-Party. A receipt given by one appellant, for money paid on a judgment in favor of himself and his co-appellant, is binding on the latter.[91]

(3) By Fiscal Officer. The acceptance of the amount of a judgment in favor of a county or city by the treasurer thereof has been held to be binding upon such county or city, although, in the case of the county, the board of county commissioners had not authorized the acceptance of the amount.[92]

(4) Proof of Acceptance. To justify an appellate court in dismissing an appeal on the ground that the judgment appealed from has been satisfied, the proof of the fact must be clear and satisfactory.[93] If the affidavits filed by the parties leave the fact of settlement in doubt,[94] or the opposing affidavits directly contradict the moving affidavits as to the purpose and understanding of the parties, the appeal will not be dismissed.[95]

(III) *Accepting Sum Allotted Under Order of Distribution.* If a distributee of a decedent's estate,[96] or an heir who is a party to a partition suit,[97] or a creditor suing to set aside a deed made by his debtor,[98] or interested in the distribution of the proceeds of property sold on the foreclosure of a mechanic's lien[99] or under execution,[1] accepts the sum allotted to him by the order of distribution, he waives his right to appeal therefrom.[2]

(IV) *Accepting Costs.* The imposition of costs as a condition of granting an order[3] allowing a defendant to answer,[4] or a petitioner to intervene,[5] or permitting a plaintiff to amend his summons and complaint,[6] or modifying a

91. Williams *v.* Richards, 152 Ind. 528, 53 N. E. 765; Holman *v.* Stannard, 14 Ind. App. 146, 42 N. E. 645.

92. State *v.* Hebel, 70 Ind. 314; New Orleans *v.* Metropolitan Bank, 44 La. Ann. 698, 11 So. 146.

But where, under N. Y. Laws (1850), c. 140, a company paid to the city chamberlain the sum awarded by the commissioners as damages for land taken belonging to New York city, it was held that the city, not having used the money, nor interfered with it, was not precluded from appealing from the order. Matter of New York, etc., R. Co., 98 N. Y. 12.

93. The court will regard as conclusive the written evidence of settlement and payment of the judgment appealed from when the genuineness of the receipt showing payment is not questioned by the appellee. New Orleans *v.* Metropolitan Bank, 44 La. Ann. 698, 11 So. 146.

The mere entry of satisfaction of the judgment sought to be revised by writ of error is not ground to dismiss the writ when the question of satisfaction involves the whole merits of the case. Tombigbee R. Co. *v.* Bell, 4 Sm. & M. (Miss.) 685.

94. Lewis *v.* Tilton, 62 Iowa 100, 17 N. W. 199.

95. Plano Mfg. Co. *v.* Rasey, 69 Wis. 246, 34 N. W. 85.

Settlement in fraud of assignee's rights.— A motion by appellants to dismiss their appeal, on the ground that the judgment has been satisfied, will be granted though opposed by persons who claim to succeed to the rights of respondent, and who ask to be substituted on the ground that the alleged satisfaction was in fraud of their rights; the granting of the motion leaving the question to be settled in the superior court, which is the proper forum. Nunan *v.* Valentine, 83 Cal. 588, 23 Pac. 713.

96. Matter of Shaver, 131 Cal. 219, 63 Pac. 340.

97. Alexander *v.* Alexander, 104 N. Y. 643, 10 N. E. 37.

98. Dunham *v.* Randall, etc., Co., 11 Tex. Civ. App. 265, 32 S. W. 720.

99. Prairie Lumber Co. *v.* Korsmeyer, (Kan. 1896) 43 Pac. 773.

1. Smith *v.* Powell, 5 Kan. App. 652, 47 Pac. 992. *Contra*, Higbie *v.* Westlake, 14 N. Y. 281; Matter of Day, 18 Wash. 359, 51 Pac. 474.

2. See 2 Cent. Dig. tit. "Appeal and Error," § 990.

3. Miller *v.* Wright, 60 Hun (N. Y.) 579, 14 N. Y. Suppl. 468, 39 N. Y. St. 44 [*affirmed* in 129 N. Y. 639, 29 N. E. 1031, 41 N. Y. St. 948]; Prentiss *v.* Bowden, 25 N. Y. Civ. Proc. 144, 14 Misc. (N. Y.) 185, 2 N. Y. Annot. Cas. 163, 35 N. Y. Suppl. 653, 70 N. Y. St. 517; Lewis *v.* Irving F. Ins. Co., 50 Abb. Pr. (N. Y.) 140 note; Lupton *v.* Jewett, 19 Abb. Pr. (N. Y.) 320, 1 Rob. (N. Y.) 639; Taussig *v.* Hart, 33 N. Y. Super. Ct. 157; Drake *v.* Scheunemann, 103 Wis. 458, 79 N. W. 749; Smith *v.* Coleman, 77 Wis. 343, 46 N. W. 664.

See 2 Cent. Dig. tit. "Appeal and Error," § 991.

By accepting costs allowed unconditionally a party does not lose his right to appeal from an order. Farmers' L. & T. Co. *v.* Bankers, etc., Tel. Co., 109 N. Y. 342, 16 N. E. 539, 15 N. Y. St. 516; Matter of Amsterdam Water Com'rs, 36 Hun (N. Y.) 534.

4. Radway *v.* Graham, 4 Abb. Pr. (N. Y.) 468.

5. Wood *v.* Richardson, 91 Hun (N. Y.) 332, 36 N. Y. Suppl. 1001, 72 N. Y. St. 103.

6. Hood *v.* Hood, 6 N. Y. St. 6. Although it may not be within the power of a referee to allow a certain amendment, yet if the adverse party accepts the terms upon which the

decree,[7] or granting a motion for a new trial,[8] is such a benefit that the acceptance of the conditions waives the right to appeal.

(v) *Accepting Privilege of Renewing Petition.* A moving party cannot appeal from an order denying his motion when he has availed himself of a provision of the order giving him leave to renew the application.[9]

(vi) *Selling Premises Under Foreclosure Decree.* A mortgagee who proceeds to sell the mortgaged premises under a decree of foreclosure thereby waives his right to appeal from that part of the decree giving judgment for a less sum than is claimed to be due,[10] or releasing certain of defendants from personal liability on the mortgage debt,[11] or directing that the sale be made subject to a lien adjudged to be prior to the mortgage.[12]

f. Recognition of Validity of Judgment[13]—(i) *In General.* Any act on the part of a defendant by which he impliedly recognizes the validity of a judgment against him operates as a waiver of his right to appeal therefrom, or to bring error to reverse it.[14]

amendment was allowed he cannot appeal. Grattan *v.* Metropolitan L. Ins. Co., 80 N. Y. 281, 36 Am. Rep. 617.

7. Marvin *v.* Marvin, 11 Abb. Pr. N. S. (N. Y.) 97.

8. Lamprey *v.* Henk, 16 Minn. 405; Cook *v.* McComb, 98 Wis. 526, 74 N. W. 353; Cogswell *v.* Colley, 22 Wis. 399. *Contra,* Tyson *v.* Wells, 1 Cal. 378.

9. Harris *v.* Brown, 93 N. Y. 390 [*affirming* 29 Hun (N. Y.) 477]; Harrison *v.* Neher, 9 Hun (N. Y.) 127; Noble *v.* Prescott, 4 E. D. Smith (N. Y.) 139; People *v.* McAdam, 1 N. Y. City Ct. Suppl. 37.

So, a party who acquiesces in a judgment against him, by availing himself of a right therein reserved to take another rule, on different grounds, cannot appeal from such judgment. Priestly *v.* Shaughnessy, 10 La. Ann. 455.

10. Lombard *v.* Bush, 85 Iowa 718, 50 N. W. 1068; Anglo-American Land, etc., Co. *v.* Bush, 84 Iowa 272, 50 N. W. 1063.

11. Guaranty Sav. Bank *v.* Butler, 56 Kan. 267, 43 Pac. 229.

12. Male *v.* Harlan, 12 S. D. 627, 82 N. W. 179. In a foreclosure suit, where the decree properly directs the sale of the premises, but erroneously directs the application of the proceeds, the suing out of an execution on such a decree does not debar plaintiff mortgagee from taking an appeal to correct the decree in regard to the application of the proceeds. Inverarity *v.* Stowell, 10 Oreg. 261.

In an action to foreclose a mortgage securing two notes in the hands of different persons, where a decree has been rendered for a foreclosure, and declaring the holders of the notes entitled to share *pro rata* in the proceeds, the holder of one of the notes, claiming to be entitled to priority, is not barred from appealing from the order of distribution by the fact that he so far carries out the decree as to cause execution to issue, the property to be sold, and the proceeds to be paid into court. Miller *v.* Washington Sav. Bank, 5 Wash. 200, 31 Pac. 712.

13. See 2 Cent. Dig. tit. "Appeal and Error," § 957 *et seq.*

14. Sheldon *v.* Motter, 59 Kan. 776, 53 Pac. 127 (attornment and payment of rent to purchaser [*compare* Kling *v.* Sejour, 4 La. Ann. 128]); Kansas City, etc., R. Co. *v.* Murray, 57 Kan. 697, 47 Pac. 835 (procuring order allowing set-off); Barnes *v.* Lynch, 9 Okla. 156, 59 Pac. 995 (seeking equitable lien on the premises in suit).

As to acquiescence in judgment see *supra,* IV, B, 2, a.

Proceeding under occupying-claimant law. — Where defendant in ejectment elects, after verdict, to proceed under the occupying-claimant law, and has a verdict of assessment, he is estopped from bringing error to reverse the judgment rendered in such action, although the judgment had not yet been rendered when the election was made (Bradley *v.* Rogers, 33 Kan. 120, 5 Pac. 374); but he is not estopped by such election if he does not ask for a jury of assessment. Mack *v.* Price, 35 Kan. 134, 10 Pac. 521.

But a party does not waive his right of review by appeal or writ of error, as the case may be, by appearing in a suit on a judgment and answering that such judgment was erroneously rendered (Martin *v.* Kittredge, 144 Mass. 13 note, 10 N. E. 710; Eliot *v.* McCormick, 144 Mass. 10, 10 N. E. 705); or by filing a petition, after having been ordered to pay alimony, to modify the decree because of complainant's misconduct, such misconduct having occurred before the decree was rendered, of which fact the moving party was ignorant until after the court had adjourned for the term (Daugherty *v.* Daugherty, 78 Ill. App. 187); or by purchasing from plaintiff in ejectment (Kling *v.* Sejour, 4 La. Ann. 128). So, a party does not waive his right to appeal, from an order denying his motion to dissolve a preliminary injunction, by procuring an order correcting defects in the order granting the injunction. Chicago Dollar Directory Co. *v.* Chicago Directory Co., 65 Fed. 463, 24 U. S. App. 525, 13 C. C. A. 8.

Rule as to pleading judgment in bar. — In Pennsylvania, it has been held that pleading a judgment as a defense to another action is a recognition of the validity of the judgment and estops defendant from afterward reversing such judgment on error (Wills *v.* Kane, 2 Grant (Pa.) 60); but in New York it has been held that an appeal will not be dismissed

(II) *Formal Entry of Judgment or Order.* The fact that a judgment or order was formally entered on the motion of appellant is not a recognition of its validity and does not affect his right to appeal therefrom.[15]

(III) *Staying Execution.* By statute in some of the states the taking of a stay of execution by a defendant in judgment operates as a waiver of the right of appeal.[16]

g. Seeking Other Mode of Relief[17] — (I) *Bringing Proceedings for Review.*

on this ground where respondent was not a party to the action to which the erroneous judgment was pleaded as a defense (Ostrander *v.* Campbell, 51 Hun (N. Y.) 637, 3 N. Y. Suppl. 597, 20 N. Y. St. 806; Cornell *v.* Donovan, 14 Daly (N. Y.) 292, 14 N. Y. St. 687; Brewster *v.* Wooster, 26 N. Y. Suppl. 912, 56 N. Y. St. 844. See also Pittsburgh, etc., R. Co. *v.* Swinney, 91 Ind. 399, holding that, where plaintiff pleads, in bar of an appeal from an order dismissing its condemnation proceedings, that defendant had, in another action, recovered judgment for the value of the condemned land, such plaintiff is not thereby estopped to appeal from the judgment which was pleaded as a bar.

Where, in a suit to enjoin the opening of a public road, a decree is rendered finding that the road has been properly established, and that plaintiff is entitled to damages for the land taken from him, the fact that plaintiff had previously filed a conditional claim for such damages, which claim had been abandoned before the decree was rendered, is not such a recognition of the decree as would prevent him from appealing from it. Smith *v.* Gorrell, 81 Iowa 218, 46 N. W. 992.

15. *Illinois.*—Board of Education *v.* Frank, 64 Ill. App. 367.

Minnesota.— Warner *v.* Lockerby, 28 Minn. 28, 8 N. W. 879.

New York.— Smith *v.* Dittman, 16 Daly (N. Y.) 427, 11 N. Y. Suppl. 769, 34 N. Y. St. 303. See Purdy *v.* Peters, 15 Abb. Pr. (N. Y.) 160, as to the right of a party to have a judgment formally entered for the purpose of appeal.

South Carolina.— Johnson *v.* Henegan, 11 S. C. 93.

Wisconsin.— Jones *v.* Davis, 22 Wis. 421.

See 2 Cent. Dig. tit. "Appeal and Error," § 970.

But see Van Leonard *v.* Eagle, etc., Mfg. Co., 60 Ga. 544, holding that, where divers lots of land, described by numbers, are levied on, claim made, and, on trial of a single issue embracing the whole property, a verdict rendered finding certain numbers subject to the execution, but failing to find certain other numbers either subject or not subject, the plaintiff, after entering up judgment on the verdict without moving for a new trial, is precluded from maintaining a writ of error.

Causing a transcript of judgment to be filed in other counties for the purpose of preserving a lien upon real estate, no action toward enforcing the judgment having been taken by appellant, is not a waiver of right of appeal from the judgment. Tama County *v.* Melendy, 55 Iowa 395, 7 N. W. 669.

Stipulation for the entry of judgment after a verdict, and in conformity with it, is not a waiver of the right to appeal from the judgment. Hall *v.* McCormick, 31 Minn. 280, 17 N. W. 620; Everett *v.* Boyington, 29 Minn. 264, 13 N. W. 45.

16. Seacrest *v.* Newman, 19 Iowa 323; Ecklund *v.* Willis, 42 Nebr. 737, 60 N. W. 1026; Sullivan Sav. Inst. *v.* Clark, 12 Nebr. 578, 12 N. W. 103; Miller *v.* Hyers, 11 Nebr. 474, 9 N. W. 645; McCreary *v.* Pratt, 9 Nebr. 122, 2 N. W. 352. See also 2 Cent. Dig. tit. "Appeal and Error," § 999.

But, in the absence of statute, no such result is held to follow.

Indiana.— Hyer *v.* Norton, 26 Ind. 269.

Kentucky.— Kellar *v.* Williams, 10 Bush (Ky.) 216.

Michigan.— Churchill *v.* Emerick, 56 Mich. 536, 23 N. W. 211.

Mississippi.—Davis *v.* Jordon, 5 How. (Miss.) 295.

Ohio.— Russell *v.* Giles, 31 Ohio St. 293.

Pennsylvania.— Ranck *v.* Becker, 12 Serg. & R. (Pa.) 412.

But in Mississippi it has been adjudged that, if a forthcoming bond is taken and forfeited, a writ of error will not lie to reverse the judgment which the bond was given to stay (Sanders *v.* McDowell, 4 How. (Miss.) 9); yet if, in a joint action against the makers and indorsers of a note, a forthcoming bond is given and forfeited by a part of defendants, this is no bar to a writ of error by a defendant who did not join in the bond (Dorsey *v.* Merritt, 6 How. (Miss.) 390).

17. See 2 Cent. Dig. tit. "Appeal and Error," § 995 *et seq.*

An application for dissolution of an injunction is no waiver of a pending appeal from the order granting the injunction. Davis *v.* Fasig, 128 Ind. 271, 27 N. E. 726; Mexican Asphalt Co. *v.* Mexican Asphalt Paving Co., 61 Ill. App. 354; Simon *v.* Walker, 26 La. Ann. 603.

Moving to set aside order.—Where appellants against an order resort to the summary remedy of by motion to set aside the order and try this motion on the merits, they cannot afterward fall back and seek the reversal of the order by appeal. Horn *v.* Volcano Water Co., 18 Cal. 141. But see Matter of Flushing Ave., 98 N. Y. 445, where, pending an appeal from an order denying a motion to set aside the commissioner's report in local improvement proceedings, founded on an alleged irregularity, a second motion was made to set aside the same order and the order confirming the report, such second motion setting forth the facts as to the irregularity, but be-

It seems that the filing of a petition in the nature of a bill of review does not prevent a party from appealing from the original decree.[18]

(II) *Enjoining Execution of Judgment.*[19] In Iowa it has been held that the suing out of an injunction to restrain the execution of a judgment at law operates as a release of all errors in such judgment.[20] In some states there are statutes to the same effect,[21] and their operation is not affected by the fact that the injunction is subsequently dissolved.[22] In other states it has been held that an injunction against a judgment does not operate as a release of errors where the order of allowance does not require it.[23]

(III) *Moving for New Trial.* While a party against whom a judgment has been rendered, by moving for and obtaining a new trial in the court below, waives his right to appeal,[24] the mere motion for a new trial is not of itself[25]

ing based mainly on the alleged unconstitutionality of the act under which the proceedings were had. This second motion was denied, but it did not appear that the question of irregularity was decided, the determination of that question not being necessary to a decision on the motion. It was held that the right to have the first appeal considered was not barred by the decision of the second motion.

18. O'Hara *v.* McConnell, 93 U. S. 150, 23 L. ed. 840. *Contra*, Wilson *v.* Roberts, 38 Nebr. 206, 56 N. W. 787.

See also *supra*, I, D, 2, a.

Application for reargument.—Under Mills' Anno. Stat. Colo. (1891), § 2425, a party aggrieved by a decree adjudicating water-rights does not waive his right to appeal from the decree by applying to the district court for a review or reargument. Daum *v.* Conley, (Colo. 1899) 59 Pac. 753.

Motion for reexamination.—A party does not waive his right to appeal from an order granting a new trial by filing a motion asking the court to reëxamine the question determined. Anderson *v.* Cahill, 65 Iowa 252, 21 N. W. 593.

Under the Indiana statute, however, it has been held that a party pursuing such remedy waives his right to appeal. Harvey *v.* Fink, 111 Ind. 249, 12 N. E. 396; Davis *v.* Binford, 70 Ind. 44; Indiana Mut. F. Ins. Co. *v.* Routledge, 7 Ind. 25; Hinesley *v.* Sheets, (Ind. App. 1897) 46 N. E. 94.

Under the Kentucky code provision allowing an absent defendant to appear in the circuit court at any time within five years after the judgment and move for a retrial of the action, such defendant is not precluded from moving for a reversal of an erroneous judgment against him in the court at any time for errors apparent in the record. Payne *v.* Witherspoon, 14 B. Mon. (Ky.) 217.

19. See 2 Cent. Dig. tit. "Appeal and Error," § 1000.

20. Gordon *v.* Ellison, 9 Iowa 317, 74 Am. Dec. 353. But the suing out of an injunction does not operate as a release of errors in a judgment at law when it is designed to enjoin proceedings in violation of law. Burge *v.* Burns, Morr. (Iowa) 287.

21. Thompson *v.* Munson, 43 Miss. 176; Moss *v.* Craft, 10 Mo. 720; Chouteau *v.* Douchouquette, 1 Mo. 715; McKenny *v.* Clark, 84 Mo. App. 624; Blake *v.* Dunn, 5 Humphr. (Tenn.) 578; Henly *v.* Robertson, 4 Yerg. (Tenn.) 171.

22. Chouteau *v.* Douchouquette, 1 Mo. 715; Henly *v.* Robertson, 4 Yerg. (Tenn.) 171.

23. Gano *v.* White, 3 Ohio 20. Thus where a party against whom a judgment has been rendered obtains an injunction merely to restrain plaintiff from further proceedings under his execution, and not seeking in any way to stay the judgment, such injunction does not operate as a release of errors in the proceedings in the suit at law prior to and including the judgment. St. Louis, etc., R. Co. *v.* Todd, 40 Ill. 89. An injunction to stay proceedings at law in order to operate as a release of errors must affect the judgment itself. McConnel *v.* Ayres, 4 Ill. 210.

A decree dissolving an injunction restraining the execution of a judgment, and adjudging that plaintiff in the injunction pay the judgment, is no bar to a writ of error upon such judgment. Utter *v.* Walker, Wright (Ohio) 46.

24. The reason being that the order granting a new trial vacates the judgment from which the appeal could have been taken. Kower *v.* Gluck, 33 Cal. 401; Trundle *v.* Providence-Washington Ins. Co., 54 Mo. App. 188; Jones *v.* Booth, 38 Ohio St. 405; Schweickhart *v.* Stuewe, 75 Wis. 157, 43 N. W. 722; and 2 Cent. Dig. tit. "Appeal and Error," § 997.

As to effect of moving for new trial on time for taking appeal see *infra*, VII, A, 1, a, (VI).

25. Moving for a new trial is merely a waiver and abandonment of all exceptions taken during the trial which are not embraced in such motion. Danley *v.* Robbins, 3 Ark. 144. The most usual method of presenting exceptions for review, and the only method in some states, is by motion for new trial, reciting the grounds relied on. An appeal from a refusal of the motion preserves the exceptions in the record. Berry *v.* Singer, 10 Ark. 483; Samuel *v.* Cravens, 10 Ark. 380; McKinnon *v.* Morrison, 104 N. C. 354, 10 S. E. 513. It has been held that where the party against whom a verdict was rendered, moved the court for a new trial, on the ground of a misdirection of the jury, which direction he acquiesced in at the trial, and the motion was overruled, the right to allege exceptions to the supposed misdirection was thereby

a waiver of an appeal,[26] writ of error,[27] or bill of exceptions[28] previously taken or sued out.

(iv) *Prosecuting Another Action.* If a party, after judgment against him, prosecutes another action based upon the same cause, he estops himself from appealing from the first judgment, or from bringing error to review it.[29]

h. Where There Has Been a Compromise and Settlement. Where, after the rendition of the judgment sought to be reversed, the matter in controversy has been the subject of a valid compromise between the parties to the litigation, which compromise leaves nothing of the controversy presented by the record in the supreme court to be decided, the appeal or writ of error will be dismissed on motion.[30]

i. Where Suit Has Been Abandoned. An appeal or writ of error will not lie from a decision where appellant, subsequent to the decision, voluntarily dismisses the suit.[31]

waived. Sylvester *v.* Mayo, 1 Cush. (Mass.) 308. But now in most states the rule is to present all exceptions on a motion for new trial, and in some states the statutes expressly allow exceptions to the charge of the court to be filed after verdict. Lowe *v.* Elliott, 107 N. C. 718, 12 S. E. 383; Taylor *v.* Plummer, 105 N. C. 56, 11 S. E. 266. See also *infra*, V, D.

26. Taylor *v.* Holland, 20 Ga. 11.

27. In some of the federal circuits there is a rule to this effect. But effect could be given to that rule only by requiring a party to waive, on the record, a writ of error before his motion for a new trial was heard. U. S. *v.* Hodge, 6 How. (U. S.) 279, 12 L. ed. 437; Brown *v.* Evans, 8 Sawy. (U. S.) 502, 18 Fed. 56.

28. West *v.* Cunningham, 9 Port. (Ala.) 104, 33 Am. Dec. 300. But *compare* Lee *v.* Tinges, 7 Md. 215, wherein it is held that, where the same questions are presented in the bill of exceptions and in a motion for a new trial, the court below should, in general, require the waiver of the exceptions before entertaining the motion. If, however, the court hear and decide the motion without requiring such waiver, the appellate court will, nevertheless, entertain the appeal.

29. Carr *v.* Casey, 20 Ill. 637 (institution of second suit by administrator); Liebuck *v.* Stahle, 66 Iowa 749, 24 N. W. 562 (bringing second action of forcible entry and detainer); Gordon *v.* Ellison, 9 Iowa 317, 74 Am. Dec. 353 (bringing action before another justice); Ehrman *v.* Astoria R. Co. 26 Oreg. 377, 38 Pac. 356 (bringing attachment action after appeal from decree refusing to foreclose a mechanic's lien).

Audita querela, having been applied for and obtained, constitutes a waiver of the party's right to bring a writ of error. Brooks *v.* Hunt, 17 Johns. (N. Y.) 484. See 2 Cent. Dig. tit. "Appeal and Error," § 998.

Bringing action in another state.—A husband brought an action in Kansas against his wife for the purpose of obtaining a divorce. In her answer and cross-petition the wife asked for a divorce and for alimony. The court refused to grant a divorce to either party, but made an equitable division of the property. To obtain a reversal of the judgment, the husband instituted a proceeding in error in the supreme court. While the proceeding was pending, the husband established a residence in Oklahoma, and there brought an action in which he obtained a divorce from his wife, and the decree barred her from any interest in his property. It was held that he was not estopped to assert error or to further prosecute his proceeding in Kansas. Samuel *v.* Samuel, 59 Kan. 335, 52 Pac. 889.

Bringing action in federal court.—Where, after decree of foreclosure and sale of a railroad in a state court, a bondholder filed a bill in a federal court to set aside the sale, which bill was dismissed on the merits, the bondholder still had the right of appeal from the decree of the state court to the state supreme court. Guaranty Trust, etc., Co. *v.* Buddington, 24 Fla. 21, 3 So. 418.

Bringing action upon counter-claim.—An appeal will not be dismissed on the ground that since it was taken appellant has brought an action to recover upon the cause of action set up in his counter-claim, it appearing that the counter-claim was stricken out for failure to furnish a bill of particulars thereof. O'Brien *v.* Smith, 59 Hun (N. Y.) 624, 13 N. Y. Suppl. 410, 37 N. Y. St. 43.

30. *California.*— People *v.* Burns, 78 Cal. 645, 21 Pac. 540.

Colorado.— Hunter *v.* Dickinson, 3 Colo. App. 372, 33 Pac. 932.

Connecticut.— Salmon *v.* Pixlee, 2 Day (Conn.) 242.

Indiana.— Monnett *v.* Hemphill, 110 Ind. 299, 11 N. E. 230.

Kansas.— Ziegler *v.* Hyle, 45 Kan. 226, 25 Pac. 568; Rasure *v.* McGrath, 23 Kan. 597.

Minnesota.— Babcock *v.* Banning, 3 Minn. 191.

Mississippi.— But see, *contra*, Gordon *v.* Gibbs, 3 Sm. & M. (Miss.) 473.

New York.— Lee *v.* Vacuum Oil Co., 126 N. Y. 579, 27 N. E. 1018, 38 N. Y. St. 662; Cock *v.* Palmer, 19 Abb. Pr. (N. Y.) 372.

Wisconsin.— Thornton *v.* Madison Wooler. Mills, 41 Wis. 265.

United States.— Dakota County *v.* Glidden, 113 U. S. 222, 5 S. Ct. 428, 28 L. ed. 981.

See 2 Cent. Dig. tit. "Appeal and Error," § 981.

31. *Georgia.*—Macrea *v.* Nolan, 33 Ga. 205; Dannelly *v.* Speer, 7 Ga. 227; Mott *v.* Hill, 7 Ga. 79.

j. Where Suit Has Been Taken to Another Court for Review. Where, under a statute, the party aggrieved is given a right of appeal to either of two courts of concurrent jurisdiction, an appeal to one waives the right to appeal to the other.[32]

C. Waiver of Objections to Right of Review. The right to object to the taking of an appeal or the issuance of a writ of error may, it seems, be waived by appellee or defendant in error whenever the objection is founded upon some act or omission on the part of appellant or plaintiff in error which may be pleaded by his opponent as an estoppel to the right of review.[33]

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.[34]

A. Necessity — 1. STATEMENT OF RULE. Subject to a few exceptions, which

Illinois.— Bradley *v.* Gilbert, 155 Ill. 154, 39 N. E. 593; Newman *v.* Dick, 23 Ill. 338. See also Hutchinson *v.* Ayres, 17 Ill. App. 271.

Indiana.— State Bank *v.* Hayes, 3 Ind. 400.

Mississippi.— Miller *v.* Keith, 26 Miss. 166, where party voluntarily withdrew from suit.

Texas.— O'Neal *v.* Wills Point Bank, 64 Tex. 644.

Washington.—Mahncke *v.* Tacoma, 1 Wash. 18, 23 Pac. 804.

See 2 Cent. Dig. tit. "Appeal and Error," § 968.

After a retraxit, a retractor cannot join in the prosecution of a writ of error, as the writ would be utterly at variance with the legal effect of the *retraxit*; but this objection must be interposed by plea before joinder, and comes too late after the pleadings are made up in the courts. Harris *v.* Preston, 10 Ark. 201.

Dismissal of levy.—Where, on demurrer to the equitable pleadings of plaintiffs in fieri facias, filed in aid of their levy, the equitable proceedings are dismissed, and plaintiffs thereupon, of their own motion, dismiss their levy, and the court enters judgment for claimants for costs, a writ of error by plaintiffs to the sustaining of said demurrer will be dismissed. McAfee *v.* Kirk, 78 Ga. 356.

Reason and extent of rule.— So long as the trial court leaves plaintiff a substantial cause of action, his withdrawal from the court must be regarded as voluntary, and as constituting a waiver of his right to appeal from the order of that court. But where the ruling of the court leaves plaintiff without a substantial cause of action — as where it rules that the recovery can be only for nominal damages — the taking of a nonsuit by plaintiff must be regarded as involuntary, and as no waiver of the right of appeal. State *v.* Thompson, 81 Mo. App. 549. During the pendency of an action against a constable and his sureties on his bond, the constable died, and, on motion of defendants, and against the opposition of plaintiff, the writ was revived against the administrator of the constable, whereupon plaintiff abandoned the suit. This action by defendants being invalid, plaintiff did not thereby lose his right to take proper steps to have the original action revived. Com. *v.* York, 9 B. Mon. (Ky.) 40.

32. Field *v.* Great Western Elevator Co., 6 N. D. 424, 71 N. W. 135, 66 Am. St. Rep. 611. But *compare* Metropolitan L. Ins. Co. *v.* Broach, 31 Ill. App. 496, holding that defendant, after an appeal to the circuit court, may appear in the city court, to which plaintiff has perfected an appeal, but which has been dismissed by the judge of such court on his own motion, and may move for a reinstatement thereof, without losing his right to a trial in the circuit court in case of the dismissal by plaintiff of the latter's appeal in said city court after such reinstatement.

Limits of the rule.— But where one of these courts reviews the decisions of the other, the fact that an appeal might have been taken to the superior tribunal in the first instance does not estop appellant from subsequently appealing to that court from the judgment of the inferior appellate court to which the cause was first taken. Northern Pac. R. Co. *v.* Amato, 144 U. S. 465, 12 S. Ct. 740, 36 L. ed. 506 [*affirming* 49 Fed. 881, 1 U. S. App. 113, 1 C. C. A. 468]. And the fact that an appellant applies for and obtains an order of appeal, through a court having no jurisdiction of the matter in dispute, does not estop him from presenting his appeal in a court of competent jurisdiction. Chaplin *v.* Highway Com'rs, 126 Ill. 264, 18 N. E. 765 [*reversing* 27 Ill. App. 643]; McWilliams *v.* Michel, 43 La. Ann. 984, 10 So. 11. See also McIntosh *v.* Wheeler, 58 Kan. 324, 49 Pac. 77.

33. Boone *v.* Poindexter, 12 Sm. & M. (Miss.) 640; D'Ivernois *v.* Leavitt, 8 Abb. Pr. (N. Y.) 59.

See 2 Cent. Dig. tit. "Appeal and Error," § 1015 *et seq.*

As to waiver of objections to parties on appeal see *infra*, VI, H, 7.

This waiver may spring either from express stipulation (Ames *v.* Mississippi Boom Co., 8 Minn. 467), or be implied from some act on the part of appellee or defendant in error, such as joining issue on the appeal or writ of error (Harris *v.* Preston, 10 Ark. 201; McDonald *v.* McConkey, 54 Cal. 143; Minneapolis Harvester Works *v.* Hedges, 11 Nebr. 46, 7 N. W. 531; Du Bois Opera-House Co. *v.* Du Bois, 16 Pa. Co. Ct. 210), or doing any other act showing acquiescence or evincing an intention to treat the appeal or writ of error as valid (Fay *v.* Harrington, 176 Mass. 270, 57 N. E. 369; Matter of Guardian Sav. Inst., 78 N. Y. 408; Henney *v.* Ralph, 6 Kulp (Pa.) 362; Fiedler *v.* Howard, 99 Wis. 388, 75 N. W. 163, 67 Am. St. Rep. 865).

34. As to questions presented by the record see *infra*, XIII.

will be noticed hereafter,[35] the rule is of almost universal application that questions, of whatever nature, not raised in the trial court will not be noticed on appeal,[36] and that, too, irrespective of any stipulations to the contrary which

As to the scope and extent of review, generally, see *infra*, XVII, A.

35. See *infra*, V, B, 1, a, (II); V, B, 1, c; V, B, 1, d, (I), (C).

36. *Alabama.*—Birmingham Loan, etc., Co. *v.* Anniston First Nat. Bank, 100 Ala. 249, 15 So. 945, 46 Am. St. Rep. 45.

California.— Mott *v.* Smith, 16 Cal. 533.

Colorado.— U. S. Security, etc., Co. *v.* Wolfe, (Colo. 1900) 60 Pac. 637; Cache la Poudre Reservoir Co. *v.* Windsor Reservoir Co., 25 Colo. 53, 52 Pac. 1104.

Florida.— Robinson *v.* Springfield Co., 21 Fla. 203.

Georgia.— Durden *v.* Meeks, 110 Ga. 319, 35 S. E. 153; Lathrop *v.* Adkisson, 87 Ga. 339, 13 S. E. 517.

Illinois.—J. Walter Thompson Co. *v.* Whitehed, 185 Ill. 454, 56 N. E. 1106, 76 Am. St. Rep. 51; McKenzie *v.* Penfield, 87 Ill. 38.

Indiana.— Lomax *v.* Strange, 14 Ind. 21.

Iowa.— Clough *v.* Ide, 107 Iowa 669, 78 N. W. 697; Wilson *v.* Palo Alto County, 65 Iowa 18, 21 N. W. 175.

Kansas.— Kansas Pac. R. Co. *v.* Mihlman, 17 Kan. 224; Brown *v.* Flower, 9 Kan. App. 536, 58 Pac. 1015.

Kentucky.— Bowling *v.* Davis, 19 Ky. L. Rep. 1859, 44 S. W. 643, 45 S. W. 77.

Louisiana.— Watson's Tutorship, 51 La. Ann. 1641, 26 So. 409; Bludworth *v.* Hunter, 9 Rob. (La.) 256.

Maine.—Moody *v.* Clark, 27 Me. 551; Emery *v.* Vinall, 26 Me. 295.

Maryland.— Bridendolph *v.* Zeller, 5 Md. 58.

Michigan.— Brown *v.* O'Donnell, 123 Mich. 100, 81 N. W. 961; Beck *v.* Finn, 122 Mich. 21, 80 N. W. 785.

Mississippi.— Anderson *v.* Leland, 48 Miss. 253; Gale *v.* Lancaster, 44 Miss. 413.

Missouri.—Palmer *v.* Alexander, (Mo. 1901) 62 S. W. 691; Hayden *v.* Lauffenburger, 157 Mo. 88, 57 S. W. 721; Kansas City *v.* McGovern, 78 Mo. App. 513.

Montana.— Philipsburg *v.* Weinstein, 21 Mont. 146, 53 Pac. 272.

Nebraska.— Hyde *v.* Hyde, 60 Nebr. 502, 83 N. W. 673; Creighton University *v.* Riley, 50 Nebr. 341, 69 N. W. 943.

Nevada.—Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271; Clarke *v.* Lyon County, 7 Nev. 75.

New Jersey.— Consolidated Traction Co. *v.* Behr, 59 N. J. L. 477, 37 Atl. 142; Cumberland Lumber Co. *v.* Clinton Hill Lumber Mfg. Co., 57 N. J. Eq. 627, 42 Atl. 585.

New York.— Martin *v.* Home Bank, 160 N. Y. 190, 54 N. E. 717 [*affirming* 30 N. Y. App. Div. 498, 52 N. Y. Suppl. 464]; McCann *v.* Albany, 158 N. Y. 634, 53 N. E. 673 [*affirming* 11 N. Y. App. Div. 378, 42 N. Y. Suppl. 94]; People *v.* Delaware, etc., Canal Co., 32 N. Y. App. Div. 120, 52 N. Y. Suppl. 850; Starr *v.* Patterson, 60 Hun (N. Y.) 583, 14 N. Y. Suppl. 901, 39 N. Y. St. 165; Hinman *v.* Stillwell, 34 Hun (N. Y.) 178; Abernethy *v.* Church of Puritans Soc., 3 Daly (N. Y.) 1; Casey *v.* Barry, 27 Misc. (N. Y.) 835, 60 N. Y. Suppl. 768; Campbell *v.* Stakes, 2 Wend. (N. Y.) 137, 19 Am. Dec. 561.

North Carolina.— Williamson *v.* Canaday, 25 N. C. 349.

Ohio.— Akerman *v.* Lima, 7 Ohio N. P. 92, 8 Ohio Dec. 430.

Oregon.— Cook *v.* Portland, 35 Oreg. 383, 58 Pac. 353; Thompson *v.* Dekum, 32 Oreg. 506, 52 Pac. 517, 755.

Pennsylvania.—Spencer *v.* Kunkle, 2 Grant (Pa.) 406; Chester City Presb. Church *v.* Conlin, 11 Pa. Super. Ct. 413, 7 Del. Co. (Pa.) 437; MacKellar *v.* Seeds, 10 Pa. Super. Ct. 167, 44 Wkly. Notes Cas. (Pa.) 182; Central School Supply House *v.* School Board, 9 Pa. Super. Ct. 110.

South Carolina.— Barnwell *v.* Marion, 54 S. C. 223, 32 S. E. 313; Sumter Bldg., etc., Assoc. *v.* Winn, 45 S. C. 381, 23 S. E. 29.

South Dakota.— Dowdle *v.* Cornue, 9 S. D. 126, 68 N. W. 194.

Texas.— Williams *v.* Loan, etc., Land Co., (Tex. Civ. App. 1900) 55 S. W. 374; Davis *v.* San Antonio, etc., R. Co., (Tex. Civ. App. 1898) 44 S. W. 1012.

Utah.— Summit County *v.* Gustaveson, 18 Utah 351, 54 Pac. 977.

Virginia.— Union Bank *v.* Richmond, 94 Va. 316, 26 S. E. 821; Swecker *v.* Swecker, 87 Va. 305, 12 S. E. 1056.

Washington.— Blewett *v.* Bash, 22 Wash. 536, 61 Pac. 770; Dearborn Foundry Co. *v.* Augustine, 5 Wash. 67, 31 Pac. 327.

West Virginia.—Smith *v.* Knight, 14 W. Va. 749.

Wisconsin.— Ritter *v.* Ritter, 100 Wis. 468, 76 N. W. 347; Congar *v.* Chamberlain, 14 Wis. 258; Bogert *v.* Phelps, 14 Wis. 88.

Wyoming.— Sherlock *v.* Leighton, (Wyo. 1901) 63 Pac. 934.

United States— Walker *v.* Sauvinet, 92 U. S. 90, 23 L. ed. 678; Lake County *v.* Sutliff, 97 Fed. 270, 38 C. C. A. 167; Van Gunden *v.* Virginia Coal, etc., Co., 52 Fed. 838, 8 U. S. App. 229, 3 C. C. A. 294.

England.— Chamley *v.* Dunsany, 2 Sch. & Lef. 714.

See 2 Cent. Dig. tit. "Appeal and Error," § 1018 *et seq.*

As to necessity of exceptions see *infra*, V, B, 2, b. Of objections see *infra*, V, V, 1. Of motion for new trial see *infra*, V, B, 3.

In Florida the rule stated in the text has at most a very limited application in chancery cases. The general doctrine is that the court may look into the whole cause, as it is presented in the record, to reëxamine questions decided against respondent and also such questions as passed *sub silentio* in the court below, as well as to examine points made for the first time on appeal, provided such points are

counsel may enter into.[37] In some jurisdictions there are express statutory declarations to the effect that questions of which a review is sought must be raised in the court below.[38]

2. REASONS FOR THE RULE. While the above-stated general rule is supportable upon a number of considerations,[39] it is usually placed upon the ground that the opposite party should have the proper opportunity to avoid, by amendment or by supplying any defects in his proof, the effect of the objection.[40]

3. EXTENT OF RULE — a. Grounds of Defense or Opposition — (I) *IN GENERAL*.[41] In applying the general rule that questions not raised in the lower court will not be considered in the appellate court to the great variety of instances which may, for the sake of convenient reference, be grouped under the head of grounds of defense or opposition, it may be said, generally speaking, that if a defendant in the trial court omits a defense upon the merits which he might have made, and submits issues not involving it, he will, in the appellate court, be bound by the case made by the pleadings and evidence as exhibited by the record, and cannot urge a defense which was not presented to the lower court.[42]

raised by the pleading and proof. O'Neil *v.* Percival, 25 Fla. 118, 5 So. 809; Foster *v.* Ambler, 24 Fla. 519, 5 So. 263; Smith *v.* Croom, 7 Fla. 180; Southern L. Ins. Co. *v.* Cole, 4 Fla. 359. The doctrine is, however, subject to the limitation that neither party will be permitted to surprise or mislead his adversary, or to make objections which might have been obviated had they been presented below. Southern L. Ins., etc., Co. *v.* Cole, 4 Fla. 359.

37. *California.*— Covillaud *v.* Tanner, 7 Cal. 38.

Illinois.— Carlyle *v.* Harms, 84 Ill. App. 264.

Michigan.— But *compare* Turner *v.* Grand Rapids, 20 Mich. 390.

New York.—Greer *v.* Greer, 58 Hun (N. Y.) 251, 20 N. Y. Civ. Proc. 71, 12 N. Y. Suppl. 778, 34 N. Y. St. 448.

United States.— McDonald *v.* Smalley, 1 Pet. (U. S.) 620, 7 L. ed. 287.

Limitation of doctrine.— In Pennsylvania it has been held that where a question is argued on appeal by both parties as though it were properly in the record, the supreme court may pass on the question, even though it was not raised in the lower court. Summerson *v.* Hicks, 142 Pa. St. 344, 21 Atl. 875.

38. Gustafson *v.* Rustemeyer, 70 Conn. 125, 39 Atl. 104, 66 Am. St. Rep. 92, 39 L. R. A. 644; Tuck *v.* Boone, 8 Gill (Md.) 187; Burgess *v.* State, 12 Gill & J. (Md.) 64.

Hence, under a statute providing that no errors are to be considered on an appeal "unless it appears on the record that the questions made were distinctly raised at the trial and decided adversely by the court," questions which were not raised and decided in the court below will not be considered upon appeal, even though no objection is interposed to their consideration. Cooley *v.* Gillan, 54 Conn. 80, 81, 6 Atl. 180.

39. The rule has been supported upon the ground that for an appellate court to consider questions which were not raised in the court below would be to overstep the bounds of the appellate jurisdiction and usurp the functions of a court of original jurisdiction. Elliott App. Proc. § 481. In Coles *v.* Kelsey, 2 Tex. 541, 47 Am. Dec. 661, Wheeler, J., in a dissenting opinion, states the reason for the rule in effect as follows: If an objection which was not raised in the court below could be considered in the appellate court there would be no assurance that there would ever be an end to the litigation; for, should the judgment be reversed on such ground and the cause be again brought before the appellate court, some new objections not before taken, which would require the judgment to be reversed and the cause remanded, might be again discovered, and the same process might be repeated indefinitely, so that the assertion of a right which a party may, unfortunately, be compelled to litigate, might be attended with interminable delay, harassment, and vexation.

40. Slater *v.* Rawson, 1 Metc. (Mass.) 450; Beekman *v.* Frost, 18 Johns. (N. Y.) 544, 9 Am. Dec. 246; Wheeler, J., in Coles *v.* Kelsey, 2 Tex. 541, 47 Am. Dec. 661.

41. As to the capacity or right to sue see *infra*, V, B, 1, d, (I).

As to the effect of a failure to set up particular defenses see particular titles, such as INFANCY; LIBEL AND SLANDER.

42. *Alabama.*— Crenshaw County *v.* Fleming, 109 Ala. 554, 19 So. 906.

Arizona.—Glencross *v.* Evans, (Ariz. 1894) 36 Pac. 212.

California.— Matter of Young, 123 Cal. 337, 55 Pac. 1011; Hanson *v.* Fricker, 79 Cal. 283, 21 Pac. 751.

Colorado.— Rose *v.* Dunklee, 12 Colo. App. 403, 56 Pac. 342.

Connecticut.— Ridgefield *v.* Fairfield, 73 Conn. 47, 46 Atl. 245.

Florida.— Pons *v.* Hart, 5 Fla. 457.

Georgia.— Carter *v.* Peoples Nat. Bank, 109 Ga. 573, 35 S. E. 61; Beach *v.* Lattner, 101 Ga. 357, 28 S. E. 110.

Illinois.— Hafner *v.* Herron, 165 Ill. 242, 46 N. E. 211 [*affirming* 60 Ill. App. 592]; People *v.* Hanson, 150 Ill. 122, 36 N. E. 998, 37 N. E. 580; Ihorn *v.* Wallace, 88 Ill. App. 562; Union Nat. Bank *v.* Hines, 88 Ill. App. 245 [*affirmed* in 187 Ill. 109, 58 N. E. 405];

This is especially true where the defense which is sought to be urged in the

Chicago, etc., R. Co. *v.* Fietsam, 24 Ill. App. 245 [*affirmed* in 187 Ill. 518, 15 N. E. 169].

Indiana.— Lewis *v.* Stanley, 148 Ind. 351, 45 N. E. 693, 47 N. E. 677; Fish *v.* Blasser, 146 Ind. 186, 45 N. E. 63.

Iowa.— Joyce *v.* Perry, 111 Iowa 567, 82 N. W. 941; Dubuque Lumber Co. *v.* Kimball, 111 Iowa 48, 82 N. W. 458; Mason *v.* Des Moines, 108 Iowa 658, 79 N. W. 389.

Kansas.— Shadduck *v.* Stotts, 9 Kan. App. 776, 59 Pac. 39, 61 Pac. 1131; Western Irrigation Co. *v.* Stayton, 1 Kan. App. 739, 41 Pac. 985.

Kentucky.— Behan *v.* Warfield, 90 Ky. 151, 11 Ky. L. Rep. 960, 13 S. W. 439; Milton *v.* Selvage, 21 Ky. L. Rep. 1689, 56 S. W. 13; Shire *v.* Johnson, 18 Ky. L. Rep. 853, 38 S. W. 694.

Louisiana.— Holmgren *v.* Werner, 51 La. Ann. 1476, 26 So. 384; Abat *v.* Michel, 1 Mart. N. S. (La.) 240.

Maine.— Tibbetts *v.* Penley, 83 Me. 118, 21 Atl. 838; Moody *v.* Clark, 27 Me. 551.

Maryland.— Manning *v.* Hays, 6 Md. 5.

Massachusetts.—Burrell *v.* Way, 176 Mass. 164, 57 N. E. 335; Old Colony R. Co. *v.* Rockland, etc., St. R. Co., 161 Mass. 416, 37 N. E. 370; Manning *v.* Albee, 14 Allen (Mass.) 7, 92 Am. Dec. 736.

Michigan.— Fields *v.* Snow, (Mich. 1900) 82 N. W. 798; Railroad Com'rs *v.* Wabash R. Co., 82 Mich. 526, 82 N. W. 526; Wierengo *v.* American F. Ins. Co., 98 Mich. 621, 57 N. W. 833; Wardle *v.* Cummings, 86 Mich. 395, 49 N. W. 212, 538.

Mississippi.—Shingleur-Johnson Co. *v.* Canton Cotton Warehouse Co., (Miss. 1901) 29 So. 770; Talbert *v.* Melton, 9 Sm. & M. (Miss.) 9.

Missouri.— Ragan *v.* Kansas City, etc., R. Co., 144 Mo. 623, 46 S. W. 602; St. Louis Brokerage Co. *v.* Bagnell, 76 Mo. 554; Bray *v.* Seligman, 75 Mo. 31; Midland Elevator Co. *v.* Cleary, 77 Mo. App. 298; Terti *v.* American Ins. Co., 76 Mo. App. 42.

Nebraska.—Downing *v.* Lewis, 59 Nebr. 38, 80 N. W. 261; State *v.* Cass County, 53 Nebr. 767, 74 N. W. 254.

New Hampshire.— Amoskeag Mfg. Co. *v.* Manchester, (N. H. 1900) 46 Atl. 470; State *v.* Rye, 35 N. H. 368.

New Jersey.— Allen *v.* Smith, 12 N. J. L. 159.

New Mexico.— Maxwell *v.* Tufts, 8 N. M. 396, 45 Pac. 979, 33 L. R. A. 854.

New York.— Dr. David Kennedy Corp. *v.* Kennedy, 165 N. Y. 353, 59 N. E. 133 [*modifying* 36 N. Y. App. Div. 599, 55 N. Y. Suppl. 917]; Greene *v.* Smith, 160 N. Y. 533, 55 N. E. 210 [*affirming* 13 N. Y. App. Div. 459, 43 N. Y. Suppl. 610]; Pellas *v.* Motley, 143 N. Y. 657, 38 N. E. 100, 62 N. Y. St. 272; Quinlan *v.* Welch, 141 N. Y. 158, 36 N. E. 12, 56 N. Y. St. 680; Blair *v.* Flack, 141 N. Y. 53, 35 N. E. 941, 56 N. Y. St. 571; Cromwell *v.* MacLean, 123 N. Y. 474, 25 N. E. 932, 34 N. Y. St. 85; Spickerman *v.* McChesney, 111 N. Y. 686, 19 N. E. 266, 20 N. Y. St. 79; Mee *v.* McNider, 109 N. Y. 500, 17 N. E. 424, 16 N. Y. St. 732; Helck *v.* Reinheimer, 105 N. Y. 470, 12 N. E. 37; Wellington *v.* Morey, 90 N. Y. 656; Whitney *v.* Martine, 88 N. Y. 535; Duryee *v.* Lester, 75 N. Y. 442; Wood *v.* Tunnicliff, 74 N. Y. 38; Wheaton *v.* Hibbard, 20 Johns. (N. Y.) 290, 11 Am. Dec. 284.

Ohio.— Perkins *v.* Dibble, 10 Ohio 433, 36 Am. Dec. 97.

Oregon.— Anderson *v.* Portland Flouring Mills Co., 37 Oreg. 483, 60 Pac. 839, 50 L. R. A. 235.

Pennsylvania.— Scott *v.* Scott, 196 Pa. St. 132, 46 Atl. 379; Kutz's Appeal, 40 Pa. St. 90; McGraw *v.* Metropolitan L. Ins. Co., 5 Pa. Super. Ct. 488, 28 Pittsb. Leg. J. N. S. (Pa.) 170, 41 Wkly. Notes Cas. (Pa.) 62.

Rhode Island.— Jones *v.* Henault, 20 R. I. 465, 40 Atl. 6.

South Dakota.— Loomis *v.* Le Cocq, 12 S. D. 324, 81 N. W. 633.

Tennessee.— Northern Bank *v.* Johnson, 5 Coldw. (Tenn.) 88; Ward *v.* Tennessee Coal, etc., Co., (Tenn. Ch. 1900) 57 S. W. 193.

Texas.— Moor *v.* Moor, (Tex. Civ. App. 1900) 57 S. W. 992.

Vermont.—Hartford *v.* School Dist. No. 13, 69 Vt. 147, 37 Atl. 252; Miles *v.* Albany, 59 Vt. 79, 7 Atl. 601.

Virginia.— Osborne *v.* Big Stone Gap Colliery Co., 96 Va. 58, 30 S. E. 446; Milburn Wagon Co. *v.* Nisewarner, 90 Va. 714, 19 S. E. 846.

Washington.— Greene *v.* Finnell, 22 Wash. 186, 60 Pac. 144; Olson *v.* Snake River Valley R. Co., 22 Wash. 139, 60 Pac. 156.

West Virginia.— Cann *v.* Cann, 45 W. Va. 563, 31 S. E. 923; Reed *v.* Nixon, 36 W. Va. 681, 15 S. E. 416.

Wisconsin.— Rudd *v.* Bell, 55 Wis. 563, 13 N. W. 446.

United States.— Canal, etc., St. R. Co. *v.* Hart, 114 U. S. 675, 5 S. Ct. 1127, 29 L. ed. 226; Morrill *v.* Jones, 106 U. S. 466, 1 S. Ct. 423, 27 L. ed. 267; Bates *v.* Coe, 98 U. S. 31, 25 L. ed. 68; Bell *v.* Bruen, 1 How. (U. S.) 169, 11 L. ed. 89; Grattan Tp. *v.* Chilton, 97 Fed. 145, 38 C. C. A. 84 [*affirming* Chilton *v.* Gratton, 82 Fed. 873]; Waterloo Min. Co. *v.* Doe, 82 Fed. 45, 48 U. S. App. 411, 27 C. C. A. 50; Tuttle *v.* Claflin, 76 Fed. 227, 45 U. S. App. 105, 22 C. C. A. 138; Seavey *v.* Seymour, 3 Cliff. (U. S.) 439, 21 Fed. Cas. No. 12,596; Drexel *v.* True, 74 Fed. 12, 36 U. S. App. 611, 20 C. C. A. 265.

See 2 Cent. Dig. tit. "Appeal and Error," §§ 1018 *et seq.*, 1079 *et seq.*

A question as to the ownership or control of property, which defendant failed to raise in the court below, cannot be raised for the first time in the appellate court. McDonald *v.* Bear River, etc., Water, etc., Co., 13 Cal. 220; Cornelius *v.* Grant, 8 Mo. 59; Durant *v.* Palmer, 29 N. J. L. 544; McAfee *v.* Robertson, 43 Tex. 591; Bogert *v.* Phelps, 14 Wis. 88; and see 2 Cent. Dig. tit. "Appeal and Error," § 1087.

appellate court is inconsistent with the defense or defenses relied upon in the court below.[43]

(II) *Constitutionality of Statutes.* In applying the general doctrine that questions not raised below will not be considered on appeal, it is held that the constitutionality of a statute cannot be first questioned on appeal,[44] especially when its constitutionality depends on questions of fact as well as of law.[45] Thus, the contention that a statute is unconstitutional because of irregularities in its passage cannot be urged for the first time on appeal;[46] and where the supreme court of a state did not consider that a question involving the violation of the constitution of the United States was raised in the case, and passed no opinion on it, the supreme court of the United States will not pass on it on a writ of error to such state supreme court.[47]

(III) *Contributory Negligence.* The question of the contributory negligence of plaintiff or plaintiff's intestate must be urged in the court below or it cannot be considered on appeal.[48].

An estoppel must be urged in the court below or it will not be available in the appellate court. Jones *v.* Grantham, 80 Ga. 472, 5 S. E. 764; Trice *v.* Rose, 80 Ga. 408, 7 S. E. 109; Chance *v.* Jennings, 159 Mo. 544, 61 S. W. 177; Bethune *v.* Cleveland, etc., R. Co., 139 Mo. 574, 41 S. W. 213; and see 2 Cent. Dig. tit. "Appeal and Error," § 1102.

Erroneous construction of contract.— An objection that the deed upon which the suit was brought was erroneously construed in the court below will not be considered if raised for the first time on appeal. Ayling *v.* Kramer, 133 Mass. 12.

Plaintiff's failure to arbitrate.— Objection that plaintiff could not recover for extra work, because of a provision in the contract for arbitration relative thereto, cannot be raised for the first time on appeal. Mueller *v.* Rosen, 179 Ill. 130, 53 N. E. 625 [*affirming* 79 Ill. App. 420].

43. *Colorado.*— Metzler *v.* James, 12 Colo. 322, 19 Pac. 885; Lamping *v.* Keenan, 9 Colo. 390, 12 Pac. 434.

Illinois.—Gilmore *v.* Litzelman, 41 Ill. App. 541; Chicago, etc., R. Co. *v.* Connors, 25 Ill. App. 561.

Indiana.— Pool *v.* Davis, 135 Ind. 323, 34 N. E. 1130.

Iowa.— Sandusky Mach., etc., Works *v.* Hooks, 83 Iowa 305, 49 N. W. 61.

Kansas.— Allen *v.* Gardner, 47 Kan. 337, 27 Pac. 982.

Massachusetts.—Lyon *v.* Prouty, 154 Mass. 488, 28 N. E. 908.

Missouri.— Naylor *v.* Cox, 114 Mo. 232, 21 S. W. 589.

Nebraska.—Omaha Brewing Assoc. *v.* Wuethrich, 47 Nebr. 920, 66 N. W. 990.

New York.— Kinnan *v.* Forty-second St., etc., R. Co., 140 N. Y. 183, 35 N. E. 498, 55 N. Y. St. 584.

Pennsylvania.— McArthur *v.* Chase, (Pa. 1887) 8 Atl. 204.

See 2 Cent. Dig. tit. "Appeal and Error," § 1080; and *infra*, V, A, 3, f.

44. *Colorado.*— Miller *v.* Thorpe, 4 Colo. App. 559, 36 Pac. 891.

Georgia.— Butler *v.* Merritt, (Ga. 1901) 38 S. E. 751.

Illinois.— Chiniquy *v.* People, 78 Ill. 570.

Iowa.— Ross *v.* Hawkeye Ins. Co., 93 Iowa 222, 61 N. W. 852, 34 L. R. A. 466; Hopper *v.* Chicago, etc., R. Co., 91 Iowa 639, 60 N. W. 487.

Louisiana.— Gagnet *v.* New Orleans, 23 La. Ann. 207.

Missouri.— Baldwin *v.* Fries, 103 Mo. 286, 15 S. W. 760; Curtwright *v.* Crow, 44 Mo. App. 563.

New York.— Purdy *v.* Erie R. Co., 162 N. Y. 42, 56 N. E. 508, 48 L. R. A. 669 [*affirming* 33 N. Y. App. Div. 643, 54 N. Y. Suppl. 1114]; Delaney *v.* Brett, 51 N. Y. 78; Emmons *v.* Wheeler, 3 Hun (N. Y.) 545. *Contra*, Parsons *v.* Van Wyck, 56 N. Y. App. Div. 329, 67 N. Y. Suppl. 1054; Brookman *v.* Hamill, 54 Barb. (N. Y.) 209.

Oregon.— Allen *v.* Portland, 35 Oreg. 420, 58 Pac. 509.

South Carolina.— Bomar *v.* Asheville, etc., R. Co., 30 S. C. 450, 9 S. E. 512; Tompkins *v.* Augusta, etc., R. Co., 21 S. C. 420.

Washington.— North River Boom Co. *v.* Smith, 15 Wash. 138, 45 Pac. 750.

See 2 Cent. Dig. tit. "Appeal and Error," § 1037.

So it has been held that in a suit by taxpayers to restrain collection of an assessment for a town subscription to a railroad, the constitutionality of the act chartering defendant company cannot be considered on appeal, though raised in the lower court, where no ruling was made thereon by the trial judge. Chamblee *v.* Tribble, 23 S. C. 70.

45. Hill *v.* Bourkhard, 5 Colo. App. 58, 36 Pac. 1115; Rice *v.* Carmichael, 4 Colo. App. 84, 34 Pac. 1010.

46. Zang *v.* Wyant, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145; Sargent *v.* La Plata County, 21 Colo. 158, 40 Pac. 366; Marean *v.* Stanley, 21 Colo. 43, 39 Pac. 1086; Auditor *v.* Haycraft, 14 Bush (Ky.) 284; Clearwater Bank *v.* Kurkonski, 45 Nebr. 1, 63 N. W. 133.

47. Bartemeyer *v.* Iowa, 18 Wall. (U. S.) 129, 21 L. ed. 929. And see Matheson *v.* Mobile Branch Bank, 7 How. (U. S.) 260, 12 L. ed. 692.

48. *Alabama.*—Alabama Midland R. Co. *v.* Johnson, 123 Ala. 197, 26 So. 160; Eufaula *v.* Speight, 121 Ala. 613, 25 So. 1009.

(IV) *Discharge, Release, or Satisfaction of Debt.* A defendant cannot assert, in the appellate court for the first time, that the debt has been released,[49] satisfied,[50] or discharged.[51]

(V) *Invalidity of Instrument in Suit*—(A) *Rule Stated.* An objection to the validity of a contract or instrument in suit must be made in the court below, and cannot be urged for the first time in the appellate court.[52]

(B) *Rule Applied.* Thus it cannot be first objected on appeal that a contract is void under the Sunday laws;[53] that a contract or deed is tainted with fraud[54] or usury;[55] that it is champertous;[56] that it is void under the statute of frauds[57]

Massachusetts.— Taylor *v.* Woburn, 130 Mass. 494.

Mississippi.—Illinois Cent. R. Co. *v.* Minor, 69 Miss. 710, 11 So. 101, 16 L. R. A. 627.

New Jersey.— Consolidated Traction Co. *v.* Behr, 59 N. J. L. 477, 37 Atl. 142.

New York.— Adler *v.* Metropolitan St. R. Co., 33 Misc. (N. Y.) 798, 68 N. Y. Suppl. 621; Pfau *v.* Alteria, 23 Misc. (N. Y.) 693, 52 N. Y. Suppl. 88; Pike *v.* Bosworth, 7 N. Y. St. 665.

Texas.— Galveston, etc., R. Co. *v.* Parsley, 6 Tex. Civ. App. 150, 25 S. W. 64.

See 2 Cent. Dig. tit. "Appeal and Error," § 1103.

49. New Orleans Gas Light, etc., Co. *v.* Hudson, 5 Rob. (La.) 486; Goodnow *v.* Hill, 125 Mass. 587.

50. Pierce *v.* Early, 79 Iowa 199, 44 N. W. 890.

Thus, where, in foreclosure, the court granted the only relief asked in the separate answer of a subsequent purchaser of part of the premises, directing that part to be sold last, and such defendant appealed, it was held that he could not be heard in the supreme court upon the question whether the mortgage had been satisfied, not having raised that issue in his answer. Palmer *v.* Yager, 20 Wis. 91.

51. Serra é Hijo *v.* Hoffman, 29 La. Ann. 17; and see 2 Cent. Dig. tit. "Appeal and Error," § 1109.

Hence, whether certain testimony tended to show accord and satisfaction of the note in suit, such testimony having been ignored by the trial court and by counsel at the time of trial, will not be considered on appeal. Clark County Bank *v.* Christie, 61 Wis. 9, 20 N. W. 644.

52. *California.*— King *v.* Meyer, 35 Cal. 646.

Illinois.— Fiske *v.* People, 188 Ill. 206, 58 N. E. 985, 52 L. R. A. 291; Chicago *v.* Duffy, 179 Ill. 447, 53 N. E. 982.

Kentucky.— Daviess *v.* Mead, 2 Bibb (Ky.) 397.

Louisiana.— State *v.* Breed, 10 La. Ann. 491.

Michigan.— People *v.* Robb, 98 Mich. 397, 57 N. W. 257.

Minnesota.— White *v.* Western Assur. Co., 52 Minn. 352, 54 N. W. 195.

Missouri.— St. Louis Agricultural, etc., Assoc. *v.* Delano, 37 Mo. App. 284.

New York.—Meakings *v.* Cromwell, 5 N. Y. 136; Friedman *v.* Rose, 83 Hun (N. Y.) 542, 31 N. Y. Suppl. 1040, 65 N. Y. St. 70.

South Dakota.— Deindorfer *v.* Bachmor, 12 S. D. 285, 81 N. W. 297.

Tennessee.— Precious Blood Soc. *v.* Elsythe, 102 Tenn. 40, 50 S. W. 759.

Virginia.— Planters Bank *v.* Whittle, 78 Va. 737; James River, etc., Co. *v.* Littlejohn, 18 Gratt. (Va.) 53.

Washington.— Fischer *v.* Quigley, 8 Wash. 327, 35 Pac. 1071.

United States.—McGahan *v.* National Bank, 156 U. S. 218, 15 S. Ct. 347, 39 L. ed. 403.

See 2 Cent. Dig. tit. "Appeal and Error," § 1088 *et seq.*

But in Massachusetts it has been held that, although the illegality of a contract sued on is not set up in defense or noticed in the trial court, where plaintiff obtains a verdict the supreme court will, on its own motion, refuse to enforce the contract. Claflin *v.* U. S. Credit System Co., 165 Mass. 501, 43 N. E. 293, 52 Am. St. Rep. 528.

53. Petty *v.* Allen, 134 Mass. 265; Woodbridge *v.* Sellwood, 65 Minn. 135, 67 N. W. 799; Brinkman *v.* Luhrs, 1 Mo. App. Rep. 215.

54. Foster *v.* Bowman, 55 Iowa 237, 7 N. W. 513; Watkins *v.* Clifton Hill Land Co., 91 Tenn. 683, 20 S. W. 246; Vance *v.* Kirk, 29 W. Va. 344, 1 S. E. 717; Bradley *v.* Hargadine-McKittrick Dry-Goods Co., 96 Fed. 914, 37 C. C. A. 623; and see 2 Cent. Dig. tit. "Appeal and Error," § 1097.

55. *Georgia.*— Dobbins *v.* Clark, 59 Ga. 709.

Mississippi.— Paine *v.* Gill, 42 Miss. 98.

Missouri.— St. Louis Domicile, etc., Loan Assoc. *v.* Augustin, 2 Mo. App. 123.

New York.— Morton *v.* Thurber, 85 N. Y. 550.

Texas.— Rutherford *v.* Smith, 28 Tex. 322.

United States.— Ewing *v.* Howard, 7 Wall. (U. S.) 499, 19 L. ed. 293; Newell *v.* Nixon, 4 Wall. (U. S.) 572, 18 L. ed. 305.

See 2 Cent. Dig. tit. "Appeal and Error," § 1098.

But it has been held that, in an action to foreclose deeds of trust, where a master, by the order of reference, is precluded from taking evidence upon the issue of usury, the question may be raised on appeal. Jenkins *v.* Bauer, 8 Ill. App. 634.

56. Percy Consol. Min. Co. *v.* Hallam, 22 Colo. 233, 44 Pac. 509; Kutcher *v.* Love, 19 Colo. 542, 36 Pac. 152; Hastings *v.* McKinley, Seld. Notes (N. Y.) 173, 1 E. D. Smith (N. Y.) 273. *Contra*, Heaton *v.* Dennis, 103 Tenn. 155, 52 S. W. 175. See also CHAMPERTY AND MAINTENANCE; and 2 Cent. Dig. tit. "Appeal and Error," § 1095.

57. *Arkansas.*— Humphreys *v.* Butler, 51 Ark. 351, 11 S. W. 479.

Georgia.— Johnson *v.* Latimer, 71 Ga. 470.

or because one of the parties was under coverture;[58] that a bill or bond sued on was not stamped;[59] that the consideration of a contract was insufficient or that there was a failure of consideration;[60] that the instrument was invalidated by a material alteration;[61] that the instrument was insufficiently acknowledged;[62] that the contract is one which is forbidden by law;[63] that the contract is *ultra vires*;[64] that a deed was ineffectual because never delivered;[65] that a bond was not properly witnessed;[66] or that the agent making the contract was without authority to do so.[67]

(VI) *LACHES.* A defendant cannot, for the first time on appeal, urge the laches of complainant in bringing[68] or in prosecuting his suit.[69]

(VII) *MATTERS OF ABATEMENT.* Matters in abatement, not going to the

Illinois.— Neagle *v.* Kelly, 146 Ill. 460, 34 N. E. 947; Berkowsky *v.* Viall, 66 Ill. App. 349.

Iowa.— Holt *v.* Brown, 63 Iowa 319, 19 N. W. 235; Lower *v.* Lower, 46 Iowa 525.

Massachusetts.— Lydig *v.* Braman, 177 Mass. 212, 58 N. E. 696.

Missouri.— Mantz *v.* Maguire, 52 Mo. App. 136; Penninger *v.* Reilley, 44 Mo. App. 255.

New York.— Throop Grain Cleaner Co. *v.* Smith, 110 N. Y. 83, 17 N. E. 671, 16 N. Y. St. 831; Eiseman *v.* Heine, 2 N. Y. App. Div. 319, 37 N. Y. Suppl. 861, 73 N. Y. St. 74; Grampp *v.* De Peyster, 80 Hun (N. Y.) 134, 29 N. Y. Suppl. 1039, 61 N. Y. St. 622; Isaacs *v.* New York Plaster Works, 40 N. Y. Super. Ct. 277; Johns *v.* Gustin, 2 Thomps. & C. (N. Y.) 662; Artcher *v.* Zeh, 5 Hill (N. Y.) 200.

South Carolina.— Rhode *v.* Tuten, 34 S. C. 496, 13 S. E. 676.

South Dakota.— Prior *v.* Sanborn County, 12 S. D. 86, 80 N. W. 169.

Texas.— League *v.* Davis, 53 Tex. 9; Erhard *v.* Callaghan, 33 Tex. 171; Day *v.* Dalziel, (Tex. Civ. App. 1895) 32 S. W. 377.

Vermont.— Sartwell *v.* Sowles, 72 Vt. 270, 48 Atl. 11.

See 2 Cent. Dig. tit. "Appeal and Error," § 1101.

As to the time and mode of invoking the statute of frauds see FRAUDS, STATUTE OF.

Though the statute of frauds is pleaded as a defense, if no point in respect thereto is raised, or exception taken on the trial, the questions cannot be considered on appeal. Bommer *v.* American Spiral Spring Butt Hinge Mfg. Co., 81 N. Y. 468.

58. Weston *v.* Palmer, 51 Me. 73; Westervelt *v.* Ackley, 62 N. Y. 505; Castree *v.* Gavelle, 4 E. D. Smith (N. Y.) 425; Murphy *v.* Bright, 3 Grant (Pa.) 296; Jackson *v.* Everett, (Tenn. 1894) 58 S. W. 340. See also Sherwin *v.* Sanders, 59 Vt. 499, 9 Atl. 239, 59 Am. Rep. 750; and see 2 Cent. Dig. tit. "Appeal and Error," § 1094.

59. Morgan *v.* Briscoe, 4 Md. 271; Hawkins *v.* Wilson, 1 W. Va. 117.

60. Crone *v.* Garst, 88 Ill. App. 124; Chamberlin *v.* Whitford, 102 Mass. 448; Graves *v.* Hillyer, (Tex. Civ. App. 1899) 48 S. W. 889; and see 2 Cent. Dig. tit. "Appeal and Error," § 1091.

61. Grimshaw *v.* Hart, 6 Rob. (La.) 265; Tate *v.* New York State Bank, 96 Va. 765, 32 S. E. 476; and see 2 Cent. Dig. tit. "Appeal and Error," § 1092.

62. See ACKNOWLEDGMENTS, III, A, 1, f.

63. Hurley *v.* Southern Express Co., 45 La. Ann. 889, 13 So. 178; Hastings *v.* New York, etc., R. Co., 53 Hun (N. Y.) 638, 6 N. Y. Suppl. 836, 25 N. Y. St. 249; Brown *v.* Platt, 8 Bosw. (N. Y.) 324; Findlay *v.* Pertz, 74 Fed. 681, 43 U. S. App. 383, 20 C. C. A. 662.

64. Pullman's Palace Car Co. *v.* Central Transp. Co., 139 U. S. 62, 11 S. Ct. 489, 35 L. ed. 69; and see 2 Cent. Dig. tit. "Appeal and Error," § 1090.

65. Shipley *v.* Bunn, 125 Mo. 445, 28 S. W. 754.

66. Hollenback *v.* Fleming, 6 Hill (N. Y.) 303.

67. Iowa Homestead Co. *v.* Duncombe, 51 Iowa 525, 1 N. W. 725; Winchester *v.* King, 48 Mich. 280, 12 N. W. 220; Blair *v.* Flack, 141 N. Y. 53, 35 N. E. 941, 56 N. Y. St. 571; Mitchell *v.* Vermont Copper Min. Co., 67 N. Y. 280; Wolfe *v.* Security F. Ins. Co., 39 N. Y. 49; Wheeler, etc., Mfg. Co. *v.* Elberson, 84 Hun (N. Y.) 501, 32 N. Y. Suppl. 303, 65 N. Y. St. 538; Crawford *v.* Pyle, 190 Pa. St. 263, 44 Wkly. Notes Cas. (Pa.) 1, 42 Atl. 687; and see 2 Cent. Dig. tit. "Appeal and Error," § 1096.

68. Larkin *v.* Mullen, 128 Cal. 449, 60 Pac. 1091; Randolph *v.* Knox County, 114 Mo. 142, 21 S. W. 592.

Thus where the objection that the petition for a mechanic's lien was not filed in time was not raised in the trial court, it will not be considered on appeal. Burrell *v.* Way, 176 Mass. 164, 57 N. E. 335.

69. Rohrbaugh *v.* Bennett, 30 W. Va. 186, 3 S. E. 593.

See 2 Cent. Dig. tit. "Appeal and Error," § 1106 *et seq.*

Applications of rule.— Thus the objection that complainant's demand is stale, so that it will not be enforced by a court of equity, must be raised in the court below.

Arkansas.— Humphreys *v.* Butler, 51 Ark. 351, 11 S. W. 479.

Illinois.— Walker *v.* Denison, 86 Ill. 142; O'Halloran *v.* Fitzgerald, 71 Ill. 53; School Trustees *v.* Wright, 12 Ill. 432.

Indiana.— State *v.* Holloway, 8 Blackf. (Ind.) 45.

Texas.— Emmons *v.* Oldham, 12 Tex. 18.

Virginia.— Wills *v.* Dunn, 5 Gratt. (Va.) 384.

jurisdiction of the subject-matter, must be pleaded below,[70] and cannot be raised for the first time in the appellate court.[71]

(VIII) *NON-COMPLIANCE WITH CONDITIONS PRECEDENT.* The objection that there has been a failure to comply with a condition precedent to the right to sue must be raised below, so that plaintiff may have an opportunity to avoid the effect of the objection, and cannot be raised for the first time on appeal.[72] This doctrine has been held to apply to the objection that no demand was made before suit brought.[73]

In an action to set aside a cancellation, by mutual consent, of a marine insurance policy, the insurance company cannot raise the question for the first time on appeal that the assured, by failing to tender the return premium to the company for a long time, was guilty of laches, and so ratified the cancellation. Duncan *v.* New York Mut. Ins. Co., 138 N. Y. 88, 33 N. E. 730, 51 N. Y. St. 661, 20 L. R. A. 386.

And it has been held that, where the answer in an action against the sureties on a guardian's bond does not allege that the ward was chargeable with laches in delaying to prosecute the guardian, the defendants cannot avail themselves of the defense on appeal even though the facts on which it is based appear in the record. Douglass *v.* Ferris, 138 N. Y. 192, 33 N. E. 1041, 52 N. Y. St. 138, 34 Am. St. Rep. 435.

70. See ABATEMENT AND REVIVAL, V, D; and *infra*, V, B, 1, t.

71. *Connecticut.*— Wetmore *v.* Plant, 5 Conn. 541.

Illinois.— McKenzie *v.* Penfield, 87 Ill. 38; Pearce *v.* Swan, 2 Ill. 266.

Kentucky.— Robinson *v.* Lillard, Ky. Dec. 347.

Maine.— Piper *v.* Goodwin, 23 Me. 251.

Mississippi.— Queen City Mfg. Co. *v.* Blalack, (Miss. 1896) 18 So. 800.

Tennessee.— Odum *v.* J. I. Case Threshing-Mach. Co., (Tenn. Ch. 1895) 36 S. W. 191.

Wisconsin.— Yale *v.* Flanders, 4 Wis. 96.

United States.— Speer *v.* Kearney County, 88 Fed. 749, 60 U. S. App. 38, 32 C. C. A. 101.

See 2 Cent. Dig. tit. "Appeal and Error," § 1081 *et seq.*

Action prematurely brought.— Thus, it has been held that an objection that a suit is prematurely brought cannot be first raised on appeal.

Alabama.— Blount *v.* McNeill, 29 Ala. 473.

Arkansas.— Johnson *v.* Meyer, 54 Ark. 442, 16 S. W. 123.

Florida.— Logan *v.* Slade, 28 Fla. 690, 10 So. 25.

Iowa.— Brownlee *v.* Marion County, 53 Iowa 487, 5 N. W. 610.

Kentucky.— Smith *v.* Hall, 19 Ky. L. Rep. 1662, 44 S. W. 125.

Louisiana.— Nicholson *v.* Hendricks, 22 La. Ann. 511; Pecquet *v.* Pecquet, 17 La. Ann. 204.

New York.— Bumstead *v.* Dividend Mut. Ins. Co., 12 N. Y. 81; Jones *v.* Tonawanda, 35 N. Y. App. Div. 151, 55 N. Y. Suppl. 115; Atkinson *v.* Singer Mfg. Co., 14 Misc. (N. Y.) 630, 35 N. Y. Suppl. 117, 69 N. Y. St. 491; Senft *v.* Manhattan R. Co., 59 N. Y. Super. Ct. 571, 14 N. Y. Suppl. 876, 39 N. Y. St. 356.

Tennessee.— Green *v.* Demoss, 10 Humph. (Tenn.) 371.

Texas.— Williams *v.* Smith, (Tex. Civ. App. 1894) 24 S. W. 1115.

Contra.— In Mississippi it is held that the objection that an action was prematurely brought goes to the right of action, and may be first raised in the appellate court (Hart *v.* Chemical Nat. Bank, (Miss. 1900) 27 So. 926; Terry *v.* Curd, etc., Mfg. Co., 66 Miss. 394, 6 So. 229; Winston *v.* Miller, 12 Sm. & M. (Miss.) 550; Wiggle *v.* Thomason, 11 Sm. & M. (Miss.) 452); except where defendant has consented to judgment against himself (Queen City Mfg. Co. *v.* Blalack, (Miss. 1896) 18 So. 800).

See 2 Cent. Dig. tit. "Appeal and Error," § 1083.

Another action pending.— The pendency of another action, unless pleaded in the lower court, cannot be raised on appeal. Townsend's Succession, 37 La. Ann. 405; State *v.* Judge, 29 La. Ann. 360; Glover *v.* St. Louis Mut. Bond Invest. Co., 138 Mo. 408, 40 S. W. 110. See also ABATEMENT AND REVIVAL, V, A, 2.

72. *California.*— Castro *v.* Gill, 5 Cal. 40.

Colorado.— Rio Grande County *v.* Phye, (Colo. 1899) 59 Pac. 55.

Iowa.— Schoening *v.* Schwenk, (Iowa 1901) 84 N. W. 916.

Kentucky.— Behan *v.* Warfield, 90 Ky. 151, 11 Ky. L. Rep. 960, 13 S. W. 439; Taylor *v.* Fulks, 16 Ky. L. Rep. 605, 29 S. W. 349.

Michigan.— Shattuck *v.* Hart, 98 Mich. 557, 57 N. W. 818.

New Hampshire.— North *v.* Crowell, 11 N. H. 251.

New York.— Coffin *v.* Grand Rapids Hydraulic Co., 136 N. Y. 655, 32 N. E. 1076, 50 N. Y. St. 15; Varian *v.* Johnston, 108 N. Y. 645, 15 N. E. 413; Wooster *v.* Sage, 67 N. Y. 67; Coffin *v.* Grand Rapids Hydraulic Co., 61 N. Y. Super. Ct. 51, 18 N. Y. Suppl. 782, 46 N. Y. St. 851.

Texas.— Luke *v.* El Paso, (Tex. Civ. App. 1900) 60 S. W. 363.

Washington.— Fitzgerald *v.* School Dist. No. 20, 5 Wash. 112, 31 Pac. 427.

See 2 Cent. Dig. tit. "Appeal and Error," § 1084.

73. *Georgia.*— Smith *v.* Bush, 58 Ga. 121.

Iowa.— Egan *v.* Murray, 80 Iowa 180, 45 N. W. 563.

Michigan.— O'Neil *v.* Detroit, 50 Mich. 133, 15 N. W. 48.

Missouri.— Weese *v.* Brown, 102 Mo. 299, 14 S. W. 945; Folden *v.* Hendrick, 25 Mo. 411.

The rule has also been applied to the objection that the demand made was insufficient.[74]

(IX) *RES JUDICATA.* As a general rule a former adjudication of a cause cannot be urged for the first time in the appellate court.[75] And this certainly cannot be done when the facts necessary to sustain an exception of *res judicata* do not appear from the record.[76] Where a decree in a former suit has been held to be *res judicata* of the controversy, objection to the sufficiency of the former suit as a bar, which objection has not been presented to the trial court, cannot be urged on appeal.[77] Accordingly, the validity or regularity of a former judgment pleaded in bar cannot be questioned for the first time on appeal.[78]

(X) *STATUTE OF LIMITATIONS.* The bar of the statute of limitations cannot be urged for the first time in the appellate court;[79] and it has been held that the

New Mexico.— Crabtree *v.* Segrist, 3 N. M. 278, 6 Pac. 202.

New York.— Govin *v.* De Miranda, 140 N. Y. 474, 35 N. E. 626, 55 N. Y. St. 837; Leach *v.* Vining, 64 Hun (N. Y.) 632, 18 N. Y. Suppl. 822, 45 N. Y. St. 170; Burnett *v.* Snyder, 45 N. Y. Super. Ct. 582; Kauffman *v.* Klang, 16 Misc. (N. Y.) 379, 38 N. Y. Suppl. 56, 74 N. Y. St. 311; Wisser *v.* O'Brien, 44 How. Pr. (N. Y.) 209.

Pennsylvania.— Pitt Tp. *v.* Leech, 12 Pa. St. 33.

See 2 Cent. Dig. tit. "Appeal and Error," § 1085.

74. Bromley *v.* Miles, 51 N. Y. App. Div. 95, 64 N. Y. Suppl. 353; Sequin *v.* Peterson, 45 Vt. 255, 12 Am. Rep. 194.

75. *California.*— Harper *v.* Gordon, 128 Cal. 489, 61 Pac. 84.

Illinois.— Williams *v.* Lindblom, 163 Ill. 346, 45 N. E. 245.

Indiana.— Eckert *v.* Binkley, 134 Ind. 614, 33 N. E. 619, 34 N. E. 441.

Iowa.— Seekel *v.* Norman, 78 Iowa 254, 43 N. W. 190.

Kentucky.— Long *v.* Louisville, etc., R. Co., 21 Ky. L. Rep. 1151, 54 S. W. 178 [*denying rehearing*, 21 Ky. L. Rep. 463, 51 S. W. 807].

Missouri.— Mackler *v.* Schuster, 68 Mo. App. 670.

Texas.— Lindsley *v.* Sparks, 20 Tex. Civ. App. 56, 48 S. W. 204.

Vermont.— Lamoille County Nat. Bank *v.* Hunt, 72 Vt. 357, 47 Atl. 1078.

Washington.— Bast *v.* Hysom, 6 Wash. 170, 32 Pac. 997.

See 2 Cent. Dig. tit. "Appeal and Error," § 1039.

76. Goodrich *v.* Pattingill, 7 La. Ann. 664; Carpenter *v.* Beatty, 12 Rob. (La.) 540; Zollicoffer *v.* Briggs, 3 Rob. (La.) 236.

It has, however, been held that an objection, that the appellate court cannot pass upon an exception of *res judicata* because the trial court did not pass upon it, cannot be sustained where it appears that, by agreement, the exceptions were referred to the merits, and the trial judge, being of the opinion that defendant was entitled to judgment on the merits, expressed no opinion as to the exception. Brady *v.* Parish of Ascension, 26 La. Ann. 320.

77. McLeod *v.* Lee, 17 Nev. 103, 28 Pac. 124; Jones *v.* Lee, (Tex. Civ. App. 1892) 20 S. W. 863.

78. Reich *v.* Cochran, 151 N. Y. 122, 45 N. E. 367, 56 Am. St. Rep. 607, 37 L. R. A. 805.

79. *Alabama.*—Sands *v.* Hammell, 108 Ala. 624, 18 So. 489; Inge *v.* Murphy, 10 Ala. 885.

California.— Barber *v.* Mulford, 117 Cal. 356, 49 Pac. 206; Zellerbach *v.* Allenberg, 99 Cal. 57, 33 Pac. 786.

Colorado.— Marshall Silver Min. Co. *v.* Kirtley, 12 Colo. 410, 21 Pac. 492.

Georgia.—Milledgeville Steam Laundry Co. *v.* Gobert, 89 Ga. 473, 15 S. E. 551.

Illinois.— Palmer *v.* Frank, 169 Ill. 90, 48 N. E. 426 [*affirming* 69 Ill. App. 472]; Kennedy *v.* Stout, 26 Ill. App. 133.

Iowa.— McMurray *v.* McMurray, 107 Iowa 648, 78 N. W. 691.

Louisiana.— Mullan *v.* His Creditors, 39 La. Ann. 397, 2 So. 45.

Mississippi.— Patterson *v.* Ingraham, 23 Miss. 87.

Nebraska.— Bell *v.* Rice, 50 Nebr. 547, 70 N. W. 25; Halbert *v.* Rosenbalm, 49 Nebr. 498, 68 N. W. 622.

New York.—Osgood *v.* Toole, 60 N. Y. 475; Salisbury *v.* Washington County, 30 N. Y. App. Div. 187, 51 N. Y. Suppl. 1070; Faburn *v.* Dimon, 20 N. Y. App. Div. 529, 47 N. Y. Suppl. 227; Williams *v.* Clements, 64 Hun (N. Y.) 636, 19 N. Y. Suppl. 613, 46 N. Y. St. 448 [*affirmed* in 137 N. Y. 560, 33 N. E. 338, 50 N. Y. St. 932]; Stewart *v.* Smith, 14 Abb. Pr. (N. Y.) 75.

Tennessee.— German Bank *v.* Haller, 103 Tenn. 73, 52 S. W. 288; Robinson *v.* Brown, 1 Baxt. (Tenn.) 206.

Washington.— Herrick *v.* Niesz, 16 Wash. 74, 47 Pac. 414; Mudgett *v.* Clay, 5 Wash. 103, 31 Pac. 424.

West Virginia.— Woodyard *v.* Polsley, 14 W. Va. 211.

United States.— Bardon *v.* Land, etc., Imp. Co., 157 U. S. 327, 15 S. Ct. 650, 39 L. ed. 719.

See 2 Cent. Dig. tit. "Appeal and Error," § 1104 *et seq.*

In Louisiana, prior to the adoption of the civil code, prescription could not be pleaded in the supreme court. Boudreau *v.* Boudreau, 12 Mart. (La.) 667. But by La. Civ. Code, art. 3427, and by La. Code Prac. art. 902, pre-

defense of limitations, even though it be pleaded, cannot be raised on appeal unless presented in some form on the trial below.[80] But it has also been held that, even though a party who has pleaded the statute of limitations does not raise it in his argument, if the court finds in such party's favor on that issue he has a right to take advantage of it on appeal.[81]

b. Questions Arising in Controversies Relating to Public Lands. In proceedings relating to public lands it has been held that the objection that the grant was fictitious,[82] or that the receiver took part with the register in the hearing and decision in the land-office,[83] will not be considered if made for the first time in the United States supreme court. Any question as to the priority of a location on public lands which was not made in the lower court cannot be raised on appeal.[84]

c. Questions as to Nature and Form of Relief. Relief which was not asked for in the court below cannot be obtained on appeal.[85] Nor can it be first set up

scription may be pleaded even after appeal. But it has been held that the plea will not be considered unless it is specifically presented by the pleadings. Mullan *v.* His Creditors, 39 La. Ann. 397, 2 So. 45; Chase *v.* Davis, 20 La. Ann. 201. And it is too late to plead prescription in the interval between the day when judgment is rendered and the day when it goes into effect. Stark *v.* Burke, 9 La. Ann. 344. On the ground that the statute does not apply to such a case, it has been held that credits claimed for payments not opposed below cannot be objected to, though resisted on the ground that the debts so paid were prescribed. Blakey's Succession, 12 Rob. (La.) 155.

In Massachusetts it has been held that where judgment was rendered against bail on scire facias, a defense that the scire facias was not served within the statutory time after judgment against the principal being apparent on the record, and of such a character that it could not be affected by any proof to be offered, the supreme court will consider it, though it was not taken below. Gass *v.* Bean, 5 Gray (Mass.) 397.

In Texas it was held, in the early case of Petty *v.* Cleveland, 2 Tex. 404, that the defense afforded by the statute of limitations could not avail a defendant in the supreme court unless it was made a ground of defense in the court below. But this case was overruled by later cases, and the rule was established that if plaintiff's pleading shows a cause of action which is barred by the statute of limitations, the bar of the statute may be taken advantage of on error though not made a ground of defense, by demurrer or otherwise, in the court below. Ogden *v.* Lund, 11 Tex. 688; Pettus *v.* Perry, 4 Tex. 486; Long *v.* Anderson, 4 Tex. 422; Swenson *v.* Walker, 3 Tex. 93; Coles *v.* Kelsey, 2 Tex. 541, 47 Am. Dec. 661. However, it was declared by the act of Feb. 5, 1852 [2 Sayles Civ. Stat. Tex. art. 3371], that the statute of limitations shall not be made available to any person unless it be especially set forth as a defense in the answer. Alston *v.* Richardson, 51 Tex. 1; Ogden *v.* Lund, 11 Tex. 688; Horton *v.* Crawford, 10 Tex. 382; Boyd *v.* Ghent, (Tex. Civ. App. 1901) 61 S. W. 723; Pickett *v.* Edwards, (Tex. Civ. App. 1894) 25 S. W. 32. And under Tex. Rev. Stat. (1895), art. 1331, as amended, precluding a reversal, in a case submitted on special issues, for a failure to submit an issue, a submission of which was not requested by appellant, a question of limitations in such a case will not be considered on appeal where no submission thereof was made or requested. Armstrong *v.* Elliott, 20 Tex. Civ. App. 41, 48 S. W. 605, 49 S. W. 635.

80. McDonald *v.* Bear River, etc., Water, etc., Co., 13 Cal. 220; Osgood *v.* Toole, 60 N. Y. 475.

But in Gautier *v.* Franklin, 1 Tex. 732, it was held that when defendant's plea of the statute of limitations is not withdrawn or renounced, but a judgment for plaintiff is nevertheless rendered, the reviewing court may correct the error although the trial court apparently overlooked the plea.

81. Vassault *v.* Seitz, 31 Cal. 225.

So, too, it has been held that the question of limitations may be raised for the first time on appeal from a judgment on an agreed statement of facts presenting the question whether plaintiffs were entitled to any relief thereon. Brown *v.* Pilcher, 60 Kan. 860, 58 Pac. 560.

82. U. S. *v.* Larkin, 18 How. (U. S.) 557, 15 L. ed. 485.

83. Carr *v.* Fife, 156 U. S. 494, 15 S. Ct. 427, 39 L. ed. 508.

84. Dowdle *v.* Cornue, 9 S. D. 126, 68 N. W. 194; and see 2 Cent. Dig. tit. "Appeal and Error," § 1041.

85. *Iowa.*— Miner *v.* Rhynders, 111 Iowa 725, 82 N. W. 909.

Kansas.— Craven *v.* Bradley, 51 Kan. 336, 32 Pac. 1112; Douglass *v.* Hannon, 45 Kan. 732, 26 Pac. 401; Truesdell *v.* Peck, 2 Kan. App. 533, 43 Pac. 990.

Minnesota.— James *v.* St. Paul, 72 Minn. 138, 75 N. W. 5.

Nebraska.— McClave *v.* McClave, 60 Nebr. 464, 83 N. W. 668.

North Carolina.— Mayo *v.* Farrar, 112 N. C. 66, 16 S. E. 910; Kennedy *v.* Johnson, 69 N. C. 249.

North Dakota.— Ravicz *v.* Nickells, 9 N. D. 536, 84 N. W. 353.

Texas.— Tucker *v.* Brackett, 28 Tex. 336.

United States.— Leathe *v.* Thomas, 97 Fed. 136, 38 C. C. A. 75.

in the appellate court that plaintiff was not entitled to the relief given him because there was no prayer for such relief.[86]

d. Questions of Right to Interest. A claim of right to interest must be made in the court below, or it cannot be allowed in the appellate court.[87]

e. Questions of Title or Ownership. In the application of the general rule, in cases involving the title and ownership of property, the courts have refused to consider the question when it is raised for the first time in the appellate court.[88]

f. Rule as to Adherence to Theory Pursued Below — (I) *In General.* One of the most important results of the rule that questions which are not raised in the court below cannot be reviewed in the appellate court is that a party cannot, when a cause is brought up for appellate review, assume an attitude inconsistent with that taken by him at the trial,[89] but that such party is restricted to the theory on which the cause was prosecuted or defended in the court below.[90] Thus, where both parties act upon a particular theory of the cause

See 2 Cent. Dig. tit. "Appeal and Error," § 1070 *et seq.*; and *infra*, V, A, 3, f, (III), (V).

86. Iowa Lumber Co. *v.* Foster, 49 Iowa 25, 31 Am. Rep. 140.

A claim, that vendors are not entitled to a personal decree for deficiency because their counsel, on the hearing of the suit to foreclose the rights of the purchaser under the contract of sale, stated that they did not care to ask a personal decree, cannot be made on appeal from such a personal decree, such claim not having been raised in the lower court by answer to, or on the hearing of, the petition. Belding *v.* Meloche, 113 Mich. 223, 71 N. W. 592.

An objection that, in a suit to contest a will, the court, after sustaining the will, should have retained the case in order to decree the partition of land of the testator undisposed of by the will, is unavailing in the appellate court where no request was made, by motion or otherwise, that the case be so retained. Hollenbeck *v.* Cook, 180 Ill. 65, 54 N. E. 154.

As to appeals in probate proceedings, generally, see EXECUTORS AND ADMINISTRATORS; WILLS.

If co-defendants are entitled to an adjustment of liabilities between them, the attention of the court below must be called to such right of adjustment or it cannot be made by the appellate court. Hamilton *v.* Williams, 18 Ky. L. Rep. 919, 38 S. W. 851; Garvey *v.* Jarvis, 54 Barb. (N. Y.) 179; Bruce *v.* Kelly, 39 N. Y. Super. Ct. 27.

Where a defendant in a hypothecary action calls in warranty his vendor, he must see that the jury passes upon the calling in warranty, and cannot raise for the first time on appeal the objection that this was not done. Core *v.* Corse, 10 La. Ann. 53.

87. Haley *v.* Prudential Ins. Co., 189 Ill. 317, 59 N. E. 545 [*affirming* 91 Ill. App. 363]; Cheney *v.* Ricks, 87 Ill. App. 388 [*affirmed* in 187 Ill. 171, 58 N. E. 234]; Reed *v.* Western Union Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492; Chamberlin *v.* Gleason, 163 N. Y. 214, 57 N. E. 487 [*affirming* 20 N. Y. App. Div. 624, 46 N. Y. Suppl. 1090].

88. This rule has been applied in actions to enforce contracts concerning land (Wilson *v.* Riddick, 100 Iowa 697, 69 N. W. 1039; Gaughen *v.* Kerr, 99 Iowa 214, 68 N. W. 694; Walker *v.* Owen, 79 Mo. 563; Jewett *v.* Black, 60 Nebr. 173, 82 N. W. 375; Snevily *v.* Egle, 1 Watts & S. (Pa.) 480; Gordon *v.* Saunders, 2 McCord Eq. (S. C.) 151; Brockenbrough *v.* Blythe, 3 Leigh (Va.) 619); where the question was one arising out of the possession of property for three years under an unrecorded deed (Inge *v.* Murphy, 10 Ala. 885); where the question was one of *animus revertendi*, arising upon the relinquishment of the possession of land by the presumptive owner (McCall *v.* Pryor, 17 Ala. 533); where the question was one of community property (Church of Christ *v.* Beach, 7 Wash. 65, 33 Pac. 1053); where the question was whether a person obtaining property by false pretenses was guilty of a felony so that he could not impart, to an innocent purchaser, a title against the former owner (Abbott *v.* Marshall, 48 Me. 44); where the question was whether certain acts constitute an assertion of ownership (Bell *v.* Anderson, 74 Wis. 638, 43 N. W. 666); and where the question was whether plaintiff's title under a foreign bankrupt act was one which the court should respect (Mosselman *v.* Caen, 34 Barb. (N. Y.) 66, 21 How. Pr. (N. Y.) 248).

See 2 Cent. Dig. tit. "Appeal and Error," §§ 1040, 1087, 1110.

So an objection that a deed was not proved and recorded within the time prescribed by law cannot be made in the appellate court if not raised in the primary court. Griffin *v.* Doe, 12 Ala. 783.

89. Nicholson *v.* Dyer, 45 Mich. 610, 8 N. W. 515; Harper *v.* Morse, 114 Mo. 317, 21 S. W. 517; Moses *v.* Hatch, 163 N. Y. 554, 57 N. E. 1118; McGrath *v.* Mangels, 2 Misc. (N. Y.) 60, 20 N. Y. Suppl. 869, 49 N. Y. St. 711; Fay *v.* Muhlker, 1 Misc. (N. Y.) 321, 20 N. Y. Suppl. 671, 48 N. Y. St. 699; Coppin *v.* Hermann, 7 Ohio N. P. 6, 528, 9 Ohio Dec. 584.

As to changing or adding grounds of objection see *infra*, V, B, 1, u.

90. *Arkansas.*— Southern Ins. Co. *v.* Hastings, 64 Ark. 233, 41 S. W. 1093.

of action, they will not be permitted to depart therefrom when the case is brought up for appellate review.[91]

(II) *As to the Law Which Governs.* When a case is tried by both parties upon the theory that the law of the forum governs, a party cannot, on appeal, take the position that the laws of another state should have been applied.[92]

(III) *As to the Nature and Form of Action.* A party is bound, in the appellate court, as to the nature and form of the action, by the theory on which it was tried.[93] Thus, where a cause has been tried upon the theory that it is an action in tort, and not in contract, that theory will govern the cause

Colorado.— Denver, etc., R. Co. *v.* Pulaski Irrigating Ditch Co., 11 Colo. App. 41, 52 Pac. 224.

Illinois.— Cleveland, etc., R. Co. *v.* Stephens, 74 Ill. App. 586.

Indiana.— Crabb *v.* Orth, 133 Ind. 11, 32 N. E. 711; Tibbet *v.* Zurbuch, 22 Ind. App. 354, 52 N. E. 815.

Indian Territory.— Swofford Bros. Dry-Goods Co. *v.* Smith-McCord Dry-Goods Co., 1 Indian Terr. 314, 37 S. W. 103.

Iowa.— Miner *v.* Rhynders, 111 Iowa 725, 82 N. W. 909.

Kansas.— Heaton *v.* Norton County State Bank, 5 Kan. App. 498, 47 Pac. 576.

Minnesota.— Green *v.* St. Paul, etc., R. Co., 55 Minn. 192, 56 N. W. 752.

Missouri.— Horgan *v.* Brady, 155 Mo. 659, 56 S. W. 294; Long *v.* Long, 141 Mo. 352, 44 S. W. 341; Huff *v.* Thurman, 78 Mo. App. 635; Guntley *v.* Staed, 77 Mo. App. 155.

Montana.— Durfee *v.* Harper, 22 Mont. 354, 56 Pac. 582.

Nebraska.— Norton *v.* Nebraska L. & T. Co., 40 Nebr. 394, 58 N. W. 953; Smith *v.* Spaulding, 40 Nebr. 339, 58 N. W. 952.

New Jersey.— Larison *v.* Polhemus, 39 N. J. Eq. 303.

New York.— Geneva, etc., R. Co. *v.* New York Cent., etc., R. Co., 163 N. Y. 228, 57 N. E. 498; Sullivan *v.* Dunham, 161 N. Y. 290, 55 N. E. 923, 76 Am. St. Rep. 274, 47 L. R. A. 715 [*affirming* 36 N. Y. App. Div. 639, 56 N. Y. Suppl. 1117]; Snider *v.* Snider, 160 N. Y. 151, 54 N. E. 676 [*affirming* 11 N. Y. App. Div. 171, 42 N. Y. Suppl. 613]; Consolidated Ice Co. *v.* New York, 53 N. Y. App. Div. 260, 65 N. Y. Suppl. 912; Ward *v.* Hasbrouck, 52 N. Y. App. Div. 627, 65 N. Y. Suppl. 200; New York *v.* Union R. Co., 31 Misc. (N. Y.) 451, 64 N. Y. Suppl. 483.

North Carolina.— Graves *v.* Barrett, 126 N. C. 267, 35 S. E. 539.

Oregon.— Swank *v.* Swank, 37 Oreg. 439, 61 Pac. 846.

Pennsylvania.— Walls *v.* Campbell, 125 Pa. St. 346, 23 Wkly. Notes Cas. (Pa.) 506, 17 Atl. 422; Turner *v.* Whitaker, 9 Pa. Super. Ct. 83, 43 Wkly. Notes Cas. (Pa.) 375.

South Dakota.— Graham *v.* Selbie, 10 S. D. 546, 74 N. W. 439; Parrish *v.* Mahany, 10 S. D. 276, 73 N. W. 97, 65 Am. St. Rep. 715, 12 S. D. 278, 81 N. W. 295, 76 Am. St. Rep. 604.

Utah.— Nebeker *v.* Harvey, 21 Utah 363, 60 Pac. 1029.

See 2 Cent. Dig. tit. "Appeal and Error," § 1053 *et seq.*

Thus where the record states that defendant elected to stand upon one of two inconsistent defenses, but it appears that the evidence and instructions went to the other defense, the case will be treated on appeal as if the latter issue only was tried. Smith *v.* Culligan, 74 Mo. 387. And where a cause is tried on the theory that the note sued on was lost, the objection that there was no proof of such loss cannot be raised for the first time on appeal. Goldstein *v.* Winkelman, 28 Mo. App. 432. So, where defendant pleaded an unauthorized alteration of the note sued on, and the trial was had on that theory alone, plaintiff cannot, on appeal, complain of failure to instruct as to the effect of a subsequent ratification of the alleged alteration. Capital Bank *v.* Armstrong, 62 Mo. 59. And where defendant tries his case on a theory that the contract sued on superseded another executed on the same day, he cannot, on appeal, contend that the two contracts should have been construed together. Oberbeck *v.* Sportsman's Park, etc., Assoc., 17 Mo. App. 310.

91. *Indiana.*— Pillars *v.* McConnell, 141 Ind. 670, 40 N. E. 689; Branson *v.* Studabaker, 133 Ind. 147, 33 N. E. 98; Robbins *v.* Swain, 7 Ind. App. 486, 34 N. E. 670.

Iowa.— Dormoy *v.* Knower, 55 Iowa 722, 8 N. W. 670; Laverty *v.* Woodward, 16 Iowa 1.

Kansas.— Leavenworth, etc., R. Co. *v.* Curtan, 51 Kan. 432, 33 Pac. 297.

Minnesota.—Davis *v.* Jacoby, 54 Minn. 144, 55 N. W. 908.

Mississippi.— Coulter *v.* Robertson, 14 Sm. & M. (Miss.) 18.

Missouri.— Carson *v.* Smith, 133 Mo. 606, 34 S. W. 855; Seckinger *v.* Philibert, etc., Mfg. Co., 129 Mo. 590, 31 S. W. 957; Tomlinson *v.* Ellison, 104 Mo. 105, 16 S. W. 201.

New York.— Corley *v.* McElmeel, 149 N. Y. 228, 43 N. E. 628; Templeton *v.* Wile, 3 N. Y. Suppl. 9, 18 N. Y. St. 1012 [*affirmed* in 3 N. Y. Suppl. 931].

North Carolina.— Cozart *v.* West Oxford Land Co., 113 N. C. 294, 18 S. E. 337.

Tennessee.— McMillan *v.* Watauga Bank, (Tenn. Ch. 1895) 35 S. W. 765.

Texas.— Blum *v.* Whitworth, 66 Tex. 350, 1 S. W. 108; Gulf, etc., R. Co. *v.* Ramey, (Tex. Civ. App. 1893) 23 S. W. 442.

92. Stockton *v.* Rogers, 17 Misc. (N. Y.) 138, 39 N. Y. Suppl. 400 [*affirming* 15 Misc. (N. Y.) 468, 37 N. Y. Suppl. 213, 72 N. Y. St. 793].

93. Broughel *v.* Southern New England Tel. Co., 72 Conn. 617, 45 Atl. 435, 49 L. R. A. 404; Peteler Portable R. Mfg. Co. *v.* North-

in the appellate court.[94] If a cause is tried as an action at law it cannot be contended, on appeal, that it is really a suit in equity.[95]

(IV) *As to the Pleadings Construed Below*—(A) *In General.*[96] If a particular construction has been placed upon the pleadings in the court below, a different construction cannot be urged upon appeal.[97]

(B) *Without Regard to Their Nature and Form.* Thus, the construction of pleadings, as to their nature and form, which is placed upon them in the trial court must be adhered to on appeal. Accordingly, where a defendant styles his answer a counter-claim, and the trial proceeded on that idea, he will not, on appeal, be permitted to claim that it was a cross-complaint.[98] And where a pleading is treated as an answer it cannot be regarded as a counter-claim on appeal.[99] On the other hand, when an answer setting up affirmative matter is treated as a counter-claim in the trial court, it will be so treated on appeal.[1]

(C) *With Regard to the Issues Presented.* While an appellate court will, ordinarily, review only such issues as are tendered by the pleadings,[2] yet where a case has been tried, without objection, as though the pleadings raised a certain issue, the objection that the issue was not raised by the pleadings cannot be made for the first time in the appellate court,[3] especially where the pleadings, by fair

western Adamant Mfg. Co., 60 Minn. 127, 61 N. W. 1024; Graves *v.* Barrett, 126 N. C. 267, 35 S. E. 539; Marshall *v.* Andrews, 8 N. D. 364, 79 N. W. 851; Newell *v.* Neal, 50 S. C. 68, 27 S. E. 560; and see 2 Cent. Dig. tit. "Appeal and Error," § 1059.

The record showing no objection on the trial to an alleged defect in the pleadings that the action was brought in assumpsit, while the statement filed was a declaration in deceit, such defect will not be considered on appeal, the case having been properly disposed of on its merits. Selig *v.* Rehfuss, 195 Pa. St. 200, 45 Atl. 919.

94. Diggs *v.* Way, 22 Ind. App. 617, 51 N. E. 429, 54 N. E. 412; Lockwood *v.* Quackenbush, 83 N. Y. 607. It has accordingly been held that, where the gravamen of the complaint was fraud, and the action was tried on that theory without exception, the questions whether it stated facts sufficient to constitute a cause of action on contract, and whether there was evidence to sustain such cause, will not be considered on appeal. Salisbury *v.* Howe, 87 N. Y. 128. And, on the other hand, where a case has been tried in the lower court on the theory that the action was founded on contract, it cannot be treated in the appellate court as founded on negligence. Padley *v.* Catterlin, 2 Mo. App. Rep. 1258.

95. Kostuba *v.* Miller, 137 Mo. 161, 38 S. W. 946; Boutin *v.* Etsell, (Wis. 1901) 85 N. W. 964. And so, on the other hand, where a case is by both parties regarded as an equity case in the court below, to be tried by the court without a jury, the question as to whether it is in fact a law case will not be considered on appeal. Hardin *v.* Clark, 32 S. C. 480, 11 S. E. 304. But it has been held that, where complainant's bill is in fact to have a mortgage, which constitutes an apparent lien upon his title, declared satisfied, and the bill contains no allegations inappropriate in such a bill, the appellate court will not dismiss it because complainant erroneously supposed it to be a bill under the statute to quiet title; but, if the case made is sustained by the evidence, the court will grant the appropriate relief. Ormsby *v.* Barr, 22 Mich. 80.

96. See also *infra*, XVII, A.

97. *Alabama.*— Davis *v.* Cook, 65 Ala. 617.

California.— San Diego Land, etc., Co. *v.* Neale, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604.

Indiana.— Wilstach *v.* Heyd, 122 Ind. 574, 23 N. E. 963.

Minnesota.— Keyes *v.* Minneapolis, etc., R. Co., 35 Minn. 290, 30 N. W. 888.

Missouri.— Harwood *v.* Toms, 130 Mo. 225, 32 S. W. 266; Blackwell *v.* Smith, 8 Mo. App. 43.

New York.— Feneran *v.* Singer Mfg. Co., 20 N. Y. App. Div. 574, 47 N. Y. Suppl. 284.

Texas.— Southern Pac. R. Co. *v.* Kennedy, 9 Tex. Civ. App. 232, 29 S. W. 394.

Where a pleading may be construed as proceeding on two or more theories, the theory adopted by the parties and the trial court will be followed by the appellate court. Anderson Foundry, etc., Works *v.* Meyers, 15 Ind. App. 385, 44 N. E. 193; Cleveland, etc., R. Co. *v.* De Bolt, 10 Ind. App. 174, 37 N. E. 737.

98. McAbee *v.* Randall, 41 Cal. 136.

99. Gaff *v.* Greer, 88 Ind. 122, 45 Am. Rep. 449.

1. Wilson *v.* Carpenter, 62 Ind. 495.

The objection that a pleading, filed and treated in the court below as a cross-bill, is in substance an original bill cannot be made for the first time in the supreme court. McCredie *v.* Buxton, 31 Mich. 383.

2. McConey *v.* Wallace, 22 Mo. App. 377.

3. *Alabama.*—Nashville, etc., R. Co. *v.* Hammond, 104 Ala. 191, 15 So. 935; Richmond, etc., R. Co. *v.* Farmer, 97 Ala. 141, 12 So. 86.

California.— Flinn *v.* Ferry, 127 Cal. 648, 60 Pac. 434; Barbour *v.* Flick, 126 Cal. 628, 59 Pac. 122; Casey *v.* Leggett, 125 Cal. 664, 58 Pac. 264.

Colorado.— Wood *v.* Chapman, 24 Colo. 134, 49 Pac. 136; Holman *v.* Boston Land, etc., Co., 8 Colo. App. 282, 45 Pac. 519.

Illinois.— Goldstein *v.* Reynolds, 190 Ill. 124, 60 N. E. 65 [*reversing* 86 Ill. App. 390].

construction, can be held to raise the issue.[4] Nor will the admission of evidence upon such issue be a ground for reversal, although the evidence would not have been admissible had the case been tried on its proper issues.[5] And certainly an objection that an allegation is not sufficiently specific to raise an issue which was tried in the court below cannot be made for the first time in the appellate court.[6] It cannot be contended on appeal that a particular allegation in the pleadings was, in fact, admitted, if the trial proceeded on the theory that it was traversed.[7] On the other hand, it cannot be urged, on appeal, that an admission was given a broader effect than it should have been given, where no such objection was made in the court below.[8] Where a case is tried without objection, upon the theory that the only issue is as to one question of fact, a party cannot urge, in the appellate court, that the evidence upon some other question of fact was insufficient to justify the verdict.[9] And when parties submit a cause upon a single hypothesis, and agree that that point shall be the only one for the jury, they cannot insist that the court erred in excluding testimony not pertinent to the question.[10]

Iowa.— Schopp *v.* Taft, 106 Iowa 612, 76 N. W. 843; Humbert *v.* Larson, 99 Iowa 275, 68 N. W. 703.

Minnesota.— Madson *v.* Madson, 80 Minn. 501, 83 N. W. 396.

Missouri.— Smiley *v.* St. Louis, etc., R. Co., (Mo. 1901) 61 S. W. 667; Epperson *v.* Postal Tel. Cable Co., 155 Mo. 346, 50 S. W. 795, 55 S. W. 1050; Barrett *v.* Baker, 136 Mo. 512, 37 S. W. 130.

New York.— German-American Bank *v.* Daly, 88 Hun (N. Y.) 608, 34 N. Y. Suppl. 986, 69 N. Y. St. 46; Cook, etc., Co. *v.* Haan, 21 Misc. (N. Y.) 346, 47 N. Y. Suppl. 131.

North Carolina.— Howard *v.* Early, 126 N. C. 170, 35 S. E. 258.

South Carolina.— Flinn *v.* Brown, 6 S. C. 209.

See 2 Cent. Dig. tit. "Appeal and Error," § 1056 *et seq.*

Although the facts upon which a decree was rendered were put in issue by the pleadings, if the parties agreed upon the facts upon which the decision was made and submitted them to the decision of the court, the objection that they were not put in issue by the pleadings cannot be raised for the first time in the appellate court, to prevent a revision of the decree. Whitworth *v.* Hart, 22 Ala. 343.

4. Snyder *v.* Hamm, 6 Kan. App. 240, 49 Pac. 693.

5. Vaughn Mach. Co. *v.* Quintard, 165 N. Y. 649, 59 N. E. 1132 [*affirming* 37 N. Y. App. Div. 368, 55 N. Y. Suppl. 1114]; Central Vermont R. Co. *v.* Ruggles, 75 Fed. 953, 33 U. S. App. 567, 21 C. C. A. 575.

6. Accordingly, it has been held that the objection, that an allegation in defendant's answer, that plaintiff's injury "resulted from his own negligence," is too broad to admit proof of contributory negligence, cannot be first raised on appeal. Johnson *v.* International, etc., R. Co., (Tex. Civ. App. 1900) 57 S. W. 869.

7. *California.*— Weidenmuller *v.* Stearns Ranchos Co., 128 Cal. 623, 61 Pac. 374; Tulley *v.* Tranor, 53 Cal. 274.

Idaho.— Toulouse *v.* Burkett, 2 Ida. 265, 13 Pac. 172.

Iowa.— Culbertson *v.* Salinger, 111 Iowa 447, 82 N. W. 925.

Massachusetts.— Drury *v.* Newman, 99 Mass. 256.

Missouri.— Bowman *v.* Stiles, 34 Mo. 141.

Montana.— Sweeney *v.* Great Falls, etc., R. Co., 11 Mont. 523, 29 Pac. 15.

Nebraska.— Minzer *v.* Willman Mercantile Co., 59 Nebr. 410, 81 N. W. 307; Missouri Pac. R. Co. *v.* Palmer, 55 Nebr. 559, 76 N. W. 169; Sun Fire Office *v.* Ayerst, 37 Nebr. 184, 55 N. W. 635.

New York.— Williams *v.* Hayes, 20 N. Y. 58; Munson *v.* Hagerman, 5 How. Pr. (N. Y.) 223.

Pennsylvania.— Crown Slate Co. *v.* Allen, (Pa. 1901) 48 Atl. 968.

South Carolina.— Dumas *v.* Ables, 20 S. C. 589.

Where the parties and the court below regarded the answer as putting in issue all the allegations of the pleadings filed by defendant, the objection that one count of the petition was filed after the answer will not be considered in the appellate court, such objection not having been raised in the court below. Wire *v.* Foster, 62 Iowa 114, 17 N. W. 174.

8. The objection, that the effect of an admission in an answer of matter properly pleaded in the complaint for one purpose only was not limited to such purpose, cannot be first raised on appeal. Connecticut Hospital *v.* Brookfield, 69 Conn. 1, 36 Atl. 1017.

9. Engstad *v.* Syverson, 72 Minn. 188, 75 N. W. 125.

10. Denver, etc., R. Co. *v.* Pulaski Irrigating Ditch Co., 11 Colo. App. 41, 52 Pac. 224.

Hence, where, in an action on a note, all evidence on a defense of failure of consideration was excluded by the trial court, on plaintiff's objection and declaration that he relied for recovery on the fact that he was a *bona fide* purchaser for value before maturity, a contention on appeal that plaintiff was entitled to recover, because no evidence was introduced to support defendant's defense of failure of consideration, cannot be considered, as the court cannot reverse the cause on some point which plaintiff contended in the trial court was not in issue, and which that court, pursuant to the contention, eliminated from the case. Lebcher *v.* Lambert, (Utah 1900) 63 Pac. 628.

(v) *As to the Relief Asked.* A party cannot, in the appellate court, urge a ground for relief which was not presented to the court below,[11] especially where the new ground is inconsistent with the theory on which he proceeded at the trial.[12]

(vi) *As to the Nature of Facts at Issue.* Where, at the trial of an action, a party assumes and treats the questions raised as being questions of law, to be decided by the court, and they are passed upon and ruled against him, he cannot, on appeal, insist that the questions decided by the court involved a question of fact.[13]

Although one of the counts in a declaration charges negligence, if that charge was not referred to in any of the instructions asked by either party, but the parties evidently tried the case upon the theory that the only issues which the evidence justified them in presenting to the jury were those arising under the other counts, the defendant, it was held, was warranted in ignoring the charge of negligence on appeal. Chicago, etc., R. Co. *v.* Maroney, 170 Ill. 520, 48 N. E. 953, 62 Am. St. Rep. 396 [*affirming* 67 Ill. App. 618].

11. *Arkansas.*— American Mortg. Co. *v.* Milum, 64 Ark. 305, 42 S. W. 417.

California.— Matter of Garcelon, 104 Cal. 570, 38 Pac. 414, 43 Am. St. Rep. 134, 32 L. R. A. 595; Green *v.* Carotta, 72 Cal. 267, 13 Pac. 685.

Connecticut.— Hall *v.* Norwalk F. Ins. Co., 57 Conn. 105, 17 Atl. 356.

Georgia.— Nesbit *v.* Donald, 86 Ga. 26, 12 S. E. 183.

Illinois.— Ballou *v.* Hushing, 46 Ill. App. 174.

Indiana.— Haggerty *v.* Byrne, 75 Ind. 499; Campbell *v.* Lindley, 18 Ind. 234.

Iowa.—Brightman *v.* Morgan, 111 Iowa 481, 82 N. W. 954; King *v.* Wells, 106 Iowa 649, 77 N. W. 338; Miller *v.* Bradish, 69 Iowa 278, 28 N. W. 594.

Kansas.— Atchison, etc., R. Co. *v.* Kansas Farmers' Ins. Co., 7 Kan. App. 447, 53 Pac. 607.

Louisiana.— Airey *v.* Okolona Sav. Inst., 33 La. Ann. 1346; Montgomery *v.* Barrow, 19 La. Ann. 169.

Massachusetts.— Storer *v.* McGaw, 11 Allen (Mass.) 527; Boylen *v.* Leonard, 2 Allen (Mass.) 407.

Michigan.— Dennis *v.* Dennis, 119 Mich. 380, 78 N. W. 333; Lamb *v.* Rathburn, 118 Mich. 666, 77 N. W. 268.

Minnesota.— Hove *v.* Bankers' Exch. Bank, 75 Minn. 286, 77 N. W. 967; Moquist *v.* Chapel, 62 Minn. 258, 64 N. W. 567; State *v.* District Ct., 56 Minn. 56, 57 N. W. 319; Powell *v.* Heisler, 45 Minn. 549, 48 N. W. 411; Humphrey *v.* Merriam, 32 Minn. 197, 20 N. W. 138.

Missouri.— State *v.* Chick, 146 Mo. 645, 48 S. W. 829; Hollmann *v.* Lange, 143 Mo. 100, 44 S. W. 752; Evans *v.* Kunze, 128 Mo. 670, 31 S. W. 123.

Montana.— Hamilton *v.* Huson, 21 Mont. 9, 53 Pac. 101.

New York.— Nelson *v.* New York, 131 N. Y. 4, 29 N. E. 814, 42 N. Y. St. 492 [*affirming* 53 Hun (N. Y.) 630, 5 N. Y. Suppl. 688, 23 N. Y. St. 518]; Martin *v.* Pettit, 117 N. Y. 118, 22 N. E. 566, 26 N. Y. St. 919, 5 L. R. A. 794; Myers *v.* Cronk, 113 N. Y. 608, 21 N. E. 984, 24 N. Y. St. 506; Home Ins. Co. *v.* Western Transp. Co., 51 N. Y. 93; Ogden *v.* Peters, 21 N. Y. 23, 78 Am. Dec. 122; Nealon *v.* Grand Trunk R. Co., 24 N. Y. Wkly. Dig. 523.

Pennsylvania.— Seibert's Appeal, 2 Wkly. Notes Cas. (Pa.) 557, 33 Leg. Int. (Pa.) 358.

South Carolina.— Ariail *v.* Ariail, 29 S. C. 84, 7 S. E. 35; McLure *v.* Melton, 24 S. C. 559, 58 Am. Rep. 272.

Utah.— Blish *v.* McCornick, 15 Utah 188, 49 Pac. 529.

Wisconsin.— Hunter *v.* Chicago, etc., R. Co., 99 Wis. 613, 75 N. W. 977; Murphy *v.* Martin, 58 Wis. 276, 16 N. W. 603.

United States.— Wilson *v.* Owens, 86 Fed. 571, 57 U. S. App. 500, 30 C. C. A. 257; Horne *v.* George H. Hammond Co., 71 Fed. 314, 33 U. S. App. 362, 18 C. C. A. 54.

But it has been held that ground for enjoining an order of seizure, although not set out in the petition, may, when apparent on the record, be noticed on appeal from a judgment sustaining the injunction, for the reason that to hold that the court cannot, in any case whatever, travel out of the matter set forth in the petition would come in direct conflict with the rule of practice that injunctions, although improvidently sued out, should never be dissolved when the facts of the case show that, on a dissolution, the party will immediately be entitled to that form of remedy on other grounds. Galbraith *v.* Snyder, 2 La. Ann. 492; Chambliss *v.* Atchison, 2 La. Ann. 488.

12. Randolph *v.* Frick, 57 Mo. App. 400; Stuckslager *v.* Neel, 123 Pa. St. 53, 16 Atl. 94; Walker *v.* Newton, 53 Wis. 336, 10 N. W. 436.

In an action to recover back moneys alleged to have been paid under a mistake, the claim that the payment was under duress cannot be raised for the first time on appeal. Lamb *v.* Rathburn, 118 Mich. 666, 77 N. W. 268.

Where a complainant has prosecuted an action to have a trust declared in land, and obtained a favorable decree which is reversed on appeal, she cannot, on motion for a rehearing, contend that, on the theory of a sale, she is entitled to a decree to enforce a vendor's lien. McDonald *v.* Hooker, 57 Ark. 632, 22 S. W. 655, 23 S. W. 678.

13. Dutcher *v.* Porter, 63 Barb. (N. Y.) 15.

Thus, when the question of plaintiff's contributory negligence has, by the acquiescence of the trial court and the parties, been tried

(VII) *As to the Necessity of Particular Evidence.* When a plaintiff has secured a verdict in the court below upon the theory that certain evidence introduced by him was necessary in order to recover, and the verdict has been set aside because of erroneous rulings when admitting such evidence, or because it was insufficient to support the verdict, plaintiff cannot shift his position on appeal and contend that the evidence was wholly unnecessary.[14]

(VIII) *As to Facts Admitted or Conceded.* When a fact is assumed to be true in the trial court it cannot afterward be contested in the appellate court.[15]

(IX) *As to the Burden of Proof.* Where a party has assumed the burden of proving a fact, he will not, on appeal, be heard to say, for the first time, that the burden of proof was on the other party.[16]

(X) *As to the Damages Recoverable.* Where a certain measure of damages has, by the parties at the trial, been accepted as the proper one, it must be adhered to on appeal.[17]

(XI) *Rule as to New Grounds for Sustaining a Judgment.* There is some authority for the view that any reason which is good in itself may be urged in the appellate court for the purpose of sustaining a judgment or order, though such reason was not presented to the court below.[18] But even the courts which sanction this rule have shown a disposition to limit its application.[19] And the

and determined as one general question of fact, the defeated party cannot, on appeal, subdivide the general issue into several sub-issues, and be heard to argue that one or more of such special sub-issues, to which the attention of the trial court was not called, should have been determined in his favor by the trial court. Pike *v.* Bosworth, 7 N. Y. St. 665.

14. Earl Fruit Co. *v.* Thurston Cold-Storage, etc., Co., 60 Minn. 351, 62 N. W. 439.

15. *California.*— People *v.* Jones, 20 Cal. 50.

Colorado.— Lemmon *v.* Sibert, (Colo. App. 1900) 61 Pac. 202.

Kansas.— School Dist. No. 23 *v.* McCoy, 30 Kan. 268, 1 Pac. 97, 46 Am. Rep. 92.

Missouri.— Pratt *v.* Conway, 148 Mo. 291, 49 S. W. 1028, 71 Am. St. Rep. 602; Allen *v.* St. Louis, etc., R. Co., 137 Mo. 205, 38 S. W. 957.

Nebraska.— Gadsden *v.* Thrush, 56 Nebr. 565, 76 N. W. 1060.

New York.— Humes *v.* Proctor, 151 N. Y. 520, 45 N. E. 948; Osterman *v.* Goldstein, 31 Misc. (N. Y.) 501, 64 N. Y. Suppl. 555; Consumers' Brewing Co. *v.* Lipot, 21 Misc. (N. Y.) 532, 47 N. Y. Suppl. 718. See Sheridan *v.* Presas, 23 Misc. (N. Y.) 757, 50 N. Y. Suppl. 667.

Utah.— Blish *v.* McCornick, 15 Utah 188, 49 Pac. 529.

See 2 Cent. Dig. tit. "Appeal and Error," § 1066.

However, when a party expects to appeal in case an adverse judgment is rendered against him, it is the safer course to present his evidence in such a manner that the record will satisfactorily disclose all of the facts on which he relies in support of his position; for, while it may be clear to the trial justice that certain facts, although formally in issue under the pleadings, are not in dispute for reasons which do not appear on the record, the appellate court, being guided solely by the record, does not enjoy the same advantage. Sheridan *v.* Presas, 23 Misc. (N. Y.) 757, 50 N. Y. Suppl. 667.

16. Benjamin *v.* Shea, 83 Iowa 392, 49 N. W. 989; Denton *v.* Chicago, etc., R. Co., 52 Iowa 161, 2 N. W. 1093, 35 Am. Rep. 263; and see 2 Cent. Dig. tit. "Appeal and Error," § 1064 *et seq.*

17. Cleveland, etc., R. Co. *v.* Stephens, 173 Ill. 430, 51 N. E. 69; Wiseman *v.* Culver, 121 Mo. 14, 25 S. W. 540.

Thus, it has been held that a plaintiff who grounds an action, against a purchaser for failure to receive and pay for goods bought, on the theory that he is entitled to recover the contract price as damages, is bound by such theory throughout the action. Browning *v.* Simons, 17 Ind. App. 45, 46 N. E. 86. And where a case has been tried on the theory that vindictive damages might be recovered, an objection that the complaint does not warrant such damages cannot be made for the first time on appeal. Avakian *v.* Noble, 121 Cal. 216, 53 Pac. 559.

In an action against a railroad company for damages to cattle during transportation, where both parties at the trial have accepted the value of the cattle at their ultimate destination as the basis upon which the damages are to be computed, defendant cannot contend, on appeal, that the true basis of damages was the value of the cattle as they were delivered at the terminus of its road. New York, etc., R. Co. *v.* Estill, 147 U. S. 591, 13 S. Ct. 444, 37 L. ed. 292.

18. Clarke *v.* Huber, 25 Cal. 593.

In Newcomb *v.* Clark, 1 Den. (N. Y.) 226, it was held that, where a plaintiff is nonsuited and brings error, any fact appearing upon the case made by him, and constituting an unanswerable obstacle to his recovery, may be relied upon to sustain the judgment, though it was not mentioned at the trial.

19. In Leigh *v.* Springfield F. & M. Ins. Co., 37 Mo. App. 542, the court said, in effect, that while it is true, as a general rule, that

prevailing doctrine undoubtedly is that a judgment or order which was rendered upon one ground cannot, in the appellate court, be sustained upon another and different ground which was not presented to the court below.[20]

g. Questions Considered on Appeal from Intermediate Courts. Where a cause has been brought up for review from an intermediate court of appellate jurisdiction to the court of last resort, questions, other than such as go to the jurisdiction of the subject-matter,[21] which were neither made in the court of first instance nor assigned for error in the intermediate court, will not be considered.[22] Nor, with the limitation referred to, will a question which could have been, but was not, raised in the intermediate court be considered by the court of last resort.[23] Thus,

any reason may be urged in an appellate court which is good in itself in support of the judgment which is appealed from, yet we think that a judgment ought not to be affirmed upon a technical and doubtful question of pleading which does not appear to have been distinctly raised at the trial court, when, if it had been so raised, it could easily have been obviated by an amendment.

20. Braidwood *v.* Weiller, 89 Ill. 606; Mathews *v.* Cedar Rapids, 80 Iowa 459, 45 N. W. 894, 20 Am. St. Rep. 436; San Marcial Land, etc., Co. *v.* Stapleton, 4 N. M. 33, 12 Pac. 621; Stapenhorst *v.* Wolff, 65 N. Y. 596; Mercer *v.* Mercer, 73 Hun (N. Y.) 192, 25 N. Y. Suppl. 867, 56 N. Y. St. 117; Seigman *v.* Keeler, 4 Misc. (N. Y.) 528, 24 N. Y. Suppl. 821, 54 N. Y. St. 125; Beecher *v.* Schuback, 4 Misc. (N. Y.) 54, 23 N. Y. Suppl. 604, 53 N. Y. St. 74.

In Vail *v.* Long Island R. Co., 106 N. Y. 283, 12 N. E. 607, 60 Am. Rep. 449, it was said that the judgment of the court below cannot be affirmed upon a ground which is not suggested in the pleading — the parties must stand or fall on the issues in the pleadings.

Applications of rule.— Thus, where an action was tried on the theory that plaintiff was entitled to recover for services rendered in effecting a lease of certain premises, and judgment was rendered in her favor, she cannot, on appeal, uphold such judgment on the theory that she was entitled to recover for services rendered in attempting to effect the lease. Brumfield *v.* Potter, etc., Mfg. Co., 4 Misc. (N. Y.) 194, 23 N. Y. Suppl. 1025, 53 N. Y. St. 489 [*reversing* 1 Misc. (N. Y.) 92, 20 N. Y. Suppl. 615, 48 N. Y. St. 516]. So, it has been held that where, in an action upon a bond, the complaint was erroneously dismissed on the ground that no breach had been proved, the objection that actual damages were not proved cannot be heard for the first time on appeal in support of the judgment of dismissal. Brooklyn *v.* Brooklyn City R. Co., 8 Abb. Pr. N. S. (N. Y.) 356. Likewise, where a motion for judgment on a counter-claim was denied generally, no specific objection having been made by plaintiff, the inference is that the decision was based on the ground that the answer discloses no counter-claim, and the ruling cannot, on appeal, be upheld on the ground that the amount of damages in the counter-claim was not proven. Isham *v.* Davidson, 52 N. Y. 237. A judgment of nonsuit cannot, on appeal therefrom, be sustained on the ground that plaintiff failed to file a reply to affirmative defenses, when no advantage was claimed on that ground in the trial court, but the specific and only objection made to the introduction of evidence was that the issues involved could only be adjudicated by a court of equity. Coggshall *v.* Munger, 54 Mo. App. 420. Where the reasons which control the making of an order or ruling are clearly insufficient, it cannot be sustained on the ground that the same order or ruling might have been made in the exercise of the discretion of the court. Keyes *v.* Clare, 40 Minn. 84, 41 N. W. 453; Leonard *v.* Green, 30 Minn. 496, 16 N. W. 399.

An estoppel by a former judgment cannot be urged for the first time on appeal as ground for sustaining a judgment. Huggins *v.* Milwaukee Brewing Co., 10 Wash. 579, 39 Pac. 152.

In South Carolina points sustaining a judgment, such points not being raised below, will not be considered by the supreme court on appeal unless notice has been served that they will be relied on. Hardin *v.* Clark, 32 S. C. 480, 11 S. E. 304. But since the fact that defendant, in an action to recover land, has held adverse possession for the period of limitations is a question for the jury, it cannot be urged by defendant, on appeal, as an additional reason to support the judgment of the trial court in his favor, even though due notice that he will ask the appellate court to sustain the judgment below upon that ground has been given. Garvin *v.* Garvin, 34 S. C. 388, 13 S. E. 625.

21. As to the right to object to the jurisdiction of the subject-matter in the appellate court see *infra*, V, B, 1, c, (I).

22. Barker *v.* Davis, 36 Iowa 692; Springfield, etc., R. Co. *v.* Western R. Constr. Co., 49 Ohio St. 681, 32 N. E. 961; Stone *v.* Brown, 16 Tex. 425.

23. *Alabama.*— Richards *v.* Griffin, 5 Ala. 195.

Colorado.— Davis *v.* Dunlevy, (Colo. 1900) 60 Pac. 570 [*affirming* 11 Colo. App. 344, 53 Pac. 250].

Illinois.— Case *v.* Phillips, 182 Ill. 187, 55 N. E. 66 [*affirming* 82 Ill. App. 231]; Taylor *v.* Pierce, 174 Ill. 9, 50 N. E. 1109 [*reversing* 71 Ill. App. 525]; Hegeler *v.* Peru First Nat. Bank, 129 Ill. 157, 21 N. E. 812, 16 Am. St. Rep. 257.

Indiana.— Patterson *v.* Scottish American Mortg. Co., 107 Ind. 497, 8 N. E. 554; Miller *v.* State, 61 Ind. 503.

it has been held that, unless the objection has been made in the intermediate court, it cannot be objected in the higher court that there is a want of proper parties plaintiff;[24] that the note in suit should have been filed;[25] that the complaint is insufficient;[26] or that the action is not of the proper form.[27]

4. Limitations and Exceptions to Rule — a. In General. Since the reason for the rule is to give an opportunity to avoid the effect of an objection, the rule is not applicable where that could not have been done, even though the question had been seasonably raised in the court below.[28] Of this character are defects apparent of record, questions relating to the jurisdiction of the court over the subject-matter, sufficiency of a complaint or declaration to state a cause of action, and a want of necessary parties.[29]

b. Questions of Public Policy. In addition it has been held that when an appeal involves a grave question of public policy, which question is covered by an exception to the report of the referee, it will be considered by the appellate court even though not raised by the pleadings or in the court below, for the reason that the people are indirectly parties and their interests should be looked after even when the party who might have objected is silent.[30] And it has been held that if a contract, for the enforcement of which suit is brought, is one which, for reasons of public policy, is void, the defense is not waived by a failure to properly plead it in the court below.[31]

B. Methods of Presentation and Reservation — 1. Objections — a. Necessity in General — (I) *Statement of Rule.* Within the rule that questions not presented in the trial court in some appropriate manner will not be considered on appeal or error, it is a rule of nearly universal application that objections must be made in the trial court in order to reserve questions for review.[32]

Kansas.— Brenner *v.* Weaver, 1 Kan. 488, 83 Am. Dec. 444.

Kentucky.— Frazier *v.* Clark, 88 Ky. 260, 10 Ky. L. Rep. 786, 10 S. W. 806, 11 S. W. 83; Kirk *v.* Taylor, 8 B. Mon. (Ky.) 262.

Michigan.— Pardee *v.* Smith, 27 Mich. 33.

Nebraska.— Weeks *v.* Wheeler, 41 Nebr. 200, 59 N. W. 554.

Ohio.— Pollock *v.* Cohen, 32 Ohio St. 514.

Tennessee.— Pile *v.* McCoy, 99 Tenn. 367, 41 S. W. 1052.

Texas.— Clemons *v.* Clemons, 92 Tex. 66, 45 S. W. 996.

West Virginia.— Kesler *v.* Lapham, 46 W. Va. 293, 33 S. E. 289.

United States.— Keyser *v.* Hitz, 133 U. S. 138, 10 S. Ct. 290, 33 L. ed. 531.

See 2 Cent. Dig. tit. "Appeal and Error," § 1133 *et seq.*

24. Roseboom *v.* Whittaker, 132 Ill. 81, 23 N. E. 339.

25. Tucker *v.* Gardiner, 63 Ind. 299.

26. Wesley *v.* Milford, 41 Ind. 413.

27. Packer *v.* Cockayne, 3 Greene (Iowa) 111.

Where testimony was objected to in the probate court, but, on appeal to the circuit court, no error was assigned to its admission, and the circuit judge made no ruling on the subject, the supreme court, it was held, would not consider the objection. *Ex p.* Turner, 24 S. C. 211.

28. Slater *v.* Rawson, 1 Metc. (Mass.) 450; Central Nat. Bank *v.* Seligman, 64 Hun (N. Y.) 615, 19 N. Y. Suppl. 362, 47 N. Y. St. 17 [*reversed* for other reasons in 138 N. Y. 435, 34 N. E. 196, 53 N. Y. St. 14]; Brookman *v.* Hamill, 54 Barb. (N. Y.) 209; Kowing *v.* Manly, 2 Abb. Pr. N. S. (N. Y.) 377; Beekman *v.* Frost, 18 Johns. (N. Y.) 544, 9 Am. Dec. 246. In Palmer *v.* Lorillard, 16 Johns. (N. Y.) 348, it was said that the rule is intended only to apply to objections which the party may be deemed to have waived by his silence, and which, when waived, still leave the merits of the case to rest with the judgment.

29. See *infra*, V, B, 1, a, (II); V, B, 1, c; V, B, 1, d, (I), (C).

30. Massachusetts Nat. Bank *v.* Shinn, 163 N. Y. 360, 57 N. E. 611 [*affirming* 18 N. Y. App. Div. 276, 46 N. Y. Suppl. 329].

31. Oscanyan *v.* Winchester Repeating Arms Co., 103 U. S. 261, 26 L. ed. 539; Hall *v.* Coppell, 7 Wall. (U. S.) 542, 19 L. ed. 244. In Fuqua *v.* Pabst Brewing Co., 90 Tex. 298, 38 S. W. 29, 750, 35 L. R. A. 241, it was held that the objection that the contract sued on is void under the statute against trusts will be considered on appeal from an order overruling a general demurrer, even if such objection was not specially raised below.

Reason for this rule.— Nevertheless, this limitation has, in a recent decision, been put upon the doctrine that a court will reverse a judgment involving the enforcement of a contract contravening public policy, in the absence of an objection on that ground in the trial court, only when the illegality appears as a matter of law upon the face of the pleadings, the face of the contract, or from the admitted facts. Carter-Crume Co. *v.* Peurrung, 86 Fed. 439, 58 U. S. App. 388, 30 C. C. A. 174.

32. *Alabama.*— Birmingham Loan, etc., Co. *v.* Anniston First Nat. Bank, 100 Ala.

(II) *Exceptions to Rule.* An exception to the general rule — that an appellate court will not consider objections first raised on appeal — exists in the

249, 13 So. 945, 46 Am. St. Rep. 45; Freeman *v.* Swan, 22 Ala. 106.

Arkansas.—Hershy *v.* Clarksville Institute, 15 Ark. 128.

California.— Alameda Macadamizing Co. *v.* Williams, 70 Cal. 534, 12 Pac. 530; Mott *v.* Smith, 16 Cal. 533.

Colorado.— U. S. Security, etc., Co. *v.* Wolfe, (Colo. 1900) 60 Pac. 637; Jennings *v.* Colorado Springs First Nat. Bank, 13 Colo. 417, 22 Pac. 777, 16 Am. St. Rep. 210.

Connecticut.— Cooley *v.* Gillan, 54 Conn. 80, 6 Atl. 180.

Florida.— Robinson *v.* Springfield Co., 21 Fla. 203; Southern L. Ins., etc., Co. *v.* Cole, 4 Fla. 359.

Georgia.— Parr *v.* Robinson, 88 Ga. 590, 15 S. E. 329; Aycock *v.* Austin, 87 Ga. 566, 13 S. E. 582.

Illinois.—J. Walter Thompson Co. *v.* Whitehed, 185 Ill. 454, 56 N. E. 1106, 76 Am. St. Rep. 51; Watson *v.* Le Grand Roller Skating Rink Co., 177 Ill. 203, 52 N. E. 317.

Indiana.— Lomax *v.* Strange, 14 Ind. 21; Davis *v.* Smith, 13 Ind. 564.

Indian Territory.— Anderson *v.* Thomas, (Indian Terr. 1898) 47 S. W. 301.

Iowa.— Clough *v.* Ide, 107 Iowa 669, 78 N. W. 697; Starry *v.* Starry, 21 Iowa 254.

Kansas.— State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318; Brown *v.* Flower, 9 Kan. App. 536, 58 Pac. 1015.

Kentucky.— Barnes *v.* Lee, 1 Bibb (Ky.) 526; Helton *v.* Com., 16 Ky. L. Rep. 464, 29 S. W. 331.

Louisiana.— State *v.* Burthe, 39 La. Ann. 341, 1 So. 656; McAlpin *v.* Jones, 10 La. Ann. 552.

Maine.— Dickey *v.* Maine Tel. Co., 46 Me. 483; Woodman *v.* Skeetup, 35 Me. 464.

Maryland.— Jackson *v.* Salisbury, 66 Md. 459, 7 Atl. 563; State *v.* Williams, 5 Md. 82.

Massachusetts.— Draper *v.* Saxton, 118 Mass. 427; Bickford *v.* Gibbs, 8 Cush. (Mass.) 154.

Michigan.— Beck *v.* Finn, 122 Mich. 21, 80 N. W. 785; Broughton *v.* Jones, 120 Mich. 462, 79 N. W. 691.

Minnesota.— White *v.* Western Assur. Co., 52 Minn. 352, 54 N. W. 195; Babcock *v.* Sanborn, 3 Minn. 141.

Mississippi.— Barrow *v.* Burbridge, 41 Miss. 622; Wooldridge *v.* Wilkins, 3 How. (Miss.) 360.

Missouri.— Hayden *v.* Lauffenburger, 157 Mo. 88, 57 S. W. 721; Claflin *v.* Sylvester, 99 Mo. 276, 12 S. W. 508.

Montana.— Philipsburg *v.* Weinstein, 21 Mont. 146, 53 Pac. 272.

Nebraska.— Hyde *v.* Hyde, 60 Nebr. 502, 83 N. W. 673; Griggs *v.* Le Poidevin, 11 Nebr. 385, 9 N. W. 557.

Nevada.— Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271; Clarke *v.* Lyon County, 7 Nev. 75.

New Hampshire.— State *v.* Stevens, 36 N. H. 59.

New Jersey.— Consolidated Traction Co. *v.* Behr, 59 N. J. L. 477, 37 Atl. 142; Trent Tile Co. *v.* Ft. Dearborn Nat. Bank, 54 N. J. L. 599, 25 Atl. 411.

New Mexico.—Williams *v.* Thomas, 3 N. M. 324, 9 Pac. 356; Crabtree *v.* Segrist, 3 N. M. 278, 6 Pac. 202.

New York.— Heimburg *v.* Manhattan R. Co., 162 N. Y. 352, 56 N. E. 899; McCann *v.* Albany, 158 N. Y. 634, 53 N. E. 673 [*affirming* 11 N. Y. App. Div. 378, 42 N. Y. Suppl. 94].

North Carolina.— Wellons *v.* Jordan, 83 N. C. 371; Williamson *v.* Lock's Creek Canal Co., 78 N. C. 156.

Ohio.— Geauga Iron Co. *v.* Street, 19 Ohio 300.

Oklahoma.— Healy *v.* Loofbourrow, 2 Okla. 458, 37 Pac. 823.

Oregon.— Cook *v.* Portland, 35 Oreg. 383, 58 Pac. 353; Shirley *v.* Burch, 16 Oreg. 83, 18 Pac. 351, 8 Am. St. Rep. 273.

Pennsylvania.— Brown *v.* Scott, 51 Pa. St. 357; Simmonds' Estate, 19 Pa. St. 439.

South Carolina.— Fleming *v.* Fleming, 33 S. C. 505, 12 S. E. 257, 26 Am. St. Rep. 694; Wilson *v.* Kelly, 19 S. C. 160.

South Dakota.— Gaines *v.* White, 2 S. D. 410, 50 N. W. 901; Hall *v.* Harris, 2 S. D. 331, 50 N. W. 98.

Tennessee.— Campbell *v.* Illinois Cent. R. Co., 16 Lea (Tenn.) 270; Rea *v.* State, 8 Lea (Tenn.) 356.

Texas.— Williams *v.* Leon, etc., Land Co., (Tex. Civ. App. 1900) 55 S. W. 374; O'Connor *v.* Koch, 9 Tex. Civ. App. 586, 29 S. W. 400.

Utah.— People *v.* Peacock, 5 Utah 237, 14 Pac. 332.

Vermont.— Hathaway *v.* National L. Ins. Co., 48 Vt. 335; Sargeant *v.* Butts, 21 Vt. 99.

Virginia.— Union Bank *v.* Richmond, 94 Va. 316, 26 S. E. 821; Bransford *v.* Karn, 87 Va. 242, 12 S. E. 404.

Washington.— Blewett *v.* Bash, 22 Wash. 536, 61 Pac. 770; Bethel *v.* Robinson, 4 Wash. 446, 30 Pac. 734.

West Virginia.— Snodgrass *v.* Copenhaver, 34 W. Va. 171, 12 S. E. 695. See also Rose *v.* Brown, 11 W. Va. 122.

Wisconsin.— Jones *v.* Evans, 28 Wis. 168; Bogert *v.* Phelps, 14 Wis. 88.

Wyoming.— Sherlock *v.* Leighton, (Wyo. 1901) 63 Pac. 934.

United States.—Flournoy *v.* Lastranes, 131 U. S. clxi, appendix, 25 L. ed. 406; King *v.* McLean Asylum, 64 Fed. 331, 21 U. S. App. 481, 12 C. C. A. 145.

See 2 Cent. Dig. tit. "Appeal and Error," § 1141 *et seq.*

See also *supra*, V, A, 1; and *infra*, V, B, 1, 2, 3, 4; *infra*, XIII; XVII.

As to effect of appearance as waiver of objections see APPEARANCES.

As to the effect of a failure to raise objections in particular actions and proceedings see the particular titles, such as ABATEMENT

case of errors apparent on the face of the record; these may be considered by the court though not objected to below.[33]

b. Relating to Form of Action or Nature of Proceedings. Where no question is raised as to the form of the action or the nature of the proceedings in the court below to obtain relief, the defendant will be regarded as having waived the objection and will not be permitted to raise it for the first time in the reviewing court.[34] Thus, it cannot be objected for the first time on appeal that trespass

AND REVIVAL; COSTS; COURTS; DAMAGES; DISMISSAL AND NONSUIT; EXECUTORS AND ADMINISTRATORS; INFANTS; INJUNCTIONS; INSANE PERSONS; JUDGES; JUDGMENTS; JURIES; NEW TRIAL; REMOVAL OF CAUSES; TAXATION; TRIAL; VENUE; WILLS.

That an attorney had no authority to bring an action cannot be objected to for the first time on appeal (Big Grove *v.* Fox, 89 Ill. App. 84), or to sign and file pleadings (McIlhenny *v.* Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. Rep. 705), or to appear in the cause (Moore *v.* Easley, 18 Ala. 619; Cockran *v.* Leister, 2 Root (Conn.) 348; Sanderson *v.* La Salle, 117 Ill. 171, 7 N. E. 114; Talbot *v.* McGee, 4 T. B. Mon. (Ky.) 375; Abernathy *v.* Latimore, 19 Ohio 286), or to consent to a judgment without service of summons (Ryors *v.* King, 48 Ind. 237), or to consent to the substitution of a party defendant (McGarry *v.* New York County, 1 Sweeny (N. Y.) 217), or to enter into an agreement enlarging an arbitration (Bingham *v.* Guthrie, 19 Pa. St. 418).

33. *California.*— Fuller *v.* Ferguson, 26 Cal. 546.

Connecticut.— Riggs *v.* Zaleski, 44 Conn. 120.

Dakota.— Dole *v.* Burleigh, 1 Dak. 227, 46 N. W. 692.

Georgia.— MacKenzie *v.* Jackson, 82 Ga. 80, 8 S. E. 77.

Illinois.— People *v.* Dragstran, 100 Ill. 286.

Kentucky.— Pauer *v.* Simon, 6 Bush (Ky.) 514.

Louisiana.— Zollicoffer *v.* Briggs, 3 Rob. (La.) 236; Orso *v.* Orso, 11 La. 61.

Maryland.— Mundell *v.* Hugh, 2 Gill & J. (Md.) 193, decided prior to the passage of the Maryland act of 1825, c. 117.

Minnesota.— Nelson *v.* Central Land Co., 35 Minn. 408, 29 N. W. 121; Jordan *v.* Humphrey, 31 Minn. 495, 18 N. W. 450.

Missouri.— State *v.* Hoyt, 123 Mo. 348, 27 S. W. 382; Jones *v.* Tuller, 38 Mo. 363.

North Carolina.— Burton *v.* Wilmington, etc., R. Co., 84 N. C. 192.

Pennsylvania.— Gregg Tp. *v.* Jamison, 55 Pa. St. 468; Maher *v.* Ashmead, 30 Pa. St. 344, 72 Am. Dec. 708.

Texas.— Hollingsworth *v.* Holshousen, 17 Tex. 41; Harmon *v.* Callahan, (Tex. Civ. App. 1896) 35 S. W. 705. *Compare* Ragsdale *v.* Robinson, 48 Tex. 379, in which it was held that objections, to an instrument offered in evidence, not made in the court below, will not be considered on appeal, even though the original paper is sent up and the objections are apparent on its face.

United States.— Bennett *v.* Butterworth, 11 How. (U. S.) 669, 13 L. ed. 859; Garland *v.* Davis, 4 How. (U. S.) 131, 11 L. ed. 907; Kentucky L., etc., Ins. Co. *v.* Hamilton, 63 Fed. 93, 22 U. S. App. 386, 548, 11 C. C. A. 42.

See 2 Cent. Dig. tit. "Appeal and Error," § 1145 *et seq.*

These and other exceptions are more particularly considered hereinafter. See *infra*, V, B, 1, c, d, e, g.

The sufficiency of the pleadings to warrant a judgment may be passed on in the appellate court, though the question was not raised in the lower court. Kentucky L., etc., Ins. Co. *v.* Hamilton, 63 Fed. 93, 22 U. S. App. 386, 548, 11 C. C. A. 42. See also to like effect Maher *v.* Ashmead, 30 Pa. St. 344, 72 Am. Dec. 708; Harmon *v.* Callahan, (Tex. Civ. App. 1896) 35 S. W. 705.

Decision not supported by findings.— In Nelson *v.* Central Land Co., 35 Minn. 408, 29 N. W. 121, it was held that the question whether the decision of the trial court was supported by its findings might be raised for the first time on appeal.

Failure to make findings on material issues. — Dole *v.* Burleigh, 1 Dak. 227, 46 N. W. 692, was a suit on a note, and defendant pleaded want of consideration and a counter-claim. The record showed a trial by the court and a finding of judgment for defendant on the counter-claim, but it was silent as to the plea of want of consideration. It was held that the omission of a finding on that issue was error requiring a reversal, though the objection was not made in the trial court.

34. *Connecticut.*— Russell *v.* Stocking, 8 Conn. 236.

Delaware.— Paynter *v.* Taylor, 5 Harr. (Del.) 392.

Illinois.— Sparling *v.* Marks, 86 Ill. 125; Rockford, etc., R. Co. *v.* Beckemeier, 72 Ill. 267; Dunne *v.* School Trustees, 39 Ill. 578.

Indiana.— Scudder *v.* Jones, 134 Ind. 547, 32 N. E. 221.

Iowa.— Garland *v.* Wholebau, 20 Iowa 271.

Louisiana.— Danjean *v.* Blacketer, 13 La. Ann. 595; Conery *v.* Heno, 9 La. Ann. 587.

Maine.— Pope *v.* Machias Water Power, etc., Co., 52 Me. 535; Emmons *v.* Lord, 18 Me. 351.

Massachusetts.— Hodgkins *v.* Price, 137 Mass. 13; Brown *v.* Waterman, 10 Cush. (Mass.) 117.

Michigan.— Creager *v.* School Dist. No. 9, 62 Mich. 101, 28 N. W. 794.

Missouri.— Whetstone *v.* Shaw, 70 Mo. 575.

Nebraska.— Richardson *v.* Smith, 34 Nebr. 595, 52 N. W. 279; Downie *v.* Ladd, 22 Nebr. 531, 35 N. W. 388.

quare clausum fregit was wrongly brought instead of case;[35] that assumpsit was wrongly brought instead of mandamus;[36] that affirmative relief should have been sought by cross-bill instead of by answer;[37] that decrees were rendered upon petition only, when they should have been rendered upon a supplemental bill or cross-bill or a bill in that nature;[38] that a supplemental bill does not show a cause of action cognizable by a bill of that character;[39] that the case made by a bill of interpleader is one which is not a proper subject for such a bill;[40] that a bill instead of a petition should have been filed;[41] or that the relief sought might have been had by motion instead of by action.[42]

c. Relating to Jurisdiction[43] — (I) *Of Subject-Matter* — (A) *In General.* Consent of parties cannot give a court jurisdiction over the subject-matter of an action; the question of jurisdiction of the subject-matter may be raised for the first time in the appellate court, or the court may, on its own motion, take notice of such want of jurisdiction.[44]

Nevada.— Dougherty *v.* Wells, 7 Nev. 368.
New Jersey.— Redstrake *v.* Cumberland Mut. F. Ins. Co., 44 N. J. L. 294.
New York.— Gillies *v.* Manhattan Beach Imp. Co., 147 N. Y. 420, 42 N. E. 196, 70 N. Y. St. 8; People *v.* McLean, 80 N. Y. 254; Asher *v.* Deyoe, 77 Hun (N. Y.) 531, 28 N. Y. Suppl. 890, 60 N. Y. St. 268.
North Carolina.— Lackey *v.* Pearson, 101 N. C. 651, 8 S. E. 121.
Pennsylvania.— Bennet *v.* Bullock, 35 Pa. St. 364; Rank *v.* Rank, 5 Pa. St. 211.
South Carolina.— McCaslan *v.* Nance, 46 S. C. 568, 24 S. E. 812; *Ex p.* Wells, 43 S. C. 477, 21 S. E. 354.
Tennessee.— Caruthers *v.* Caruthers, 2 Lea (Tenn.) 264.
Vermont.— Newell *v.* Humphrey, 37 Vt. 265.
Virginia.— Whitehead *v.* Bradley, 87 Va. 676, 13 S. E. 195.
Washington.—Sweeney *v.* Pacific Coast Elevator Co., 14 Wash. 562, 45 Pac. 151.
West Virginia.— Haymond *v.* Camden, 22 W. Va. 180.
Wisconsin.— Manegold *v.* Grange, 70 Wis. 575, 36 N. W. 263.
United States.— Marine Bank *v.* Fulton County Bank, 2 Wall. (U. S.) 252, 17 L. ed. 785; Kelsey *v.* Hobby, 16 Pet. (U. S.) 269, 10 L. ed. 961.
See 2 Cent. Dig. tit. "Appeal and Error," § 1161 *et seq.*

Where no objection is raised to the consolidation of actions in the trial court, an objection cannot be made on appeal. McDowell *v.* Mitcham, 37 Ala. 417; Raulerson *v.* Rockner, 17 Fla. 809; Turley *v.* Barnes, 131 Mo. 548, 33 S. W. 172.

35. Beirly *v.* Strohecker, 2 Wkly. Notes Cas. (Pa.) 37, 32 Leg. Int. (Pa.) 354.
36. Creager *v.* School Dist. No. 9, 62 Mich. 101, 28 N. W. 794.
37. Garner *v.* Providence Second Nat. Bank, 67 Fed. 833, 33 U. S. App. 91, 16 C. C. A. 86; Moran *v.* Hagerman, 64 Fed. 499, 29 U. S. App. 71, 12 C. C. A. 239.
38. Coburn *v.* Cedar Valley Land, etc., Co., 138 U. S. 196, 11 S. Ct. 258, 34 L. ed. 876.
39. Van Wert *v.* Boyes, 140 Ill. 89, 29 N. E. 710 [*reversing* 38 Ill. App. 426].
40. Sammis *v.* L'Engle, 19 Fla. 800.
41. Bigham's Appeal, 123 Pa. St. 262, 23 Wkly. Notes Cas. (Pa.) 79, 16 Atl. 613, 10 Am. St. Rep. 522.
42. Folmsbee *v.* Amsterdam, 66 Hun (N. Y.) 214, 21 N. Y. Suppl. 42, 49 N. Y. St. 51; Lackey *v.* Pearson, 101 N. C. 651, 8 S. E. 121.
43. Where a court has general jurisdiction of a class of cases, an objection that it has not jurisdiction of a particular case belonging to that class must be made in the court below. Thus, where an action is brought in a court having jurisdiction over actions of that class, but the subject-matter is situated within the jurisdiction of another court, an objection to the jurisdiction of the court in which the action is brought cannot be raised for the first time on appeal. See, generally, VENUE.
44. *Alabama.*— Whorton *v.* Moragne, 62 Ala. 201; Wyatt *v.* Judge, 7 Port. (Ala.) 37. *Compare* Vaughan *v.* Seed, 7 Ala. 740.
California.— People *v.* Oakland Water Front Co., 118 Cal. 234, 50 Pac. 305; Mastick *v.* Superior Ct., 94 Cal. 347, 29 Pac. 869.
Colorado.— McKinnon *v.* Hall, 10 Colo. App. 291, 50 Pac. 1052.
Connecticut.— Wildman *v.* Rider, 23 Conn. 172.
Dakota.— Murry *v.* Burris, 6 Dak. 170, 42 N. W. 25.
Florida.— Livingston *v.* Webster, 26 Fla. 325, 8 So. 442.
Georgia.— Dickinson *v.* Mann, 74 Ga. 217; Bostwick *v.* Perkins, 4 Ga. 47.
Illinois.— Way *v.* Way, 64 Ill. 406; Soldiers' Orphans' Home *v.* Lyon, 42 Ill. App. 615.
Indiana.— Forsythe *v.* Hammond, 142 Ind. 505, 40 N. E. 267, 41 N. E. 950, 30 L. R. A. 576; Debs *v.* Dalton, 7 Ind. App. 84, 34 N. E. 236.
Iowa.— Hodges *v.* Tama County, 91 Iowa 578, 60 N. W. 185; Cerro Gordo County *v.* Wright County, 59 Iowa 485, 13 N. W. 645.
Kansas.— Foreman *v.* Carter, 9 Kan. 674; St. Louis, etc., R. Co. *v.* Brown, (Kan. App. 1900) 61 Pac. 457.
Kentucky.— Wickliffe *v.* Bailey, 5 B. Mon. (Ky.) 253; Lindsey *v.* McClelland, 1 Bibb (Ky.) 262.
Louisiana.— State *v.* Judges, 48 La. Ann. 672, 19 So. 617; Edwards *v.* Edwards, 21 La.

(B) *As Dependent Upon Amount Involved.* Hence, the objection may be raised for the first time on appeal that the lower court was without jurisdiction because the amount involved was insufficient.[45]

(C) *For Failure to State Jurisdictional Facts.* If the existence of jurisdictional facts is admitted,[46] or if they appear by any part of the record,[47] the objection that they do not appear from the complaint or declaration cannot be first raised on appeal. So, if sufficient facts are alleged to bring the case within the general equitable jurisdiction of the court, an objection cannot be first raised on appeal that it was not alleged that complainant had not a complete remedy at law,[48]

Ann. 610; Smith *v.* Barkemeyer, McGloin (La.) 139.

Maryland.— Fairfax Forest Min., etc., Co. *v.* Chambers, 75 Md. 604, 23 Atl. 1024.

Massachusetts.— Riley *v.* Lowell, 117 Mass. 76.

Mississippi.— Green *v.* Creighton, 10 Sm. & M. (Miss.) 159, 48 Am. Dec. 742.

Missouri.— Davis *v.* Jacksonville Southeastern Line, 126 Mo. 69, 28 S. W. 965; Beck, etc., Lithographing Co. *v.* Obert, 54 Mo. App. 240.

New Jersey.— Dodd *v.* Una, 40 N. J. Eq. 672, 5 Atl. 155; Gifford *v.* Thorn, 7 N. J. Eq. 90.

New York.— Fiester *v.* Shepard, 92 N. Y. 251; Levy *v.* Swick Piano Co., 17 Misc. (N. Y.) 145, 39 N. Y. Suppl. 409.

North Carolina.— Whitehurst *v.* Pettipher, 105 N. C. 40, 11 S. E. 369; Green *v.* Dawson, 92 N. C. 61.

Ohio.— The Steamboat General Buell *v.* Long, 18 Ohio St. 521; Gilliland *v.* Sellers, 2 Ohio St. 223.

Pennsylvania.— Fowler *v.* Eddy, 110 Pa. St. 117, 1 Atl. 789; Coleman's Appeal, 75 Pa. St. 441.

Rhode Island.— *In re* College St., 11 R. I. 472.

South Carolina.— Gibbes *v.* Morrison, 39 S. C. 369, 17 S. E. 803; Hardin *v.* Trimmier, 30 S. C. 391, 9 S. E. 342; Poole *v.* Brown, 12 S. C. 556.

South Dakota.— Nelson *v.* Ladd, 4 S. D. 1, 34 N. W. 809.

Texas.— Swigley *v.* Dickson, 2 Tex. 192; Capps *v.* Leachman, (Tex. Civ. App. 1896) 35 S. W. 397.

Vermont.— *Re* Parsons, 64 Vt. 193, 23 Atl. 519; Franks *v.* Lockey, 45 Vt. 395.

Virginia.— Witz *v.* Mullin, 90 Va. 805, 20 S. E. 783; Buffalo *v.* Pocahontas, 85 Va. 222, 7 S. E. 238.

Washington.— Brown *v.* Rauch, 1 Wash. 497, 20 Pac. 785.

West Virginia.— Hall *v.* Wadsworth, 30 W. Va. 55, 3 S. E. 29.

Wisconsin.— Plano Mfg. Co. *v.* Rasey, 69 Wis. 246, 34 N. W. 85; Edler *v.* Hasche, 67 Wis. 653, 31 N. W. 57.

United States.— Morris *v.* Gilmer, 129 U. S. 315, 8 S. Ct. 289, 32 L. ed. 690; Metcalf *v.* Watertown, 128 U. S. 586, 9 S. Ct. 173, 32 L. ed. 543.

England.— Cannan *v.* Reynolds, 5 E. & B. 301, 85 E. C. L. 301.

But see Cooley *v.* Smith, 17 Iowa 99; Campbell *v.* Illinois Cent. R. Co., 16 Lea (Tenn.) 270. See also 2 Cent. Dig. tit. "Appeal and Error," § 1166 *et seq.*

By Md. Acts (1841), c. 163, the supreme court is prohibited from allowing any objection to be urged to the jurisdiction of the court below when no such objection was there taken, although the objection is that the trial court had no jurisdiction of the subject-matter at issue. Farmers, etc., Bank *v.* Wayman, 5 Gill (Md.) 336.

45. Smaw *v.* Cohen, 95 N. C. 85, and see 2 Cent. Dig. tit. "Appeal and Error," § 1169.

Nevertheless it must very clearly appear to the reviewing court that the necessary amount is not involved before that court will take cognizance of an objection based on that ground. People's Telephone, etc., Co. *v.* East Tennessee Telephone Co., 103 Fed. 212, 43 C. C. A. 185. Thus, where the trial court has jurisdiction of the cause of action stated in one paragraph of the complaint, but not of that stated in another, and renders judgment upon both, such judgment is not void, and it will, in the absence of any proper objection to the jurisdiction in the court below, be upheld on appeal to the supreme court. Louisville, etc., R. Co. *v.* Fox, 101 Ind. 416. And if the declaration in a suit commenced by attachment is for a sum sufficient to give the lower court jurisdiction, the reviewing court will not consider an objection, raised for the first time on appeal, that the amount involved was not sufficient to give the court jurisdiction, notwithstanding the fact that the attachment was for an insufficient amount. Roberts *v.* Burke, 6 Ala. 348.

46. Schaghticoke *v.* Fitchburg R. Co., 53 N. Y. App. Div. 16, 65 N. Y. Suppl. 498.

New York — District and municipal courts of New York city.— The N. Y. Consol. Act, c. 410, applicable to the district courts of the city of New York, and which has been continued in force with respect to the municipal court, provides that the court will be deemed to have jurisdiction if the objection that it has not jurisdiction is not taken at the trial. Under this section, where no objection for want of jurisdiction is taken at the trial, and the trial is had solely on the merits, it cannot be objected on appeal that the court had no jurisdiction, because facts showing that the court had jurisdiction were not alleged. Meuthen *v.* Eyelis, 33 Misc. (N. Y.) 98, 67 N. Y. Suppl. 246. See also Berring *v.* McAvoy, 52 N. Y. App. Div. 501, 65 N. Y. Suppl. 467.

47. Clarey *v.* Marshall, 4 Dana (Ky.) 95.

48. Schilling *v.* Rominger, 4 Colo. 100.

or that plaintiffs have exhausted their legal rights against defendants.[49] On the other hand, it has been held that, where there is not a sufficient allegation of non-residence of defendant to give the court jurisdiction, the question of want of jurisdiction may be raised for the first time on appeal.[50]

(D) *Want of Jurisdiction Apparent of Record.* The want of jurisdiction apparent on the face of the record will be taken notice of by the appellate court, whether set up and relied on as a defense in the court below or not.[51]

(II) *Of the Parties.* An objection to the jurisdiction of the person must be made in the trial court. Where no objection is made in the lower court it will, upon appeal, be held to have been waived.[52]

49. People's Nat. Bank *v.* Loeffert, 184 Pa. St. 164, 38 Atl. 996. See also McIntosh *v.* Augusta Oil Co., 47 W. Va. 832, 35 S. E. 800, in which it was held that if the court had jurisdiction of cases of the class to which the case at bar belonged, the fact that the affidavit therein was defective does not make the suit one without jurisdiction, and, where the validity of the affidavit is not questioned in the trial court, no objection for want of jurisdiction can be raised on appeal.

See 2 Cent. Dig. tit. "Appeal and Error," § 1171.

50. Ormsby *v.* Lynch, Litt. Sel. Cas. (Ky.) 303.

So it has similarly been held, in a suit in which federal jurisdiction depends wholly on diversity of citizenship, and in which the record shows that such diversity has been insufficiently alleged, that the judgment should be reversed in the appellate court for want of jurisdiction, although exception to the jurisdiction was not taken in the trial court. St. Louis, etc., R. Co. *v.* Newcom, 56 Fed. 951, 12 U. S. App. 503, 6 C. C. A. 172. So, where the affidavit to a bill in a divorce case fails to comply with the prescribed statutory form, the trial court, it has been held, acquires no jurisdiction, and the reviewing court will dismiss the suit upon its own motion, though no question was made in the trial court or the reviewing court as to the sufficiency of the affidavit. Holloman *v.* Holloman, 127 N. C. 15, 37 S. E. 68; De Armond *v.* De Armond, 92 Tenn. 40, 20 S. W. 422. But see Holcomb *v.* Holcomb, 100 Mich. 421, 59 N. W. 170.

51. *Arkansas.*— Sibley *v.* Leek, 45 Ark. 346.

Iowa.— Groves *v.* Richmond, 53 Iowa 570, 5 N. W. 763.

Maryland.— Schiff *v.* Solomon, 57 Md. 572.

Missouri.— Graham *v.* Ringo, 67 Mo. 324.

North Carolina.— Smaw *v.* Cohen, 95 N. C. 85.

Ohio.— The Steamboat General Buell *v.* Long, 18 Ohio St. 521.

South Carolina.— Varney *v.* Vosch, 3 Hill (S. C.) 237.

Texas.— Heidenheimer *v.* Marx, 1 Tex. App. Civ. Cas. § 171.

Wisconsin.— Pelton *v.* Blooming Grove, 3 Wis. 310.

United States.— Blachly *v.* Davis, 1 McLean (U. S.) 412, 3 Fed. Cas. No. 1,456.

But see, *contra,* Birney *v.* Haim, 2 Litt. (Ky.) 262.

See 2 Cent. Dig. tit. "Appeal and Error," § 1172.

52. *Alabama.*— Barnett *v.* Tarrence, 23 Ala. 463; Cullum *v.* Batre, 2 Ala. 415.

California.— Matter of Thompson, 101 Cal. 349, 35 Pac. 991, 36 Pac. 98, 508; Arroyo Ditch, etc., Co. *v.* Superior Ct., 92 Cal. 47, 28 Pac. 54, 27 Am. St. Rep. 91.

Colorado.— Schoolfield *v.* Brunton, 20 Colo. 139, 36 Pac. 1103; Lord *v.* Hendrie, etc., Mfg. Co., 13 Colo. 393, 22 Pac. 782.

Florida.— Gordon *v.* Clarke, 10 Fla. 179; Griffin *v.* Orman, 9 Fla. 22.

Georgia.— Macon, etc., R. Co. *v.* Gibson, 85 Ga. 1, 11 S. E. 442, 21 Am. St. Rep. 135; Cottle *v.* Harrold, 72 Ga. 830 [*distinguishing* Sharman *v.* Thomaston, 67 Ga. 246].

Illinois.— Reynolds *v.* Foster, 89 Ill. 257; Wallace *v.* Cox, 71 Ill. 548.

Indiana.— Perkins *v.* Hayward, 132 Ind. 95, 31 N. E. 670; McCoy *v.* Able, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453.

Iowa.— Matter of Capper, 85 Iowa 82, 52 N. W. 6; Bridgman *v.* Wilcut, 4 Greene (Iowa) 563.

Kansas.— Wells *v.* Patton, 50 Kan. 732, 33 Pac. 15; Anderson *v.* Burchett, 48 Kan. 781, 30 Pac. 174.

Kentucky.— Baker *v.* Kinnaird, 94 Ky. 5, 14 Ky. L. Rep. 695, 21 S. W. 237.

Louisiana.— Reynolds *v.* Rowley, 3 Rob. (La.) 201, 38 Am. Dec. 233. *Compare* State *v.* Judges, 47 La. Ann. 1293, 17 So. 800.

Maryland.— Fairfax Forest Min., etc., Co. *v.* Chambers, 75 Md. 604, 23 Atl. 1024; Ashton *v.* Ashton, 35 Md. 496.

Massachusetts.— Prince *v.* Gundaway, 157 Mass. 417, 32 N. E. 653; Davis *v.* McEnaney, 150 Mass. 451, 23 N. E. 221.

Michigan.— Hopkins *v.* Green, 93 Mich. 394, 53 N. W. 537.

Minnesota.—Masterson *v.* Le Claire, 4 Minn. 163.

Mississippi.— Ramsey *v.* Barbaro, 12 Sm. & M. (Miss.) 293.

Missouri.— Davis *v.* Jacksonville Southeastern Line, 126 Mo. 69, 28 S. W. 965; Wolf *v.* Harrington, 38 Mo. App. 276.

Montana.— Gage *v.* Maryatt, 9 Mont. 265, 23 Pac. 337.

Nebraska.— Leake *v.* Gallogly, 34 Nebr. 857, 52 N. W. 824; Bucklin *v.* Strickler, 32 Nebr. 602, 49 N. W. 371.

New Jersey.— North Hudson County R. Co. *v.* Flanagan, 57 N. J. L. 696, 32 Atl. 216; Delaware Bay, etc., R. Co. *v.* Markley, 45 N. J. Eq. 139, 16 Atl. 436.

New York.— Burdick *v.* Freeman, 120 N. Y. 420, 24 N. E. 949, 31 N. Y. St. 427; Matter

(III) *That Equitable Action Should Have Been Brought.* The objection that a cause is of equitable, and not of legal, cognizance cannot be raised for the first time on appeal.[53] If a party, when sued at law, conceives that the action, or any material issue in it, is of equitable cognizance, he must interpose the objection at the threshold of the case, and will not be heard to make it for the first time in the appellate court.[54]

(IV) *That Remedy at Law Is Adequate.* So, where a party submits without objection to the jurisdiction of a court of equity, he cannot raise the objection on appeal that there was an adequate remedy at law.[55] This doctrine is, of course,

of Feust, 55 Hun (N. Y.) 607, 8 N. Y. Suppl. 420, 28 N. Y. St. 721 [*affirmed* in 121 N. Y. 299, 24 N. E. 479, 31 N. Y. St. 33].

North Carolina.—Baruch *v.* Long, 117 N. C. 509, 23 S. E. 447; Devereux *v.* Devereux, 81 N. C. 12.

Ohio.— Fee *v.* Big Sand Iron Co., 13 Ohio St. 563; Marsden *v.* Soper, 11 Ohio St. 503.

Tennessee.— Eller *v.* Richardson, 89 Tenn. 575, 15 S. W. 650.

Texas.— Williams *v.* Verne, 68 Tex. 414, 4 S. W. 548; Perry *v.* McKinzie, 4 Tex. 154.

Virginia.— Hunter *v.* Humphreys, 14 Gratt. (Va.) 287.

Wisconsin.— Wickham *v.* South Shore Lumber Co., 89 Wis. 23, 61 N. W. 287; German Mut. Farmer F. Ins. Co. *v.* Decker, 74 Wis. 556, 43 N. W. 500.

United States.— Bradstreet *v.* Thomas, 12 Pet. (U. S.) 59, 9 L. ed. 999; Western Union Beef Co. *v.* Thurman, 70 Fed. 960, 30 U. S. App. 516, 17 C. C. A. 542.

See 2 Cent. Dig. tit. "Appeal and Error," § 1184 *et seq.*

53. *Illinois.*— Yeager *v.* Manning, 183 Ill. 275, 55 N. E. 691; Vermont *v.* Miller, 161 Ill. 210, 43 N. E. 975.

Iowa.— Matthews *v.* J. H. Luers Drug Co., 110 Iowa 231, 81 N. W. 464; Bibbins *v.* Clark, 90 Iowa 230, 57 N. W. 884, 59 N. W. 290, 29 L. R. A. 278.

Missouri.— Estes *v.* Fry, 94 Mo. 266, 6 S. W. 660; Farmers Bank *v.* Gallaher, 43 Mo. App. 482.

New York.— Stephens *v.* Meriden Britannia Co., 160 N. Y. 178, 54 N. E. 781, 73 Am. St. Rep. 678 [*reversing* 13 N. Y. App. Div. 268, 43 N. Y. Suppl. 226]; Worthington *v.* London Guarantee, etc., Co., 47 N. Y. App. Div. 609, 62 N. Y. Suppl. 591.

Pennsylvania.— North Shore R. Co. *v.* Pennsylvania Co., 193 Pa. St. 641, 44 Atl. 1083; Williams *v.* Concord Cong. Church, 193 Pa. St. 120, 44 Atl. 272.

Texas.— Zapp *v.* Davidson, 21 Tex. Civ. App. 566, 54 S. W. 366.

Virginia.— Robinson *v.* Moses, (Va. 1899) 34 S. E. 48.

West Virginia.—Jarrell *v.* French, 43 W. Va. 456, 27 S. E. 263.

Wisconsin.— Buffington *v.* Bardon, 80 Wis. 635, 50 N. W. 776.

United States.— International Trust Co. *v.* T. B. Townsend Brick, etc., Co., 95 Fed. 850, 37 C. C. A. 396; Union Pac. R. Co. *v.* Harris, 63 Fed. 800, 27 U. S. App. 450, 12 C. C. A. 598.

See 2 Cent. Dig. tit. "Appeal and Error," § 1179 *et seq.*

Objection by plaintiff.— Where a plaintiff sues in a court of equity he cannot subsequently object for the first time on appeal that the cause was not of equitable cognizance. Ellis *v.* Allen, 99 Wis. 598, 74 N. W. 537, 75 N. W. 949.

That trial should not have been by jury, is an objection which cannot be raised for the first time on appeal. Neff *v.* Reed, 98 Ind. 341; Taggart *v.* Tevanny, 1 Ind. App. 339, 27 N. E. 511; Philbrook *v.* Burgess, 52 Me. 271; Estes *v.* Fry, 94 Mo. 266, 6 S. W. 660; King *v.* Van Vleck, 109 N. Y. 363, 16 N. E. 547, 15 N. Y. St. 521; Megrue *v.* United L. Ins. Assoc., 71 Hun (N. Y.) 174, 24 N. Y. Suppl. 618, 54 N. Y. St. 310; McCormick *v.* Ketchum, 48 Wis. 643, 4 N. W. 798. This applies to such objections as that the cause should not have been tried by a jury because an equitable defense was pleaded. Megrue *v.* United L. Ins. Assoc., 71 Hun (N. Y.) 174, 24 N. Y. Suppl. 618, 54 N. Y. St. 310. And where no objection has been made to the reference to the jury of all the issues in a chancery cause and none of the exceptions raise this question, the objection cannot be raised on appeal. Frank *v.* Humphreys, 24 S. C. 325.

54. Union Pac. R. Co. *v.* Harris, 63 Fed. 800, 27 U. S. App. 450, 12 C. C. A. 598.

55. *Arizona.*—Daggs *v.* Bolton, (Ariz. 1899) 57 Pac. 611.

Arkansas.— Daniels *v.* Street, 15 Ark. 307; Sexton *v.* Pike, 13 Ark. 193.

California.— Simons *v.* Bedell, 122 Cal. 341, 55 Pac. 3, 68 Am. St. Rep. 35; Matter of Kasson, 119 Cal. 489, 51 Pac. 706.

Colorado.— Derry *v.* Ross, 5 Colo. 295; Strousse *v.* Clear Creek County Bank, 9 Colo. App. 478, 49 Pac. 260.

Florida.— International Imp. Fund *v.* Gleason, 39 Fla. 771, 22 So. 539; Freeman *v.* Timanus, 12 Fla. 393; Griffin *v.* Orman, 9 Fla. 22.

Georgia.— Mecks *v.* Guckenheimer, 102 Ga. 710, 29 S. E. 486.

Illinois.— Parsons *v.* Millar, 189 Ill. 107, 59 N. E. 606; Hazle *v.* Bondy, 173 Ill. 302, 50 N. E. 671; Kelly *v.* Gallbraith, 87 Ill. App. 63 [*affirmed* in 186 Ill. 593, 58 N. E. 431]; Soldiers' Orphans' Home *v.* Lyon, 42 Ill. App. 615.

Indiana.— Lowery *v.* State L. Ins. Co., 153 Ind. 100, 54 N. E. 442.

Indian Territory.— Shapleigh Hardware Co. *v.* Brittain, (Indian Terr. 1899) 48 S. W. 1069.

applicable only in cases where the jurisdiction of the court of equity and the court of law are concurrent. If the cause is one not properly cognizable by a court of equity under any circumstances, the objection may be raised at any time, as want of jurisdiction of the subject-matter is always fatal at any stage of the proceedings.[56]

(v) *That Hearing Was by Wrong Division of Trial Court.* Where a case is allotted to one division of a court consisting of several divisions, and a judge in another division takes jurisdiction, it is too late, on appeal, to urge the want of jurisdiction if no objection has been made below.[57]

(vi) *With Respect of Time of Hearing.* If no objection is made to the jurisdiction of the court to try a cause at an adjourned day of a special term, the objection cannot be raised on appeal.[58]

d. Relating to Parties[59]—(i) *Capacity or Right to Sue*—(a) *Statement*

Iowa.— Cooper *v.* Cedar Rapids, (Iowa 1900) 83 N. W. 1050; Brown *v.* Chicago, etc., R. Co., (Iowa 1900) 82 N. W. 1003.

Kansas.— List *v.* Jockheck, 59 Kan. 143, 52 Pac. 420; Barton *v.* Pond, 8 Kan. App. 859, 55 Pac. 519.

Kentucky.—Salyer *v.* Napier, 21 Ky. L. Rep. 172, 51 S. W. 10.

Massachusetts.— Whiting *v.* Burkhardt, (Mass. 1901) 60 N. E. 1; McRae *v.* Locke, 114 Mass. 96.

Michigan.— Atty.-Gen. *v.* Moliter, 26 Mich. 444.

Mississippi.— Dufour *v.* Chapotel, 75 Miss. 656, 23 So. 387; Black *v.* Washington, 65 Miss. 60, 3 So. 140.

Missouri.— White *v.* Missouri, etc., R. Co., 72 Mo. App. 400; Farmers Bank *v.* Gallaher, 43 Mo. App. 482.

Nebraska.— Stahlhut *v.* Bauer, 51 Nebr. 64, 70 N. W. 496; Sherwin *v.* Gaghagen, 39 Nebr. 238, 57 N. W. 1005.

New Hampshire.— Cushing *v.* Miller, 62 N. H. 517.

New York.— Powell *v.* Waldron, 89 N. Y. 328, 42 Am. Rep. 301; Clarke *v.* Sawyer, 2 N. Y. 498; Barker *v.* Archer, 49 N. Y. App. Div. 80, 63 N. Y. Suppl. 298.

Ohio.— Wellston *v.* Morgan, 59 Ohio St. 147, 52 N. E. 127; Culver *v.* Rodgers, 33 Ohio St. 537.

Pennsylvania.— Williams *v.* Concord Cong. Church, 193 Pa. St. 120, 44 Atl. 272; Edgett *v.* Douglass, 144 Pa. St. 95, 28 Wkly. Notes Cas. (Pa.) 469, 22 Atl. 868.

South Carolina.— Bomar *v.* Means, 47 S. C. 190, 25 S. E. 60; McDonald *v.* Crockett, 2 McCord Eq. (S. C.) 130.

Tennessee.— McGuire *v.* Caruthers, 5 Humphr. (Tenn.) 413.

Virginia.— Cox *v.* Cox, 95 Va. 173, 27 S. E. 834; Stonebunger *v.* Roller, (Va. 1896) 25 S. E. 1012; Wiltz *v.* Mullin, 90 Va. 805, 20 S. E. 783; Green *v.* Massie, 21 Gratt. (Va.) 356.

Wisconsin.— Bent *v.* Barnes, 90 Wis. 631, 64 N. W. 428; Buffington *v.* Bardon, 80 Wis. 635, 50 N. W. 776.

United States.— Burbank *v.* Bigelow, 154 U. S. 558, 14 S. Ct. 1163, 19 L. ed. 51; New York, etc., Land Co. *v.* Gulf, etc., R. Co., 100 Fed. 830, 41 C. C. A. 87; Schoolfield *v.* Rhodes, 82 Fed. 153, 49 U. S. App. 486, 27 C. C. A. 95; St. Louis, etc., R. Co. *v.* Phillips, 66 Fed. 35, 27 U. S. App. 643, 13 C. C. A. 315.

But see and *compare* Conklin *v.* Plant, 34 Ill. App. 264; Spelman *v.* Gill, 75 Iowa 717, 38 N. W. 168; Lone Jack Min. Co. *v.* Megginson, 82 Fed. 89, 48 U. S. App. 452, 27 C. C. A. 63; Reynolds *v.* Watkins, 60 Fed. 824, 22 U. S. App. 83, 9 C. C. A. 273; Union Pac. R. Co. *v.* Harris, 63 Fed. 800, 27 U. S. App. 450, 12 C. C. A. 598.

56. *Colorado.*— Derry *v.* Ross, 5 Colo. 295.

Florida.— Griffin *v.* Orman, 9 Fla. 22.

Illinois.— Stout *v.* Cook, 41 Ill. 447.

New York.— Delafield *v.* Illinois, 2 Hill (N. Y.) 159.

Pennsylvania.— Edgett *v.* Douglass, 144 Pa. St. 95, 22 Atl. 868; Pittsburgh, etc., Drove Yard Co.'s Appeal, 123 Pa. St. 250, 16 Atl. 625.

South Carolina.— McDonald *v.* Crockett, 2 McCord Eq. (S. C.) 130.

Tennessee.— McGuire *v.* Caruthers, 5 Humphr. (Tenn.) 413.

Virginia.— Buffalo *v.* Pocahontas, 85 Va. 222, 7 S. E. 238; Coleman *v.* Anderson, 29 Gratt. (Va.) 425; Green *v.* Massie, 21 Gratt. (Va.) 356.

United States.— Allen *v.* Pullman's Palace Car Co., 139 U. S. 658, 11 S. Ct. 682, 35 L. ed. 303; New York Guaranty, etc., Co. *v.* Memphis Water Co., 107 U. S. 205, 2 S. Ct. 279, 27 L. ed. 484; Lewis *v.* Cocks, 23 Wall. (U. S.) 466, 23 L. ed. 70; Oelrichs *v.* Williams, 15 Wall. (U. S.) 211, 21 L. ed. 43; Parker *v.* Winnipiseogee Lake Cotton, etc., Co., 2 Black (U. S.) 545, 17 L. ed. 333.

57. Labouisse *v.* Orleans Cotton Rope, etc., Co., 43 La. Ann. 582, 9 So. 492. See also James *v.* Meyer, 43 La. Ann. 38, 8 So. 575; Pironi *v.* Riley, 39 La. Ann. 302, 1 So. 675; Tracy *v.* McKinney, 82 Mo. App. 506.

58. Short *v.* Gill, 126 N. C. 803, 36 S. E. 336. See also Crush *v.* Kirkland, 18 Ind. 190; White *v.* Coulter, 59 N. Y. 629.

59. See also, generally, PARTIES.

Objections to the time of making one a party to the action must be made in the court below, or they cannot be raised in the appellate court. Johnston *v.* Hainesworth, 6 Ala. 443.

of Rule. An objection to the capacity of plaintiff to sue must be raised in the court below, or it cannot be considered in the appellate court.[60]

(B) *Applications of Rule*—(1) In General. Thus, it has been held that it cannot be objected for the first time in the appellate court that plaintiff is an alien,[61] a foreign receiver,[62] a foreign corporation which has not complied with the statutes relating to foreign corporations and, therefore, is without standing to maintain an action,[63] a lunatic,[64] an infant,[65] or subject to the disabilities of coverture.[66]

(2) Failure to Obtain Leave to Sue. It cannot be objected for the first time in the appellate court that the suit was instituted without obtaining the requisite leave of court,[67] or that the leave obtained was invalid.[68]

(3) Improper Party Plaintiff. A formal objection that the suit is brought by the wrong person or official must be made in the court below, or it cannot be urged in the appellate court.[69]

(4) Plaintiff's Want of Interest in Controversy. An objection to the title under which a plaintiff sues will not be considered when raised for the first time in the appellate court.[70]

60. *Alabama.*— Louisville, etc., R. Co. *v.* Touart, 97 Ala. 514, 11 So. 756.

Arkansas.— Robinson *v.* German Ins. Co., 51 Ark. 441, 11 S. W. 686, 4 L. R. A. 251.

California.— Quan Wye *v.* Chin Lin Hee, 123 Cal. 185, 55 Pac. 783; Matter of Robinson, 106 Cal. 493, 39 Pac. 862.

Illinois.— Kingman *v.* Reinemer, 166 Ill. 208, 46 N. E. 786 [*affirming* 58 Ill. App. 173]; Gillham *v.* State Bank, 3 Ill. 245, 35 Am. Dec. 105.

Indiana.— La Plante *v.* State, 152 Ind. 80, 52 N. E. 452.

Louisiana.— Taylor *v.* Littell, 21 La. Ann. 665; Dejona *v.* Steamboat Osceola, 17 La. Ann. 277.

Nebraska.— Clark *v.* Carey, 41 Nebr. 780, 60 N. W. 78.

New York.— Hathaway *v.* Orient Ins. Co., 58 Hun (N. Y.) 602, 11 N. Y. Suppl. 413, 33 N. Y. St. 678.

United States.— St. Louis Southwestern R. Co. *v.* Henson, 58 Fed. 531, 19 U. S. App. 169, 7 C. C. A. 349.

See 2 Cent. Dig. tit. "Appeal and Error," § 1184 *et seq.*

61. O'Reilly *v.* Campbell, 116 U. S. 418, 6 S. Ct. 421, 29 L. ed. 669.

62. Clark *v.* Lopp, 80 Mo. App. 542.

63. Holmes *v.* Standard Oil Co., 183 Ill. 70, 55 N. E. 647 [*affirming* 82 Ill. App. 476]; Minneapolis Trust Co. *v.* Verhulst, 74 Ill. App. 350; City Trust, etc., Co. *v.* Wilson Mfg. Co., 58 N. Y. App. Div. 271, 68 N. Y. Suppl. 1004.

64. Martin *v.* Dufalla, 50 Ill. App. 371.

65. Chicago *v.* Hogan, 80 Ill. App. 344.

The objection that plaintiff, although of age, sued by next friend is an objection to the form of the process, and not to the cause of action, and cannot be taken advantage of for the first time on error. Wilms *v.* White, 26 Md. 380, 90 Am. Dec. 113.

66. Schwarze *v.* Mahoney, 97 Cal. 131, 31 Pac. 908; Taylor *v.* Brown, 32 Fla. 334, 13 So. 957; Lyman *v.* Albee, 7 Vt. 508.

Thus, where a wife alleges in her petition that she is authorized by her husband to bring suit, and no exception is taken in the lower court, the question of her authority will not be questioned on appeal. Durham *v.* Daugherty, 30 La. Ann. 1255.

67. *Alabama.*— Smith *v.* Inge, 80 Ala. 283.

Iowa.— Elder *v.* Littler, 15 Iowa 65.

New York.— Dunham *v.* Fitch, 48 N. Y. App. Div. 321, 62 N. Y. Suppl. 905; Knapp *v.* Valentine, 24 N. Y. Civ. Proc. 331, 33 N. Y. Suppl. 712, 67 N. Y. St. 582.

Oregon.— Multnomah County *v.* Kelly, 37 Oreg. 1, 60 Pac. 202.

Wisconsin.— Johannes *v.* Youngs, 48 Wis. 101, 4 N. W. 32.

68. Pierpoint *v.* McGuire, 13 Misc. (N. Y.) 70, 34 N. Y. Suppl. 150, 68 N. Y. St. 197.

Revocation of authority to sue.— And, even if a county judge could, after the suit was commenced, revoke authority granted to sue on an administrator's bond, the objection that he had done so comes too late on appeal. Johannes *v.* Youngs, 48 Wis. 101, 4 N. W. 32.

69. *Illinois.*— Knox County *v.* Davis, 63 Ill. 405; Oliver *v.* Cochran, 19 Ill. App. 236.

Kentucky.— Davidson *v.* Morrison, 9 Ky. L. Rep. 629, 5 S. W. 871.

Massachusetts.— Wood *v.* Dean, 165 Mass. 559, 43 N. E. 510; Hodgkins *v.* Price, 137 Mass. 13.

Michigan.— People *v.* Smith, 42 Mich. 138, 3 N. W. 302.

Mississippi.— Fly *v.* King, 71 Miss. 537, 14 So. 465.

Missouri.— Stumpe *v.* Ringshausen, 9 Mo. App. 599; Wolff *v.* Schaeffer, 6 Mo. App. 589.

New York.— Torrey *v.* Willard, 55 Hun (N. Y.) 78, 8 N. Y. Suppl. 392, 28 N. Y. St. 641.

Oregon.— Bellinger *v.* Thompson, 26 Oreg. 320, 37 Pac. 714, 40 Pac. 229.

Pennsylvania.— Wisener *v.* Myers, 3 Pa. Dist. 687, 25 Pittsb. Leg. J. N. S. (Pa.) 166.

Washington.— Jenkins *v.* Columbia Land, etc., Co., 13 Wash. 502, 43 Pac. 328.

Wisconsin.— State *v.* Smith, 11 Wis. 65.

United States.— Fortier *v.* New Orleans Nat. Bank, 112 U. S. 439, 5 S. Ct. 234, 28 L. ed. 764.

70. *Iowa.*— Ham *v.* Wisconsin, etc., R. Co., 61 Iowa 716, 17 N. W. 157.

(5) Plaintiff not Real Party in Interest. So, too, the objection that plaintiff is not the real party in interest, and, hence, has no right to sue, comes too late when made for the first time in the appellate court.[71]

(6) Plaintiff's Want of Representative Capacity. Where plaintiff sues in a representative capacity, and the right to sue in such capacity is not put in issue in the court below, it cannot be questioned in the appellate court.[72]

(7) Plaintiff Suing in Double Capacity. The right of a plaintiff to sue both in a personal and a representative capacity cannot be first questioned on appeal.[73]

(8) Plaintiff Suing in Wrong Capacity. In a suit for partition of an estate left by plaintiff's former husband, no objection can be made, on appeal, to the capacity in which plaintiff sues, where defendants proceed in the investigation of their rights without reference to the true capacity in which plaintiff ought to have alleged her claim.[74] And it has been held that persons made defendants to a foreclosure suit, which persons did not appear in the court below, cannot raise the objection in the appellate court that the action was brought by plaintiff in his individual capacity when he should have brought it as trustee.[75]

(9) Incapacity of Foreign Executor to Sue. In a suit by a foreign executor or administrator the objection that he has no capacity to sue is unavailable if urged for the first time in the appellate court.[76]

(10) Copartnership of Plaintiff and Defendant. The objection that plaintiff is a co-partner with the defendant, and therefore cannot maintain the suit, is waived unless made in the trial court, and cannot be urged for the first time in the appellate court.[77]

(c) *Exception to Rule Where Want of Authority to Sue Appears of Record.*

Louisiana.— Adams *v.* Coons, 37 La. Ann. 305.

Maine.— Sargent *v.* Machias, 65 Me. 591.

Michigan.— Davison *v.* Davison, 99 Mich. 625, 58 N. W. 637.

New York.— Delafield *v.* Illinois, 26 Wend. (N. Y.) 192.

North Carolina.— Wellons *v.* Jordan, 83 N. C. 371.

Texas.— Reinhardt *v.* Pleasants, 36 Tex. 684.

Applications of this rule.— Accordingly, where the trial of an action on a note proceeds on the assumption that plaintiff was the owner and holder, his title cannot be questioned in the appellate court (Decker *v.* House, 30 Kan. 614, 1 Pac. 584), even though it was put in issue by the pleadings (Moors *v.* Sanford, 2 Kan. App. 243, 41 Pac. 1064). And, in an action on a note, the objection that the legal title is not in plaintiff must be made at the trial, where it can be remedied, and not for the first time in the appellate court. Bowles *v.* Wright, 34 Miss. 409.

71. Irish *v.* Sharp, 89 Ill. 261; Smith *v.* Moore, 4 Ill. 462; Bowser *v.* Mattler, 137 Ind. 649, 35 N. E. 701, 36 N. E. 714; Vanderpool *v.* Brake, 28 Ind. 130; Stimpson *v.* Gilchrist, 1 Me. 202; Mechanics' Bank *v.* Gilpin, 105 Mo. 17, 16 S. W. 524; Giraldin *v.* Howard, 103 Mo. 40, 15 S. W. 383.

72. *Alabama.*— Alabama Gold L. Ins. Co. *v.* Garner, 77 Ala. 210.

Illinois.— Hughes *v.* Richter, 60 Ill. App. 616.

Indiana.— Mahon *v.* Mahon, 19 Ind. 324.

Missouri.— Reynolds' Appeal, 70 Mo. App. 576.

Tennessee.— Glass *v.* Stovall, 10 Humphr. (Tenn.) 452.

Texas.— Rankin *v.* Busby, (Tex. Civ. App. 1894) 25 S. W. 678.

West Virginia.— List *v.* Pumphrey, 3 W. Va. 672.

Illustrations.— Thus, the right of plaintiffs to represent a corporation, which right was not contested below, cannot be examined on appeal. Baillie *v.* Western Assur. Co., 49 La. Ann. 658, 21 So. 736; Player *v.* Tarkington, 4 La. Ann. 396. The defendant, in an action by a receiver, cannot object for the first time in the appellate court that the receiver had been discharged. Driver *v.* Lanier, 66 Ark. 126, 49 S. W. 816.

73. Stilwell *v.* Carpenter, 62 N. Y. 639, 2 Abb. N. Cas. (N. Y.) 238.

74. Bryan *v.* Moore, 11 Mart. (La.) 26, 13 Am. Dec. 347.

75. Mead *v.* Bagnall, 15 Wis. 156.

76. May *v.* Burk, 80 Mo. 675; Blackman *v.* Green, 17 Tex. 322.

Thus if cannot be objected for the first time in the appellate court that the foreign executor or administrator has not filed his letters in the jurisdiction in which the suit is brought (Wayland *v.* Porterfield, 1 Metc. (Ky.) 638); that his appointment has not been authenticated in the manner required by law (Northwestern Mut. L. Ins. Co. *v.* Lowery, 14 Ky. L. Rep. 600, 20 S. W. 607); or that he has not given the bond required by statute (Northwestern Mut. L. Ins. Co. *v.* Lowery, 14 Ky. L. Rep. 600, 20 S. W. 607).

77. Selby *v.* Hutchinson, 9 Ill. 319; Candler *v.* Rossiter, 10 Wend. (N. Y.) 487; Smith *v.* Allen, 18 Johns. (N. Y.) 245.

It has been held that where the record shows that there is no authority in plaintiff to maintain the suit, the objection will be fatal in the appellate court, although it was not made in the court below.[78]

(II) *Defect of Parties*—(A) *In General.* The general rule is that an objection to the want of proper parties, or to other defects as to parties, comes too late when raised for the first time on appeal.[79]

(B) *Want of Necessary Parties.* Where, however, the omitted party is not only a proper but a necessary one, so that a final decree cannot be rendered without affecting his or her interests, the objection may be taken on appeal or writ of error.[80]

78. See 2 Cent. Dig. tit. "Appeal and Error," § 1188; and Crosby *v.* Huston, 1 Tex. 203.

In Thomas *v.* Franklin, 42 Nebr. 310, 60 N. W. 568, it was held that, in reviewing a special statutory proceeding, the court will look into the record to determine whether the person prosecuting the suit is authorized by statute so to do, though such authority was not questioned below.

79. *Alabama.*—Alexander *v.* Steele, 84 Ala. 332, 4 So. 281; Sanders *v.* Godley, 23 Ala. 473.

Colorado.—Hagerman *v.* Bates, 24 Colo. 71, 49 Pac. 139; Melsheimer *v.* Hommel, 15 Colo. 475, 24 Pac. 1079.

Georgia.— Howard *v.* Gray, 65 Ga. 182.

Illinois.— Mantonya *v.* Reilly, 184 Ill. 183, 56 N. E. 425 [*affirming* 83 Ill. App. 275]; Atkinson *v.* Foster, 134 Ill. 472, 25 N. E. 528; Geist *v.* Rothschild, 90 Ill. App. 324.

Indiana.— Hays *v.* Walker, 90 Ind. 105; Easter *v.* Severin, 78 Ind. 540. See also Phelps *v.* Smith, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156.

Iowa.— Iowa Stone Co. *v.* Crissman, (Iowa 1900) 83 N. W. 794.

Kansas.—Coop *v.* Condon, 6 Kan. App. 574, 51 Pac. 587.

Kentucky.—Keith *v.* Wilson, 3 Metc. (Ky.) 201; Bailey *v.* Herron, 20 Ky. L. Rep. 1957, 50 S. W. 834.

Massachusetts.— Evans *v.* Wall, 159 Mass. 164, 34 N. E. 183, 38 Am. St. Rep. 406.

Michigan.— Clark *v.* O'Rourke, 111 Mich. 108, 69 N. W. 147, 66 Am. St. Rep. 389; Butterfield *v.* Gilchrist, 53 Mich. 22, 18 N. W. 542.

Mississippi.— Planters' Oil Mill, etc., Co. *v.* Falls, (Miss. 1901) 29 So. 786; Walker *v.* Hall, 66 Miss. 390, 6 So. 318.

Missouri.— Sensenderfer *v.* Kemp, 83 Mo. 581; Ingerham *v.* Weatherman, 79 Mo. App. 480.

Nebraska.— Ayres *v.* Duggan, 57 Nebr. 750, 78 N. W. 296.

New Jersey.— See Green *v.* Heritage, 63 N. J. L. 455, 43 Atl. 698.

New York.— Hotopp *v.* Huber, 160 N. Y. 524, 55 N. E. 206 [*affirming* 16 App. Div. 327, 44 N. Y. Suppl. 617]; Rose *v.* Durant, 44 App. Div. 381, 61 N. Y. Suppl. 15; Phillips *v.* Metropolitan El. R. Co., 12 N. Y. App. Div. 283, 42 N. Y. Suppl. 33; Sheldon *v.* Wood, 2 Bosw. (N. Y.) 267; Kubin *v.* Miller, 61 N. Y. Suppl. 1121.

Ohio.— Howard *v.* Levering, 8 Ohio Cir. Ct. 614.

Oregon.— State *v.* Estes, 34 Oreg. 19, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25.

Texas.— Mateer *v.* Cockrill, 18 Tex. Civ. App. 391, 45 S. W. 751; Southern Bldg., etc., Assoc. *v.* Skinner, (Tex. Civ. App. 1897) 42 S. W. 320; Spicer *v.* Taylor, (Tex. Civ. App. 1893) 21 S. W. 314.

Virginia.— Chappell *v.* Robertson, 2 Rob. (Va.) 590.

Washington.— Jenkins *v.* Columbia Land, etc., Co., 13 Wash. 502, 43 Pac. 328.

Wisconsin.— La Crosse *v.* Melrose, 22 Wis. 459.

United States.—Gibbs *v.* Diekma, 131 U. S. clxxxvi, appendix, 26 L. ed. 176; Wheeler *v.* Sedgwick, 94 U. S. 1, 24 L. ed. 31; People's Telephone, etc., Co. *v.* East Tennessee Telephone Co., 103 Fed. 212, 43 C. C. A. 185.

See 2 Cent. Dig. tit. "Appeal and Error," § 1186.

Thus, where a motion for the assessment of damages on an injunction bond was made by one only of the real parties in interest, and defendants did not, on the trial of the motion, object, either by answer or demurrer, to the defect of parties plaintiff apparent on the face of the motion, they cannot make that objection for the first time in the appellate court, but must be considered as having waived the same. Helmkampf *v.* Wood, 84 Mo. App. 261.

80. *Alabama.*— McCully *v.* Chapman, 58 Ala. 325; Gould *v.* Hayes, 19 Ala. 438.

Florida.— Robinson *v.* Howe, 35 Fla. 73, 17 So. 368.

Illinois.— Dubs *v.* Egli, 167 Ill. 514, 47 N. E. 766; Gerard *v.* Bates, 124 Ill. 150, 16 N. E. 258, 7 Am. St. Rep. 350.

New Jersey.— McLaughlin *v.* Van Kueren, 21 N. J. Eq. 379; Berryman *v.* Graham, 21 N. J. Eq. 370.

South Carolina.— But see Shell *v.* Boyd, 32 S. C. 359, 11 S. E. 205.

Texas.— Monday *v.* Vance, 11 Tex. Civ. App. 374, 32 S. W. 559; Hanner *v.* Summerhill, 6 Tex. Civ. App. 764, 26 S. W. 906.

Virginia.— Thornton *v.* Gaar, 87 Va. 315, 12 S. E. 753, 15 Va. L. J. 102; Welsh *v.* Solenberger, 85 Va. 441, 8 S. E. 91; Hinton *v.* Bland, 81 Va. 588.

See 2 Cent. Dig. tit. "Appeal and Error," § 1187.

Consent decree.— In Herndon *v.* Crawford, 41 Tex. 267, it was held that, where parties consented to a decree in the district court, they could not, for the first time in the supreme court, take advantage of a want of necessary parties to the cause.

(III) *Misjoinder.* The objection that there is a misjoinder of parties, either plaintiff or defendant, cannot be made for the first time in the appellate court.[81]

(IV) *Misnomer.* The misnomer of a party to a cause cannot be objected to for the first time in the appellate court.[82]

e. Relating to Process — (I) *Absence of Service.* It has been held that absence of service of process may be objected to for the first time on appeal.[83]

(II) *Defects in Process or Service.*[84] However, objections based on defects of process — summons, citation, or notice — cannot be first raised on appeal.[85]

Where the record discloses the fact that there are other parties whose rights will be materially affected by a decree in the cause it seems that the appellate court may, of its own motion, refuse to proceed further in the cause, although no objection is made on account of want of parties. Beasley *v.* Shively, 20 Oreg. 508, 26 Pac. 846. To the same effect see Gerard *v.* Bates, 124 Ill. 150, 16 N. E. 258, 7 Am. St. Rep. 350.

81. *Alabama.*— Cazalas *v.* Rodayt, 35 Ala. 256; Harris *v.* Plant, 31 Ala. 639.

Arkansas.— Collins *v.* Lightle, 50 Ark. 97, 6 S. W. 596; Long *v.* De Bevois, 31 Ark. 480.

Colorado.—Moore *v.* Vickers, 3 Colo. App. 443, 34 Pac. 257; Atchison, etc., R. Co. *v.* Denver, 2 Colo. App. 436, 31 Pac. 240.

Illinois.— Podolski *v.* Stone, 186 Ill. 540, 58 N. E. 340; Blankenbeker *v.* Ennis, 78 Ill. App. 457; Spraker *v.* Ennis, 78 Ill. App. 446; Nelson *v.* Smith, 54 Ill. App. 345.

Indiana.— Gatling *v.* Newell, 9 Ind. 572.

Iowa.—Easton *v.* Somerville, 111 Iowa 164, 82 N. W. 475; Beacham *v.* Gurney, 91 Iowa 621, 60 N. W. 187.

Minnesota.— Breault *v.* Merrill, etc., Lumber Co., 72 Minn. 143, 75 N. W. 122.

Mississippi.— Pugh *v.* Boyd, 38 Miss. 326.

Missouri.— Rothschild *v.* Lynch, 76 Mo. App. 339; Johnson *v.* Simmons, 61 Mo. App. 395.

Nebraska.— Culbertson Irrigating, etc., Co. *v.* Wildman, 45 Nebr. 663, 63 N. W. 947.

New York.—Allen *v.* Buffalo, 38 N. Y. 280; Tibbits *v.* Percy, 24 Barb. (N. Y.) 39; Bates *v.* James, 3 Duer (N. Y.) 45.

Texas.—Allen *v.* Read, 66 Tex. 13, 17 S. W. 115; Green *v.* Scottish-American Mortg. Co., 18 Tex. Civ. App. 286, 44 S. W. 319.

Washington.— Le May *v.* Baxter, 11 Wash. 649, 40 Pac. 122; Phelps *v.* The Steamship City of Panama, 1 Wash. Terr. 518.

United States.— Hayes *v.* Pratt, 147 U. S. 557, 13 S. Ct. 503, 37 L. ed. 279; Griffin *v.* Reynolds, 17 How. (U. S.) 609, 15 L. ed. 229.

See 2 Cent. Dig. tit. "Appeal and Error," § 1185.

82. Thus, the objection that plaintiff corporation did not sue in the proper corporate name, if such objection be made for the first time on appeal, will not be considered. Richwine *v.* Noblesville Presb. Church, 135 Ind. 80, 34 N. E. 737. So, in an action to foreclose a mortgage, one of the parties defendant was described by his full name in the pleadings, but in the report of sale and order of confirmation by his initials only. It was claimed, on appeal, that the report and order were invalid because the party defendant was not stated therein; but it was held that, the point not having been raised in the court below, it would not be considered on appeal. Piper *v.* Sawyer, (Minn. 1901) 85 N. W. 206.

83. Shannon *v.* Goffe, 15 La. Ann. 86; State *v.* Whittet, 61 Wis. 351, 21 N. W. 245; and see 2 Cent. Dig. tit. "Appeal and Error," § 1190 *et seq.*

84. As to amendment of process or waiver of defects therein see Appearances; Process.

85. *Alabama.*— Bancroft *v.* Stanton, 7 Ala. 351; Sawyer *v.* Price, 6 Ala. 285.

Colorado.— Hook *v.* Fenner, 18 Colo. 283, 32 Pac. 614, 36 Am. St. Rep. 277.

Florida.— Keil *v.* West, 21 Fla. 508.

Georgia.— Raney *v.* McRae, 14 Ga. 589, 60 Am. Dec. 660.

Illinois.— Cruikshank *v.* Brown, 10 Ill. 75.

Indiana.— Hawkins *v.* McDougal, 126 Ind. 539, 25 N. E. 820.

Iowa.— Gray *v.* Wolf, 77 Iowa 630, 42 N. W. 504; Dougherty *v.* McManus, 36 Iowa 657.

Maine.— Piper *v.* Goodwin, 23 Me. 251.

Massachusetts.— Burlen *v.* Shannon, 115 Mass. 438.

Michigan.—Adair *v.* Cummin, 48 Mich. 375, 12 N. W. 495.

Mississippi.— Wiggle *v.* Owen, 45 Miss. 691.

New York.— Campbell *v.* Wright, 21 How. Pr. (N. Y.) 9.

Tennessee.— Odell *v.* Koppee, 5 Heisk. (Tenn.) 88.

Texas.— Cave *v.* Houston, 65 Tex. 619; Marshall *v.* Marshall, (Tex. Civ. App. 1895) 30 S. W. 578.

See 2 Cent. Dig. tit. "Appeal and Error," § 1190 *et seq.*

Applications of this rule.— Thus, it cannot be objected for the first time on appeal that there was a variance between the process and the pleadings (Ferguson *v.* George, 42 Ala. 135; Roberts *v.* Johnson, 2 Stew. (Ala.) 13; Davis *v.* American, etc., Christian Union, 100 Ill. 313; Holley *v.* Knapp, 45 Ill. App. 372; Palmer *v.* McGinnis, Hard. (Ky.) 505; Kennedy *v.* Terrill, Hard. (Ky.) 490; Haskins *v.* Citizens Bank, 12 Nebr. 39, 10 N. W. 466); that the citation was without a seal (Wiggle *v.* Owen, 45 Miss. 691); that there is a clerical error in the date of the process (Allen *v.* Traylor, 31 Tex. 124); or that the summons was without a stamp (Roberts *v.* Formhalls, 46 Ill. 66).

In Texas it has been held that if the process

It is also well settled that objections based on defects in service[86] or return of process cannot be raised for the first time on appeal.[87]

f. Relating to Pleadings[88] — (I) *Absence of Pleadings.* It has been held that after judgment by confession no advantage can be taken on appeal because of the want of a declaration,[89] and that when one of several plaintiffs has come into a case after issue joined, the objection that he tenders no pleading must be made in the trial court.[90] So it cannot first be objected on appeal that no reply or replication was filed.[91]

(II) *Sufficiency and Form of Pleadings*[92] — (A) *In General.* Objections which go merely to the form of the pleadings are waived unless raised in the court below.[93] It cannot be objected for the first time on appeal that the cause

is absolutely void the objection may be raised first on appeal. Hale *v.* McComas, 59 Tex. 484; Crain *v.* Griffis, 14 Tex. 358. There are also some Texas decisions which do not seem to agree with the Texas decisions cited in support of the text. It has been held that the absence of the file number (Durham *v.* Betterton, 79 Tex. 223, 14 S. W. 1060), of the date of filing petition (Railroad Co. *v.* Erving, 2 Tex. App. Civ. Cas. § 122; Kirk *v.* Hampton, 2 Tex. App. Civ. Cas. § 719), of the date of issuance (Railroad Co. *v.* Pape, 1 Tex. App. Civ. Cas. § 243), of the names of all the parties to the suit (Owsley *v.* Paris Exch. Bank, 1 Tex. Unrep. Cas. 93), or of the christian names of defendants (Carlton *v.* Miller, 2 Tex. Civ. App. 619, 21 S. W. 697), is ground for reversal, though defendant made no objection in the court below.

86. *Alabama.*— Herbert *v.* Varner, 42 Ala. 182; Moore *v.* Fiquett, 19 Ala. 236.

Florida.— Keil *v.* West, 21 Fla. 508.

Illinois.— Wayman *v.* Crozier, 35 Ill. 156; Swingley *v.* Haynes, 22 Ill. 214.

Iowa.— Davis *v.* Burt, 7 Iowa 56.

Mississippi.— Thornton *v.* Fitzhugh, 10 Sm. & M. (Miss.) 438.

New York.— Miller *v.* Jones, 67 Hun (N. Y.) 281, 22 N. Y. Suppl. 86, 51 N. Y. St. 361; Myers *v.* Overton, 4 E. D. Smith (N. Y.) 428.

South Carolina.— Beattie *v.* Latimer, 42 S. C. 313, 20 S. E. 53.

Texas.— Hale *v.* McComas, 59 Tex. 484.

Virginia.—Gunn *v.* Turner, 21 Gratt. (Va.) 382.

West Virginia.— Scott *v.* Ludington, 14 W. Va. 387.

Defects in service by publication cannot be objected to for the first time on appeal. Woods *v.* Mosier, 22 Mo. 335.

87. Martin *v.* Godwin, 34 Ark. 682; Keil *v.* West, 21 Fla. 508; Davis *v.* Burt, 7 Iowa 56; Shenandoah Valley R. Co. *v.* Griffith, 76 Va. 913.

88. See 2 Cent. Dig. tit. "Appeal and Error," §§ 1209, 1221 *et seq.*

89. Payne *v.* Lewis, 1 Bibb (Ky.) 164; Pickett *v.* Claiborne, 4 Call (Va.) 99.

90. Lallman *v.* Hovey, 92 Hun (N. Y.) 419, 36 N. Y. Suppl. 662, 71 N. Y. St. 576.

The want of a declaration in a writ cannot first be taken advantage of on appeal after a trial on the merits in the inferior court. Lane *v.* Roberts, 3 Gray (Mass.) 514.

91. Robinson Reduction Co. *v.* Johnson, 10 Colo. App. 135, 50 Pac. 215; Lyford *v.* Martin, 79 Minn. 243, 82 N. W. 479; Merchants Nat. Bank *v.* Barlow, 79 Minn. 234, 82 N. W. 364; Howe *v.* Pacific Mut. L. Ins. Co., 75 Mo. App. 63; Hudson *v.* Voigt, 15 Ohio Cir. Ct. 391.

92. See also, generally, Equity; Pleading.

93. *Alabama.*— Stewart *v.* Goode, 29 Ala. 476.

Arizona.—Dalton *v.* Rentaria, (Ariz. 1887) 15 Pac. 37.

California.— White *v.* San Rafael, etc., R. Co., 50 Cal. 417; Sutter *v.* Cox, 6 Cal. 415.

Colorado.— Kimball *v.* Lyon, 19 Colo. 266, 35 Pac. 44; Gallup *v.* Wortmann, 11 Colo. App. 308, 53 Pac. 247.

Connecticut.—Miller *v.* Cross, (Conn. 1901) 48 Atl. 213.

Illinois.— Northwestern Brewing Co. *v.* Manion, 47 Ill. App. 627.

Indiana.— Simons *v.* Busby, 119 Ind. 13, 21 N. E. 451; Aiken *v.* Bruen, 21 Ind. 137.

Iowa.— Beacham *v.* Gurney, 91 Iowa 621, 60 N. W. 187.

Kentucky.— Preston *v.* Brown, (Ky. 1901) 62 S. W. 265; Louisville, etc., R. Co. *v.* Payton, 20 Ky. L. Rep. 75, 45 S. W. 83.

Maryland.— Hardey *v.* Coe, 5 Gill (Md.) 189.

Massachusetts.— Com. *v.* Flannigan, 137 Mass. 560; Com. *v.* Donahoe, 130 Mass. 280.

Michigan.— County Treasurer *v.* Bunbury, 45 Mich. 79, 7 N. W. 704.

Mississippi.— Brown *v.* Ashford, 56 Miss. 677; Hargroves *v.* Thompson, 31 Miss. 211.

Missouri.— Kennayde *v.* Pacific R. Co., 45 Mo. 255; Henson *v.* St. Louis, etc., R. Co., 34 Mo. App. 636.

Montana.— Burke *v.* Interstate Sav., etc., Assoc., (Mont. 1901) 64 Pac. 879.

Nebraska.— Clay *v.* Greenwood, 35 Nebr. 736, 53 N. W. 659; Chicago, etc., R. Co. *v.* Lundstrom, 16 Nebr. 254, 20 N. W. 198, 49 Am. Rep. 718.

New York.— Barnes *v.* Perine, 12 N. Y. 18.

North Carolina.—Bennett *v.* Western Union Tel. Co., 128 N. C. 103, 38 S. E. 294.

Ohio.— Horning *v.* Poyer, 18 Ohio Cir. Ct. 732, 6 Ohio Cir. Dec. 370.

Oklahoma.—Twine *v.* Kilgore, 3 Okla. 640, 39 Pac. 388.

South Carolina.— Price *v.* Krasnoff, (S. C. 1901) 38 S. E. 413.

Texas.— O'Connor *v.* Towns, 1 Tex. 107;

of action[94] or defense[95] is defectively stated, or that the complaint or declaration is indefinite or uncertain;[96] that it contains redundant matter;[97] that there are verbal inaccuracies[98] or clerical errors therein;[99] that a copy of the instrument sued on was not filed therewith;[1] that the complaint contains no statutory prayer;[2] that the relief granted is not authorized by the prayer;[3] that there is a misjoinder of causes of action;[4] that the pleading is bad for duplicity;[5] or that separate causes of action, properly triable together, are not separately stated and numbered in the petition.[6]

Gulf, etc., R. Co. *v.* Wilbanks, 7 Tex. Civ. App. 489, 27 S. W. 302.

Washington.— Howard *v.* Hibbs, 22 Wash. 513, 61 Pac. 159.

United States.— Ankeny *v.* Clark, 148 U. S. 345, 13 S. Ct. 617, 37 L. ed. 475; McMaster *v.* New York L. Ins. Co., 99 Fed. 856, 40 C. C. A. 119.

See 2 Cent. Dig. tit. "Appeal and Error," § 1224 *et seq.*

94. *Connecticut.*— Brockett *v.* Fair Haven, etc., R. Co., (Conn. 1900) 47 Atl. 763.

Indiana.— Micks *v.* Stevenson, 22 Ind. App. 475, 51 N. E. 492; Heyde *v.* Sult. 22 Ind. App. 83, 52 N. E. 456; Indiana Ins. Co. *v.* Pringle, 21 Ind. App. 559, 52 N. E. 821.

Massachusetts.— O'Brien *v.* Nute-Hallett Co., 177 Mass. 422, 59 N. E. 65.

Minnesota.— Dorr *v.* McDonald, 43 Minn. 458, 45 N. W. 864.

Missouri.— Estes *v.* Desnoyers Shoe Co., 155 Mo. 577, 56 S. W. 316.

Montana.— Montana Nat. Bank *v.* Merchants Nat. Bank, 19 Mont. 586, 49 Pac. 149, 61 Am. St. Rep. 532.

New York.— Schoepflin *v.* Coffey, 162 N. Y. 12, 56 N. E. 502.

North Carolina.— Hanover Nat. Bank *v.* Cocke, 127 N. C. 467, 37 S. E. 507.

Oregon.— Weaver *v.* Southern Oregon Co., 31 Oreg. 14, 48 Pac. 167; Askren *v.* Squire, 29 Oreg. 228, 45 Pac. 779.

Virginia.— Matney *v.* Ratliff, 96 Va. 231, 31 S. E. 512.

95. Diefendorff *v.* Hopkins, 95 Cal. 343, 28 Pac. 265, 30 Pac. 549; Hayden *v.* Missouri, etc., R. Co., 124 Mo. 566, 28 S. W. 74; Haynes *v.* Trenton, 123 Mo. 326, 27 S. W. 622; Orr *v.* Haskell, 2 Mont. 225; Neis *v.* Franzen, 18 Wis. 537.

96. *California.*— Carpenter *v.* Furrey, 128 Cal. 665, 61 Pac. 369.

Connecticut.— Brockett *v.* Fair Haven, etc., R. Co., (Conn. 1900) 47 Atl. 763.

Illinois.— Smith *v.* Henline, 174 Ill. 184, 51 N. E. 227.

Indiana.— Sheeks *v.* State, 156 Ind. 508, 60 N. E. 142; German F. Ins. Co. *v.* Seibert, 24 Ind. App. 279, 56 N. E. 686.

Missouri.— Green *v.* Supreme Lodge Nat. Reserve Assoc., 79 Mo. App. 179.

Where no objection is made on account of the insufficiency of description of the property in litigation, there can be no objection on appeal on the ground of insufficiency of description. Kocher *v.* Palmetier, (Iowa 1900) 83 N. W. 816; Graves *v.* Barrett, 126 N. C. 267, 35 S. E. 539; Moor *v.* Moor, (Tex. Civ. App. 1900) 57 S. W. 992.

97. Bright *v.* Ecker, 9 S. D. 192, 68 N. W. 326.

98. Houston, etc., R. Co. *v.* Rowell, (Tex. Civ. App. 1898) 45 S. W. 763.

99. Gable *v.* Seiben, 137 Ind. 155, 36 N. E. 844; Rogers *v.* Golson, (Tex. Civ. App. 1895) 31 S. W. 200.

1. Chumasero *v.* Gilbert, 26 Ill. 39; McGonnigle *v.* McGonnigle, 5 Pa. Super. Ct. 168. See also Wescott *v.* Menard, Dall. (Tex.) 503. But see Old *v.* Mohler, 122 Ind. 594, 23 N. E. 967, in which it was held that, under a statute providing that when any pleading is founded on a written instrument, such instrument, or a copy of it, must be filed with the pleading, a complaint for breach of covenant in a deed, where neither the deed nor a copy of it is filed, is insufficient to sustain a judgment by default, even when questioned for the first time on appeal.

2. Smith *v.* Soper, 12 Colo. App. 264, 55 Pac. 195.

3. *Colorado.*—Ensley *v.* Page, 13 Colo. App. 452, 59 Pac. 225.

Iowa.— Williams *v.* Wilcox, 66 Iowa 65, 23 N. W. 266; Boude *v.* Methodist Episcopal Church, 47 Iowa 705.

Pennsylvania.— Dorff *v.* Schmunk, 197 Pa. St. 298, 47 Atl. 113.

Texas.— International, etc., R. Co. *v.* Cook, (Tex. Civ. App. 1895) 33 S. W. 888.

United States.— Morrow Shoe Mfg. Co. *v.* New England Shoe Co., 57 Fed. 685, 18 U. S. App. 256, 6 C. C. A. 508, 24 L. R. A. 417.

4. *Alabama.*— Richmond, etc., R. Co. *v.* Jones, 102 Ala. 212, 14 So. 786; Walker *v.* Mobile Mar. Dock, etc., Ins. Co., 31 Ala. 529.

Indiana.— Mark *v.* North, 155 Ind. 575, 57 N. E. 902; Rankin *v.* Collins, 50 Ind. 158; Rutherford *v.* Moore, 24 Ind. 311; Pittsburgh, etc., R. Co. *v.* Carlson, 24 Ind. App. 559, 56 N. E. 251.

Iowa.— Hines *v.* Horner, 86 Iowa 594, 53 N. W. 317; Baugh *v.* Barrett, 69 Iowa 495, 29 N. W. 425.

Kentucky.— Hardigen *v.* Simpkins, 19 Ky. L. Rep. 1376, 43 S. W. 410.

Minnesota.— St. Paul *v.* Kuby, 8 Minn. 154.

Missouri.— Kansas City Hotel Co. *v.* Sigement, 53 Mo. 176; Brent *v.* Shelley, 5 Mo. App. 580; Schuricht *v.* Broadwell, 4 Mo. App. 160.

Nebraska.— North Bend First Nat. Bank *v.* Miltonberger, 33 Nebr. 847, 51 N. W. 232.

Contra.— Boerum *v.* Taylor, 19 Conn. 122; Dalson *v.* Bradberry, 50 Ill. 82.

5. Northwestern Brewing Co. *v.* Manion, 47 Ill. App. 627; Brown *v.* Ashford, 56 Miss. 677; Howard *v.* Clark, 43 Mo. 34.

6. Kennedy *v.* Dodge, 19 Ohio Cir. Ct. 425, 10 Ohio Cir. Dec. 360.

(B) *Failure to State a Cause of Action or a Defense.* While it is the rule in a few jurisdictions that the objection that the complaint does not state facts sufficient to constitute a cause of action is waived by a failure to raise that objection below in some appropriate manner,[7] it is well settled in most jurisdictions that an objection of this character may be urged for the first time on appeal.[8] Nevertheless the reviewing court does not look upon such an objection with favor, and the complaint will be construed liberally and supported by every legal intendment,[9] and, if it states facts sufficient to render the judgment thereon a complete bar to another suit for the same cause of action, it will withstand the attack.[10] It has

7. *Iowa.*—Osborne *v.* Metcalf, (Iowa 1900) 84 N. W. 685; Iowa Stone Co. *v.* Crissman, (Iowa 1900) 83 N. W. 794; Hendershott *v.* Hollister, 46 Iowa 710.

Kansas.—McBride *v.* Hartwell, 2 Kan. 410.

Louisiana.— See Yorke *v.* Scott, 23 La. Ann. 54.

New York.— Knapp *v.* Simon, 96 N. Y. 284; Hofheimer *v.* Campbell, 59 N. Y. 269; Abernethy *v.* Church of Puritans Soc., 3 Daly (N. Y.) 1; Hinds *v.* Kellogg, 13 N. Y. Suppl. 922, 37 N. Y. St. 356 [*affirmed in* 133 N. Y. 536, 30 N. E. 1148, 44 N. Y. St. 929].

South Carolina.— Green *v.* Green, 50 S. C. 514, 27 S. E. 952, 62 Am. St. Rep. 846; Miller *v.* George, 30 S. C. 526, 9 S. E. 659.

Wisconsin.— Midlothian Iron Min. Co. *v.* Dahlby, 108 Wis. 195, 84 N. W. 152; Momsen *v.* Atkins, 105 Wis. 557, 81 N. W. 647.

8. *Alabama.*— Louisville, etc., R. Co. *v.* Williams, 113 Ala. 402, 21 So. 938; Marion *v.* Regenstein, 98 Ala. 475, 13 So. 384.

California.— Haskell *v.* Moore, 29 Cal. 437; Russell *v.* Byron, 2 Cal. 86.

Colorado.— Hoy *v.* Leonard, 13 Colo. App. 449, 59 Pac. 229; Nylan *v.* Renhard, 10 Colo. App. 46, 49 Pac. 266; Creswell *v.* Woodside, 8 Colo. App. 514, 46 Pac. 842.

Florida.— Eddins *v.* Tweddle, 35 Fla. 107, 17 So. 66; Pittman *v.* Myrick, 16 Fla. 692.

Idaho.— Gorman *v.* Boise County Com'rs, 1 Ida. 655.

Illinois.— Bowman *v.* People, 114 Ill. 474, 2 N. E. 484; Chicago, etc., R. Co. *v.* Eselin, 86 Ill. App. 94.

Indiana.— Bertha *v.* Sparks, 19 Ind. App. 431, 49 N. E. 831; Metropolitan L. Ins. Co. *v.* McCormick, 19 Ind. App. 49, 49 N. E. 44, 65 Am. St. Rep. 392; Western Assur. Co. *v.* Koontz, 17 Ind. App. 54, 46 N. E. 95; Cincinnati, etc., R. Co. *v.* Stanley, 4 Ind. App. 364, 30 N. E. 1103.

Kentucky.—Walters *v.* Chinn, 1 Metc. (Ky.) 499; Fible *v.* Caplinger, 13 B. Mon. (Ky.) 464.

Massachusetts.— Perry *v.* Goodwin, 6 Mass. 498.

Missouri.— Childs *v.* Kansas City, etc., R. Co., (Mo. 1891) 17 S. W. 954; Smith *v.* Burrus, 106 Mo. 94, 16 S. W. 881, 27 Am. St. Rep. 329, 13 L. R. A. 59.

Montana.— Morse *v.* Swan, 2 Mont. 306; Territory *v.* Virginia Road Co., 2 Mont. 96.

Nebraska.— Kemper, etc., Dry Goods Co. *v.* Renshaw, 58 Nebr. 513, 78 N. W. 1071; Hudelson *v.* Tobias First Nat. Bank, 51 Nebr. 557, 71 N. W. 304.

North Carolina.— Manning *v.* Roanoke, etc., R. Co., 122 N. C. 824, 28 S. E. 963; Ladd *v.* Ladd, 121 N. C. 118, 28 S. E. 190.

Ohio.— Toomey *v.* Avery Stamping Co., 20 Ohio Cir. Ct. 183.

Oregon.— Ball *v.* Doud, 26 Oreg. 14, 37 Pac. 70; Bowen *v.* Emmerson, 3 Oreg. 452.

South Dakota.— Johnson *v.* Burnside, 3 S. D. 230, 52 N. W. 1057; Porter *v.* Booth, 1 S. D. 558, 47 N. W. 960.

Tennessee.— Tumley *v.* Clarksville, etc., R. Co., 2 Coldw. (Tenn.) 327; Shelton *v.* Bruce, 9 Yerg. (Tenn.) 24.

Utah.— Holt *v.* Pearson, 12 Utah 63, 41 Pac. 560.

United States.— Slacum *v.* Pomery, 6 Cranch (U. S.) 221, 3 L. ed. 205.

See 2 Cent. Dig. tit. "Appeal and Error," § 1223 *et seq.*

Limitations of rule — Objections to one of several paragraphs.— The practice that permits an objection to a complaint for the first time on appeal, on the ground that such complaint does not state a cause of action, has no application in the case of an objection to one of several paragraphs of a complaint. Ashton *v.* Shepherd, 120 Ind. 69, 22 N. E. 98; Branch *v.* Faust, 115 Ind. 464, 17 N. E. 898; Carr *v.* State, 81 Ind. 342.

9. *Colorado.*—Insurance Co. of North America *v.* Bonner, 24 Colo. 220, 49 Pac. 366.

Indiana.— Du Souchet *v.* Dutcher, 113 Ind. 249, 15 N. E. 459.

Minnesota.— Smith *v.* Dennett, 15 Minn. 81.

Nebraska.— Philadelphia F. Assoc. *v.* Ruby, 60 Nebr. 216, 82 N. W. 629; Omaha Nat. Bank *v.* Kiper, (Nebr. 1900) 82 N. W. 102.

Ohio.— Toomey *v.* Avery Stamping Co., 20 Ohio Cir. Ct. 183, 11 Ohio Cir. Dec. 216.

Washington.— Bishop *v.* Averill, 17 Wash. 209, 49 Pac. 237, 50 Pac. 1024.

10. Du Souchet *v.* Dutcher, 113 Ind. 249, 15 N. E. 459; McCreery *v.* Nordyke, 23 Ind. App 630, 53 N. E. 849, 55 N. E. 967; Cleveland, etc., R. Co. *v.* Baker, 24 Ind. App. 152, 54 N. E. 814; Crouch *v.* Chamness, 21 Ind. App. 492, 51 N. E. 941; Pipkin *v.* National Loan, etc., Assoc., 80 Mo. App. 1.

Where the complaint is sufficient, contention that the complaint and reply together admit an alleged defense is not within the rule that objections to the sufficiency of the complaint may be raised for the first time on appeal, without an assignment of error. The right of a plaintiff to the relief which he prays must be measured by the allegations of his complaint, and not by what he may aver in his reply. Wyatt *v.* Henderson, 31 Oreg. 48, 48 Pac. 790.

similarly been held in some jurisdictions, where an objection to a complaint for failure to state a cause of action is waived by failure to present it in the court below, that the objection that the answer fails to state a defense cannot be urged for the first time in the reviewing court;[11] and in some jurisdictions, where the sufficiency of the complaint to state a cause of action is not waived by failure to object thereto in the court below, the sufficiency of an answer to state a defense may be urged for the first time on appeal.[12]

g. Relating to Provisional Remedies. Objections to proceedings relating to provisional remedies must be made in the trial court.[13] Thus, an objection to the validity of an attachment proceeding is not available if made for the first time on appeal.[14]

h. Relating to References. Objection that a cause was irregularly or improperly referred cannot be raised for the first time on appeal[15]— as that the cause was referred without the consent of the parties;[16] that the reference was filed in vacation and not in open court as required by agreement;[17] or that the person

11. Alleman *v.* Stepp, 52 Iowa 626, 3 N. W. 636, 35 Am. Rep. 288; Effray *v.* Masson, 28 Abb. N. Cas. (N. Y.) 207, 18 N. Y. Suppl. 353, 45 N. Y. St. 296.

12. Caldwell *v.* Ruddy, 2 Ida. 5, 1 Pac. 339; Brugman *v.* Burr, 30 Nebr. 406, 46 N. W. 644. *Compare* Dunham *v.* Courtnay, 24 Nebr. 627, 39 N. W. 784; and see Moreland *v.* Thorn, 143 Ind. 211, 42 N. E. 639, in which it is held that the rule applicable to complaints has no application to answers.

13. *Alabama.*— Johnston *v.* Hannah, 66 Ala. 127.

Arkansas.— Landfair *v.* Lowman, 50 Ark. 446, 8 S. W. 188; Fletcher *v.* Menken, 37 Ark. 206.

California.— Matter of Mealy, 127 Cal. 103, 59 Pac. 313; Wolters *v.* Rossi, 126 Cal. 644, 59 Pac. 143.

Illinois.— Commercial Nat. Bank *v.* Payne, 161 Ill. 316, 43 N. E. 1070; Kehm *v.* Mott, 86 Ill. App. 549.

Iowa.— Blair *v.* Sioux City, etc., R. Co., (Iowa 1898) 73 N. W. 1053; American Express Co. *v.* Smith, 57 Iowa 242, 10 N. W. 655.

Kansas.— Leser *v.* Glaser, 32 Kan. 546, 4 Pac. 1026.

Kentucky.— Buffington *v.* Mosby, 17 Ky. L. Rep. 1307, 34 S. W. 704.

Louisiana.— Ledoux *v.* Smith, 4 La. Ann. 482.

Maryland.— Coward *v.* Dillinger, 56 Md. 59; Mears *v.* Adreon, 31 Md. 229.

Minnesota.— Brown *v.* Minneapolis Lumber Co., 25 Minn. 461.

Mississippi.— Thompson *v.* Raymon, 7 How. (Miss.) 186.

Missouri.— Alexander *v.* Hayden, 2 Mo. 211.

New York.— Weehawken Wharf Co. *v.* Knickerbocker Coal Co., 22 Misc. (N. Y.) 559, 49 N. Y. Suppl. 1001; Engelage *v.* Raymond, 18 N. Y. Suppl. 364, 45 N. Y. St. 291.

Tennessee.— Gordonsville Milling Co. *v.* Jones, (Tenn. Ch. 1900) 57 S. W. 630; Rogers *v.* Rogers, (Tenn. Ch. 1896) 42 S. W. 70.

Texas.— Seinsheimer *v.* Flanagan, 17 Tex. Civ. App. 427, 44 S. W. 30; Merielles *v.* State Bank, 5 Tex. Civ. App. 483, 24 S. W. 564.

Virginia.— Sims *v.* Tyrer, 96 Va. 5, 26 S. E. 508; McAllister *v.* Guggenheimer, 91 Va. 317, 21 S. E. 475.

Wisconsin.— Oppermann *v.* Waterman, 94 Wis. 583, 69 N. W. 569.

Wyoming.— Roy *v.* Union Mercantile Co., 3 Wyo. 417, 26 Pac. 996.

See 2 Cent. Dig. tit. "Appeal and Error," § 1216 *et seq.*

14. Fears *v.* Thompson, 82 Ala. 294, 2 So. 719; McAbee *v.* Parker, 78 Ala. 573; and see 2 Cent. Dig. tit. "Appeal and Error," § 1216 *et seq.*

Judgment by default.— But where a judgment in an attachment suit is by default, objection to the sufficiency of the affidavit upon which the proceedings are based, going, as it does, to the jurisdiction of the lower court, may be made upon appeal. Reitz *v.* People, 77 Ill. 518; Adams *v.* Merritt, 10 Ill. App. 275. *Compare* Decatur, etc., Imp. Co. *v.* Crass, 97 Ala. 524, 12 So. 41.

Objection to the sufficiency of an attachment bond comes too late if made in the first instance on appeal.

Alabama.— Fleming *v.* Burge, 6 Ala. 373; Conklin *v.* Harris, 5 Ala. 213.

Arkansas.— Fletcher *v.* Menken, 37 Ark. 206.

Illinois.— Lawver *v.* Langhans, 85 Ill. 138; Morris *v.* School Trustees, 15 Ill. 266.

Iowa.— Bretney *v.* Jones, 1 Greene (Iowa) 366.

Kansas.— Myers *v.* Cole, 32 Kan. 138, 4 Pac. 169.

New York.— Northrup *v.* Garrett, 17 Hun (N. Y.) 497.

See, generally, ATTACHMENT; and 2 Cent. Dig. tit. "Appeal and Error, § 1218.

15. Goodwin *v.* Hedrick, 24 Ind. 121; Bartholomew *v.* Lehigh County, 148 Pa. St. 82, 30 Wkly. Notes Cas. (Pa.) 150, 23 Atl. 1122; Manning *v.* Leighton, 66 Vt. 56, 28 Atl. 630; Young *v.* Schenck, 22 Wis. 556.

As to objections relating to reports of auditors, masters, or referees, see *infra*, V, B, 1, m.

16. Joshua Hendy Mach. Works *v.* Pacific Cable Constr. Co., 99 Cal. 421, 33 Pac. 1084; Dundee Mortg., etc., Invest. Co. *v.* Hughes, 124 U. S. 157, 8 S. Ct. 377, 31 L. ed. 357.

17. Ross *v.* Helton, 4 Ind. 273.

to whom the cause was referred was without power to act as such.[18] Nor can it be objected for the first time on appeal that the referee had not taken the oath prescribed;[19] that the trial by reference was held outside of the jurisdiction of the supreme court;[20] that an account should have been referred to a master instead of being stated by the court;[21] that the record of the cause tried by the referee does not show an order of reference;[22] or that an order of reference was improperly set aside.[23]

i. **Relating to Evidence and Witnesses**[24]—(I) *In General.* All objections to the admission or exclusion of evidence, its competency, relevancy or sufficiency, and as to the competency of witnesses and their examination, must be made in the trial court. They cannot be raised for the first time on appeal.[25]

(II) *Admission of Evidence.* As just stated, objections to the admission of

18. Robertson *v.* Consolidated Boat Store Co., 5 Ohio N. P. 257; Scott *v.* Scott, 196 Pa. St. 132, 46 Atl. 379.

19. Kerr *v.* Dudley, 26 Colo. 457, 58 Pac. 610.

20. Blevins *v.* Morledge, 5 Okla. 141, 47 Pac. 1068.

21. Whittemore *v.* Fisher, 132 Ill. 243, 24 N. E. 636. See also Dorr *v.* Dewing, 36 W. Va. 466, 15 S. E. 93.

22. Spencer *v.* Levering, 8 Minn. 461.

23. Casky *v.* January, Hard. (Ky.) 539; and see 2 Cent. Dig. tit. "Appeal and Error," § 1248 *et seq.; infra*, V, B, 1, m; and, generally, References.

24. See also, generally, Depositions; Equity; Pleading; References; Trial; Witnesses.

25. *Alabama.*—Watson *v.* Simmons, 91 Ala. 567, 8 So. 347; Rice *v.* Tobias, 89 Ala. 214, 7 So. 765.

Arkansas.—Heaslet *v.* Spratlin, 54 Ark. 185, 15 S. W. 461.

California.— Bennett *v.* Green, 74 Cal. 425, 16 Pac. 231; Scott *v.* Sierra Lumber Co., 67 Cal. 71, 7 Pac. 131.

Colorado.— Northern Colorado Irrigation Co. *v.* Richards, 22 Colo. 450, 45 Pac. 423; Strassheim *v.* Cole, 14 Colo. App. 164, 59 Pac. 479.

Connecticut.— Leonard *v.* Charter Oak L. Ins. Co., 65 Conn. 529, 33 Atl. 511.

Florida.— McSwain *v.* Howell, 29 Fla. 248, 10 So. 588.

Georgia.— Arline *v.* Miller, 22 Ga. 330.

Idaho.— Darby *v.* Heagerty, 2 Ida. 260, 13 Pac. 85.

Illinois.— Montgomery *v.* Black, 124 Ill. 57, 15 N. E. 48; Miller *v.* Potter, 59 Ill. App. 125.

Indiana.— Howlett *v.* Scott, 100 Ind. 485; Adams *v.* Bullock, (Ind. App. 1901) 59 N. E. 1081.

Iowa.— Hough *v.* Gearen, 110 Iowa 240, 81 N. W. 463; Sawin *v.* Union Bldg., etc., Assoc., 95 Iowa 477, 64 N. W. 401.

Kansas.— Brumbaugh *v.* Schmidt, 9 Kan. 117.

Kentucky.— Cahill *v.* Bigger, 8 B. Mon. (Ky.) 211; Luker *v.* Com., 9 Ky. L. Rep. 385, 5 S. W. 354.

Louisiana.— Heiss *v.* Corcoran, 15 La. Ann. 694; Wilcox *v.* His Creditors, 11 Rob. (La.) 346.

Maine.— Witherell *v.* Maine Ins. Co., 49 Me. 200; Gardner *v.* Gooch, 48 Me. 487.

Maryland.—Long *v.* Long, 9 Md. 348; Luckett *v.* White, 10 Gill & J. (Md.) 480.

Massachusetts.— Hall *v.* Lowell, 10 Cush. (Mass.) 260.

Michigan.— Barbier *v.* Young, 115 Mich. 100, 72 N. W. 1096; Phippen *v.* Morehouse, 50 Mich. 537, 15 N. W. 895.

Minnesota.— Redmond *v.* St. Paul, etc., R. Co., 39 Minn. 248, 40 N. W. 64; Osborne *v.* Williams, 37 Minn. 507, 35 N. W. 371.

Mississippi.— McComb *v.* Turner, 14 Sm. & M. (Miss.) 119; Chew *v.* Read, 11 Sm. & M. (Miss.) 182.

Missouri.— State *v.* Lett, 85 Mo. 52.

Montana.— Merchant's Nat. Bank *v.* Greenhood, 16 Mont. 395, 41 Pac. 250, 851; Brand *v.* Servoss, 11 Mont. 86, 27 Pac. 407.

Nebraska.—Fuller *v.* Cunningham, 48 Nebr. 857, 67 N. W. 879; Wohlenberg *v.* Melchert, 35 Nebr. 803, 53 N. W. 982.

New Hampshire.— Boyce *v.* Cheshire R. Co., 43 N. H. 627.

New Jersey.— Coxe *v.* Field, 13 N. J. L. 215.

New York.— Matter of Yates, 99 N. Y. 94, 1 N. E. 248; Hawley *v.* Gloversville, 4 N. Y. App. Div. 343, 38 N. Y. Suppl. 647, 74 N. Y. St. 513.

North Carolina.— Scott *v.* Green, 89 N. C. 278.

Ohio.— Baird *v.* Clark, 12 Ohio St. 87; Eilers *v.* National L. Ins. Co., 2 Cinc. L. Bul. 333.

Oregon.— Aldrich *v.* Columbia Southern R. Co., (Oreg. 1901) 64 Pac. 455.

South Carolina.— Bowen *v.* Atlantic, etc., R. Co., 17 S. C. 574; Powers *v.* McEachern, 7 S. C. 290.

Tennessee.— Gunn *v.* Mason, 2 Sneed (Tenn.) 637; Betts *v.* Demumbrune, Cooke (Tenn.) 39.

Texas.— Mullins *v.* Thompson, 51 Tex. 7; Gill *v.* Bickel, 10 Tex. Civ. App. 67, 30 S. W. 919.

Virginia.— Smith *v.* Burton, 94 Va. 158, 26 S. E. 412.

Washington.— Sears *v.* Seattle Consol. St. R. Co., 6 Wash. 227, 33 Pac. 389, 1081.

Wisconsin.—Mowry *v.* Mosher, 16 Wis. 46; Demier *v.* Durand, 15 Wis. 580.

United States.— Gorham Mfg. Co. *v.* Emery-Bird-Thayer Dry-Goods Co., 104 Fed. 243, 43 C. C. A. 511 [*affirming* 92 Fed. 774].

And see 2 Cent. Dig. tit. "Appeal and Error," § 1258.

As to necessity of ruling on objections to evidence, see *infra*, V, B, 1, v, (III).

evidence can in no case be raised for the first time on appeal, and the rule is applicable no matter what may be the grounds which render the evidence inadmissible.[26] The rule has been applied to the improper admission of hearsay

26. *Alabama.*— Southern R. Co. *v.* Wildman, 119 Ala. 565, 24 So. 764; Dean *v.* Witherington, 116 Ala. 573, 22 So. 869.

Arkansas.— Frauenthal *v.* Bridgeman, 50 Ark. 348, 7 S. W. 388; James *v.* Biscoe, 10 Ark. 184.

California.— Barrell *v.* Lake View Land Co., 122 Cal. 129, 54 Pac. 594; Yaeger *v.* Southern California R. Co., (Cal. 1897) 51 Pac. 190.

Colorado.— Teller *v.* Ferguson, 24 Colo. 432, 51 Pac. 429; Employers' Liability Assur. Co. *v.* Morris, (Colo. App. 1900) 60 Pac. 21.

Connecticut.— Nichols *v.* Hayes, 13 Conn. 155. *Compare* Stein *v.* Coleman, (Conn. 1901) 48 Atl. 206.

Florida.— McSwain *v.* Howell, 29 Fla. 248, 10 So. 588; Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65.

Georgia.— Daniel *v.* Hannah, 106 Ga. 91, 31 S. E. 734; Rushing *v.* Willingham, 105 Ga. 166, 31 S. E. 154.

Illinois.— Wallen *v.* Moore, 187 Ill. 388, 58 N. E. 1095 [*affirming* 88 Ill. App. 287]; Chicago *v.* Hogan, 80 Ill. App. 344.

Indiana.— Burnett *v.* Milnes, 148 Ind. 230, 46 N. E. 464; Adams *v.* Bullock, (Ind. App. 1901) 59 N. E. 1081.

Iowa.— Bird *v.* Jacobus, (Iowa 1901) 84 N. W. 1062; Enix *v.* Iowa Cent. R. Co., 111 Iowa 748, 83 N. W. 805.

Kansas.— State *v.* Freeman, (Kan. App. 1900) 62 Pac. 717; Burkhalter *v.* Nuzum, 9 Kan. App. 885, 61 Pac. 310.

Kentucky.— Morris *v.* Pullen, (Ky. 1901) 62 S. W. 492; Frazier *v.* Malcolm, (Ky. 1901) 62 S. W. 13.

Louisiana.—Perry *v.* Rue, 31 La. Ann. 287; Lavergne *v.* Elkins, 17 La. 220.

Maine.— Hewett *v.* Buck, 17 Me. 147, 35 Am. Dec. 243.

Maryland.— Sentman *v.* Gamble, 69 Md. 293, 13 Atl. 58, 14 Atl. 673; Atwell *v.* Grant, 11 Md. 101.

Massachusetts.— McCann *v.* Metropolitan L. Ins. Co., 177 Mass. 280, 58 N. E. 1026; Cooke *v.* Plaisted, 176 Mass. 374, 57 N. E. 687.

Michigan.— Cleland *v.* Clark, 123 Mich. 179, 81 N. W. 1086; Morse *v.* Blanchard, 117 Mich. 37, 75 N. W. 93.

Minnesota.— Barnett *v.* St. Anthony Falls Water-Power Co., 33 Minn. 265, 22 N. W. 535; Tierney *v.* Minneapolis, etc., R. Co., 33 Minn. 311, 23 N. W. 229, 53 Am. Rep. 35.

Mississippi.—Cazeneuve *v.* Martinez, (Miss. 1900) 28 So. 788; Pearson *v.* Kendrick, 75 Miss. 416, 23 So. 290.

Missouri.— Westminster College *v.* Piersol, (Mo. 1901) 61 S. W. 811; State *v.* Silverstein, 77 Mo. App. 304.

Montana.— Wastl *v.* Montana Union R. Co., 24 Mont. 159, 61 Pac. 9; Story *v.* Black, 5 Mont. 26, 1 Pac. 1, 51 Am. Rep. 37.

Nebraska.— Fulton *v.* Ryan, 60 Nebr. 9, 82 N. W. 105; Palmer *v.* Ulysses First Bank, 59 Nebr. 412, 81 N. W. 303.

Nevada.— Palmer *v.* Culverwell, 24 Nev. 114, 50 Pac. 1; Watt *v.* Nevada Cent. R. Co., 23 Nev. 154, 44 Pac. 423, 46 Pac. 52, 726, 62 Am. St. Rep. 772.

New Hampshire.—Roberts *v.* Rice, 69 N. H. 472, 45 Atl. 237.

New Jersey.— Hatfield *v.* Central R. Co., 33 N. J. L. 251; Dare *v.* Moore, 1 N. J. L. 111.

New York.— People *v.* Holmes, 166 N. Y. 540, 60 N. E. 249; Masor *v.* Blumstein, 30 Misc. (N. Y.) 787, 63 N. Y. Suppl. 91. But see Grunberg *v.* Grant, 3 Misc. (N. Y.) 230, 22 N. Y. Suppl. 747, 51 N. Y. St. 866; Beneville *v.* Whalen, 14 Daly (N. Y.) 508, 2 N. Y. Suppl. 20, 16 N. Y. St. 672; Wehle *v.* Haviland, 42 How. Pr. (N. Y.) 399.

North Carolina.— Gudger *v.* Penland, 118 N. C. 832, 23 S. E. 921; Sugg *v.* Watson, 101 N. C. 188, 7 S. E. 709.

Ohio.— Circleville *v.* Sohn, 20 Ohio Cir. Ct. 368, 11 Ohio Cir. Dec. 193.

Oregon.— Currey *v.* Butcher, 37 Oreg. 380, 61 Pac. 631.

South Carolina.— Hicks *v.* Southern R. Co., (S. C. 1901) 38 S. E. 725; Garrett *v.* Weinberg, 59 S. C. 162, 37 S. E. 51.

South Dakota.— McLaughlin *v.* Wheeler, 1 S. D. 497, 47 N. W. 816; Warder, etc., Co. *v.* Ingli, 1 S. D. 155, 46 N. W. 181.

Tennessee.— Citizens' St. R. Co. *v.* Dan, 102 Tenn. 320, 52 S. W. 177; McElroy *v.* Barkley, (Tenn. Ch. 1899) 58 S. W. 406.

Texas.— Wright *v.* Wright, 6 Tex. 3; Galveston, etc., R. Co. *v.* Jackson, (Tex. Civ. App. 1899) 53 S. W. 81.

Utah.— Lebcher *v.* Lambert, (Utah 1900) 63 Pac. 628.

Vermont.— Stearns *v.* Howe, 12 Vt. 577.

Virginia.— Meyer *v.* Falk, (Va. 1901) 38 S. E. 178; Shacklett *v.* Roller, 97 Va. 639, 34 S. E. 492.

Washington.— Uren *v.* Golden Tunnel Min. Co., (Wash. 1901) 64 Pac. 174; Blewett *v.* Bash, 22 Wash. 536, 61 Pac. 770.

Wisconsin.— Masterson *v.* Chicago, etc., R. Co., 102 Wis. 571, 78 N. W. 757; Brown *v.* Johnson, 101 Wis. 661, 77 N. W. 900.

See also 2 Cent. Dig. tit. "Appeal and Error," §§ 1258, 1280.

Admission "subject to all legal exceptions." — An objection not taken below to evidence is not open, even where the evidence is submitted to the court "subject to all legal exceptions," and cannot be assigned as error on appeal. Covillaud *v.* Tanner, 7 Cal. 38. But see Whitman *v.* Granite Church, 24 Me. 236.

Evidence admissible for certain purposes, but not for others.— A paper admissible for one purpose may go to the jury, and the objection that it is not admissible for any other purpose must be made, and instructions to that effect to the jury asked for at the time, or no error can be assigned as to its admis-

evidence,[27] the admission of evidence as to offers of compromise,[28] the admission of parol evidence,[29] the admission of documents,[30] the admission of accounts and

sion or effect. Scruggs *v.* Bibb, 33 Ala. 481; Firemen's Ins. Co. *v.* Crandall, 33 Ala. 9. See also Watrous *v.* Cunningham, 71 Cal. 30, 11 Pac. 811; Lyungstrandh *v.* William Haaker Co., 16 Misc. (N. Y.) 387, 38 N. Y. Suppl. 129, 73 N. Y. St. 808.

In the case of trials de novo on appeal, objections may be made to the admission of incompetent evidence, although such objections were not made in the lower court. Baker *v.* Brown, 18 Ill. 91.

Mere exception without objection is not sufficient.— *Indiana.*—Mooney *v.* Kinsey, 90 Ind. 33.

Kentucky.— Mercer *v.* King, 13 Ky. L. Rep. 429.

New York.— Third Ave. R. Co. *v.* Ebling, 100 N. Y. 98, 2 N. E. 878; Cheesebrough *v.* Taylor, 12 Abb. Pr. (N. Y.) 227.

South Carolina.—Stark *v.* Watson, 24 S. C. 215.

United States.— Teal *v.* Bilby, 123 U. S. 572, 8 S. Ct. 239, 31 L. ed. 263.

See 2 Cent. Dig. tit. "Appeal and Error," § 1259.

Presumption in absence of objection.— Where the record does not show that the court was asked to rule on the admissibility of evidence, it will be presumed on appeal that the decision of the court below was correct. Kent *v.* Gray, 26 Ark. 142.

Review on appeal from default judgment.— In Hannas *v.* Hannas, 110 Ill. 53, it was held that objection to the admission of evidence cannot be made for the first time on appeal, even by one against whom the judgment was taken by default.

Where an action is tried by the court without a jury, and all the evidence is submitted subject to objection, objection in regard to the introduction of evidence cannot be first raised on appeal. Whitehead *v.* Hall, 148 Ill. 253, 35 N. E. 871.

27. Key *v.* Knott, 9 Gill & J. (Md.) 342; Hadden *v.* Shortridge, 27 Mich. 212; Fischer *v.* Neil, 6 Fed. 89; and see 2 Cent. Dig. tit. "Appeal and Error," § 1260.

28. Cudd *v.* Jones, 63 Hun (N. Y.) 142, 17 N. Y. Suppl. 582, 44 N. Y. St. 131; Bascom *v.* Danville Stove, etc., Co., 182 Pa. St. 427, 41 Wkly. Notes Cas. (Pa.) 131, 38 Atl. 510; Cooper *v.* Denver, etc., R. Co., 11 Utah 46, 39 Pac. 478; and see 2 Cent. Dig. tit. "Appeal and Error," § 1261.

29. *Alabama.*— Hamilton *v.* Griffin, 123 Ala. 600, 26 So. 243; Moody *v.* McCown, 39 Ala. 586.

California.— Le Mesnager *v.* Hamilton, 101 Cal. 532, 35 Pac. 1054, 40 Am. St. Rep. 81; Sweetland *v.* Shattuck, 66 Cal. 31, 4 Pac. 885.

Indiana.— Poole *v.* McGahan, 124 Ind. 583, 24 N. E. 723; Louisville, etc., R. Co. *v.* Hendricks, 13 Ind. App. 10, 40 N. E. 82, 41 N. E. 14.

Iowa.— Saunders *v.* Mullen, 66 Iowa 728, 24 N. W. 529.

Louisiana.— Babineau *v.* Cormier, 1 Mart. N. S. (La.) 456.

Maine.— Chamberlain *v.* Black, 64 Me. 40.

Missouri.— McFadden *v.* Missouri Pac. R. Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721; Judd *v.* Wabash, etc., R. Co., 23 Mo. App. 56.

Nebraska.— McCormick *v.* Laughran, 16 Nebr. 87, 20 N. W. 107.

Nevada.— Vietti *v.* Nesbitt, 22 Nev. 390, 41 Pac. 151.

New York.— Reinmiller *v.* Skidmore, 7 Lans. (N. Y.) 161.

South Dakota.— Zipo *v.* Colchester Rubber Co., 12 S. D. 218, 80 N. W. 367; Locke *v.* Hubbard, 9 S. D. 364, 69 N. W. 588.

Texas.— Levy *v.* Maddox, 81 Tex. 210, 16 S. W. 877; Cook *v.* Halsell, 65 Tex. 1.

Virginia.— Eaves *v.* Vial, 98 Va. 134, 34 S. E. 978.

See 2 Cent. Dig. tit. "Appeal and Error," § 1263.

30. *California.*— Davis *v.* Lamb, (Cal. 1893) 35 Pac. 306.

Illinois.— Carbine *v.* Pringle, 90 Ill. 302; Hansen *v.* Hale, 44 Ill. App. 474.

Indiana.— Doan *v.* Dow, 8 Ind. App. 324, 35 N. E. 709.

Iowa.— Bays *v.* Herring, 51 Iowa 286, 1 N. W. 558.

Kentucky.— Northwestern Mut. L. Ins. Co. *v.* Lowery, 14 Ky. L. Rep. 600, 20 S. W. 607; Powell *v.* Calvert, 5 Ky. L. Rep. 769.

Louisiana.— Tucker *v.* Lefebre, 5 La. Ann. 122.

Maine.— Longfellow *v.* Longfellow, 54 Me. 240.

Michigan.— Farrell *v.* School Dist. No. 2, 98 Mich. 43, 56 N. W. 1053; Durfee *v.* Abbott, 61 Mich. 471, 28 N. W. 521.

Mississippi.— Stiles *v.* Inman, 55 Miss. 469; Monk *v.* Horne, 38 Miss. 100, 75 Am. Dec. 94.

Missouri.— McCartney *v.* Shepard, 21 Mo. 573, 64 Am. Dec. 250.

New Hampshire.— Baker *v.* Davis, 19 N. H. 325.

New York.— Power *v.* Athens, 99 N. Y. 592, 2 N. E. 609; Bloomingdale *v.* Adler, 7 Misc. (N. Y.) 182, 27 N. Y. Suppl. 321, 57 N. Y. St. 524.

Ohio.— Bethel *v.* Woodworth, 11 Ohio St. 393.

Pennsylvania.— Bergner *v.* Palethorp, 2 Wkly. Notes Cas. (Pa.) 297.

Texas.— Hubert *v.* Bartlett. 9 Tex. 97.

Virginia.— Anderson *v.* Johnson, 32 Gratt. (Va.) 558; Johnson *v.* Brown, 3 Call (Va.) 259.

United States.—Houghton *v.* Jones, 1 Wall. (U. S.) 702, 17 L. ed. 503; U. S. *v.* Auguisola, 1 Wall. (U. S.) 352, 17 L. ed. 613; U. S. *v.* Delespine, 15 Pet. (U. S.) 319, 10 L. ed. 753; Hoppenstedt *v.* Fuller, 71 Fed. 99, 36 U. S. App. 271, 17 C. C. A. 623; Hunt *v.* U. S., 61 Fed. 795, 19 U. S. App. 683, 10 C. C. A. 74.

See 2 Cent. Dig. tit. "Appeal and Error," § 1265 *et seq.*

account-books,[31] the admission of deeds,[32] the admission of judgments,[33] the admission of ordinances,[34] the admission of letters,[35] the admission of secondary evidence,[36] the want of a seal,[37] the want of proof of execution of instruments,[38]

31. *Arkansas.*— St. Louis, etc., R. Co. *v.* Murphy, 60 Ark. 333, 30 S. W. 419, 46 Am. St. Rep. 202.

Illinois.— Smith *v.* Forth, 24 Ill. App. 198.

Iowa.— Poole *v.* Hintrager, 60 Iowa 180, 14 N. W. 223.

New Jersey.— Tindall *v.* McIntyre, 24 N. J. L. 147.

New York.— Bartow *v.* Sidway, 72 Hun (N. Y.) 435, 25 N. Y. Suppl. 179, 55 N. Y. St. 268.

See 2 Cent. Dig. tit. "Appeal and Error," § 1267.

32. *Alabama.*— Griffin *v.* Doe, 12 Ala. 783.

Illinois.— Jackson *v.* Warren, 32 Ill. 331; Moore *v.* Vanormer, 60 Ill. App. 25.

Kentucky.— Harris *v.* Granger, 4 B. Mon. (Ky.) 369; Thurston *v.* Masterson, 9 Dana (Ky.) 228.

Maine.— Webster *v.* Calden, 55 Me. 165.

Maryland.— Carroll *v.* Norwood, 4 Harr. & M. (Md.) 287.

Mississippi.— New Orleans, etc., R. Co. *v.* Moye, 39 Miss. 374; McCraven *v.* McGuire, 23 Miss. 100.

Missouri.— Western *v.* Flanagan, 120 Mo. 61, 25 S. W. 531.

Nevada.—Streeter *v.* Johnson, 23 Nev. 194, 44 Pac. 819; Langworthy *v.* Coleman, 18 Nev. 440, 5 Pac. 65.

New York.— Meakings *v.* Cromwell, 5 N. Y. 136.

Pennsylvania.— Uplinger *v.* Bryan, 12 Pa. St. 219; Wilmarth *v.* Mountford, 8 Serg. & R. (Pa.) 124.

Texas.— McNeally *v.* Stroud, 22 Tex. 229; Miller *v.* Wybrants, 2 Tex. Unrep. Cas. 409.

See 2 Cent. Dig. tit. "Appeal and Error," § 1266.

33. *Illinois.*— Cottingham *v.* Springer, 88 Ill. 90; People *v.* Gray, 72 Ill. 343.

Indiana.— Hunsinger *v.* Hofer, 110 Ind. 390, 11 N. E. 463.

Mississippi.— House *v.* Fultz, 10 Sm. & M. (Miss.) 39.

New York.— Wells *v.* Davis, 105 N. Y. 670, 12 N. E. 42; Schrader *v.* Musical Mut. Protective Union, 55 Hun (N. Y.) 608, 8 N. Y. Suppl. 706, 29 N. Y. St. 371.

South Carolina.— Lawrence *v.* Grambling, 13 S. C. 120.

Texas.— Still *v.* Focke, 66 Tex. 715, 2 S. W. 59.

Washington.— Vincent *v.* Snoqualmie Mill Co., 7 Wash. 566, 35 Pac. 396.

See 2 Cent. Dig. tit. "Appeal and Error," § 1265.

34. Flora *v.* Lee, 5 Ill. App. 629; McCloughry *v.* Finney, 37 La. Ann. 27; Morris *v.* Greenwood, 73 Miss. 430, 19 So. 105; Dunkman *v.* Wabash, etc., R. Co., 16 Mo. App. 547; and see 2 Cent. Dig. tit. "Appeal and Error," § 1269.

35. Key *v.* Knott, 9 Gill & J. (Md.) 342; Watson *v.* Walker, 23 N. H. 471; General Electric Co. *v.* Blacksburg Land, etc., Co., 46 S. C. 75, 24 S. E. 43; and see 2 Cent. Dig. tit. "Appeal and Error," § 1268.

36. *Alabama.*— Beattie *v.* Abercrombie, 18 Ala. 9.

Arkansas.— Allen *v.* Ozark Land Co., 55 Ark. 549, 18 S. W. 1042.

California.— Frink *v.* Alsip, 49 Cal. 103.

Colorado.— Coleman *v.* Davis, 13 Colo. 98, 21 Pac. 1018.

Illinois.— Condon *v.* Brockway, 157 Ill. 90, 41 N. E. 634; Cleveland, etc., R. Co. *v.* Strong, 56 Ill. App. 604.

Indiana.— McIlvain *v.* State, 80 Ind. 69.

Iowa.— Scott *v.* Chicago, etc., R. Co., 78 Iowa 199, 42 N. W. 645; Burlington, etc., R. Co. *v.* Sherwood, 62 Iowa 309, 17 N. W. 564.

Kentucky.— Williamson *v.* Johnston, 4 T. B. Mon. (Ky.) 253.

Louisiana.— State *v.* Breed, 10 La. Ann. 491.

Maine.— Woodward *v.* Shaw, 18 Me. 304.

Michigan.— Hart *v.* Port Huron Tp., 46 Mich. 428, 9 N. W. 481.

Missouri.— Rothwell *v.* Jamison, 147 Mo. 601, 49 S. W. 503; Brown *v.* Oldham, 123 Mo. 621, 27 S. W. 409.

New Hampshire.— Carter *v.* Beals, 44 N. H. 408.

New York.— Howell *v.* Adams, 68 N. Y. 314; Ochs *v.* Frey, 47 N. Y. App. Div. 390, 62 N. Y. Suppl. 67; Voshefskey *v.* Hillside Coal, etc., Co., 21 N. Y. App. Div. 168, 47 N. Y. Suppl. 386.

South Carolina.— Long *v.* McKissick, 50 S. C. 218, 27 S. E. 636.

South Dakota.— Zipp *v.* Colchester Rubber Co., 12 S. D. 218, 80 N. W. 367.

Texas.— Long *v.* Garnett, 59 Tex. 229; Barnes *v.* Downes, 2 Tex. App. Civ. Cas. § 527.

Virginia.— Western Union Tel. Co. *v.* Powell, 94 Va. 268, 26 S. E. 828; Shue *v.* Turk, 15 Gratt. (Va.) 256.

West Virginia.— White *v.* Core, 20 W. Va. 272; Baltimore, etc., R. Co. *v.* Skeels, 3 W. Va. 556.

Wisconsin.— Klœty *v.* Delles, 45 Wis. 484.

United States.— Beebe *v.* U. S., 161 U. S. 104, 16 S. Ct. 532, 40 L. ed. 633.

See 2 Cent. Dig. tit. "Appeal and Error," § 1262.

37. Baker *v.* Baker, 159 Ill. 394, 42 N. E. 867; Chouquette *v.* Barada, 28 Mo. 491; Gillett *v.* Campbell, 1 Den. (N. Y.) 520; Robinson *v.* Dewhurst, 68 Fed. 336, 25 U. S. App. 345, 15 C. C. A. 466; and see 2 Cent. Dig. tit. "Appeal and Error," § 1271.

38. *California.*— Shain *v.* Sullivan, 106 Cal. 208, 39 Pac. 606.

Georgia.— Poulet *v.* Johnson, 25 Ga. 403.

Iowa.— Mumma *v.* McKee, 10 Iowa 107.

Kentucky.— Underwood *v.* Ogden, 6 B. Mon. (Ky.) 606.

Louisiana.— Cawthorn *v.* McDonald, 1 Rob. (La.) 55.

New York.— Ranney *v.* Gwynne, 3 E. D. Smith (N. Y.) 59.

and to the reception of opinion evidence and the allowance of hypothetical questions.[39]

(III) *Exclusion of Evidence*—(A) *Necessity of Offer.* To reserve any question on the ruling of the trial court in excluding testimony, there must be a pertinent question propounded, and, upon objection being made, a statement to the court of the testimony which it is expected will be elicited by the question, and an exception taken to the ruling thereon.[40]

(B) *Improperly Restricting Use of Evidence.* Where no objection is made at the trial to a direction of the court limiting the testimony to certain questions, the defeated party cannot, on appeal, contend that he was injured thereby.[41]

(IV) *Manner and Order of Receiving Evidence.* Objections as to the mode or order in which evidence is received by the trial court must be made in that court,[42] and objection cannot be made in the appellate court to the considera-

Texas.— McCamant *v.* Roberts, 80 Tex. 316, 15 S. W. 580, 1054.

Virginia.— George Campbell Co. *v.* Angus, 91 Va. 438, 22 S. E. 167.

See 2 Cent. Dig. tit. "Appeal and Error," § 1270.

39. *Indiana.*— Midland R. Co. *v.* Dickason, 130 Ind. 164, 29 N. E. 775.

Iowa.— Quackenbush *v.* Chicago, etc., R. Co., 73 Iowa 458, 35 N. W. 523.

Kansas.— Holman *v.* Raynesford, 3 Kan. App. 676, 44 Pac. 910.

Nebraska.— Omaha Belt R. Co. *v.* McDermott, 25 Nebr. 714, 41 N. W. 648; Republican Valley R. Co. *v.* Hayes, 13 Nebr. 489, 14 N. W. 521.

New York.— Dunsbach *v.* Hollister, 132 N. Y. 602, 30 N. E. 1152, 44 N. Y. St. 934; Sands *v.* Sparling, 82 Hun (N. Y.) 401, 31 N. Y. Suppl. 251, 63 N. Y. St. 558; Phillips *v.* Covell, 79 Hun (N. Y.) 210, 29 N. Y. Suppl. 613, 61 N. Y. St. 156; Gibbons *v.* Phœnix, 61 Hun (N. Y.) 619, 15 N. Y. Suppl. 410, 39 N. Y. St. 658; Pollock *v.* Brennan, 39 N. Y. Super. Ct. 477; Kilpatrick *v.* Dean, 3 N. Y. Suppl. 60, 19 N. Y. St. 837.

See 2 Cent. Dig. tit. "Appeal and Error," § 1272.

40. *California.*— Sonoma County *v.* Hall, 129 Cal. 659, 62 Pac. 213; Hand *v.* Scodeletti, 128 Cal. 674, 61 Pac. 373.

Connecticut.— Gustafson *v.* Rustemeyer, 70 Conn. 125, 39 Atl. 104, 66 Am. St. Rep. 92, 39 L. R. A. 644.

Illinois.— Stewart *v.* Kirk, 69 Ill. 509; Maxwell *v.* Habel, 92 Ill. App. 510.

Indiana.— Kern *v.* Bridwell, 119 Ind. 226, 21 N. E. 664, 12 Am. St. Rep. 409; Vurpillat *v.* Zehner, 2 Ind. App. 397, 28 N. E. 556.

Massachusetts.— Wheeler *v.* Rice, 8 Cush. (Mass.) 205.

Minnesota.— Zimmerman *v.* Lamb, 7 Minn. 421.

Missouri.— Fearey *v.* O'Neill, 149 Mo. 467, 50 S. W. 918, 73 Am. St. Rep. 440.

Nebraska.— Wittenberg *v.* Mollyneaux, 60 Nebr. 583, 83 N. W. 842; McLain *v.* Maricle, 60 Nebr. 359, 83 N. W. 829.

New Mexico.— Maxwell Land Grant Co. *v.* Dawson, 7 N. M. 133, 34 Pac. 191.

New York.— Dimon *v.* Keery, 54 N. Y. App. Div. 318, 66 N. Y. Suppl. 817; Millard *v.* Holland Trust Co., 90 Hun (N. Y.) 607, 35 N. Y. Suppl. 948, 70 N. Y. St. 584.

North Dakota.— Brundage *v.* Mellon, 5 N. D. 72, 63 N. W. 209; Halley *v.* Folsom, 1 N. D. 325, 48 N. W. 219.

South Carolina.— State *v.* Weaver, 58 S. C. 106, 36 S. E. 499.

South Dakota.— Tootle *v.* Petrie, 8 S. D. 19, 65 N. W. 43. And see Meadows *v.* Osterkamp, 13 S. D. 571, 83 N. W. 624.

Tennessee.—Pickett *v.* Boyd, 11 Lea (Tenn.) 498; Jones *v.* State, 11 Lea (Tenn.) 468.

Texas.— Galveston, etc., R. Co. *v.* Dehnisch, (Tex. Civ. App. 1900) 57 S. W. 64.

Vermont.— Cutler *v.* Skeels, 69 Vt. 154, 37 Atl. 228; Houston *v.* Brush, 66 Vt. 331, 29 Atl. 380.

United States.— Ladd *v.* Missouri Coal, etc., Co., 66 Fed. 880, 32 U. S. App. 93, 14 C. C. A. 246.

See 2 Cent. Dig. tit. "Appeal and Error." § 1282.

Presumption in favor of ruling.— In Haas *v.* C. B. Cones, etc., Mfg. Co., 25 Ind. App. 469, 58 N. E. 499, it was held that a ruling excluding testimony will stand on appeal if sustainable on any theory, whether or not the objection was advanced at the trial.

Where a party withdrew his objection to the exclusion of certain evidence, such exclusion cannot be urged as error. Watts *v.* South Bound R. Co., (S. C. 1901) 38 S. E. 240.

Where the judgment was not given on the issues of fact the correctness of a decision below in rejecting a deposition will not be examined. Duplessis *v.* Kennedy, 6 La. 231.

Where the question is in itself proper and pertinent the facts expected to be proved by the witness need not be stated in order to make the ruling rejecting the evidence available on appeal. Bauernschmidt *v.* Maryland Trust Co., 89 Md. 507, 43 Atl. 790.

41. Covell *v.* Chadwick, 153 Mass. 263, 26 N. E. 856, 25 Am. St. Rep. 625; Rutherford *v.* Talent, 6 Mont. 132, 9 Pac. 821; McCamant *v.* Roberts, (Tex. Civ. App. 1894) 25 S. W. 731; and see 2 Cent. Dig. tit. "Appeal and Error," § 1283.

42. Brand *v.* Merritt, 15 Colo. 286, 25 Pac. 175; Martin *v.* Hazzard Powder Co., 2 Colo. 596; Howell *v.* Edmonds, 47 Ill. 79; Cassidy *v.* Fontham, 14 N. Y. Suppl. 151, 38 N. Y. St.

tion by the trial court of evidence not formally introduced, where no objection was made to the consideration of such evidence on the trial.[43]

(v) *Competency of Witness.* The question of the competency of witnesses to testify comes too late when raised for the first time in the appellate court.[44]

(vi) *Examination of Witness.* An objection to the form of an interrogatory to a witness, not taken below, will not be noticed on appeal.[45] Where the answer of a witness to a question is not objected to on the trial, it cannot afterward be contended on appeal that such answer was incompetent.[46] The improper cross-examination of a witness, or the admission, on cross-examination, of evidence which has no relation to the examination in chief, is not reversible error where no objection is made or exception taken in the lower court.[47]

(vii) *Weight and Sufficiency of Evidence*—(a) *In General.* The question of the sufficiency of evidence must be raised by objection in the court below, and will not be considered if raised for the first time on appeal.[48]

177; and see 2 Cent. Dig. tit. "Appeal and Error," § 1284 *et seq.*

43. Murray *v.* Hobson, 10 Colo. 66, 13 Pac. 921; Stephens *v.* Pence, 56 Iowa 257, 9 N. W. 215; Webb *v.* Archibald, (Mo. 1894) 28 S. W. 80; Shields *v.* Hanbury, 128 U. S. 584, 9 S. Ct. 176, 32 L. ed. 565; and see 2 Cent. Dig. tit. "Appeal and Error," § 1285.

44. *California.*— Higgins *v.* San Diego, 126 Cal. 303, 58 Pac. 700, 59 Pac. 209.

Illinois.— Beasley *v.* Beasley, 180 Ill. 163, 54 N. E. 187; Dewees *v.* Osborne, 178 Ill. 39, 52 N. E. 942 [*affirming* 78 Ill. App. 314].

Louisiana.— Lavergne *v.* Elkins, 17 La. 220.

Missouri.— Adair *v.* Mette, 156 Mo. 496, 57 S. W. 551; Long *v.* Martin, 152 Mo. 668, 54 S. W. 473; Sprague *v.* Sea, 152 Mo. 327, 53 S. W. 1074.

New York.— Dunican *v.* Union R. Co., 56 N. Y. App. Div. 181, 67 N. Y. Suppl. 649.

Oregon.— Aldrich *v.* Columbia Southern R. Co., (Oreg. 1901) 64 Pac. 455.

United States.— Sigafus *v.* Porter, 84 Fed. 430, 51 U. S. App. 693, 28 C. C. A. 443.

Objections to the competency of an expert witness must be made at the trial. Dunican *v.* Union R. Co., 56 N. Y. App. Div. 181, 67 N. Y. Suppl. 649; Aldrich *v.* Columbia Southern R. Co., (Oreg. 1901) 64 Pac. 455.

See 2 Cent. Dig. tit. "Appeal and Error." § 1283 *et seq.*

45. *Indiana.*— Pence *v.* Makepeace, 65 Ind. 345.

Iowa.— Luke *v.* Bruner, 15 Iowa 3; Samuels *v.* Griffith, 13 Iowa 103.

Massachusetts.— Smith *v.* Jagoe, 172 Mass. 538, 52 N. E. 1088; Bennett *v.* Clemence, 6 Allen (Mass.) 10.

Michigan.— Potter *v.* Detroit, etc., R. Co., 122 Mich. 179, 81 N. W. 80, 82 N. W. 245; Ives *v.* Williams, 50 Mich. 100, 15 N. W. 33.

New York.—Pollock *v.* Hoag, 4 E. D. Smith (N. Y.) 473; Pearson *v.* Fiske, 7 Abb. Pr. (N. Y.) 419.

Pennsylvania.— Kemmerer *v.* Edelman, 23 Pa. St. 143; Corkery *v.* O'Neill, 9 Pa. Super. Ct. 335, 43 Wkly. Notes Cas. (Pa.) 420.

Wisconsin.—Hanson *v.* Milwaukee Mechanics' Mut. Ins. Co., 45 Wis. 321.

See 2 Cent. Dig. tit. "Appeal and Error," § 1286.

46. Tysen *v.* Fritz, 44 N. Y. App. Div. 562, 60 N. Y. Suppl. 923; Shepard *v.* New York El. R. Co., 60 Hun (N. Y.) 584, 15 N. Y. Suppl. 175, 39 N. Y. St. 430.

47. Sexson *v.* Hoover, 1 Ind. App. 65, 27 N. E. 105; Higgenbotham *v.* Fair, 36 Kan. 742, 14 Pac. 267; Jennings *v.* Prentice, 39 Mich. 421; Burley *v.* German-American Bank, 111 U. S. 216, 4 S. Ct. 341, 28 L. ed. 406; and see 2 Cent. Dig. tit. "Appeal and Error," § 1288.

Where a witness is recalled after the submission of the case, objection thereto must be made in the lower court, and cannot be raised for the first time on appeal. Hawthorne *v.* Bowman, 3 Sneed (Tenn.) 523. See also 2 Cent. Dig. tit. "Appeal and Error," § 1289.

48. *Alabama.*— Rhodes *v.* Sherrod, 9 Ala. 63; Duffee *v.* Buchanan, 8 Ala. 27.

California.— Goodale *v.* West, 5 Cal. 339.

Florida.— Logan *v.* Slade, 28 Fla. 699, 10 So. 25; Sanderson *v.* Sanderson, 17 Fla. 820.

Illinois.— Sugar Creek Min. Co. *v.* Peterson, 177 Ill. 324, 52 N. E. 475; Illinois Cent. R. Co. *v.* Reardon, 157 Ill. 372, 41 N. E. 871; Parmelee *v.* Ennis, 54 Ill. App. 376.

Iowa.— Sisson *v.* Kaper, 105 Iowa 599, 75 N. W. 490.

Kentucky.— Strode *v.* Ross, 3 A. K. Marsh. (Ky.) 358.

Massachusetts.— Clapp *v.* Massachusetts Ben. Assoc., 146 Mass. 519, 16 N. E. 433.

Michigan.—Niagara F. Ins. Co. *v.* De Graff, 12 Mich. 124.

Minnesota.— Lund *v.* Anderson, 42 Minn. 201, 44 N. W. 6; Barker *v.* Todd, 37 Minn. 370, 34 N. W. 895.

Mississippi.— Parr *v.* Gibbons, 27 Miss. 375.

Missouri.— Spear *v.* Scott, 14 Mo. 516; Cockran *v.* Britton, 14 Mo. 446.

New Jersey.— Cole *v.* Cliver, 44 N. J. L. 212.

New Mexico.— Crabtree *v.* Segrist, 3 N. M. 278, 6 Pac. 202.

New York.— Clarke *v.* Westcott, 158 N. Y. 736, 53 N. E. 1124 [*affirming* 2 N. Y. App. Div. 503, 37 N. Y. Suppl. 1111, 74 N. Y. St. 406]; Knell *v.* Stephan, 144 N. Y. 657, 39 N. E. 857 [*affirming* 65 Hun (N. Y.) 624, 20 N. Y. Suppl. 393, 48 N. Y. St. 190]; Newell *v.* Woolfolk, 91 Hun (N. Y.) 211, 36 N. Y.

(B) *Insufficiency as to Material Fact.* An objection that the evidence offered to prove a material fact was insufficient cannot be first made on appeal, but must be made in the trial court.[49] And if there is a failure to make all the proof

Suppl. 327, 71 N. Y. St. 129; Crouch *v.* Moll, 55 Hun (N. Y.) 603, 8 N. Y. Suppl. 183, 28 N. Y. St. 48; Pollock *v.* Brennan, 29 N. Y. Super. Ct. 477; Bennett *v.* Levi, 19 N. Y. Suppl. 226, 46 N. Y. St. 754.

South Dakota.— Parrish *v.* Mahony, 12 S. D. 278, 81 N. W. 295, 76 Am. St. Rep. 604.

Texas.— Shornick *v.* Bennett, 77 Tex. 244, 13 S. W. 982.

Washington.— Tacoma Grocery Co. *v.* Barlow, 12 Wash. 21, 40 Pac. 380.

Wisconsin.— Kidd *v.* Fleek, 47 Wis. 443, 2 N. W. 1121.

United States.— Guarantee Co. of North America *v.* Mechanic Sav. Bank, 80 Fed. 766, 47 U. S. App. 91, 26 C. C. A. 146; Chisholm *v.* Radford Brick Co., 65 Fed. 1, 24 U. S. App. 523, 12 C. C. A. 490.

See 2 Cent. Dig. tit. "Appeal and Error." § 1290 *et seq.*

Non-production of instrument.— In Delany *v.* Reade, 4 Iowa 292, it was held that the objection that a judgment was rendered on a verbal contract which related to a promissory note which was not produced, could not be raised for the first time on appeal. In an action for the price of bonds, an objection that the bonds were not produced on the trial cannot be first raised on appeal. Stokes *v.* Mackay, 147 N. Y. 223, 41 N. E. 496, 69 Am. St. Rep. 515 [*affirming* 82 Hun (N. Y.) 449, 31 N. Y. Suppl. 706, 64 N. Y. St. 403].

The objection that facts were proved by one witness when the law requires proof by two witnesses cannot be made for the first time in the appellate court. Cucullu *v.* Emmerling, 22 How. (U. S.) 83, 16 L. ed. 300.

The question of law as to whether the evidence tends to support the verdict cannot be raised for the first time on appeal. Ohio, etc., R. Co. *v.* Wangelin, 152 Ill. 138, 38 N. E. 760.

Want of evidence.— Where defendant, in an action for conversion, does not object at the trial that there is no evidence of conversion he cannot raise this objection on appeal. Lee *v.* Schmidt, 6 Abb. Pr. (N. Y.) 183, 1 Hilt. (N. Y.) 537.

Objection made in appellate court sustained. — Where plaintiff failed to offer evidence to establish a fact necessary to his recovery, but which fact was not brought to the notice of the lower court, the judgment for plaintiff will be reversed at his cost, and, upon objection made in the appellate court, the case remanded for a new trial. Humphreys *v.* Switzer, 11 La. Ann. 320. Where there was an entire absence of proof of a company's incorporation, and no allegation thereof in the pleadings, the fact that the objection was not taken at the trial does not preclude its being raised on appeal, though the action was tried upon the theory that the company was incorporated. Fish *v.* De Wolf, 4 Bosw. (N. Y.) 573.

49. *Alabama.*— Barnett *v.* Riser, 63 Ala. 347.

California.— Mamlock *v.* White, 20 Cal. 598.

Illinois.— Lord *v.* Board of Trade, 163 Ill. 45, 45 N. E. 205; Jones *v.* McGuirk, 51 Ill. 382, 99 Am. Dec. 556; Baltimore, etc., R. Co. *v.* Higgins, 69 Ill. App. 412.

Indiana.— Warren County *v.* Osborn, 4 Ind. App. 590, 31 N. E. 541.

Iowa.— Gallagher *v.* Bell, 82 Iowa 722, 47 N. W. 897.

Kansas.— Missouri Pac. R. Co. *v.* Cooper, 57 Kan. 185, 45 Pac. 587.

Maine.— Porter *v.* Sherburne, 21 Me. 258.

Massachusetts.— Wentworth *v.* Leonard, 4 Cush. (Mass.) 414.

Missouri.— Ringo *v.* St. Louis, etc., R. Co., 91 Mo. 667, 4 S. W. 396.

Nevada.— Carpenter *v.* Johnson, 1 Nev. 331.

New Jersey.— McDonald *v.* Hutton, 8 N. J. Eq. 473.

New York.— Flandrow *v.* Hammond, 148 N. Y. 129, 42 N. E. 511; Bliss *v.* Sickles, 142 N. Y. 647, 36 N. E. 1064, 59 N. Y. St. 168; Hynes *v.* McDermott, 82 N. Y. 41, 37 Am. Rep. 538; Sullivan *v.* Metropolitan St. R. Co., 53 N. Y. App. Div. 89, 65 N. Y. Suppl. 842; Daley *v.* Brown, 45 N. Y. App. Div. 428, 60 N. Y. Suppl. 840; Kafka *v.* Levensohn, 18 Misc. (N. Y.) 202, 41 N. Y. Suppl. 368, 75 N. Y. St. 777.

Ohio.— White *v.* Richmond, 16 Ohio 5.

Texas.— Lufkin *v.* Galveston, 73 Tex. 340, 11 S. W. 340; Eastham *v.* Sims, 11 Tex. Civ. App. 133, 32 S. W. 359.

Virginia.— Brewer *v.* Hastie, 3 Call (Va.) 22.

Wisconsin.— Mace *v.* Roberts, 97 Wis. 199, 72 N. W. 866; Sanger *v.* Guenther, 73 Wis. 354, 41 N. W. 436.

See 2 Cent. Dig. tit. "Appeal and Error," § 1290 *et seq.*

Proof of title.— *Illinois.*— South Park Com'rs *v.* Todd, 112 Ill. 379.

Iowa.— Davis *v.* Nolan, 49 Iowa 683.

New Hampshire.— Haydock *v.* Salvage, 67 N. H. 598, 38 Atl. 207.

New York.— New York Cent., etc., R. Co. *v.* Rochester, 127 N. Y. 591, 28 N. E. 416, 40 N. Y. St. 193; Sanders *v.* Riedinger, 30 N. Y. App. Div. 277, 51 N. Y. Suppl. 937.

Texas.— Holstein *v.* Adams, 72 Tex. 485, 10 S. W. 560.

Virginia.—Wynn *v.* Harman, 5 Gratt. (Va.) 157.

Proof of value.— New Haven, etc., Co. *v.* Campbell, 128 Mass. 104, 35 Am. Rep. 360; Hand *v.* National Live-Stock Ins. Co., 57 Minn. 519, 59 N. W. 538; Stoothoff *v.* Long Island R. Co., 32 Hun (N. Y.) 437; Phillips *v.* Citizens Gas-Light Co., 67 Hun (N. Y.) 649, 21 N. Y. Suppl. 1109, 51 N. Y. St. 553.

Proof of execution or delivery of instrument. — *Massachusetts.*— Dolan *v.* Alley, 153 Mass. 380, 26 N. E. 989.

Michigan.— Ready *v.* Kearsley, 14 Mich. 215.

which is required, it seems that the defect should be pointed out in the trial court so that it may be supplied, an objection coming too late if first made in the appellate court.[50] And it has been held that such objection cannot be taken after the rendition of the verdict.[51]

j. Relating to Giving or Refusing Instructions. Questions as to the correctness of instructions given will not be considered on appeal unless properly presented and passed upon by the court below;[52] and objections, based on a failure or refusal to give instructions, are likewise waived by failure to take the appropriate steps in the trial court.[53] Accordingly, the following objections cannot be

New York.— Farmers' L. & T. Co. *v.* Curtis, 7 N. Y. 466; Zink *v.* Bohn, 3 N. Y. Suppl. 4, 19 N. Y. St. 479.

Pennsylvania.— Messmore *v.* Morrison, 172 Pa. St. 300, 37 Wkly. Notes Cas. (Pa.) 431, 34 Atl. 45.

Virginia.— McFalls *v.* Essex County, 79 Va. 137; Anderson *v.* De Soer, 6 Gratt. (Va.) 363.

50. Cooper *v.* Bean, 5 Lans. (N. Y.) 318. To the same effect see Newman *v.* Bennett, 23 Ill. 427; Brown *v.* Cayuga, etc., Co., 12 N. Y. 486; Cheney *v.* Beals, 47 Barb. (N. Y.) 523.

51. Catlin *v.* Springfield F. Ins. Co., 1 Sumn. (U. S.) 434, 5 Fed. Cas. No. 2,522. *Compare* Darlington *v.* Fredenhagen, 18 Ill. App. 273.

52. *Alabama.*— Dominick *v.* Randolph, 124 Ala. 557, 27 So. 481; Anderson *v.* Timberlake, 114 Ala. 377, 22 So. 431, 62 Am. St. Rep. 105.

Arkansas.— Johnson *v.* West, 41 Ark. 535; St. Louis, etc., R. Co. *v.* Vincent, 36 Ark. 451.

California.— Clark *v.* His Creditors, 57 Cal. 639; Chester *v.* Bower, 55 Cal. 46.

Colorado.— Pike *v.* Sutton, 21 Colo. 84, 39 Pac. 1084; Kelly *v.* Doyle, 12 Colo. App. 38, 54 Pac. 394.

District of Columbia.— Baltimore, etc., R. Co. *v.* Golway, 6 App. Cas. (D. C.) 143.

Florida.— Williams *v.* State, 32 Fla. 251, 13 So. 429; Coker *v.* Hayes, 16 Fla. 368.

Illinois.— Highley *v.* Metzger, 187 Ill. 237, 58 N. E. 407; Steidley *v.* Burton, 61 Ill. App. 117.

Indiana.— Lowell *v.* Cathright, 97 Ind. 313; Comparet *v.* Hedges, 6 Blackf. (Ind.) 416.

Iowa.— Casey *v.* Ballou Banking Co., 98 Iowa 107, 67 N. W. 98; Norris *v.* Kipp, 74 Iowa 444, 38 N. W. 152.

Kansas.— Wilson *v.* Jones, 48 Kan. 767, 30 Pac. 117; Kansas Pac. R. Co. *v.* Little, 19 Kan. 267.

Kentucky.— Garrard *v.* White, 12 Ky. L. Rep. 656, 14 S. W. 966; Burks *v.* McFela, 4 Ky. L. Rep. 833.

Maryland.— Washington County Water Co. *v.* Garver, 91 Md. 398, 46 Atl. 979; Worcester County *v.* Ryckman, 91 Md. 36, 46 Atl. 317; Jacob Tome Institute *v.* Crothers, 87 Md. 569, 40 Atl. 261.

Massachusetts.—Rockport *v.* Rockport Granite Co., 177 Mass. 246, 58 N. E. 1017; Gay *v.* Boston, etc., R. Co., 141 Mass. 407, 6 N. E. 236.

Michigan.— Gladstone Exch. Bank *v.* Keating, 94 Mich. 429, 53 N. W. 1110; Thorn *v.* Maurer, 85 Mich. 569, 48 N. W. 640.

Minnesota.—Knauft *v.* St. Paul, etc., R. Co., 22 Minn. 173; Siebert *v.* Leonard, 21 Minn. 442.

Mississippi.— Smokey *v.* Johnson, (Miss. 1888) 4 So. 788; Fisher *v.* Fisher, 43 Miss. 212.

Missouri.— Taylor *v.* Pullen, 152 Mo. 434, 53 S. W. 1086; Price *v.* Hallett, 138 Mo. 561, 38 S. W. 451.

Nebraska.—Elkhorn Valley Bank *v.* Marley, (Nebr. 1901) 85 N. W. 846; Missouri Pac. R. Co. *v.* Tipton, 60 Nebr. 502, 84 N. W. 416.

Nevada.— McGurn *v.* McInnis, 24 Nev. 370, 55 Pac. 304, 56 Pac. 94.

New Hampshire.— Pitman *v.* Mauran, 69 N. H. 230, 40 Atl. 392.

New York.— Zingrebe *v.* Union R. Co., 44 N. Y. App. Div. 577, 60 N. Y. Suppl. 913; Simmons *v.* Ocean Causeway, 21 N. Y. App. Div. 30, 47 N. Y. Suppl. 360.

North Carolina.— Cunningham *v.* Cunningham, 121 N. C. 413, 28 S. E. 525; Cathey *v.* Shoemaker, 119 N. C. 424, 26 S. E. 44.

Ohio.— Pittsburg, etc., R. Co. *v.* Porter, 32 Ohio St. 328; Dollman *v.* Haefner, 12 Ohio Cir. Ct. 721.

Oregon.— Jennings *v.* Garner, 30 Oreg. 344, 48 Pac. 177.

South Carolina.— Bowen *v.* Southern R. Co., 58 S. C. 222, 36 S. E. 590; Fleming *v.* Fleming, 33 S. C. 505, 12 S. E. 257, 26 Am. St. Rep. 694.

South Dakota.— Dell Rapids Mercantile Co. *v.* Dell Rapids, 11 S. D. 116, 75 N. W. 898, 74 Am. St. Rep. 783.

Tennessee.— Knoxville *v.* Bell, 12 Lea (Tenn.) 157.

Texas.— O'Brien *v.* Seale, 16 Tex. Civ. App. 260, 41 S. W. 150; Yoakum *v.* Mettasch, (Tex. Civ. App. 1894) 26 S. W. 129.

Utah.— Thirkfield *v.* Mountain View Cemetery Assoc., 12 Utah 76, 41 Pac. 564.

Virginia.— Clarke *v.* Sleet, (Va. 1901) 38 S. E. 183.

Wisconsin.— Brunette *v.* Gagen, 106 Wis. 618, 82 N. W. 564; Lampman *v.* Van Alstyne, 94 Wis. 417, 69 N. W. 171.

United States.— Doe *v.* Watson, 8 How. (U. S.) 263, 12 L. ed. 1072; Texas, etc., R. Co. *v.* Ludlam, 52 Fed. 94, 2 U. S. App. 342, 2 C. C. A. 633.

See 2 Cent. Dig. tit. "Appeal and Error," § 1309 *et seq.*; and, generally, TRIAL.

53. See, generally, TRIAL.

The rule stated in the text is not abrogated or modified by statutory provisions that if both parties to the suit, or their attorneys, shall enter, on the stenographer's notes, a written agreement that the same is correct, such transcribed note shall become a part of the record in the case without the approval or signature of the trial judge. Alexander *v.* Flood, 77 Miss. 925, 28 So. 787.

raised for the first time on appeal: that the instructions given are not authorized by the pleadings[54] or by the evidence;[55] that the instructions are not sufficiently full;[56] that the evidence[57] or issues were misstated therein;[58] that the instructions were not sufficiently specific,[59] improperly assume facts,[60] or were on the weight of the evidence;[61] that the instructions were oral when required to be in writing,[62] were not signed,[63] were not marked "given" or "refused,"[64] contain mistakes in names,[65] or fail to limit the consideration of evidence to the very purpose for which it was admissible.[66]

k. Relating to Submission or Refusal to Submit Issues to Jury. An omission or failure to submit an issue or question of fact to the jury cannot be complained of for the first time on appeal — the party aggrieved must request the trial court to submit such issue or question of fact to the jury.[67] Especially is this true

In Montana "an instruction containing a correct rule of law when considered in the abstract, but faulty when applied to a particular case, is ground for a reversal, even though counsel for appellant raises no objection — even though he, at the trial, is content with the same. We believe that Montana is one of only two jurisdictions in which such a rule prevails; . . . If the instruction is plainly erroneous, the neglect of counsel to call the attention of the trial judge to it should constitute a waiver; on the other hand, if the error is so veiled as to escape the inspection of counsel learned in law, it may well be doubted that such error could injure his cause with the jury." Sheehy *v.* Flaherty, 8 Mont. 365, 370, 20 Pac. 687.

54. Empson Packing Co. *v.* Vaughn, (Colo. 1899) 59 Pac. 749.

55. Worcester County *v.* Ryckman, 91 Md. 36, 46 Atl. 317; Regester *v.* Medcalf, 71 Md. 528, 18 Atl. 966; Stoner *v.* Devilbiss, 70 Md. 144, 16 Atl. 440; Straus *v.* Young, 36 Md. 246; Turner *v.* Goldsboro Lumber Co., 119 N. C. 387, 26 S. E. 23.

56. *Iowa.*— Conway *v.* Jordan, 110 Iowa 462, 81 N. W. 703.

Kansas.— State *v.* Asbell, (Kan. App. 1900) 59 Pac. 727; John V. Farwell Co. *v.* Thompson, 8 Kan. App. 614, 56 Pac. 151.

Massachusetts.—Whitney Electrical Instrument Co. *v.* Anderson, 172 Mass. 1, 51 N. E. 182.

South Carolina.—Bowen *v.* Southern R. Co., 58 S. C. 222, 36 S. E. 590.

Tennessee.— Chicago Guaranty Fund L. Soc. *v.* Ford, 104 Tenn. 533, 58 S. W. 239.

Texas.— Hargrave *v.* Western Union Tel. Co., (Tex. Civ. App. 1901) 60 S. W. 687.

United States.— Cass County *v.* Gibson, 107 Fed. 363.

57. *Maine.*— Bradstreet *v.* Rich, 74 Me. 303; Grows *v.* Maine Cent. R. Co., 69 Me. 412.

Michigan.—Wolf *v.* Holton, 110 Mich. 166, 67 N. W. 1082; Farmers' Mut. F. Ins. Co. *v.* Gargett, 42 Mich. 289, 3 N. W. 954; Reeves *v.* Kelly, 30 Mich. 132.

Minnesota.— O'Connor *v.* Chicago, etc., R. Co., 27 Minn. 166, 6 N. W. 481, 38 Am. Rep. 288.

New Hampshire.—Cutler *v.* Welsh, 43 N. H. 497.

Rhode Island.— Case *v.* Dodge, 18 R. I. 661, 29 Atl. 785.

South Carolina.— Davis *v.* Elmore, 40 S. C. 533, 19 S. E. 204; Rumph *v.* Hiott, 35 S. C. 444, 15 S. E. 235.

Wisconsin.— Braunsdorf *v.* Fellner, 76 Wis. 1, 45 N. W. 97.

58. Garrett *v.* Weinberg, 59 S. C. 162, 37 S. E. 51; Bowen *v.* Southern R. Co., 58 S. C. 222, 36 S. E. 590; Johnson *v.* International, etc., R. Co., (Tex. Civ. App. 1900) 57 S. W. 869.

59. Garrett *v.* Weinberg, 59 S. C. 162, 37 S. E. 61; Dell Rapids Mercantile Co. *v.* Dell Rapids, 11 S. D. 116, 75 N. W. 898, 74 Am. St. Rep. 783; Halsell *v.* Neal, 23 Tex. Civ. App. 26, 56 S. W. 137; Dow *v.* Dempsey, 21 Wash. 86, 57 Pac. 355; Enoch *v.* Spokane Falls, etc., R. Co., 6 Wash. 393, 36 Pac. 966.

60. Padgett *v.* Sweeting, 65 Md. 404, 4 Atl. 887; Rasin *v.* Conley, 58 Md. 59; Laughlin *v.* Hammond, 51 Hun (N. Y.) 642, 4 N. Y. Suppl. 582; Stedman *v.* Western Transp. Co., 48 Barb. (N. Y.) 97; Carnes *v.* Platt, 6 Rob. (N. Y.) 270; Gibbs *v.* Consolidated Gas Co., 130 U. S. 396, 9 S. Ct. 553, 32 L. ed. 979.

61. Chambers *v.* Meaut, 66 Miss. 625, 6 So. 465; Atchison, etc., R. Co. *v.* Worley, (Tex. Civ. App. 1894) 25 S. W. 478.

62. Bowling *v.* Floyd, 5 Kan. App. 879, 48 Pac. 875.

63. Bowling *v.* Floyd, 5 Kan. App. 879, 48 Pac. 875.

64. Harrigan *v.* Turner, 65 Ill. App. 469.

65. Westbury *v.* Simmons, 57 S. C. 467, 35 S. E. 764.

66. Hasbrouck *v.* Western Union Tel. Co., 107 Iowa 160, 77 N. W. 1034, 70 Am. St. Rep. 181.

67. *California.*— Moore *v.* Copp, 119 Cal. 429, 51 Pac. 630.

Colorado.— Bailey *v.* Carnduff, 14 Colo. App. 392, 59 Pac. 407.

Illinois.— Jeffery *v.* Robbins, 73 Ill. App. 353.

New York.— Sweetland *v.* Buell, 164 N. Y. 541, 58 N. E. 663, 79 Am. St. Rep. 676 [*affirming* 89 Hun (N. Y.) 543, 35 N. Y. Suppl. 346, 69 N. Y. St. 733]; Barnes *v.* Perine, 12 N. Y. 18.

North Carolina.— Walker *v.* Scott, 106 N. C. 56, 11 S. E. 364; McDonald *v.* Carson, 95 N. C. 377.

Pennsylvania.—Robbins *v.* Farwell, 193 Pa. St. 37, 44 Atl. 260.

Texas.— Phœnix Ins. Co. *v.* Moore, (Tex.

where the parties treat all the questions involved as purely legal,[68] where a case is submitted by agreement on certain specified issues,[69] or where the party complaining asks the court at the close of the case to direct a verdict in his favor.[70] So, on the other hand, an objection to the submission of an issue or question of fact, when first made on appeal, comes too late,[71] nor can it be objected for the first time on appeal that the court erroneously submitted a question of law to the jury.[72]

1. **Relating to Verdicts and Findings.** Objections to the form of the verdict cannot be first raised on appeal;[73] and the following objections are waived when not raised in the appropriate manner in the trial court: that the verdict is uncertain;[74] that it lacked the signature of the foreman of the jury;[75] that it is general where there are several counts or causes of action;[76] that the verdict was rendered by only eleven jurors;[77] that the verdict is for a gross sum, without specifying the separate items in controversy;[78] that the verdict is against part of several defendants, sued jointly, without any finding as to the others;[79] that the verdict is joint where it should have been several;[80] that the verdict in an action for conversion is for the return of the property, without assessing the value of

Civ. App. 1898) 46 S. W. 1131; Bailey *v.* Mickle, (Tex. Civ. App. 1898) 45 S. W. 949.

Wisconsin.—Limited Invest. Assoc. *v.* Glendale Invest. Assoc., 99 Wis. 54, 74 N. W. 633; State *v.* Lever, 62 Wis. 387, 22 N. W. 576.

United States.— Hammond *v.* Crawford, 66 Fed. 425, 35 U. S. App. 1, 14 C. C. A. 109.

See 2 Cent. Dig. tit. "Appeal and Error," § 1304 *et seq.*

68. Barnes *v.* Perine, 12 N. Y. 18.

69. Moore *v.* Copp, 119 Cal. 429, 51 Pac. 630; Breneman *v.* Mayer, (Tex. Civ. App. 1900) 58 S. W. 725.

70. Edgar *v.* Clason, 31 Misc. (N. Y.) 763, 64 N. Y. Suppl. 359.

71. *California.*—Lestrade *v.* Barth, 19 Cal. 660.

Florida.— Emerson *v.* Ross, 17 Fla. 122.

Iowa.— Vandall *v.* Vandall, 13 Iowa 247.

Kentucky.— Sallee *v.* Eades, 21 Ky. L. Rep. 109, 50 S. W. 1102.

Minnesota.— Davis *v.* Smith, 7 Minn. 414.

New Hampshire.— Dunbar *v.* Locke, 62 N. H. 442.

New York.— Warner *v.* Press Pub. Co., 15 Daly (N. Y.) 545, 8 N. Y. Suppl. 341, 29 N. Y. St. 310; Schaff *v.* Miles, 10 Misc. (N. Y.) 395, 31 N. Y. Suppl. 134, 63 N. Y. St. 526.

North Carolina.—Holden *v.* Strickland, 116 N. C. 185, 21 S. E. 684.

72. Baxter *v.* Graham, 5 Watts (Pa.) 418; Syme *v.* Butler, 1 Call (Va.) 105.

73. *Arkansas.*— Johnson *v.* Barbour, 28 Ark. 188.

California.— Johnson *v.* Visher, 96 Cal. 310, 31 Pac. 106; Hicks *v.* Coleman, 25 Cal. 122, 85 Am. Dec. 103.

District of Columbia.— Washington Gas Light Co. *v.* Lansden, 9 App. Cas. (D. C.) 508.

Illinois.— Moss *v.* Oakland, 88 Ill. 109; Illinois Cent. R. Co. *v.* People, 49 Ill. App. 538.

Indiana.— Cook *v.* McNaughton, 128 Ind. 410, 24 N. E. 361, 28 N. E. 74; Waymire *v.* Lank, 121 Ind. 1, 22 N. E. 735.

Maryland.— Barker *v.* Ayers, 5 Md. 202.

Michigan.— Casserly *v.* Casserly, 123 Mich. 44, 81 N. W. 930.

Minnesota.— Manny *v.* Griswold, 21 Minn. 506.

Nebraska.— Cervena *v.* Thurston, 59 Nebr. 343, 80 N. W. 1048; Parish *v.* McNeal, 36 Nebr. 727, 55 N. W. 222.

New York.— Tripp *v.* Smith, 50 N. Y. App. Div. 499, 64 N. Y. Suppl. 94.

Oklahoma.— Brook *v.* Bayless, 6 Okla. 568, 52 Pac. 738.

South Dakota.— Plano Mfg. Co. *v.* Person, 12 S. D. 448, 81 N. W. 897.

Texas.— Flanagan *v.* Pearson, 61 Tex. 302.

Washington.— McClellan *v.* Gaston, 18 Wash. 472, 51 Pac. 1062; Rawson *v.* Ellsworth, 13 Wash. 667, 43 Pac. 934.

Wisconsin.— Hrouska *v.* Janke, 66 Wis. 252, 28 N. W. 166.

United States.— Laber *v.* Cooper, 7 Wall. (U. S.) 565, 19 L. ed. 151; Philip Schneider Brewing Co. *v.* American Ice-Mach. Co., 77 Fed. 138, 40 U. S. App. 382, 23 C. C. A. 89.

See 2 Cent. Dig. tit. "Appeal and Error," § 1315 *et seq.*

74. Ryan *v.* Fitzgerald, 87 Cal. 345, 25 Pac. 546; Sharp *v.* Flinn, 27 Ind. 98.

75. Louisville, etc., R. Co. *v.* Kemper, 153 Ind. 618, 53 N. E. 931; Wolcott *v.* Yeager, 11 Ind. 84; Berry *v.* Pusey, 80 Ky. 166; Duncan *v.* Oliphant, 59 Mo. App. 1.

76. Henry *v.* Lowe, 73 Mo. 96; Sweet *v.* Maupin, 65 Mo. 65; Bigelow *v.* North Missouri R. Co., 48 Mo. 510; Stone *v.* Wendover, 2 Mo. App. 247; National Security Bank *v.* Butler, 129 U. S. 223, 9 S. Ct. 281, 32 L. ed. 682.

77. Goldstein *v.* Smith, 85 Ill. App. 588; Flanagan *v.* Pearson, 61 Tex. 302.

78. Casserly *v.* Casserly, 123 Mich. 44, 81 N. W. 93; Hewitt *v.* Morley, 111 Mich. 187, 69 N. W. 245; Tripp *v.* Smith, 50 N. Y. App. Div. 499, 64 N. Y. Suppl. 94; Jones *v.* Roach, 21 Tex. Civ. App. 301, 51 S. W. 549.

79. Washington Gas Light Co. *v.* Lansden, 9 App. Cas. (D. C.) 508.

80. Hicks *v.* Coleman, 25 Cal. 122, 85 Am. Dec. 103.

such property;[81] or that the jury passed upon only one of two issues submitted.[82] So, the question of the propriety of amending a verdict cannot first be raised on appeal.[83] Similarly, it cannot be objected for the first time on appeal that the finding of the trial court is incomplete;[84] that it is inconsistent with the pleadings;[85] that the findings are not stated separately from the conclusions of law;[86] that the findings of fact are not entered on the record;[87] that the findings amount to conclusions of law;[88] that the court failed to make special findings of fact, none having been asked;[89] that the court had no authority to make special findings;[90] that the court refused to modify the special findings, no motion having been made therefor;[91] or that the findings are not supported by the evidence.[92]

m. Relating to Reports of Auditors, Masters, or Referees. Objections to the report of a referee, auditor, or master, when made for the first time on appeal, will not be considered.[93] Thus, it cannot be objected that the report was not sufficiently specific;[94] that it did not include all the issues;[95] that the evidence before the commissioner was not returned with the report;[96] that special findings were not made;[97] that the report did not include the master's opinion which was directed to be given by the order of reference;[98] that the report is not sustained by the evidence;[99] or that the report is against the weight of the evidence.[1]

n. Relating to Judgments — (1) *In General.* An appellate court will not review alleged errors in a judgment, which errors are not fundamental or

81. Mitchell *v.* Mitchell, 51 Hun (N. Y.) 644, 4 N. Y. Suppl. 72, 22 N. Y. St. 70.

82. Campbell *v.* Stakes, 2 Wend. (N. Y.) 137, 19 Am. Dec. 561.

83. Chittenden *v.* Evans, 48 Ill. 52.

84. Ashmead *v.* Reynolds, 134 Ind. 139, 33 N. E. 763, 39 Am. St. Rep. 238; Arnold *v.* Hodge, 20 Tex. Civ. App. 211, 49 S. W. 714.

85. *California.*— Schroeder *v.* Pissis, 128 Cal. 209, 60 Pac. 758.

Kansas.— Rucker *v.* Donovan, 13 Kan. 251, 19 Am. Rep. 84.

Missouri.— Bell *v.* McCoy, 136 Mo. 552, 38 S. W. 329.

Montana.— Southnayd *v.* Southnayd, 4 Mont. 100, 5 Pac. 318.

New York.— Goodrich *v.* Thompson, 44 N. Y. 324.

Wisconsin.— Cordes *v.* Coates, 78 Wis. 641, 47 N. W. 949.

United States.— New Orleans, etc., R. Co. *v.* Lindsay, 4 Wall. (U. S.) 650, 18 L. ed 328.

86. Ash *v.* Scott, 76 Iowa 27, 39 N. W. 924; Ach *v.* Carter, 21 Wash. 140, 57 Pac. 344.

87. Kruck *v.* Prine, 22 Iowa 570.

88. Langworthy *v.* Coleman, 18 Nev. 440, 5 Pac. 65.

89. Sheibley *v.* Dixon County, (Nebr. 1901) 85 N. W. 399. See also Georgia Home Ins. Co. *v.* O'Neal, 14 Tex. Civ. App. 516, 38 S. W. 62.

90. Swift *v.* Harley, 20 Ind. App. 614, 49 N. E. 1069.

91. Windfall Natural Gas, etc., Co. *v.* Terwilliger, 152 Ind. 364, 53 N. E. 284.

92. Armstrong *v.* Elliott, 20 Tex. Civ. App. 41, 48 S. W. 605, 49 S. W. 635.

93. *California.*— Porter *v.* Barling, 2 Cal. 72.

Illinois.— Gehrke *v.* Gehrke, 190 Ill. 166, 60 N. E. 59; Butler *v.* Cornell, 148 Ill. 276, 35 N. E. 892.

Iowa.—Feister *v.* Kent, 92 Iowa 1, 60 N. W. 493.

Kentucky.— Hopkins *v.* Sodouskie, 1 Bibb (Ky.) 148; Patrick *v.* McClure, 1 Bibb (Ky.) 52.

Maine.— Hall *v.* Decker, 51 Me. 31.

Missouri.— Hornblower *v.* Crandall, 78 Mo. 581.

New Hampshire.— Ireland *v.* Drown, 61 N. H. 638.

New Mexico.—Albuquerque First Nat. Bank *v.* McClellan, 9 N. M. 636, 58 Pac. 247.

Pennsylvania.— Scott *v.* Scott, 196 Pa. St. 132, 46 Atl. 379.

South Dakota.— Merchants Nat. Bank *v.* McKinney, 4 S. D. 226, 55 N. W. 929.

Texas.— Smith *v.* Smith, 10 Tex. Civ. App. 485, 32 S. W. 28.

Vermont.—Manning *v.* Leighton, 66 Vt. 56, 28 Atl. 630.

Virginia.— Cralle *v.* Cralle, 84 Va. 198, 6 S. E. 12; Beckham *v.* Duncan, (Va. 1888) 5 S. E. 690.

West Virginia.— Sandy *v.* Randall, 20 W. Va. 244; Ellison *v.* Peck, 2 W. Va. 487.

Wisconsin.— Milwaukee County *v.* Ehlers, 45 Wis. 281.

United States.— McMicken *v.* Perin, 18 How. (U. S.) 507, 15 L. ed. 504.

See 2 Cent. Dig. tit. "Appeal and Error," § 1325 *et seq.*; and References.

94. Englebrecht *v.* Rickert, 14 Minn. 140.

95. Ingraham *v.* Gilbert, 20 Barb. (N. Y.) 151.

96. Felton *v.* Felton, 47 W. Va. 27, 34 S. E. 753.

97. Nutt *v.* Gaddis, (Kan. App. 1900) 59 Pac. 727.

98. Wells, etc., Express Co. *v.* Walker, 9 N. M. 456, 54 Pac. 875.

99. Borchus *v.* Sayler, 90 Ind. 439; Feister *v.* Kent, 92 Iowa 1, 60 N. W. 493; Joyner *v.* Stancill, 108 N. C. 153, 12 S. E. 912.

1. Hornblower *v.* Crandall, 78 Mo. 581.

apparent of record, unless appellant or plaintiff in error, by presenting proper objections, gave the trial court an opportunity to correct the errors.[2] In other words, objections to errors and irregularities in the judgment, as to matters of form and procedure, must be taken in the lower court by some appropriate method, to authorize a review thereof on error or appeal.[3] On the other hand, an objection which goes to the foundation of the judgment,[4] such as a lack of necessary parties,[5] or a material defect in the process[6] or pleadings,[7] may be made for the first time in the appellate court.

(II) *Error in Rendition of Personal Judgment.* In the absence of an objection below, an appellate court will not reverse a judgment or decree for an error, which is one of form only, in rendering an unauthorized personal judgment against a defendant in an action to enforce a lien[8] or foreclose a mortgage.[9] On the other hand, the judgment will be reversed, even though no objection was taken below, when the error goes to the foundation of the judgment, as where

2. *Colorado.*— Drake *v.* Root, 2 Colo. 685; Cripple Creek Syndicate Min., etc., Co. *v.* Snyder, 5 Colo. App. 414, 38 Pac. 1096.

Indiana.— Hormann *v.* Hartmetz, 128 Ind. 353, 27 N. E. 731; Thames L. & T. Co. *v.* Beville, 100 Ind. 309.

Iowa.— Stewart *v.* Stewart, 96 Iowa 620, 65 N. W. 976; Hanks *v.* North, 58 Iowa 396, 10 N. W. 785.

Louisiana.— Swift *v.* Armstrong, 18 La. Ann. 189; Spiller *v.* Their Creditors, 16 La. Ann. 292.

Oregon.— Shirley *v.* Burch, 16 Oreg. 83, 18 Pac. 351, 8 Am. St. Rep. 273.

Pennsylvania.— Superior Nat. Bank *v.* Stadelman, 153 Pa. St. 634, 32 Wkly. Notes Cas. (Pa.) 143, 26 Atl. 201.

See 2 Cent. Dig. tit. "Appeal and Error," § 1338 *et seq.*; and, generally, Equity; Judgments; New Trial.

3. Decree by two judges in relation to same matter.—It is too late, on appeal, to raise objections to a decree because the judge of one of the divisions of a district court rendered a decree touching a part of the property, and another judge of another division also made a decree in relation to the same matter. Johnson *v.* Barkley, 47 La. Ann. 98, 16 So. 659.

Entry of judgment on erroneous award.— An objection to the entry of a judgment under an award made under a submission by order of the court, which could be obviated by further evidence, comes too late when made for the first time on appeal. McMillan *v.* James, 105 Ill. 194.

Erroneous judgment by default.— An objection that the note sued on was not produced in evidence at the time judgment by default was rendered in the lower court cannot be made for the first time in the court of appeals. Prestage *v.* Loving, 1 Tex. App. Civ. Cas. § 707.

Improper refusal of judgment.— An objection that judgment was improperly refused, no reply having been filed, must be taken in the court below. Castleberg *v.* Wheeler, 68 Md. 266, 12 Atl. 3.

Improper refusal of nonsuit.— An objection that the lower court refused a nonsuit for want of proof of a demand, cannot be taken for the first time on appeal. Baker *v.* Joseph, 16 Cal. 173.

Issuance of writ of assistance.— Where objection was not made at the time of the issuance of a writ of assistance to defects in the judgment on which the writ was based, they cannot be considered on appeal. Gordon *v.* Clark, 22 Cal. 533.

Judgment by default against one joint trespasser.— An objection to a judgment by default against one defendant, sued jointly with others for trespass, cannot be made for the first time on appeal. Johnson *v.* Vutrick, 14 Ind. 216.

Judgment on unconfirmed referee's report.— A judgment entered on a referee's report cannot be objected to for the first time on appeal on the ground that it was not preceded by an order confirming the report. Little *v.* Little, 2 N. D. 175, 49 N. W. 736.

The fact that judgment was prematurely rendered, immediately on the making and filing of the findings of fact, is not ground for complaint on appeal where there was no objection below, and no motion was made to set the judgment aside on that ground, and it appears that appellant has lost none of his rights thereby. Main *v.* Johnson, 7 Wash. 321, 35 Pac. 67.

Upon an appeal from an order denying a motion to vacate a previous order, the appellate court should not consider the objection that the order to show cause on such motion did not specify the irregularities or grounds upon which it was sought to set the original order aside, unless it appears that such objection was made in the trial court. Miller *v.* Kent, 59 How. Pr. (N. Y.) 321.

4. Friedman *v.* Payne, (Tex. Civ. App. 1896) 35 S. W. 47.

5. Bissell *v.* Lavaca, 6 Tex. 54.

6. Douthit *v.* State, 30 Miss. 133.

7. Edgar *v.* Greer, 7 Iowa 136; Fritz *v.* Hathaway, 135 Pa. St. 274, 26 Wkly. Notes Cas. (Pa.) 273, 19 Atl. 1011. *Compare* Allen *v.* Studebaker Brothers Mfg. Co., 152 Ind. 406, 53 N. E. 422.

8. Shrum *v.* Salem, 13 Ind. App. 115, 39 N. E. 1050; and see 2 Cent. Dig. tit. "Appeal and Error," § 1344 *et seq.*

9. Thompson *v.* Davis, 29 Ind. 264; Buell *v.* Shuman, 28 Ind. 464; Bullock *v.* Hayter, 24 Tex. 9.

the trial court was without jurisdiction to render a personal judgment against defendant.[10]

(III) *Failure to Formally Default Defendant Not Appearing.* Where the failure to enter a default against a defendant not appearing does not affect the substantial merits of a cause, a defect in the judgment in that respect will not be considered by a court of review when it was not presented to the lower court by proper objection.[11]

(IV) *Form of Judgment.* Where the proceedings in the trial court authorized the rendition of a judgment or decree against the party complaining, it will not be reversed, upon appeal or error, because of a mere error or irregularity in its form, to which no objection was made below.[12] Thus, such a judgment, not

10. In an action to enforce a mechanic's lien, a personal judgment inadvertently rendered against the contractor, who was served by publication, will be corrected in the appellate court even though the error was not called to the attention of the trial court. Schulenburg *v.* Werner, 6 Mo. App. 292.

11. Hedrick *v.* Hall, 155 Ind. 371, 58 N. E. 257; Bender *v.* State, 26 Ind. 285; Denny *v.* Moore, 13 Ind. 418; State *v.* Nolan, 99 Mo. 569, 12 S. W. 1047; and see 2 Cent. Dig. tit. "Appeal and Error," § 1341.

12. *Illinois.*— Wallace *v.* Gatchell, 106 Ill. 315.

Indiana.— Stalcup *v.* Dixon, 136 Ind. 9, 35 N. E. 987; Cockrum *v.* West, 122 Ind. 372, 23 N. E. 140.

Iowa.— Treiber *v.* Shafer, 18 Iowa 29.

Nevada.— State *v.* Consolidated Virginia Min. Co., 13 Nev. 194.

New York.— Buck *v.* Remsen, 34 N. Y. 383; Baldwin *v.* McArthur, 17 Barb. (N. Y.) 414.

Pennsylvania.— Weaver's Estate, 25 Pa. St. 434.

South Carolina.— Brown *v.* Foster, 41 S. C. 118, 19 S. E. 299.

Wisconsin.— Sayre *v.* Langton, 7 Wis. 214, See 2 Cent. Dig. tit. "Appeal and Error," § 1342.

Action against principal and sureties.— Upon an appeal from a judgment for defendant in an action on a bond it cannot be objected for the first time that judgment should have been rendered against the principal, even if it should have gone in favor of the sureties. Chester *v.* Leonard, 68 Conn. 495, 37 Atl. 397.

Error in form of judgment against executor.— The objection that a judgment against an executor is not in proper form, and should have been *de bonis testatoris*, is not one that can be made for the first time upon appeal. De Lavallette *v.* Wendt, 75 N. Y. 579, 31 Am. Rep. 494.

Error in granting relief not prayed.— An appellate court will not disturb a judgment in quo warranto proceedings against a public officer, whereby the relator was given the office, although the action was brought merely to oust respondent, when no objection was made below to its form and extent. Wood *v.* State, 130 Ind. 364, 30 N. E. 309. Where a sale of land was canceled for fraud and the decree required it to be reconveyed to the vendor's administrator, it was objected on appeal, in the interests of other defendants, that this was unwarranted. It was held, that the objection should have been raised on the settlement of the decree. Wright *v.* Wright, 37 Mich. 55.

Extinguishment of principal debt by counter-claim.— Where a chancellor, in making his decree in favor of a complainant, decreed that the amount due on a note owing from complainant to defendant should extinguish *pro tanto* the sum decreed to be paid by defendant to complainant, the decree should not be disturbed for this cause where no objection was raised when it was entered. Davenport *v.* Bartlett, 9 Ala. 179.

Failure to impose condition incident to relief.— A tax-title was set aside without ordering the tax repaid to defendant. The plaintiff in his bill offered to pay, but the point was not made at the hearing. It was held that, because of this omission, the appellate court should not disturb the decree. Dobbins *v.* Peoria First Nat. Bank, 112 Ill. 553.

Failure to allow benefit of valuation laws.—Where defendant appears, in an action on a note which contains no waiver of benefit of the valuation laws, he cannot raise the question for the first time on appeal of the failure of the lower court to specify his right to such benefit in the judgment. Johnson *v.* Prine, 55 Ind. 351; O'Brien *v.* Peterman, 34 Ind. 556.

Failure to dispose fully of motion for nonsuit.— Where defendant moved for a nonsuit on each of six causes of action, but assigned several grounds for the motion which were applicable to the first three only, and the record shows that the parties and the court thenceforth ignored the last three causes, it is too late for defendant to make the objection for the first time on appeal that the judgment does not dispose of these last three causes. Plumer *v.* Marathon County, 46 Wis. 163, 50 N. W. 416.

Failure to render deficiency judgment.— In an action by remainder-man to have taxes paid by him declared a lien on the estate of the life-tenant, the plaintiff cannot, upon appeal, complain of the failure of the court to render a deficiency judgment after decreeing the sale of the land, unless such judgment was asked and refused. Brownlee *v.* Davidson, 28 Nebr. 785, 45 N. W. 51.

Failure to require resort to personalty.— The omission of a decree foreclosing a vendor's lien to require that the vendee's personal property should be first resorted to is not available on appeal where no objection or exception was made below. Stelzer *v.* La Rose, 79 Ind. 435.

so objected to, will not be reversed because it is several instead of joint;[13] is against some of defendants only, when it should have been against all;[14] is not in the alternative, in an action of replevin[15] or detinue;[16] or is based upon an erroneous assessment of damages.[17]

(v) *Irregularities in Entry of Judgment.* Where a judgment has been properly rendered, a mere irregularity or informality in its entry cannot be taken advantage of on appeal unless, by the interposition of a proper objection, the trial court was given an opportunity to correct the error.[18] A mistake of this sort is usually the error of the clerk, not of the court, and for that reason is not available in an appellate court until it has been expressly adopted or approved by the trial court, after being brought to its attention by an objection.[19]

(vi) *Variance Between Pleadings and Judgment.* It being necessary that the judgment should be founded upon and conform to the pleadings, a variance between them is a fatal objection to the judgment, and may be raised for the first time in an appellate court.[20]

An objection to a judgment that it directed a sale of real estate without inquiry as to a sufficiency of personalty will not be noticed on appeal when the objection was not made below. Alshuler *v.* Yandes, 17 Ind. 291.

Failure to take judgment on count not pleaded to.—Where the declaration contained two counts, the defendant pleaded to one, plaintiff demurred, defendant joined, the court sustained the demurrer and gave a judgment for plaintiff, and defendant appealed, it was held that it was too late for defendant to object in the appellate court that plaintiff omitted to take judgment by *nil dicit* on the other count, the objection not having been made in the court below. Mager *v.* Hutchinson, 7 Ill. 266.

Greater judgment than damages laid in declaration.— An objection cannot be made for the first time on appeal that a judgment for a debt, allowing the interest due as damages, exceeds the damages laid in the declaration. Grand Lodge, etc. *v.* Bagley, 164 Ill. 340, 45 N. E. 538 [*affirming* 60 Ill. App. 589].

13. Morton *v.* State, 18 Ind. 198. Or joint, instead of several. Braitwaite *v.* Aikin, 1 N. D. 455, 48 N. W. 354.

14. Walker *v.* Mobile Mar. Dock, etc., Ins. Co., 31 Ala. 529; Leonard *v.* Fulwiler, 60 Ind. 273; Leonard *v.* Blair, 59 Ind. 510.

15. Woodbury *v.* Tuttle, 26 Ill. App. 211; Baker *v.* Horsey, 21 Ind. 246.

Excessive money judgment in replevin.— A reversal of a money judgment on a replevin bond cannot be had because it fails to show that defendant elected to take such judgment, and that the judgment was slightly in excess of the value of the property, when such errors were not called to the attention of the trial court. Crill *v.* Jeffrey, 95 Iowa 634, 64 N. W. 625.

16. Robinson *v.* Keith, 25 Iowa 321; Barlow *v.* Brock, 25 Iowa 308.

17. Denny *v.* Graeter, 20 Ind. 20; Black *v.* Jackson, 17 Ind. 13.

18. *Michigan.*— Kellogg *v.* Putnam, 11 Mich. 344.

Minnesota.— Lundberg *v.* Single Men's Endowment Assoc., 41 Minn. 508, 43 N. W. 394.

Missouri.— Hanly *v.* Holmes, 1 Mo. 84.

New York.— Hinds *v.* Kellogg, 13 N. Y. Suppl. 922, 37 N. Y. St. 356.

South Carolina.— Crane *v.* Lipscomb, 24 S. C. 430.

See 2 Cent. Dig. tit. "Appeal and Error," § 1330 *et seq.*

As, for instance:

Variance between judgment entered and that ordered.— Harper *v.* Carroll, 66 Minn. 487, 69 N. W. 610, 1069; Levine *v.* Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855.

Entry without order of the court.— Scott *v.* Minneapolis, etc., R. Co., 42 Minn. 179, 43 N. W. 966; Oldenberg *v.* Devine, 40 Minn. 409, 42 N. W. 88.

Entry of judgment in vacation.— Carmichael *v.* Vandebur, 50 Iowa 651.

Premature entry.— Payne *v.* Trigg, 19 Ky. L. Rep. 801, 41 S. W. 4; Newell *v.* West, 149 Mass. 520, 21 N. E. 954.

Entry too late.— Bucker *v.* Miller, 50 Minn. 360, 52 N. W. 958.

Erroneous entry of judgment by default.—Wyland *v.* Frost, 75 Iowa 209, 39 N. W. 241; Durell *v.* Abbott, 6 Wyo. 265, 44 Pac. 647.

Compare McPherson *v.* Bristol, 122 Mich. 354, 81 N. W. 254, which holds that where judgment should have been entered against two joint defendants, but, without objection below, was entered against one only, an appellate court will treat it as having been entered against both, the trial court having authority to amend the judgment.

Waiver of irregularity by appeal.— An irregularity in the entry of a judgment is waived by an appeal upon the merits. Hinds *v.* Kellogg, 13 N. Y. Suppl. 922, 37 N. Y. St. 356. To the same effect see Hanly *v.* Holmes, 1 Mo. 84.

19. Payne *v.* Trigg, 19 Ky. L. Rep. 801, 41 S. W. 4; Harper *v.* Carroll, 66 Minn. 487, 69 N. W. 610, 1069; Levine *v.* Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855; Scott *v.* Minneapolis, etc., R. Co., 42 Minn. 179, 43 N. W. 966; Lundberg *v.* Single Men's Endowment Assoc., 41 Minn. 508, 43 N. W. 394; Oldenberg *v.* Devine, 40 Minn. 409, 42 N. W. 88; Crane *v.* Lipscomb, 24 S. C. 430.

20. *Alabama.*— Spence *v.* Savery, 25 Ala. 723.

(VII) *Variance Between Verdict and Judgment.* The objection that a judgment does not conform to, and is not supported by, the verdict, is a fundamental one, apparent of record, and may be made for the first time upon appeal or writ of error.[21]

o. Relating to Motions for New Trial. The following objections in relation to motions for new trial are waived if raised for the first time on appeal:[22] that the motion was not properly before the court[23] or was not made in time;[24] that the notice of motion was insufficient;[25] that there was no notice of the motion;[26] that the motion was not signed by counsel;[27] that the assignment of errors on the motion is incorrect;[28] that attorneys other than those of record appeared in behalf of the motion;[29] or that no formal motion was filed — notice of the motion and order overruling it appearing of record.[30]

p. Relating to Proceedings to Vacate Judgment. In relation to proceedings to vacate a judgment it cannot be objected for the first time on appeal that the application was by motion instead of by petition,[31] or that a motion was made without first having a case settled.[32]

Kansas.— Soper *v.* Gabe, 55 Kan. 646, 41 Pac. 969.

Missouri.— Hempstead *v.* Stone, 2 Mo. 65.

Montana.— Foster *v.* Wilson, 5 Mont. 53, 2 Pac. 310; Parker *v.* Bond, 5 Mont. 1, 1 Pac. 209; Gilette *v.* Hibbard, 3 Mont. 412.

Texas.—Friedman *v.* Payne, (Tex. Civ. App. 1896) 35 S. W. 47.

Wyoming.— McNamara *v.* O'Brien, 2 Wyo. 447.

See 2 Cent. Dig. tit. "Appeal and Error," § 1347.

The decision in the case of Hempstead *v.* Stone, 2 Mo. 65, was put on the ground that the departure of the judgment from the pleadings would be regarded by the supreme court as an express decision, and would be reviewed accordingly.

Compare Gatling *v.* Robbins, 8 Ind. 184, where it was held that a slight variance in the name of defendant will be presumed to have been caused by a clerical error.

Compare, also, Bassett *v.* Woodward, 13 Kan. 341, which holds that where the allegations in the petition and the findings of fact sustain the judgment, a variance between the prayer for relief in the petition and the judgment will not, when first noticed in the supreme court, ordinarily justify a reversal, particularly when the variance is immaterial.

Contra, Russell *v.* Hubbard, 76 Ga. 618, 622, the decision being based upon the express ground that the supreme court of Georgia is "an appellate court, and has no original jurisdiction," and that "its authority extends only to the correction of errors in the decisions, etc., of courts to which writs of error lie." To the same effect see Holdom *v.* Lockwood, 59 Ill. App. 359, wherein it is said that the appellate court is a court of review; and that generally only such matters as had been pointed out in the court below, and considered there, were proper subjects for review by the appellate court.

21. Holt *v.* Van Eps, 1 Dak. 206, 46 N. W. 689; West *v.* Miles, 9 Mo. 167; Bennett *v.* Butterworth, 11 How. (U. S.) 669, 13 L. ed. 859.

Contra, Johnson *v.* Barbour, 28 Ark. 188; Watts *v.* Green, 30 Ind. 98.

See also Hauser *v.* Roth, 37 Ind. 89, which holds that, if the court renders judgment on the report of a master which does not, in fact, warrant the judgment, the error is waived if no objection is made by exception taken in the trial court.

See 2 Cent. Dig. tit. "Appeal and Error," § 1340.

22. See 2 Cent. Dig. tit. "Appeal and Error," § 1333 *et seq.*; and, generally, New Trial.

23. Dickinson *v.* Mann, 69 Ga. 729.

24. Hegard *v.* California Ins. Co., 72 Cal. 535, 14 Pac. 180, 359; Brichman *v.* Ross, 67 Cal. 601, 8 Pac. 316; Smith *v.* Adair, 61 Ga. 281; Habbe *v.* Viele, 148 Ind. 116, 45 N. E. 783, 47 N. E. 1; State *v.* Anderson, (Iowa 1899) 80 N. W. 430; State *v.* Stevenson, 104 Iowa 50, 73 N. W. 360.

25. *California.*— Brady *v.* O'Brien, 23 Cal. 244.

Georgia.— Cleveland *v.* Chambliss, 64 Ga. 352.

Iowa.— Darrance *v.* Preston, 18 Iowa 396.

Minnesota.— Chesley *v.* Mississippi, etc., River Boom Co., 39 Minn. 83, 38 N. W. 769.

Texas.— Bradshaw *v.* Davis, 12 Tex. 336.

26. Gage *v.* Downey, (Cal. 1888) 19 Pac. 113; Beck *v.* Thompson, 22 Nev. 109, 36 Pac. 562; Fletcher *v.* Nelson, 6 N. D. 94, 69 N. W. 53.

27. Pape *v.* Lathrop, 18 Ind. App. 633, 46 N. E. 154; Crust *v.* Evans, 37 Kan. 263, 15 Pac. 214.

28. Rhemke *v.* Clinton, 2 Utah 438.

29. Searles *v.* Christensen, 5 S. D. 650, 60 N. W. 29.

30. Needham *v.* Salt Lake City, 7 Utah 319, 26 Pac. 920.

31. Callanan *v.* Ætna Nat. Bank, 84 Iowa 8, 50 N. W. 69; Storm Lake *v.* Iowa Falls, etc., R. Co., 62 Iowa 218, 17 N. W. 489.

32. Jones *v.* Evans, 28 Wis. 168.

If a motion to vacate a judgment by confession is overruled, defendant waives all objections to the overruling of the motion by pleading and going to trial on the merits. Anderson Transfer Co. *v.* Fuller, 73 Ill. App. 48.

If the notice of a motion to set aside a

q. Relating to Amount of Recovery. Where no objection is taken to a verdict or judgment on the ground that the amount thereby allowed is excessive[33] or inadequate,[34] the objection will not be noticed on appeal. In the application of this general principle it is held that the following objections are waived when not raised in the court below: that the recovery is in excess of the amount claimed in the pleadings;[35] that there was error in allowing or not allowing interest, or in the calculation of the amount of interest allowed;[36] that there was error in allow-

judgment by default shows that the motion was made on the affidavits and pleadings, and it appears by affidavit that the judgment was a surprise to defendant and that the application to set aside was based on mistake and excusable neglect, the motion itself not appearing in the record and no objection as to its being defective having been made in the court below, the motion will be held sufficient. Utah Commercial, etc., Bank *v.* Trumbo, 17 Utah 198, 53 Pac. 1033.

33. *Alabama.*— Smith *v.* Dick, 95 Ala. 311, 10 So. 845; Powell *v.* Glenn, 21 Ala. 458.

Arkansas.— Johnson *v.* Barbour, 28 Ark. 188.

California.—Whiting *v.* Clark, 17 Cal. 407.

Colorado.— Mason *v.* Sieglitz, 22 Colo. 320, 44 Pac. 588.

Georgia.—Witkowski *v.* Stubbs, 91 Ga. 440, 17 S. E. 609.

Illinois.— Shaffner *v.* Appleman, 170 Ill. 281, 48 N. E. 978; Masterson *v.* Furman, 82 Ill. App. 386.

Indiana.— New York, etc., R. Co. *v.* Hamlet Hay Co., 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269; Henderson *v.* Henderson, 110 Ind. 316, 11 N. E. 432.

Iowa.— Tarpy *v.* Blume, 101 Iowa 469, 70 N. W. 620; Waterhouse *v.* Black, 87 Iowa 317, 54 N. W. 342.

Kentucky.— Clarke *v.* Finnell, 16 B. Mon. (Ky.) 329; Bell *v.* Mansfield, 12 Ky. L. Rep. 89, 13 S. W. 838.

Louisiana.— Gamble *v.* McClintock, 9 La. Ann. 159.

Maryland.— Baltimore, etc., R. Co. *v.* State, 60 Md. 449.

Massachusetts.— Tyng *v.* Thayer, 8 Allen (Mass.) 391.

Michigan.— Brushaber *v.* Stegemann, 22 Mich. 266.

Minnesota.— Bank of Commerce *v.* Smith, 57 Minn. 374, 59 N. W. 311; Spencer *v.* St. Paul, etc., R. Co., 22 Minn. 29.

Mississippi.— Phipps *v.* Nye, 34 Miss. 330.

Missouri.— St. Joseph Union Depot Co. *v.* Chicago, etc., R. Co., 131 Mo. 291, 31 S. W. 908; Catron's Estate, 82 Mo. App. 416.

Nebraska.— Omaha First Nat. Bank *v.* Bartlett, 8 Nebr. 329, 1 N. W. 145.

Nevada.— Ehrhardt *v.* Curry, 7 Nev. 221.

New York.— Nilsson *v.* De Haven, 47 N. Y. App. Div. 537, 62 N. Y. Suppl. 506; Saltsman *v.* New York, etc., R. Co., 65 Hun (N. Y.) 448, 20 N. Y. Suppl. 361, 48 N. Y. St. 55.

North Dakota.—Q. W. Lovering-Browne Co. *v.* Buffalo Bank, 7 N. D. 569, 75 N. W. 923.

Pennsylvania.—Patton *v.* Philadelphia, 189 Pa. St. 602, 42 Atl. 296; Readdy *v.* Shamokin, 137 Pa. St. 92, 20 Atl. 424.

South Carolina.— Ragsdale *v.* Southern R. Co., (S. C. 1901) 38 S. E. 609; Crane *v.* Lipscomb, 24 S. C. 430.

Tennessee.— Kirk *v.* York, 1 Coldw. (Tenn.) 446.

Texas.— Petri *v.* Fond du Lac First Nat. Bank, 83 Tex. 424, 18 S. W. 752, 29 Am. St. Rep. 657; Mills *v.* Hackett, 65 Tex. 580.

Virginia.—Richmond, etc., R. Co. *v.* George, 88 Va. 223, 13 S. E. 429; Wray *v.* Davenport, 79 Va. 19.

Washington.— Bethel *v.* Robinson, 4 Wash. 446, 30 Pac. 734.

Wisconsin.—Reed *v.* Catlin, 49 Wis. 686, 6 N. W. 326.

United States.— J. S. Keator Lumber Co. *v.* Thompson, 144 U. S. 434, 12 S. Ct. 669, 36 L. ed. 495.

See 2 Cent. Dig. tit. "Appeal and Error," § 1353 *et seq.*

34. Johnson *v.* His Creditors, 16 La. Ann. 177; Elkins *v.* Elkins, 11 La. 224; Garner's Appeal, 1 Walk. (Pa.) 438; Houston, etc., R. Co. *v.* McFadden, (Tex. Civ. App. 1897) 40 S. W. 216; Befay *v.* Wheeler, 84 Wis. 135, 53 N. W. 1121.

35. *Alabama.*— Smith *v.* Dick, 95 Ala. 311, 10 So. 845; Government St. R. Co. *v.* Hanlon, 53 Ala. 70.

Illinois.— Fidelity, etc., Co. *v.* Weise, 80 Ill. App. 499; Wells *v.* Mathews, 70 Ill. App. 504; Wheatley *v.* Chicago Trust, etc., Bank, 64 Ill. App. 612.

Iowa.— Brownlee *v.* Marion County, 53 Iowa 487, 5 N. W. 610; Finch *v.* Billings, 22 Iowa 228.

Kentucky.— Clarke *v.* Finnell, 16 B. Mon. (Ky.) 329. *Compare* Preston *v.* Roberts, 12 Bush (Ky.) 570.

Massachusetts.— Tyng *v.* Thayer, 8 Allen (Mass.) 391.

Michigan.—Smith *v.* Huntley, 48 Mich. 352, 12 N. W. 200.

Minnesota.— Bank of Commerce *v.* Smith, 57 Minn. 374, 59 N. W. 311.

Missouri.— *Compare* Carr *v.* Edwards, 1 Mo. 137.

Nevada.— Ehrhardt *v.* Curry, 7 Nev. 221.

New York.— Clason *v.* Baldwin, 68 Hun (N. Y.) 404, 23 N. Y. Suppl. 50, 52 N. Y. St. 748; Houghton *v.* Starr, 4 Wend. (N. Y.) 175.

Pennsylvania.— Readdy *v.* Shamokin, 137 Pa. St. 92, 20 Atl. 424.

Texas.— Washington L. Ins. Co. *v.* Gooding, 19 Tex. Civ. App. 490, 49 S. W. 123.

Wisconsin.— Morris *v.* Peck, 73 Wis. 482, 41 N. W. 623.

36. *California.*— Whiting *v.* Clark, 17 Cal. 407; Morgan *v.* Hugg, 5 Cal. 409.

ing attorney's fees;[37] or that, through clerical error, there was a failure to allow credits in giving judgment.[38] No mere mistake in computation will be noticed on appeal when not brought to the attention of the court below by some appropriate method.[39]

r. Relating to Executions. Objections based on the sufficiency or regularity of executions cannot be raised for the first time on appeal,[40] as that the execution does not follow the judgment;[41] that the judgment on which the execution issued was dormant;[42] that the execution does not contain the date of the judgment;[43] that the application for leave to issue execution was not made on affidavit as required by statute;[44] that there were no judgments on which the executions issued;[45] that the execution was issued five years from the entry of judgment;[46] that the clerk issuing the execution had no authority so to do;[47] that during a motion for new trial execution was allowed to issue for a part of the sum where part was admitted to be due;[48] or that the appointment of a substitute sheriff to make a levy was irregular.[49] So, irregularities in executing a writ of habere facias possessionem will not be regarded in the appellate court until adjudicated in the court below,[50] and the fact that a notice to quash an execution and a sale there-

Colorado.—Carson *v.* Arvantes, Colo. (1899) 59 Pac. 737.

Georgia.— Aycock *v.* Austin, 87 Ga. 566, 13 S. E. 582; Brower *v.* East Rome Town Co., 84 Ga. 219, 10 S. E. 629.

Illinois.— District Grand Lodge No. 4, etc. *v.* Menken, 67 Ill. App. 576; Weaver *v.* Snow, 60 Ill. App. 624.

Iowa.— Keller *v.* Jackson, 58 Iowa 629, 12 N. W. 618.

Kentucky.— Clarke *v.* Finnell, 16 B. Mon. (Ky.) 329; Armendt *v.* Perkins, 17 Ky. L. Rep. 1327, 32 S. W. 270.

Louisiana.—Rhodes' Succession, 39 La. Ann. 473, 2 So. 36; Elkins *v.* Elkins, 11 La. 224.

Massachusetts.— Franklin Sav. Inst. *v.* Reed, 125 Mass. 365.

Missouri.—Conway *v.* St. Louis, 9 Mo. App. 488.

Montana.— McFarland *v.* Cutter, 1 Mont. 383.

Nevada.—McCausland *v.* Lamb, 7 Nev. 238.

Wisconsin.— Mahon *v.* Kennedy, 87 Wis. 50, 57 N. W. 1108.

United States.— Journeycake *v.* Cherokee Nation, 30 Ct. Cl. 172.

37. J. Obermann Brewing Co. *v.* Ohlerking, 33 Ill. App. 26; Haldeman *v.* Massachusetts Mut. L. Ins. Co., 21 Ill. App. 146; Smith *v.* Brownson, 53 Tex. 271; Mason *v.* McLean, 6 Wash. 31, 32 Pac. 1006; Wheeler *v.* Ralph, 4 Wash. 617, 30 Pac. 709; Reed *v.* Catlin, 49 Wis. 686, 6 N. W. 326.

38. Long *v.* Gaines, 4 Bush (Ky.) 353; Doods *v.* Combs, 3 Metc. (Ky.) 28, 77 Am. Dec. 150; Bell *v.* Mansfield, 12 Ky. L. Rep. 89, 13 S. W. 838.

What is not a clerical error.— Failure of the court to give defendant the credit to which the pleadings entitled him was not a clerical misprision, as it does not appear at once upon a mere inspection of the record as a matter upon which there could be any dispute; hence the failure to give the credit is reviewable on appeal without a previous motion for its correction below. King *v.* Walker, 15 Ky. L. Rep. 605.

39. *Iowa.*— Reed *v.* Lane, 96 Iowa 454, 65 N. W. 380; Doud *v.* Blood, 89 Iowa 237, 56 N. W. 452; Keller *v.* Jackson, 58 Iowa 629, 12 N. W. 618.

Kentucky.— Wilson *v.* Barnes, 13 B. Mon. (Ky.) 330.

Louisiana.— Gamble *v.* McClintock, 9 La. Ann. 159.

Mississippi.—Walker *v.* Jones, 44 Miss. 623.

New York.— Monnet *v.* Heller, 57 N. Y. Super. Ct. 576, 5 N. Y. Suppl. 913, 25 N. Y. St. 609; Rogers *v.* Hosack, 18 Wend. (N. Y.) 319.

Trial before referee.— An objection to the allowance of damages and the computation of damages by the referee will not be considered on appeal. Lazarus *v.* Metropolitan El. R. Co., 69 Hun (N. Y.) 190, 23 N. Y. Suppl. 515, 53 N. Y. St. 31.

40. *Illinois.*— Parr *v.* Van Horn, 38 Ill. 226; McCartney *v.* Loomis, 61 Ill. App. 364.

Kentucky.—Payne *v.* Mattox, 1 Bibb (Ky.) 164; Smith *v.* Carr, Hard. (Ky.) 305.

Missouri.— Posey *v.* Buckner, 3 Mo. 604.

New York.—People *v.* Marston, 18 Abb. Pr. (N. Y.) 257.

North Carolina.—Currie *v.* Clark, 101 N. C. 321, 7 S. E. 776.

Virginia.— Leftwitch *v.* Stovall, 1 Wash. (Va.) 303.

See 2 Cent. Dig. tit. "Appeal and Error," § 1369 *et seq.*; and, generally, EXECUTIONS; JUDICIAL SALES.

41. Sappington *v.* Lenz, 53 Mo. App. 44.

42. Currie *v.* Clark, 101 N. C. 321, 7 S. E. 776.

43. Mooney *v.* Moriarty, 36 Ill. App. 175.

44. Matter of Holmes, 59 Hun (N. Y.) 369, 13 N. Y. Suppl. 100, 36 N. Y. St. 535.

45. Evans *v.* Wilder, 5 Mo. 313. See also Becker *v.* Goldschild, 9 Pa. Super. Ct. 50.

46. Union Bank *v.* Sargeant, 53 Barb. (N. Y.) 422, 35 How. Pr. (N. Y.) 87.

47. Noyes *v.* Manning, 162 Mass. 14, 37 N. E. 768.

48. Planters' Bank *v.* Union Bank, 16 Wall. (U. S.) 483, 21 L. ed. 473.

49. Turner *v.* Billagram, 2 Cal. 520.

50. Kouns *v.* Lawall, 2 Bibb (Ky.) 236.

under did not specify the error cannot be assigned for error in the reviewing court.[51]

s. Relating to Time of Hearing. Objections as to the time of the hearing or trial, when made for the first time on appeal, will not be considered[52] — such, for instance, as that the issues were not fully made up;[53] that the time for the hearing was not properly fixed;[54] that the cause was heard immediately upon overruling a demurrer;[55] or that the cause was tried, not at a term of court, but before a judge out of court.[56]

t. Relating to Revival of Action. In respect to the revival of actions it has been held that it cannot be objected for the first time on appeal that a suit was revived in the name of the administrator, without proving that he was administrator;[57] that an action was revived against executors instead of devisees;[58] that the revival of a suit was by an improper method;[59] that there was no formal revival of the suit;[60] that an application for revival should have been made by motion, supported by affidavit, instead of by petition;[61] or that one of the defendants in the original action was not joined in the application.[62] So, where one of two joint executors dies pending a suit brought by them, and his death is suggested, but the case is not revived against his representatives, and a final hearing is had in the court below, it is too late to object in the appellate court that the suit was not so revived.[63]

u. Changing or Adding Grounds of Objection. Only objections or grounds of objection urged in the trial court will be considered on appeal. The party will not be permitted to change them or to add others.[64] This doctrine has been

51. January *v.* Bradford, 4 Bibb (Ky.) 566.

52. *Alabama.*—Bancroft *v.* Stanton, 7 Ala. 351.

Florida.— Livingston *v.* Webster, 26 Fla. 325, 8 So. 442.

Illinois.— Bahe *v.* Jones, 132 Ill. 134, 23 N. E. 338.

Kansas.— Sawyer *v.* Forbes, 36 Kan. 612, 14 Pac. 148.

Kentucky.—Moss *v.* Rowland, 3 Bush (Ky.) 505.

Michigan.— Crippen *v.* Jacobson, 56 Mich. 386, 23 N. W. 56.

Minnesota.— Fallgatter *v.* Lammers, 71 Minn. 238, 73 N. W. 860.

Nebraska.— Lincoln *v.* Staley, 32 Nebr. 63, 48 N. W. 887.

New York.— Fisher *v.* Hepburn, 48 N. Y. 41; Matter of Broadway, etc., R. Co., 73 Hun (N. Y.) 7, 25 N. Y. Suppl. 1080, 57 N. Y. St. 108.

North Carolina.—Anthony *v.* Estes, 99 N. C. 598, 6 S. E. 705.

Pennsylvania.— Feather's Appeal, 1 Penr. & W. (Pa.) 322.

Texas.— Texas, etc., R. Co. *v.* Garcia, 62 Tex. 285.

United States.— J. S. Keator Lumber Co. *v.* Thompson, 144 U. S. 432, 12 S. Ct. 669, 36 L. ed. 495.

53. J. S. Keator Lumber Co. *v.* Thompson, 144 U. S. 434, 12 S. Ct. 669, 36 L. ed. 495.

54. Fallgatter *v.* Lammers, 71 Minn. 238, 73 N. W. 860.

55. Bahe *v.* Jones, 132 Ill. 134, 23 N. E. 338.

56. Fisher *v.* Hepburn, 48 N. Y. 41.

57. Patterson *v.* Burnett, 6 Ala. 844; Copewood *v.* Taylor, 7 Port. (Ala.) 33.

58. Klenke *v.* Koeltze, 75 Mo. 239.

59. Slaughters *v.* Farland, 31 Gratt. (Va.) 134.

60. MacGregor *v.* Gardner, 14 Iowa 326; Read *v.* Sexton, 20 Kan. 195; Whiting *v.* Crandall, 78 Mo. 593.

61. Broadwater *v.* Foxworthy, 57 Nebr. 406, 77 N. W. 1103.

62. Broadwater *v.* Foxworthy, 57 Nebr. 406, 77 N. W. 1103.

63. Kee *v.* Kee, 2 Gratt. (Va.) 116.

64. *Alabama.*— Thompson *v.* Hartline, 84 Ala. 65, 4 So. 18; Massey *v.* Smith, 73 Ala. 173.

California.— Toby *v.* Oregon Pac. R. Co., 98 Cal. 490, 33 Pac. 550.

Colorado.— Quimby *v.* Boyd, 8 Colo. 194, 6 Pac. 462.

Connecticut.— Plumb *v.* Curtis, 66 Conn. 154, 33 Atl. 998.

Georgia.— Giles *v.* Vandiver, 91 Ga. 192, 17 S. E. 115.

Illinois.— McCarthy *v.* Neu, 91 Ill. 127; Hamilton *v.* Stafford, 78 Ill. App. 54.

Indiana.— Standard Oil Co. *v.* Bowker, 141 Ind. 12, 40 N. E. 128; Louisville, etc., R. Co. *v.* Rush, 127 Ind. 545, 26 N. E. 1010; Leach *v.* Dickerson, 14 Ind. App. 375, 42 N. E. 1031.

Kansas.— Parsons Water Co. *v.* Hill, 46 Kan. 145, 26 Pac. 412.

Louisiana.—Allopathic State Board of Medical Examiners *v.* Fowler, 50 La. Ann. 1358, 24 So. 809.

Michigan.— Ives *v.* Leonard, 50 Mich. 296, 15 N. W. 463; Achey *v.* Hull, 7 Mich. 423.

Minnesota.—Triggs *v.* Jones, 46 Minn. 277, 48 N. W. 1113; Bond *v.* Corbett, 2 Minn. 248.

Mississippi.— Alexander *v.* Polk, 39 Miss. 737; Prewett *v.* Coopwood, 30 Miss. 369.

Missouri.—Winton, etc., State Bank *v.* Harris, 54 Mo. App. 156.

specifically applied in very many instances, such as rulings admitting or rejecting evidence,[65] rulings on motion for nonsuit,[66] to direct a verdict,[67] or for a continuance.[68]

v. Necessity of Ruling on Objections — (i) *In General.* Under ordinary circumstances, merely to object is not enough. To make a question available as error, a direct decision must be obtained. Unless there is a ruling by the court, there can be no predicate for an assignment of error.[69]

Nevada.— Gooch *v.* Sullivan, 13 Nev. 78.
New Jersey.— Vantilburgh *v.* Shann, 24 N. J. L. 740; Polis *v.* Tice, 28 N. J. Eq. 432.
New York.— Evans *v.* Keystone Gas Co., 148 N. Y. 112, 42 N. E. 513, 51 Am. St. Rep. 681, 30 L. R. A. 651; Phillips *v.* Metropolitan El. R. Co., 12 N. Y. App. Div. 283, 42 N. Y. Suppl. 33.
North Carolina.— Kidder *v.* McIlhenny, 81 N. C. 123; Rollins *v.* Henry, 78 N. C. 342.
Oregon.— Ladd *v.* Sears, 9 Oreg. 244.
Pennsylvania.— Mills *v.* Buchanan, 14 Pa. St. 59.
South Carolina.— Shull *v.* Caughman, 54 S. C. 203, 32 S. E. 301.
South Dakota.— Gaines *v.* White, 2 S. D. 410, 50 N. W. 901; State *v.* Leehman, 2 S. D. 171, 49 N. W. 3.
Tennessee.—Daniels *v.* Pratt, 6 Lea (Tenn.) 443.
Texas.— Ann Berta Lodge No. 42, etc. *v.* Leverton, 42 Tex. 18.
Virginia.— Warren *v.* Warren, 93 Va. 73, 24 S. E. 913.
Washington.—Gustin *v.* Jose, 11 Wash. 348, 39 Pac. 687.
West Virginia.— Long *v.* Perine, 41 W. Va. 314, 23 S. E. 611.
United States.— Belk *v.* Meagher, 104 U. S. 279, 26 L. ed. 735; Hinde *v.* Longworth, 11 Wheat. (U. S.) 199, 6 L. ed. 454.
See 2 Cent. Dig. tit. "Appeal and Error," § 1426 *et seq.*; and *infra*, XVII.

65. *Alabama.*— Glawson *v.* Wiley, 35 Ala. 328; Walker *v.* Blassingame, 17 Ala. 810.
Connecticut.— Lyon *v.* Ely, 24 Conn. 507.
Georgia.— Giles *v.* Vandiver, 91 Ga. 192, 17 S. E. 115.
Illinois.— Johnson *v.* Adleman, 35 Ill. 265; Fries *v.* Fagan, 23 Ill. App. 613.
Indiana.— Chandler *v.* Beal, 132 Ind. 596, 32 N. E. 597; Huntington *v.* Breen, 77 Ind. 29.
Iowa.— Hanks *v.* Van Garder, 59 Iowa 179, 13 N. W. 103; Boardman *v.* Beckwith, 18 Iowa 292.
Louisiana.— Ball *v.* Ball, 15 La. 173.
Massachusetts.— Howard *v.* Hayward, 10 Metc. (Mass.) 408.
Michigan.— Young *v.* Stephens, 9 Mich. 500.
Minnesota.—Towle *v.* Sherer, 70 Minn. 312, 73 N. W. 180; Levine *v.* Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855.
Mississippi.— Love *v.* Stone, 56 Miss. 449; Monk *v.* Horne, 38 Miss. 100, 75 Am. Dec. 94.
Missouri.— Watson *v.* Race, 46 Mo. App. 546.
Nevada.— Gooch *v.* Sullivan, 13 Nev. 78.
New Jersey.— Delaware, etc., R. Co. *v.* Dailey, 37 N. J. L. 526.
New York.— Devereux *v.* Sun Fire Office, 51 Hun (N. Y.) 147, 4 N. Y. Suppl. 655, 20 N. Y. St. 584; Burns *v.* Schenectady, 24 Hun (N. Y.) 10; Parsons *v.* Disbrow, 1 E. D. Smith (N. Y.) 547.
Oregon.— Ladd *v.* Sears, 9 Oreg. 244.
Pennsylvania.— Fidler *v.* Hershey, 90 Pa. St. 363; Berks, etc., Turnpike Road Co. *v.* Myers, 6 Serg. & R. (Pa.) 12.
Tennessee.—Monteeth *v.* Caldwell, 7 Humphr. (Tenn.) 13.
Texas.—Watson *v.* Blymer Mfg. Co., 66 Tex. 558, 2 S. W. 353; Sharp *v.* Schmidt, 62 Tex. 263.
Vermont.— Richardson *v.* Sanborn, 33 Vt. 75.
Washington.—Gustin *v.* Jose, 11 Wash. 348, 39 Pac. 687.
Wisconsin.—McDermott *v.* Jackson, 97 Wis. 64, 72 N. W. 375; Coggswell *v.* Davis, 65 Wis. 191, 26 N. W. 557.
United States.— German Ins. Co. *v.* Frederick, 58 Fed. 144, 19 U. S. App. 24, 7 C. C. A. 122.
See 2 Cent. Dig. tit. "Appeal and Error," § 1430 *et seq.*
Instances.— Where an objection is made to evidence as leading, it cannot be urged on appeal that it was irrelevant (McDermott *v.* Jackson, 97 Wis. 64, 72 N. W. 375); and, where a party objected to the admission of books of account on the ground that they were not properly authenticated under the statute, he cannot urge on appeal that the statute was inapplicable and that they should have been authenticated according to the common-law rule (Levine *v.* Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855); and in ejectment, where a release and quitclaim deed relied on by one of the parties to show title was objected to in the court below solely on the ground that it was not authenticated, the court of appeals will not hear an objection that it was ineffectual because at the time of its execution the grantor was not in possession (Sessions *v.* Reynolds, 7 Sm. & M. (Miss.) 130).

66. Raimond *v.* Eldridge, 43 Cal. 506; Mateer *v.* Brown, 1 Cal. 231; Quimby *v.* Boyd, 8 Colo. 194, 6 Pac. 462; Pratt *v.* Dwelling House Mut. F. Ins. Co., 130 N. Y. 206, 29 N. E. 117, 41 N. Y. St. 303.
See 2 Cent. Dig. tit. "Appeal and Error," § 1428.

67. Decorah First Nat. Bank *v.* Laughlin, 4 N. D. 391, 61 N. W. 473.

68. Gaines *v.* White, 1 S. D. 434, 47 N. W. 524.

69. *Colorado.*—Kenney *v.* Jefferson County Bank, 12 Colo. App. 24, 54 Pac. 404, where a ruling was reserved.

(II) *Rulings on Demurrers.* After demurrer, if the parties proceed to trial on the merits without insisting on a disposition of the demurrer, it will be presumed to have been waived, and it cannot be objected in the appellate court that it was not formally disposed of.[70] And this rule applies whether the demurrer be general or special.[71]

(III) *Rulings on Evidence.* Error alleged in the admission or rejection of evidence cannot be considered by the reviewing court if it does not appear from the record that there was a ruling relating thereto.[72] If evidence is received sub-

Iowa.—Des Moines *v.* Layman, 21 Iowa 153 (an objection to the service of a notice); Houston *v.* Walcott, 1 Iowa 86.

Minnesota.— Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec. 93.

Missouri.— Beine *v.* Beine, 24 Mo. App. 675 (an objection to the introduction of testimony); Davis *v.* Scripps, 2 Mo. 187.

Nebraska.— Chicago, etc., R. Co. *v.* Lundstrom, 16 Nebr. 254, 20 N. W. 198, 49 Am. Rep. 718.

New York.— Union Bank *v.* Sargeant, 53 Barb. (N. Y.) 422, 35 How. Pr. (N. Y.) 87.

North Carolina.—Tyson *v.* Tyson, 100 N. C. 360, 6 S. E. 707; Scroggs *v.* Stevenson, 100 N. C. 354, 6 S. E. 111, where it was said that a ruling was necessary to confer appellate jurisdiction.

Pennsylvania.— Duvall *v.* Darby, 38 Pa. St. 56; Dobson *v.* Philadelphia, 7 Pa. Dist. 321.

Tennessee.— Youngstown Bridge Co. *v.* Barnes, 98 Tenn. 401, 39 S. W. 714.

Vermont.— Sherwin *v.* Sanders, 59 Vt. 499, 9 Atl. 239, 59 Am. Rep. 750.

See 2 Cent. Dig. tit. "Appeal and Error," § 1417 *et seq.*

If irregularities or errors occur subsequent to judgment, they cannot be considered in the appellate court till they have been made the subject of an adjudication in the court below. Davis *v.* Thomas, 5 Tex. 389; Frazier *v.* Campbell, 5 Tex. 275.

Silence may have the effect of a ruling.— It has, however, been held that the silence of the court, when objection is made to flagrantly improper practices, may be considered as an actual permission and allowance of what was objected to. Injurious irregularities of the trial cannot be protected against review in the appellate court by the judge's refusal to make express rulings on objections properly made against them. "Were it otherwise it would be in his power to stifle the right to a revision in many cases." Corning *v.* Woodin, 46 Mich. 44, 46, 8 N. W. 572. In Yingling *v.* Hesson, 16 Md. 112, four issues were tendered in the orphan's court, and the court sent three to the jury, but took no notice of the fourth. This was held to be in effect a refusal, and the objection was considered.

Rulings on pleas in abatement.— It is the duty of a party relying on a plea in abatement to call the attention of the court to it and require its ruling thereon. If he fails to do so at the proper time, and the case is proceeded with on its merits, the plea is to be deemed waived and cannot be considered on appeal. Wallace *v.* Furber, 62 Ind. 126; Grand Lodge, etc. *v.* Stumpf, (Tex. Civ. App. 1900) 58 S. W. 840 (where the plea was filed out of its order); Beale *v.* Ryan, 40 Tex. 399; and see 2 Cent. Dig. tit. "Appeal and Error," § 1419; ABATEMENT AND REVIVAL, V.

70. *Alabama.*— Steed *v.* Knowles, 97 Ala. 573, 12 So. 75; Marcy *v.* Howard, 91 Ala. 133, 8 So. 566.

California.— De Leon *v.* Higuera, 15 Cal. 483.

Illinois.— Belleville Nail Mill Co. *v.* Chiles, 78 Ill. 14 (where the parties went to trial by consent); Davis *v.* Ransom, 26 Ill. 100.

Louisiana.— Kuhn *v.* Embry, 35 La. Ann. 488; Hickman *v.* Dawson, 33 La. Ann. 438.

Rhode Island.— Burdick *v.* Kenyon, 20 R. I. 498, 40 Atl. 99.

Tennessee.— Coffman *v.* Williams, 4 Heisk. (Tenn.) 233.

Texas.— State *v.* Thompson, 18 Tex. 526 (where the record showed that the case was submitted "to the court upon the record and evidence"); Western Union Tel. Co. *v.* Stratton, (Tex. Civ. App. 1894) 28 S. W. 700; Chambers *v.* Ker, 6 Tex. Civ. App. 373, 24 S. W. 1118.

See 2 Cent. Dig. tit. "Appeal and Error," § 1420.

Exceptions to the rule that matters not passed upon will be considered waived are said to be where the foundation of the action itself appears to have failed, or where the objection first taken in the appellate court goes to the merits or to the foundation of the action, and could not have been obviated had it been made in the court below, and not to those matters merely which the party could be deemed by his silence to have waived. Ladd *v.* Ladd, 121 N. C. 118, 28 S. E. 190; Rowlett *v.* Fulton, 5 Tex. 458; Petty *v.* Cleveland, 2 Tex. 404.

71. Knoxville, etc., R. Co. *v.* Mason, 16 Ky. L. Rep. 9, 26 S. W. 534, was an action to foreclose a lien for work done, etc., and the petition, if defective, was only so to the extent that a special demurrer would lie to make the averment as to performance and acceptance more specific. But the court below took no action on the demurrer, and on issue taken the proof showed performance and acceptance, and the appellate court refused to notice the objection.

72. *Alabama.*— Taliaferro *v.* Lee, 97 Ala. 92, 13 So. 125.

California.— Bryce *v.* Joynt, 63 Cal. 375, 49 Am. Rep. 94.

Iowa.— Depee *v.* Grand Lodge, etc., 106 Iowa 747, 76 N. W. 798; Philbrick *v.* University Place, 106 Iowa 352, 76 N. W. 742.

Kentucky.—Lewis *v.* Wright, 3 Bush (Ky.) 311; Patrick *v.* Day, 8 Ky. L. Rep. 349, 1 S. W. 477.

ject to objection, and a subsequent ruling is not sought by motion or otherwise, the reviewing court will not consider the admission of such evidence, because there is no definite or final decision as to its admissibility.[73]

(IV) *Rulings on Motions.* A motion which, so far as appears from the record, was never decided below, presents no question for decision in the appellate court.[74]

(V) *Rulings Relating to Remarks of Counsel.* If counsel, in the exercise of his rights, objects to misconduct of opposing counsel, or to improper remarks made by the opposing counsel in his argument, and requests a ruling of

Tennessee.— Sahlien *v.* Lonoke Bank, 90 Tenn. 221, 16 S. W. 373, a deposition on which exceptions were indorsed.

Texas.— Mann *v.* Falcon, 25 Tex. 271.

See 2 Cent. Dig. tit. "Appeal and Error," § 1421.

Rulings of referee.— The supreme court will not review the rulings of a referee in accepting or rejecting evidence where it does not appear from the record that they were considered by the lower court. Clark's Code Civ. Proc. N. C. (1900), p. 564; Drummond *v.* Huyssen, 46 Wis. 188, 50 N. W. 590.

73. *Arkansas.*— St. Louis, etc., R. Co. *v.* Brown, 62 Ark. 254, 35 S. W. 225.

Iowa.— Grape *v.* Wiederholdt, (Iowa 1899) 80 N. W. 516; Gable *v.* Hainer, 83 Iowa 457, 49 N. W. 1024.

Maryland.— Grand Fountain United Order of True Reformers *v.* Murray, 88 Md. 422, 41 Atl. 896; Flach *v.* Gottschalk Co., 88 Md. 368, 41 Atl. 908, 71 Am. St. Rep. 418, 42 L. R. A. 745.

Minnesota.— Bitzer *v.* Bobo, 39 Minn. 18, 38 N. W. 609.

Missouri.— Sieferer *v.* St. Louis, 141 Mo. 586, 43 S. W. 163.

Tennessee.— Bruce *v.* Beall, 99 Tenn. 303, 41 S. W. 445.

In Brooks *v.* Christopher, 5 Duer (N. Y.) 216, evidence had been received by a referee on condition that if certain other evidence making it material was not put in by defendant, it should be struck out, and the condition not being fulfilled, it was struck out. It was held that if the party acquiescing in the provisional admission desired to have the ruling reviewed, he should, when the case was closed, have obtained a specific ruling rejecting the evidence.

A motion in the nature of a demurrer to evidence, of which no disposition was made in the trial court, will not be acted upon by the reviewing court. White *v.* Bird, 45 Kan. 759, 26 Pac. 463.

See 2 Cent. Dig. tit. "Appeal and Error," § 1425.

Objections to mere offers of testimony.— As a general rule exceptions taken to mere offers of testimony will not be reviewed. Pucci *v.* Barney, 2 Misc. (N. Y.) 354, 21 N. Y. Suppl. 1099, 51 N. Y. St. 581 [*affirming* 1 Misc. (N. Y.) 84, 20 N. Y. Suppl. 375, 48 N. Y. St. 30]. But this rule may be departed from, as where, from an inspection of the case, it is manifest that the offers were made in good faith, and for the purpose of facilitating the business of the court and with its sanction, no objection being made at the time. Gerard *v.* Cowperthwait, 143 N. Y. 637, 37 N. E. 827, 60 N. Y. St. 874 [*affirming* 2 Misc. (N. Y.) 371, 21 N. Y. Suppl. 1092, 50 N. Y. St. 592], where the case was determined upon the exceptions as if they had been to testimony actually offered and excluded.

See 2 Cent. Dig. tit. "Appeal and Error," § 1423.

74. *Illinois.*— Plato *v.* Turrill, 18 Ill. 273, a motion to strike a declaration from the files.

Indiana.— Brownlee *v.* Hare, 64 Ind. 311; Griffith *v.* State, 12 Ind. 548, where error was alleged in overruling a motion in arrest of judgment, but the record did not show that any such motion was ever made.

Iowa.— Payne *v.* Dicus, 88 Iowa 423, 55 N. W. 483 (a motion to dismiss the case and strike out testimony); Johnson *v.* Webster, 81 Iowa 581, 47 N. W. 769; Cook *v.* Smith, 50 Iowa 700 (where it was said that, where no ruling is made upon a motion, the presumption is, it not appearing otherwise, that it was waived); Hoops *v.* Culbertson, 17 Iowa 305.

Kansas.—Bliss *v.* Burnes, McCahon (Kan.) 91.

Missouri.— Thomas *v.* Thomas, 64 Mo. 353; Morgan *v.* Taggart, 1 Mo. 403.

Nebraska.— Barr *v.* Kimball, 43 Nebr. 766, 62 N. W. 196 (a motion for judgment *non obstante veredicto*); Dewey *v.* Lewis, 12 Nebr. 306, 11 N. W. 330 (a motion to set aside a default).

South Carolina.— Davis *v.* Elmore, 40 S. C. 533, 19 S. E. 204, a motion to reduce the verdict on the ground of excessive damages.

Texas.— Cole *v.* Grigsby, (Tex. Civ. App. 1894) 35 S. W. 680; International, etc., R. Co. *v.* Brett, 61 Tex. 483; Pennell *v.* Lovett, 15 Tex. 265.

See 2 Cent. Dig. tit. "Appeal and Error," § 1418.

Motion made after appeal.— After an appeal had been taken from a decree of the surrogate, settling accounts, a motion was made by appellant to open the decree for taking of further testimony. The surrogate denied the motion, and appellant refused to join in a stipulation providing for a withdrawal of the appeal and the resubmission of the case to the surrogate. The supreme court declined, under the discretionary power given it by N. Y. Code Civ. Proc. § 2481, under which it has the same power as the surrogate, to grant the motion as an original application. Matter of May, 53 Hun (N. Y.) 632, 6 N. Y. Suppl. 357, 24 N. Y. St. 888.

Motion to vacate order of no effect with-

the court thereon, there can be no review of the matter in the appellate court unless there is a ruling or a refusal to rule on such request.[75]

2. Exceptions — a. Definition and Office. An exception is an objection taken to a decision of the court on a matter of law.[76] The office of an exception is to call the attention of the court to some specific matter as to which error is claimed.[77]

b. Necessity in General. It is a general rule of law, applicable to all actions or proceedings, that rulings or decisions made therein which affect substantial rights, and on which error is predicated, will not be revised unless an appropriate exception to the alleged error was reserved,[78] and especially so if an exception is a

out ruling.— Portions of a complaint which are stricken out are not restored by a motion to vacate the order, and hence, on appeal from an order sustaining a demurrer to the complaint, it not appearing that such motion was ever acted upon, the reviewing court will consider the orde striking out as still in force. Washington County *v.* Semler, 41 Wis. 374.

75. *Colorado.*— Ames *v.* Patridge, 13 Colo. App. 407, 58 Pac. 341.

Illinois.— North Chicago St. R. Co. *v.* Shreve, 171 Ill. 438, 49 N. E. 534 [*affirming* 70 Ill. App. 666]; North Chicago St. R. Co. *v.* Gillow, 166 Ill. 444, 46 N. E. 1082; Illinois Cent. R. Co. *v.* Cole, 165 Ill. 334, 46 N. E. 275; Pennsylvania Co. *v.* Greso, 79 Ill. App. 127; Chicago Trust, etc., Bank *v.* Landfield, 73 Ill. App. 173.

Indiana.— Houk *v.* Branson, 17 Ind. App. 119, 45 N. E. 78; Welsh *v.* Brown, 8 Ind. App. 421, 35 N. E. 921.

Nebraska.— Chicago, etc., R. Co. *v.* Kellogg, 55 Nebr. 748, 76 N. W. 462; Golder *v.* Lund, 50 Nebr. 867, 70 N. W. 379.

Wisconsin.— Mulcairns *v.* Janesville, 67 Wis. 24, 29 N. W. 565.

See 2 Cent. Dig. tit. "Appeal and Error," § 1424.

76. Train *v.* Gridley, 36 Ind. 241.

Cal. Code Civ. Proc. § 647, defines an exception as an objection upon a matter of law to a decision, made either before or after judgment by a court, tribunal, judge, or other judicial officer in an action or proceeding.

Nevada practice act defines an exception as "an objection taken at the trial to a decision upon a matter of law, whether such trial be by jury, court, or referees, and whether the decision be made during the formation of a jury, or in the admission of evidence, or in the charge to a jury, or at any other time from the calling of the action for trial to the rendering of the verdict or decision." State *v.* Central Pac. R. Co., 17 Nev. 259, 270, 30 Pac. 887.

As to the sufficiency and effect of exceptions see, generally, Trial.

77. Brown *v.* Haynes, 59 N. C. 49.

78. *Alabama.*— Binford *v.* Dement, 72 Ala. 491; Gordon *v.* McLeod, 20 Ala. 242.

Arizona.— See Sandford *v.* Moeller, 1 Ariz. 362, 25 Pac. 534.

Arkansas.— Dunnington *v.* Frick Co., 60 Ark. 250, 30 S. W. 212; Prairie County *v.* Bancroft, 26 Ark. 526.

California.— Lee *v.* Murphy, 119 Cal. 364, 51 Pac. 549, 955; Russell *v.* Dennison, 45 Cal. 337.

Colorado.— Corbin *v.* Phillips, 26 Colo. 461, 58 Pac. 590; *In re* Smiley, 4 Colo. App. 582, 36 Pac. 894.

Connecticut.— Post *v.* Hartford St. R. Co., 72 Conn. 362, 44 Atl. 547.

Dakota.— McCormack *v.* Phillips, 4 Dak. 506, 34 N. W. 39.

Delaware.— See Lewis *v.* Hazel, 4 Harr. (Del.) 470.

District of Columbia.— Evans *v.* Schoonmaker, 2 App. Cas. (D. C.) 62.

Florida.—Williams *v.* State, 32 Fla. 251, 13 So. 429; Miller *v.* Kingsbury, 8 Fla. 356.

Georgia.— La Grange Bank *v.* Cotter, 101 Ga. 134, 28 S. E. 644; Van Pelt *v.* Home Bldg., etc., Assoc., 87 Ga. 370, 13 S. E. 574.

Idaho.— Goodman *v.* Minear Min., etc., Co., 1 Ida. 131; Lamkin *v.* Sterling, 1 Ida. 120.

Illinois.— Marshal *v.* John Grosse Clothing Co., 184 Ill. 421, 56 N. E. 807, 75 Am. St. Rep. 181; Sherrod *v.* Ozment, 81 Ill. App. 116.

Indiana.— Hedrick *v.* Whitehorn, 145 Ind. 642, 43 N. E. 942; Markle *v.* Hunt, 12 Ind. App. 353, 40 N. E. 280.

Indian Territory.—Eddings *v.* Boner, 1 Ind. Terr. 173, 38 S. W. 1110.

Iowa.— Smith *v.* Smith, 99 Iowa 747, 68 N. W. 721; Casey *v.* Ballou Banking Co., 98 Iowa 107, 67 N. W. 98.

Kansas.— Clarkson *v.* Hibler, 39 Kan. 125, 17 Pac. 784; St. Louis, etc., R. Co. *v.* Irwin, 37 Kan. 701, 16 Pac. 146, 1 Am. St. Rep. 266.

Kentucky.— Tandy *v.* Oliver, 19 Ky. L. Rep. 223, 39 S. W. 700; Hedge *v.* Vallandingham, 10 Ky. L. Rep. 322.

Louisiana.— Stewart *v.* Harper, 16 La. Ann. 181; Cooper *v.* Polk, 2 La. Ann. 158.

Maine.— Hill *v.* Reynolds, 93 Me. 25, 44 Atl. 135, 74 Am. St. Rep. 329; Stephenson *v.* Thayer, 63 Me. 143.

Maryland.— Keefer *v.* Mattingly, 1 Gill (Md.) 182.

Massachusetts.— New York L. Ins. Co. *v.* Macomber, 169 Mass. 580, 48 N. E. 776; Hatch *v.* Kenny, 141 Mass. 171, 5 N. E. 527.

Michigan.— Selby *v.* Detroit R. Co., 122 Mich. 311, 81 N. W. 106; Leitelt *v.* Parker, 48 Mich. 297, 12 N. W. 219.

Minnesota.— London, etc., Mortg. Co. *v.* McMillan, 78 Minn. 53, 80 N. W. 841; Lawrence *v.* Bucklen, 45 Minn. 195, 47 N. W. 655.

Mississippi.— Hunt *v.* Nugent, 10 Sm. & M. (Miss.) 541; Commercial, etc., Bank *v.* Lum, 7 How. (Miss.) 414.

Missouri.— Sarazin *v.* Union R. Co., 153 Mo. 479, 55 S. W. 92; Gutta Percha Rubber

statutory prerequisite to a right of review.[79] This requirement, when absolute, cannot be dispensed with by stipulation or agreement,[80] by rules, or by the practice of particular courts.[81] But where error appears in the record proper, the

Mfg. Co. *v.* Kansas City Fire Dept. Supply Co., 149 Mo. 538, 50 S. W. 912; Whittaker *v.* Summerville, 83 Mo. App. 553.

Montana.— Currie *v.* Montana Cent. R. Co., 24 Mont. 123, 60 Pac. 989; Froman *v.* Patterson, 10 Mont. 107, 24 Pac. 692.

Nebraska.— Maul *v.* Drexel, 55 Nebr. 446, 76 N. W. 163; Roode *v.* Dunbar, 9 Nebr. 95, 2 N. W. 345.

Nevada.— Reese *v.* Kinkead, 20 Nev. 65, 14 Pac. 871.

New Hampshire.— State *v.* Saidell, (N. H. 1900) 46 Atl. 1083; Conway *v.* Jefferson, 46 N. H. 521.

New Jersey.— Potts *v.* Evans, 58 N. J. L. 384, 34 Atl. 4.

New Mexico.— Southern California Fruit Exch. *v.* Stamm, 9 N. M. 361, 54 Pac. 345; Talbot *v.* Randall, 3 N. M. 230, 5 Pac. 537.

New York.— Jung *v.* Keuffel, 144 N. Y. 381, 39 N. E. 340, 63 N. Y. St. 690; Wicks *v.* Thompson, 129 N. Y. 634, 29 N. E. 301, 41 N. Y. St. 510 [*affirming* 59 Hun (N. Y.) 618, 13 N. Y. Suppl. 651, 38 N. Y. St. 340]; Van Vleck *v.* Ballou, 40 N. Y. App. Div. 489, 58 N. Y. Suppl. 125; Union Trust Co. *v.* Levor, 32 Misc. (N. Y.) 703, 65 N. Y. Suppl. 532.

North Carolina.— Jones *v.* Benbow, 122 N. C. 508, 29 S. E. 774; King *v.* Ellington, 87 N. C. 573.

North Dakota.— Colby *v.* McDermont, 6 N. D. 495, 71 N. W. 772.

Ohio.— Templeton *v.* Kraner, 24 Ohio St. 554.

Oklahoma.— Everett *v.* Akins, 8 Okla. 184, 56 Pac. 1062.

Oregon.— Rogue River Min. Co. *v.* Walker, 1 Oreg. 341.

Pennsylvania.— Rynd *v.* Baker, 193 Pa. St. 486, 44 Atl. 551; Security Sav., etc., Assoc. *v.* Anderson, 172 Pa. St. 305, 34 Atl. 44.

Rhode Island.— Phillips *v.* Shackford, 21 R. I. 422, 44 Atl. 306; Stone *v.* Pendleton, 21 R. I. 332, 43 Atl. 643.

South Carolina.— Meinhard *v.* Strickland, 29 S. C. 491, 7 S. E. 838; McLure *v.* Lancaster, 24 S. C. 273, 58 Am. Rep. 259.

South Dakota.—Winn *v.* Sanborn, 10 S. D. 642, 75 N. W. 201; Hilton *v.* Advance Thresher Co., 8 S. D. 412, 66 N. W. 816.

Tennessee.— Boston Mar. Ins. Co. *v.* Scales, 101 Tenn. 628, 49 S. W. 743; Sutton *v.* Sutton, (Tenn. Ch. 1900) 58 S. W. 891.

Texas.— Holmes *v.* Thomason, (Tex. Civ. App. 1901) 61 S. W. 504; Glenn *v.* Kimbrough, 70 Tex. 147, 8 S. W. 81.

Utah.— Garner *v.* Van Patten, 20 Utah 342, 58 Pac. 684; Thirkfield *v.* Mountain View Cemetery Assoc., 12 Utah 76, 41 Pac. 564.

Vermont.— State *v.* Preston, 48 Vt. 12; Wakefield *v.* Merrick, 38 Vt. 82.

Virginia.—National Exch. Bank *v.* Preston, (Va. 1899) 33 S. E. 546; Wilson *v.* Wilson, 93 Va. 546, 25 S. E. 596.

Washington.— Brown *v.* Coey, 12 Wash. 659, 41 Pac. 892.

West Virginia.— Righter *v.* Riley, 42 W. Va. 633, 26 S. E. 357.

Wisconsin.— Tanner *v.* Gregory, 71 Wis. 490, 37 N. W. 830.

Wyoming.— Syndicate Imp. Co. *v.* Bradley, 6 Wyo. 171, 43 Pac. 79, 44 Pac. 60.

United States.— Lincoln *v.* Power, 151 U. S. 436, 14 S. Ct. 387, 38 L. ed. 224; Loring *v.* Frue, 104 U. S. 223, 26 L. ed. 713; Storm *v.* U. S., 94 U. S. 76, 24 L. ed. 42; Pomeroy *v.* Indiana State Bank, 1 Wall. (U. S.) 592, 17 L. ed. 638; Imperial L. Ins. Co. *v.* Newcomb, 62 Fed. 97, 19 U. S. App. 669, 10 C. C. A. 288.

See 2 Cent. Dig. tit. "Appeal and Error," § 1432 *et seq.*

That the appellee joins in error assigned will not cure the omission to except. Martin *v.* Foulke, 114 Ill. 206, 29 N. E. 683.

79. Roehl *v.* Baasen, 8 Minn. 26.

As to applying this rule to equity cases see Melvin *v.* Aldridge, 81 Md. 650, 32 Atl. 389; Hubbard *v.* Jarrell, 23 Md. 66; O'Neill *v.* Cole, 4 Md. 107.

80. *Indiana.*— Lagrange County *v.* Newman, 35 Ind. 10.

Louisiana.— Prevost's Succession, 4 La. Ann. 347; West *v.* His Creditors, 4 La. Ann. 447.

Maryland.— Levy *v.* Taylor, 24 Md. 282.

Massachusetts.— Howes *v.* Colburn, 165 Mass. 385, 43 N. E. 125.

Montana.— Daniels *v.* Andes Ins. Co., 2 Mont. 500.

New York.— Briggs *v.* Waldron, 83 N. Y. 582; Stephens *v.* Reynolds, 6 N. Y. 454; Greer *v.* Greer, 58 Hun (N. Y.) 251, 20 N. Y. Civ. Proc. 71, 12 N. Y. Suppl. 778, 34 N. Y. St. 448. See also New York *v.* National Broadway Bank, 56 Hun (N. Y.) 649, 10 N. Y. Suppl. 555, 31 N. Y. St. 803.

81. Appeals in same court.—In some jurisdictions, where an appeal is heard in the appellate branch of the same court, exceptions are unnecessary to authorize a revision of the alleged errors below. Marquis *v.* Wood, 30 Misc. (N. Y.) 770, 62 N. Y. Suppl. 525; Gruhn *v.* Gudebrod Brothers Co., 21 Misc. (N. Y.) 528, 47 N. Y. Suppl. 714; Manning *v.* West, 19 Misc. (N. Y.) 481, 43 N. Y. Suppl. 1070. And see Morris *v.* Deane, 94 Va. 572, 27 S. E. 432, holding that an exception need not be taken to a judgment of the circuit court on a writ of error to the county court. But this rule is not applicable to appeals from the appellate branch of an inferior to the appellate branch of a superior court. Machauer *v.* Fogel, 21 Misc. (N. Y.) 637, 47 N. Y. Suppl. 1056; Kraus *v.* J. H. Mohlman Co., 18 Misc. (N. Y.) 430, 42 N. Y. Suppl. 23; Seligman *v.* Hahn, 7 Misc. (N. Y.) 65, 27 N. Y. Suppl. 405, 57 N. Y. St. 527; Scott *v.* Yeandle, 43 N. Y. Suppl. 1164 [*affirmed* in 20 Misc. (N. Y.) 89, 45 N. Y. Suppl. 87]. The power of the court to reverse in such a case will not be exercised, if the error might have been cured at the trial. Currier *v.* Henderson, 85 Hun (N. Y.) 300, 32

appellate or reviewing court may correct it notwithstanding that no exception was taken thereto.[82] Thus, where it appears that the trial court was without jurisdiction;[83] that judgment was taken by default on a complaint which stated no cause of action;[84] that the trial was by an unconstitutional jury, the reviewing court may determine whether or not error was committed at the trial, although no exception was taken;[85] and sometimes,when from the whole case it is manifest that injustice has been done, this rule applies.[86] Where a judgment or decision is rendered on demurrer,[87] or motion in arrest,[88] or the record shows the jury was improperly instructed,[89] no exception is necessary to enable the appellate court to review it.

N. Y. Suppl. 953, 66 N. Y. St. 383; Kennedy *v.* Cunningham, 2 Metc. (Ky.) 538; Christner *v.* John, 2 Pa. Super. Ct. 78, 39 Wkly. Notes Cas. (Pa.) 44.

82. *Alabama.*— Jones *v.* Jones, 42 Ala. 218.
Arkansas.— Tunstall *v.* Means, 5 Ark. 700.
Colorado.— Barr *v.* Foster, 25 Colo. 28, 52 Pac. 1101.
Dakota.— Galloway *v.* McLean, 2 Dak. 372, 9 N. W. 98.
Florida.— Barnes *v.* Scott, 29 Fla. 285, 11 So. 48.
Illinois.—Wiggins Ferry Co. *v.* People, 101 Ill. 446.
Iowa.— Washington County *v.* Jones, 45 Iowa 260.
Kansas.— Matter of Johnston, 54 Kan. 726, 39 Pac. 725; McKinstry *v.* Carter, 48 Kan. 428, 29 Pac. 597.
Kentucky.— Gordon *v.* Ryan, 1 J. J. Marsh. (Ky.) 55.
Louisiana.— Louisiana State Bank *v.* Cammack, 21 La. Ann. 133.
Massachusetts.— Rathbone *v.* Rathbone, 4 Pick. (Mass.) 89.
Mississippi.— Falkner *v.* Thurmond, (Miss. 1898) 23 So. 584.
Missouri.— Lilly *v.* Menke, 126 Mo. 190, 28 S. W. 643, 994; South St. Joseph Land Co. *v.* Bretz, 125 Mo. 418, 28 S. W. 656; Harned *v.* Shores, 75 Mo. App. 500; Keaton *v.* Keaton, 74 Mo. App. 174.
Nebraska.—O'Donohue *v.* Hendrix, 13 Nebr. 255, 13 N. W. 215.
New York.— Sanford *v.* Granger, 12 Barb. (N. Y.) 392; Donahue *v.* New York Cent., etc., R. Co., 15 Misc. (N. Y.) 256, 36 N. Y. Suppl. 441, 71 N. Y. St. 491; Mills *v.* Thursby, 2 Abb. Pr. (N. Y.) 432, 12 How. Pr. (N. Y.) 385.
North Carolina.— Griffith *v.* Richmond, 126 N. C. 377, 35 S. E. 620; Upper Appomattox Co. *v.* Buffaloe, 121 N. C. 37, 27 S. E. 999.
Oklahoma.— Territory *v.* Caffrey, (Okla. 1899) 57 Pac. 204.
Pennsylvania.— Bean's Road, 35 Pa. St. 280; Frankstown Tp. Road, 26 Pa. St. 472; Rogers *v.* Playford, 12 Pa. St. 181; Middletown Road, 15 Pa. Super. Ct. 167, 31 Pittsb. Leg. J. N. S. (Pa.) 107.
Virginia.— Cullop *v.* Leonard, 97 Va. 256, 33 S. E. 611; Nutt *v.* Summers, 78 Va. 164.
West Virginia.— State *v.* King, (W. Va. 1900) 35 S. E. 30.
Wisconsin.— Rosenthal *v.* Vernon, 79 Wis. 245, 48 N. W. 485.
United States.— Macker *v.* Thomas, 7 Wheat. (U. S.) 530, 5 L. ed. 515.
See 2 Cent. Dig. tit. "Appeal and Error," § 1447 *et seq.*

83. *Colorado.*— Roberts *v.* More, 5 Colo. App. 511, 39 Pac. 346.
Georgia.— Kirkman *v.* Gillespie, 112 Ga. 507, 37 S. E. 714.
Indiana.— Terrell *v.* State, 66 Ind. 570.
Missouri.— Fields *v.* Maloney, 78 Mo. 172.
North Carolina.— Smith *v.* Fort, 105 N. C. 446, 10 S. E. 914; Godwin *v.* Monds, 101 N. C. 354, 7 S. E. 793; Statesville Bank *v.* Graham, 82 N. C. 489; Meekins *v.* Tatem, 79 N. C. 546.
South Carolina.—Chapman *v.* Charleston, 28 S. C. 373, 6 S. E. 158, 13 Am. St. Rep. 681.

84. Lamkin *v.* Sterling, 1 Ida. 120.

85. Cox *v.* Moss, 53 Mo. 432.

86. *California.*— Ringgold *v.* Haven, 1 Cal. 108.
Kentucky.— Barger *v.* Cashman, 4 Bibb (Ky.) 278.
Missouri.— Shore *v.* Coons, 24 Mo. 556.
New York.— Gillett *v.* Kinderhook, 77 Hun (N. Y.) 604, 28 N. Y. Suppl. 1044, 60 N. Y. St. 485; Kowalewska *v.* New York, etc., R. Co., 72 Hun (N. Y.) 611, 25 N. Y. Suppl. 184, 55 N. Y. St. 167; Blum *v.* Munzesheimer, 66 Hun (N. Y.) 633, 21 N. Y. Suppl. 498, 50 N. Y. St. 306; Whitman *v.* Johnson, 10 Misc. (N. Y.) 730, 31 N. Y. Suppl. 1009, 65 N. Y. St. 103 [*modified* in 12 Misc. (N. Y.) 23, 33 N. Y. Suppl. 60, 66 N. Y. St. 717, 24 N. Y. Civ. Proc. 350, 1 N. Y. Annot. Cas. 238]; Beyer *v.* Clark, 8 Misc. (N. Y.) 416, 28 N. Y. Suppl. 655, 59 N. Y. St. 568; Goodenough *v.* Fuller, 5 N. Y. St. 896; Howell *v.* Manwaring, 3 N. Y. St. 454; Hastings *v.* McKinley, 3 Code Rep. (N. Y.) 10.
North Carolina.— Statesville Bank *v.* Graham, 82 N. C. 489; Meekins *v.* Tatem, 79 N. C. 546.
Ohio.— Little Miami R. Co. *v.* Fitzpatrick, 42 Ohio St. 318.
In Louisiana, if there is a statement of facts the cause is examinable though no exceptions were taken. Bachemain *v.* His Creditors, 2 La. 346.

87. Hamlin *v.* Reynolds, 22 Ill. 207; Coffman *v.* Wilson, 2 Metc. (Ky.) 542; Lee *v.* Rutledge, 51 Md. 311; Long *v.* Billings, 7 Wash. 267, 34 Pac. 936. See also Barnes *v.* Scott, 29 Fla. 285, 11 So. 48.

88. Mix *v.* Nettleton, 29 Ill. 245; Cushwa *v.* Cushwa, 9 Gill (Md.) 242 [*followed* in Newcommer *v.* Keedy, 9 Gill (Md.) 263].

89. Weybright *v.* Fleming, 40 Ohio St. 52; Mowry *v.* Kirk, 19 Ohio St. 375; Janney *v.* Howard, 150 Pa. St. 339, 30 Wkly. Notes Cas. (Pa.) 379, 24 Atl. 740; Wheeler *v.* Winn, 53 Pa. St. 122, 91 Am. Dec. 186; Sidney School Furniture Co. *v.* Warsaw Tp. School Dist., (Pa. 1886) 7 Atl. 65. See *infra*, V, B, 2, e, (III), (D).

c. Rulings Respecting Pleadings — (I) *Statement of General Rule.* It is a general rule that rulings made in respect to pleadings will in no case be reviewed unless duly excepted to.[90]

(II) *Extent and Limits of Rule.* In the application of this doctrine it is held that a ruling on a demurrer to a pleading will not, in the absence of an exception thereto, be reviewed,[91] except in cases where the sufficiency of the pleading may be first questioned on appeal.[92] So the general rule applies to rulings on applications to strike out pleadings in whole or in part,[93] or the rulings granting

90. *Illinois.*— Caveny *v.* Weiller, 90 Ill. 158.

Kansas.— Lyons *v.* Bodenhamer, 7 Kan. 455; Osgood *v.* Haverty, McCahon (Kan.) 182.

Louisiana.— Wafford *v.* Wafford, 10 La. Ann. 636.

Mississippi.— Aldridge *v.* Grider, 13 Sm. & M. (Miss.) 281.

Missouri.— Beard *v.* Parks, 44 Mo. 244.

New York.— Driscoll *v.* Downer, 125 N. Y. 728, 26 N. E. 757 [*affirming* 55 Hun (N. Y.) 531, 9 N. Y. Suppl. 129, 29 N. Y. St. 609]; Hamilton *v.* Dinning, 81 Hun (N. Y.) 52, 30 N. Y. Suppl. 519, 62 N. Y. St. 371; Pickard *v.* Simson, 53 Hun (N. Y.) 631, 6 N. Y. Suppl. 93, 24 N. Y. St. 841 [*affirmed* in 127 N. Y. 681, 28 N. E. 255, 38 N. Y. St. 1017].

Ohio.— Marks *v.* Harris, 12 Cinc. L. Bul. 184.

See 2 Cent. Dig. tit. "Appeal and Error," § 1485 *et seq.*

In Colorado, the interrogatories and answers in supplementary proceedings in garnishment are regarded as pleadings within a provision that "no exceptions need be taken to opinions or decisions of courts of record sustaining or overruling demurrers or written motions affecting or based on the pleadings." Burton *v.* Snyder, 21 Colo. 292, 294, 40 Pac. 451.

91. *Alabama.*— Powell *v.* Asten, 36 Ala. 140.

Florida.— Judge *v.* Moore, 9 Fla. 269.

Idaho.— Guthrie *v.* Fisher, 2 Ida. 101, 6 Pac. 111.

Indiana.— Cowan *v.* Huffman, 130 Ind. 600, 28 N. E. 619; Fox *v.* Monticello, 83 Ind. 483; Bond *v.* Halloway, (Ind. App. 1897) 46 N. E. 358; Haines *v.* Porch, 9 Ind. App. 413, 36 N. E. 926.

Iowa.— Petersborough Sav. Bank *v.* Des Moines Sav. Bank, 110 Iowa 519, 81 N. W. 786; Walker *v.* Sargent 47 Iowa 448.

Kansas.— Turner *v.* State, 45 Kan. 554, 26 Pac. 35; Lott *v.* Kansas City, etc., R. Co., 42 Kan. 293, 21 Pac. 1070.

Montana.— Territory *v.* Virginia Road Co., 2 Mont. 96.

Nebraska.— Estep *v.* Schlesinger, 58 Nebr. 62, 78 N. W. 383.

South Carolina.— Chapman *v.* Charleston, 28 S. C. 373, 6 S. E. 158, 13 Am. St. Rep. 681.

See 2 Cent. Dig. tit. "Appeal and Error," § 1486 *et seq.*

Applications of rule.— The failure to dispose of a demurrer to a reply before trial and judgment (Norton *v.* Hooten, 17 Ind. 365), or a refusal to permit defendant to answer after overruling his demurrer, must be excepted to (Moore *v.* Nowell, 94 N. C. 265).

Correct judgment on insufficient complaint. — Though no exception was taken to the overruling of a demurrer to an insufficient complaint, the judgment will not be reversed if a good cause of action was proven. St. Paul *v.* Kuby, 8 Minn. 154.

92. *California.*— Davis *v.* Honey Lake Water Co., 98 Cal. 415, 33 Pac. 270.

Colorado.— Garfield County *v.* Leonard, 26 Colo. 145, 57 Pac. 693.

Illinois.— Marshall *v.* Cleveland, etc., R. Co., 80 Ill. App. 531.

Missouri.— Newton *v.* Newton, (Mo. 1901) 61 S. W. 881; McKenzie *v.* Donnell, 151 Mo. 431, 52 S. W. 214.

Wisconsin.—Dow *v.* Deissner, 105 Wis. 385, 80 N. W. 940, 81 N. W. 671.

See 2 Cent. Dig. tit. "Appeal and Error," § 1487.

For cases in which the sufficiency of a pleading may be first questioned on appeal see V, B, 1, f, (II).

93. *Alabama.*— Blackford *v.* Killan, 42 Ala. 487; Mahoney *v.* O'Leary, 34 Ala. 97.

California.—Young *v.* Donegan, (Cal. 1892) 29 Pac. 412.

Georgia.— Turner *v.* Camp, (Ga. 1901) 38 S. E. 743; Columbus R. Co., *v.* Sizemore, 106 Ga. 307, 31 S. E. 744.

Illinois.— Gaynor *v.* Hibernia Sav. Bank, 166 Ill. 577, 46 N. E. 1070; American Vault Safe, etc., Co. *v.* Springer, 73 Ill. App. 232; Huntington *v.* Chambers, 15 Ill. App. 426.

Iowa.— Cook *v.* Steuben County Bank, 1 Greene (Iowa) 447.

Missouri.— Martin *v.* Jones, 72 Mo. 23; Gorwyn *v.* Anable, 48 Mo. App. 297.

Texas.— Equitable Mortg. Co. *v.* Thorn, (Tex. Civ. App. 1894) 26 S. W. 276.

Virginia.—Bowyer *v.* Hewitt, 2 Gratt. (Va.) 192; White *v.* Toncray, 9 Leigh (Va.) 347.

West Virginia.— Quesenberry *v.* People's Bldg., etc., Assoc., 44 W. Va. 512, 30 S. E. 73; Shank *v.* Ravenswood, 43 W. Va. 242, 27 S. E. 223.

See 2 Cent. Dig. tit. "Appeal and Error," § 1489.

In California the refusal to strike out a pleading is not within a statutory provision that no exception is necessary to review an order striking out a pleading. Ganceart *v.* Henry, 98 Cal. 281, 33 Pac. 92.

An appealable order, striking out an answer which is made a part of the record on appeal from a judgment, may be reviewed

or denying an application to require a pleading to be made more definite and certain.[94] It also applies to rulings allowing[95] or refusing to allow amendments,[96] or to rulings permitting or refusing to permit the filing of supplemental pleadings.[97] On the other hand, the question whether the pleadings support and warrant the judgment is one which arises on the record proper, and may be tested by writ of error or appeal from the judgment without any exception.[98]

d. Rulings and Decisions Before Trial. Where the action of the court may be appealed from, to authorize a review of its ruling or decision before trial and as to matters unconnected therewith — as rulings as to the sufficiency of the service of process,[99] rulings on questions respecting misjoinder of parties or causes

even though no exception was taken to it. Harlan *v.* St. Paul, etc., R. Co., 31 Minn. 427, 18 N. W. 147.

94. Kelly *v.* West Bend, 101 Iowa 669, 70 N. W. 726.

95. *Alabama.*— Mock *v.* Walker, 42 Ala. 668; Jarman *v.* McMahon, 37 Ala. 431.

Georgia.— Pettis *v.* Campbell, 47 Ga. 596.

Indiana.— Alcorn *v.* Morgan, 77 Ind. 184; Knowles *v.* Rexroth, 67 Ind. 59.

Kentucky.— Jouitt *v.* Lewis, 4 Litt. (Ky.) 160.

Maine.— Sutherland *v.* Kittridge, 19 Me. 424.

Missouri.— Chance *v.* Jennings, 159 Mo. 544, 61 S. W. 177; Aull *v.* Missouri Pac. R. Co., 73 Mo. App. 369; Long *v.* Bolen Coal Co., 56 Mo. App. 605.

Oregon.— Wallace *v.* Baisley, 22 Oreg. 572, 30 Pac. 432.

Virginia.—Gibson *v.* Beveridge, 90 Va. 696, 19 S. E. 785.

See 2 Cent. Dig. tit. "Appeal and Error," § 1490.

Changing form of action.— The allowance of an amendment at the trial, changing the cause of action from malicious prosecution to false imprisonment, will be reviewed even though no exception was taken. Cumber *v.* Schoenfeld, 16 Daly (N. Y.) 454, 12 N. Y. Suppl. 282, 34 N. Y. St. 770.

The imposition of terms as a condition of an amendment will be deemed to have been acquiesced in unless excepted to. Griggs *v.* Howe, 31 Barb. (N. Y.) 100.

96. McNutt *v.* King, 59 Ala. 597; Troup *v.* Horbach, 57 Nebr. 644, 78 N. W. 286; Tubbs *v.* Doll, 15 Wis. 640.

Necessity of vacating order.— Where an order refusing leave to amend was inserted in an order sustaining demurrers to the complaint, and the former order was deemed excepted to by force of a statutory provision, it is not necessary to move to vacate or modify the order entered for the purpose of having the point reviewed. Schaake *v.* Eagle Automatic Can Co., (Cal. 1901) 63 Pac. 1025.

97. Giddings *v.* '76 Land, etc., Co., 109 Cal. 116, 41 Pac. 788; Reynolds *v.* Mandel, 175 Ill. 615, 51 N. E. 649 [*affirming* 73 Ill. App. 379].

98. *Colorado.*— Nylan *v.* Renhard, 10 Colo. App. 46, 49 Pac. 266.

Indiana.— Nugent *v.* Laduke, 87 Ind. 482.

North Carolina.— Murray *v.* Southerland, 125 N. C. 175, 34 S. E. 270.

Wisconsin.— Dow *v.* Deissner, 105 Wis. 385, 80 N. W. 940, 81 N. W. 671; Donkle *v.* Milem, 88 Wis. 33, 59 N. W. 586; Edleman *v.* Kidd, 65 Wis. 18, 26 N. W. 116; Towsley *v.* Ozaukee County, 60 Wis. 251, 18 N. W. 840; Bowman *v.* Van Kuren, 29 Wis. 209, 9 Am. Rep. 554.

United States.— Vicksburg, etc., R. Co. *v.* O'Brien, 119 U. S. 99, 7 S. Ct. 118, 172, 30 L. ed. 299.

In considering the correctness of conclusions of law, all questions that could be raised on the sufficiency of the pleadings will necessarily be considered. Runner *v.* Scott, 150 Ind. 441, 50 N. E. 479.

Rendition of judgment on the pleadings.— In applying the principle stated in the text it is held that where judgment is rendered on the pleadings no exceptions are necessary to preserve for review error in the rendition of such judgment, because the error is apparent of record. Nylan *v.* Renhard, 10 Colo. App. 46, 49 Pac. 266; Johnson *v.* Manning, 2 Ida. 1073, 29 Pac. 101; Murray *v.* Southerland, 125 N. C. 175, 34 S. E. 270; Upper Appomattox Co. *v.* Buffaloe, 121 N. C. 37, 27 S. E. 999; Thornton *v.* Brady, 100 N. C. 38, 5 S. E. 910; Donkle *v.* Milem, 88 Wis. 33, 59 N. W. 586.

Denial of motion for judgment on pleadings.— The Pennsylvania act of April 18, 1874 [Pamphl. L. 64], provides that in all actions wherein, by act of assembly or rule of court, the plaintiff is entitled to ask for judgment for want of a sufficient affidavit of defense, and the court shall decide against his right to such judgment, plaintiff may except to such decision and take a writ of error to the supreme court. This statute has been held to mean that unless plaintiff show exceptions no writ of error or appeal will lie. Security Sav., etc., Assoc. *v.* Anderson, 172 Pa. St. 305, 34 Atl. 44; Titusville Bldg., etc., Assoc. *v.* McCombs, 92 Pa. St. 364; Mehring *v.* Commonwealth Bldg., etc., Assoc., 17 Wkly. Notes Cas. (Pa.) 422; Watson *v.* Supplee, 14 Wkly. Notes Cas. (Pa.) 452. Under Mont. Rev. Stat. § 280, the overruling of a motion for judgment on the pleadings is deemed to have been excepted to without formal objection. Power *v.* Gum, 6 Mont. 5, 9 Pac. 575.

99. Frenzer *v.* Phillips, 57 Nebr. 229, 77 N. W. 668. See also Bliss *v.* Burnes, McCahon (Kan.) 91, wherein the complaining party failed to ask action upon a motion to set aside a summons, so as to enable him to except to the refusal to act, and was held precluded from complaining.

of action,[1] the substitution of parties,[2] the consolidation of actions,[3] the transfer of a suit from one branch of the court to another,[4] or the advancement of a cause for trial — an appropriate exception must be saved.[5] And so with decisions granting or denying a change of venue[6] or a continuance.[7]

e. Matters Arising During Trial — (1) *In General.* The failure to except to erroneous rulings or decisions made during the trial, or to formal defects, clerical errors, or irregularities which might have been cured had attention been called to them at the time, will constitute a waiver thereof, whether the cause is tried to a jury[8] or by the court without a jury.[9]

1. Wright *v.* Kinney, 123 N. C. 618, 31 S. E. 874.

2. Maul *v.* Drexel, 55 Nebr. 446, 76 N. W. 163.

3. Bangs *v.* Dunn, 66 Cal. 72, 4 Pac. 963; Turley *v.* Barnes, 67 Mo. App. 237.

4. Combs *v.* Combs, 19 Ky. L. Rep. 439, 41 S. W. 7.

5. Caveny *v.* Weiller, 90 Ill. 158; and see 2 Cent. Dig. tit. "Appeal and Error," § 1494 *et seq.*

6. Goodnow *v.* Plumb, 67 Iowa 661, 25 N. W. 870; Scott *v.* Neises, 61 Iowa 62, 15 N. W. 663; State *v.* McKee, 150 Mo. 233, 51 S. W. 421; Klotz *v.* Perteet, 101 Mo. 213, 13 S. W. 955; Carpenter *v.* McDavitt, 53 Mo. App. 393; Muller *v.* Bayly, 21 Gratt. (Va.) 521; Church *v.* Milwaukee, 31 Wis. 512; and see 2 Cent. Dig. tit. "Appeal and Error," § 1495.

Under Mills' Anno. Code Colo. (1891), § 387, providing that no exception need be taken to decisions on written motions based on the pleadings, the overruling of a written motion for a change of venue, based on the complaint, need not be excepted to. Campbell *v.* Equitable Securities Co., 12 Colo. App. 544, 56 Pac. 88.

7. Murphy *v.* Simonds, 14 La. Ann. 322; Scott *v.* Lawson, 10 La. Ann. 547; State *v.* Powers, 136 Mo. 194, 37 S. W. 936; Staples *v.* Arlington State Bank, 54 Nebr. 760, 74 N. W. 1066; Coad *v.* Home Cattle Co., 32 Nebr. 761, 49 N. W. 757, 29 Am. St. Rep. 465; Sulphur Springs *v.* Weeks, (Tex. 1891) 18 S. W. 489; Texas, etc., R. Co. *v.* Mallon, 65 Tex. 115; McGregor *v.* Skinner, (Tex. Civ. App. 1898) 47 S. W. 398; Peoples *v.* Terry, (Tex. Civ. App. 1898) 43 S. W. 846; and see 2 Cent. Dig. tit. "Appeal and Error," § 1496.

8. *Alabama.*— McLendon *v.* Bush, (Ala. 1900) 29 So. 56; Cook *v.* Davis, 12 Ala. 551.

Georgia.— Georgia R., etc., Co. *v.* Fitzgerald, 111 Ga. 869, 36 S. E. 955.

Indiana.— Poock *v.* Lafayette Bldg. Assoc., 71 Ind. 357.

Illinois.— Marshall *v.* John Grosse Clothing Co., 184 Ill. 421, 56 N. E. 807, 75 Am. St. Rep. 181; Crone *v.* Garst, 88 Ill. App. 124.

Kansas.— Morrill *v.* Seip, 26 Kan. 148.

Mississippi.— Rabe *v.* Tyler, 10 Sm. & M. (Miss.) 440, 48 Am. Dec. 763.

Missouri.— Sarazin *v.* Union R. Co., 153 Mo. 479, 55 S. W. 92; Bethune *v.* Cleveland, etc., R. Co., 149 Mo. 587, 51 S. W. 465; Thompson *v.* Cohen, (Mo. 1894) 24 S. W. 1023.

New Hampshire.— State *v.* Saidell, (N. H. 1900) 46 Atl. 1083.

New York.— Van Vleck *v.* Ballou, 40 N. Y. App. Div. 489, 58 N. Y. Suppl. 125; Rose *v.* Andrews, 62 N. Y. Suppl. 1146 [*affirmed* in 31 Misc. (N. Y.) 762, 64 N. Y. Suppl. 359].

Pennsylvania.— Hedge's Appeal, 63 Pa. St. 273; Matter of Pennsylvania Hall, 5 Pa. St. 204.

South Carolina.— See Hillhouse *v.* Jennings, (S. C. 1901) 38 S. E. 596.

Texas.— Glenn *v.* Kimbrough, 70 Tex. 147, 8 S. W. 81.

9. *Arkansas.*— Gardner *v.* Miller, 21 Ark. 398.

Illinois.— Jackson *v.* Bloom, 66 Ill. App. 473.

Iowa.—Williams *v.* Judd-Wells Co., 91 Iowa 378, 59 N. W. 271, 51 Am. St. Rep. 350.

Maryland.— Jackson *v.* Salisbury, 66 Md. 459, 7 Atl. 563.

Massachusetts.— Bass *v.* Haverhill Mut. F. Ins. Co., 10 Gray (Mass.) 400.

New York.— Waydell *v.* Adams, 23 N. Y. App. Div. 508, 48 N. Y. Suppl. 635.

Wisconsin.— Moss *v.* Vroman, 5 Wis. 147.

United States.— Martinton *v.* Fairbanks, 112 U. S. 670, 5 S. Ct. 321, 28 L. ed. 862; St. Louis Consol. Coal Co. *v.* Polar Wave Ice Co., 106 Fed. 798, 45 C. C. A. 638.

See 2 Cent. Dig. tit. "Appeal and Error," § 1498 *et seq.*

Availability of exceptions taken on former trial.— Exceptions taken on one trial are not available on an appeal from a determination in a subsequent trial. Harmison *v.* Clark, 2 Ill. 131; Lacy *v.* Overton, 2 A. K. Marsh. (Ky.) 440.

Mode of reservation.— On trial of the facts by the court, in order to reserve questions of law the court should be requested to decide legal propositions deemed applicable, and an exception taken to the refusal of such request. Griswold *v.* Sharpe, 2 Cal. 17.

When court will disregard failure to except. — While a court of review may take notice of erroneous rulings although no exceptions have been taken, yet it is a power which will not ordinarily be used, and will only be resorted to when it is apparent that grave injustice has been done. McMurray *v.* Gage, 19 N. Y. App. Div. 505, 46 N. Y. Suppl. 608. On an appeal from an order refusing a mandamus, where the issues of fact were tried by the trial court without a jury, the appellate court is not confined to a review of the rulings on questions of law and exceptions, since the court must determine whether the writ was properly refused or not from an inspection of the whole record; and, hence, no advantage can be taken of plaintiff's failure

(II) *Chancery Rule*—(A) *In General.* The rules of chancery practice do not require that exceptions should be taken to the various rulings and decisions made during the progress of the cause. The entire proceedings are matters of record, and are all subject to review without the taking of technical exceptions.[10] So, in some jurisdictions, where the practice is regulated by statute, exceptions are not required in equity causes triable anew on appeal.[11] But statutes of this character are not applicable to rulings on motions or demurrers, in which cases exceptions must be interposed.[12]

(B) *Issues Out of Chancery.* Error as to the form in which an issue out of chancery is submitted must be excepted to,[13] and on trial of such issues it is necessary, in order to authorize a consideration of the propriety of the rulings of the evidence, that exceptions be saved.[14]

(III) *Application of the Rule*—(A) *In General.* The general rule of requiring exceptions to be saved applies to rulings refusing a jury trial,[15] an order permitting two defendants to sever in their defense,[16] irregularities in selecting and swearing the jury,[17] misconduct of the jury,[18] an order requiring, or refusing

to except to an adverse charge in his instructions by the trial court. Manger *v.* Board of State Medical Examiners, 90 Md. 659, 45 Atl. 891. Where a judgment sets forth what facts the court found from the pleadings, and the legal conclusions it arrived at from the facts so found, as these appear on the record proper, such facts and conclusions may be reviewed by an appellate court, though no exception was saved to any ruling of the court. Browne *v.* Appleman, 83 Mo. App. 79.

10. 2 Daniels Ch. Pl. & Pr. 1459 *et seq.; Ex p.* Story, 12 Pet. (U. S.) 339, 9 L. ed. 1108, wherein Taney, J., said: "A bill of exceptions is altogether unknown in chancery practice."

11. Miller *v.* Whelan, 158 Ill. 544, 42 N. E. 59; Chicago Artesian Well Co. *v.* Connecticut Mut. L. Ins. Co., 57 Ill. 424; Cochrane *v.* Breckenridge, 75 Iowa 213, 39 N. W. 274; Dicken *v.* Morgan, 59 Iowa 157, 13 N. W. 57; Mize *v.* Jackson, 17 Ky. L. Rep. 750, 32 S. W. 467; Newcomb *v.* White, 5 N. M. 435, 23 Pac. 671. *Contra,* Binford *v.* Dement, 72 Ala. 491.

A defective answer, not excepted to, will be examined on appeal. Stuart *v.* Mechanics', etc., Bank, 19 Johns. (N. Y.) 496. But in Alabama it seems that an exception should be taken to an answer which, though responsive, is not precise or explicit. Andrews *v.* Jones, 10 Ala. 400.

In Kentucky the court can review a case in equity on exceptions to an order sustaining a demurrer to an answer, and refusing leave to file an amended answer, although there may be no exception to the order submitting the cause or to the final judgment. Mathews *v.* Mathews, 16 Ky. L. Rep. 788, 29 S. W. 862.

In Maryland, by statute, the appellate court may not, in the absence of proper exceptions, consider matters relating to the competency of witnesses and the taking of proof. Young *v.* Omohundro, 69 Md. 424, 16 Atl. 120; Cross *v.* Cohen, 3 Gill (Md.) 257; Harwood *v.* Jones, 10 Gill & J. (Md.) 404, 32 Am. Dec. 180.

Under the Maryland act of 1832, § 5, the court may, in the absence of exception to the sufficiency of the averments of the bill, consider them as constituting a part of the equity of the cause. See Eyler *v.* Crabbs, 2 Md. 137, 56 Am. Dec. 711; Thomas *v.* Doub, 1 Md. 252. But this section will not preclude consideration of an objection, made for the first time, that the relief should have been sought by petition and not original bill. Boteler *v.* Beall, 7 Gill & J. (Md.) 389.

In Washington, contrary to the general rule elsewhere, an objection to testimony raises the question on appeal without exception to the ruling. Scully *v.* Book, 3 Wash. 182, 28 Pac. 556.

12. Fink *v.* Mohn, 85 Iowa 739, 52 N. W. 506; Hodgin *v.* Toler, 70 Iowa 21, 30 N. W. 1, 59 Am. Rep. 435; Patterson *v.* Jack, 59 Iowa 632, 13 N. W. 724; Powers *v.* O'Brien County, 54 Iowa 501, 6 N. W. 720; Abbott *v.* Barton, 47 Nebr. 822, 66 N. W. 838.

13. Hay *v.* Miller, 48 Nebr. 156, 66 N. W. 1115.

14. Dodge *v.* Griswold, 12 N. H. 573; Lee *v.* Boak, 11 Gratt. (Va.) 182; Stadler *v.* Grieben, 61 Wis. 500, 21 N. W. 629; McLaughlin *v.* Potomac Bank, 7 How. (U. S.) 220, 12 L. ed. 675; Brockett *v.* Brockett, 3 How. (U. S.) 691, 11 L. ed. 786.

The exceptions must be brought before the court of chancery, and passed upon by it, before they can be considered by the appellate court. McLaughlin *v.* Potomac Bank, 7 How. (U. S.) 220, 12 L. ed. 675; Brockett *v.* Brockett, 3 How. (U. S.) 691, 11 L. ed. 786.

In Virginia an exception to the amount of a commissioner's fees must be taken in the trial court; otherwise, on the filing of a proper affidavit, he will be allowed his fees. Shipman *v.* Fletcher, 83 Va. 349, 2 S. E. 198.

15. Klotz *v.* Perteet, 101 Mo. 213, 13 S. W. 955. But see Meech *v.* Brown, 4 Abb. Pr. (N. Y.) 19, 1 Hilt. (N. Y.) 257, holding that the right to a trial by jury when demanded will not be lost by the failure to except.

16. Commercial, etc., Bank *v.* Lum, 7 How. (Miss.) 414.

17. Quinn *v.* Woodhouse, 26 Pa. St. 333.

18. Leeser *v.* Boekhoff, 38 Mo. App. 445.

to require, plaintiff to elect upon which count of his complaint he will proceed,[19] a ruling limiting the number of witnesses on a given point,[20] the conduct of, or remarks made by, the presiding judge,[21] objectionable conduct or remarks of counsel during the progress of the trial, or in the course of argument to the court or jury,[22] and rulings as to the right of counsel to argue or address the jury as to particular matters.[23] Rulings respecting the right of the jury to view premises must also be excepted to if it is desired to test their accuracy.[24]

(B) *Competency of Witnesses.* The alleged incompetency of a witness will not be considered where no exception on that ground was saved below.[25] But no exception on that ground need be taken to a deposition in a chancery cause.[26]

(C) *Rulings as to Evidence* — (1) IN GENERAL. It may be laid down as a general proposition that rulings respecting evidence, unless duly excepted to, will be deemed to have been waived by the complaining party.[27]

19. Finley *v.* Brown, 22 Iowa 538; Hammett *v.* Trueworthy, 51 Mo. App. 281; Tuckwood *v.* Hanthorn, 67 Wis. 326, 30 N. W. 705.

20. Skeen *v.* Mooney, 8 Utah 157, 30 Pac. 363.

21. Hall *v.* Emporia First Nat. Bank, 133 Ill. 234, 24 N. E. 546; Mulliner *v.* Bronson, 114 Ill. 510, 2 N. E. 671; Yunker *v.* Marshall, 65 Ill. App. 667; Long *v.* Travellers' Ins. Co., (Iowa 1901) 85 N. W. 24; Osborn *v.* Ratliff, 53 Iowa 748, 5 N. W. 746; Vass *v.* Waukesha, 90 Wis. 337, 63 N. W. 280; and see 2 Cent. Dig. tit. "Appeal and Error," § 1499.

22. *Alabama.*— Kansas City, etc., R. Co. *v.* Webb, 97 Ala. 157, 11 So. 888; Lunsford *v.* Dietrich, 93 Ala. 565, 9 So. 308, 30 Am. St. Rep. 79.

Georgia.— Poullain *v.* Poullain, 79 Ga. 11, 4 S. E. 81.

Illinois.— Grand Lodge, etc. *v.* Belcham, 145 Ill. 308, 33 N. E. 886; Elgin City R. Co. *v.* Wilson, 56 Ill. App. 364; West Chicago St. R. Co. *v.* Levy, 82 Ill. App. 202; Chicago City R. Co. *v.* Duffin, 24 Ill. App. 28.

Indiana.— Staser *v.* Hogan, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; Farman *v.* Lauman, 73 Ind. 568; McKinney *v.* Shaw, etc., Mfg. Co., 51 Ind. 219; Vannatta *v.* Duffy, 4 Ind. App. 168, 30 N. E. 807.

Kansas.— Kansas City *v.* McDonald, 60 Kan. 481, 57 Pac. 123.

Michigan.— Bedford *v.* Penney, 65 Mich. 667, 32 N. W. 888.

Missouri.— Casey *v.* Gill, 154 Mo. 181, 55 S. W. 219; Doyle *v.* Missouri, etc., Trust Co., 140 Mo. 1, 41 S. W. 255; Sampson *v.* Atchison, etc., R. Co., 57 Mo. App. 308; Kennedy *v.* Holladay, 25 Mo. App. 503.

Montana.— Littrell *v.* Wilcox, 11 Mont. 77, 27 Pac. 394.

New York.—Frischman *v.* Zimmermann, 19 Misc. (N. Y.) 53, 42 N. Y. Suppl. 824.

Pennsylvania.— Sheehan *v.* Rosen, 12 Pa. Super. Ct. 298.

Texas.— Western Union Tel. Co. *v.* Smith, (Tex. Civ. App. 1895) 33 S. W. 742.

Wisconsin.— Lane *v.* Madison, 86 Wis. 453, 57 N. W. 93.

See 2 Cent. Dig. tit. "Appeal and Error," § 1500.

23. Brinkley *v.* Platt, 40 Md. 529; Wilkins *v.* Anderson, 11 Pa. St. 399.

24. Chicago, etc., R. Co. *v.* Leah, 152 Ill. 249, 38 N. E. 556; Gilmore *v.* H. W. Baker Co., 12 Wash. 468, 41 Pac. 124; and see 2 Cent. Dig. tit. "Appeal and Error," § 1501.

25. H. Herman Sawmill Co. *v.* Bailey, (Ky. 1900) 58 S. W. 449; Case *v.* Case, 49 Hun (N. Y.) 83, 1 N. Y. Suppl. 714, 17 N. Y. St. 313; Downey *v.* Hicks, 14 How. (U. S.) 240, 14 L. ed. 404; and see 2 Cent. Dig. tit. "Appeal and Error," § 1506.

26. Fant *v.* Miller, 17 Gratt. (Va.) 187; Vanscoy *v.* Stinchcomb, 29 W. Va. 263, 11 S. E. 927; Hill *v.* Proctor, 10 W. Va. 59.

27. *Alabama.*— Saltmarsh *v.* Bower, 22 Ala. 221; Rives *v.* McLosky, 5 Stew. & P. (Ala.) 330.

California.— Wise *v.* Wakefield, 118 Cal. 107, 50 Pac. 310; Dickerson *v.* Dickerson, 108 Cal. 351, 41 Pac. 475.

Colorado.— Cone *v.* Montgomery, 25 Colo. 277, 53 Pac. 1052; Mt. Wilson Gold, etc., Min. Co. *v.* Burbridge, 11 Colo. App. 487, 53 Pac. 826.

Connecticut.— Post *v.* Hartford St. R. Co., 72 Conn. 362, 44 Atl. 547.

District of Columbia.—Wilkins *v.* Hillman, 8 App. Cas. (D. C.) 469.

Georgia.— Cook *v.* Kilgo, 111 Ga. 817, 35 S. E. 673.

Illinois.— Chicago Great Western R. Co. *v.* Mohan, 187 Ill. 281, 58 N. E. 395; Bloomington *v.* Legg, 151 Ill. 9, 37 N. E. 696, 42 Am. St. Rep. 216; McGuire *v.* Gilbert, 80 Ill. App. 235; Huthmacher *v.* Lowman, 66 Ill. App. 448.

Indiana.— Bartholomew County *v.* Boynton, 27 Ind. 19; Union City Electric Light, etc., Co. *v.* Jacqua, (Ind. App. 1900) 58 N. E. 508.

Indian Territory.— Eddings *v.* Boner, 1 Indian Terr. 173, 38 S. W. 1110.

Iowa.— Parker *v.* Ottumwa, (Iowa 1901) 85 N. W. 805.

Kansas.—Fleming *v.* Latham, 48 Kan. 773, 30 Pac. 166.

Kentucky.— H. Herman Sawmill Co. *v.* Bailey, (Ky. 1900) 58 S. W. 449; Terrill *v.* Jennings, 1 Metc. (Ky.) 450.

Massachusetts.— Walkup *v.* Pickering, 176 Mass. 174, 57 N. E. 364.

Michigan.— Childs *v.* Nordella, 116 Mich. 511, 74 N. W. 713; Banks *v.* Cramer, 109 Mich. 168, 66 N. W. 946.

Minnesota.— Roehl *v.* Baasen, 8 Minn. 26.

(2) Admission and Exclusion. A mere objection to a ruling admitting or excluding evidence is not enough to preserve for review alleged error in the ruling, but an exception must also be taken.[28] If evidence is erroneously admitted,[29]

Missouri.— Trenton *v.* Devorss, 70 Mo. App. 8.

Montana.— Gregg *v.* Kommers, 22 Mont. 511, 57 Pac. 92.

Nebraska.— Bennett *v.* McDonald, 52 Nebr. 278, 72 N. W. 268; Johnson *v.* Swayze, 35 Nebr. 117, 52 N. W. 835.

New Jersey.— Ward *v.* Ward, 22 N. J. L. 699.

Pennsylvania.—Simpson *v.* Meyers, 197 Pa. St. 522, 47 Atl. 868; Schondorf *v.* Griffith, 13 Pa. Super. Ct. 580.

Tennessee.— Sutton *v.* Sutton, (Tenn. Ch. 1900) 58 S. W. 891; Southern Iron Car Line *v.* East Tennessee, etc., R. Co., (Tenn. Ch. 1897) 42 S. W. 529.

Texas.— Orr, etc., Shoe Co. *v.* Ferrell, 68 Tex. 638, 5 S. W. 490.

Washington.— State *v.* McCann, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216.

Wisconsin.— Moss *v.* Vroman, 5 Wis. 147.

United States.— Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. ed. 485; St. Louis Consol. Coal Co. *v.* Polar Wave Ice Co., 106 Fed. 798, 45 C. C. A. 638.

See 2 Cent. Dig. tit. "Appeal and Error," § 1503 *et seq.*

In Washington, in causes tried by the court without a jury, rulings relating to the admission or rejection of evidence will not, in the absence of exceptions to the findings on the evidence, be reviewed. Lewis *v.* McDougall, 19 Wash. 338, 53 Pac. 664; Schlotfeldt *v.* Bull, 18 Wash. 64, 50 Pac. 590; Rice *v.* Stevens, 9 Wash. 298, 37 Pac. 440. But *compare* Schlotfeldt *v.* Bull, 17 Wash. 6, 7, 48 Pac. 343, in which it was held "that where the appeal is from an error of the court in refusing to admit testimony, and such refusal is duly excepted to at the time, it is not incumbent upon the appellant to again except to the findings of fact."

28. *Alabama.*— Spear *v.* Lomax, 42 Ala. 576; State Bank *v.* McDade, 4 Port. (Ala.) 252.

California.—Austin *v.* Andrews, 71 Cal. 98, 16 Pac. 546; Turner *v.* Tuolumne County Water Co., 25 Cal. 397.

Florida.— Tischler *v.* Apple, 30 Fla. 132, 11 So. 273; Coker *v.* Hayes, 16 Fla. 368.

Indiana.— Cox *v.* Rash, 82 Ind. 519; McKinney *v.* Shaw, etc., Mfg. Co., 51 Ind. 219; Wiler *v.* Manley, 51 Ind. 169.

Kansas.— Benepe *v.* Wash. 38 Kan. 407, 16 Pac. 950.

Kentucky.—Russell *v.* Marks, 3 Metc. (Ky.) 37; Carrol *v.* Mays, 8 Dana (Ky.) 178.

Louisiana.— Gueringer *v.* His Creditors, 33 La. Ann. 1279; Burke *v.* Edey, 21 La. Ann. 749.

Missouri.— Griffith *v.* Hanks, 91 Mo. 109, 4 S. W. 508; Koegel *v.* Givens, 79 Mo. 77; Springfield *v.* Ford, 40 Mo. App. 586; Fairgieve *v.* Moberly, 29 Mo. App. 141.

New York.— Huller *v.* Wynne, 16 Misc. (N. Y.) 580, 38 N. Y. Suppl. 700, 74 N. Y. St. 160.

Pennsylvania.— Yeager *v.* Fuss, 9 Wkly. Notes Cas. (Pa.) 557.

South Carolina.— Burri *v.* Whitner, 3 S. C. 510.

Washington.—Scully *v.* Book, 3 Wash. 182, 28 Pac. 556.

West Virginia.— Poling *v.* Ohio River R. Co., 38 W. Va. 645, 18 S. E. 782, 24 L. R. A. 215; State *v.* Harr, 38 W. Va. 58, 17 S. E. 794.

United States.— Laber *v.* Cooper, 7 Wall. (U. S.) 565, 19 L. ed. 151; Poole *v.* Fleeger, 11 Pet. (U. S.) 185, 9 L. ed. 680.

See 2 Cent. Dig. tit. "Appeal and Error," § 1504 *et seq.*

It has been held that the ruling may be revised where the exception is subsequently allowed by the presiding judge. Holbrook *v.* Dow, 12 Gray (Mass.) 357.

29. *Alabama.*— Louisville, etc., R. Co. *v.* Binion, 107 Ala. 645, 18 So. 75; Inge *v.* Boardman, 2 Ala. 331.

California.—Woods *v.* Jensen, 130 Cal. 200, 62 Pac. 473; McVey *v.* Beam, (Cal. 1894) 38 Pac. 515.

Connecticut.— Post *v.* Hartford St. R. Co., 72 Conn. 362, 44 Atl. 547.

Georgia.— Hill *v.* Van Duzer, 111 Ga. 867, 36 S. E. 966.

Illinois.— Bloomington *v.* Legg, 151 Ill. 9, 37 N. E. 696, 42 Am. St. Rep. 216 [*affirming* 48 Ill. App. 459]; Deane *v.* Denver, etc., R. Co., 77 Ill. App. 242.

Indiana.— Rotan *v.* Stoeber, 81 Ind. 145; Hunt *v.* Jones, 1 Ind. App. 545, 28 N. E. 98.

Iowa.— Parker *v.* Ottumwa, (Iowa 1901) 85 N. W. 805; Price *v.* Burlington, etc., R. Co., 42 Iowa 16.

Kansas.— Shirk *v.* Sheridan, (Kan. App. 1900) 62 Pac. 436; Samuels *v.* Burnham, (Kan. App. 1900) 61 Pac. 755.

Kentucky.— Shippen *v.* Curry, 3 Metc. (Ky.) 184; White *v.* Neville, 9 Ky. L. Rep. 56.

Louisiana.—Somerville *v.* Young, 3 La. Ann. 290.

Maryland.— McCullough *v.* Biedler, 66 Md. 283, 7 Atl. 454; Mahoney *v.* Mackubin, 54 Md. 268.

Massachusetts.— Walkup *v.* Pickering, 176 Mass. 174, 57 N. E. 364; Damon *v.* Carrol, 163 Mass. 404, 40 N. E. 185.

Michigan.— Noble *v.* St. Joseph, etc., St. R. Co., 98 Mich. 249, 57 N. W. 126.

Mississippi.—Anderson *v.* Williams, 24 Miss. 684; McRaven *v.* McGuire, 9 Sm. & M. (Miss.) 34.

Missouri.— Dammann *v.* St. Louis, 152 Mo. 186, 53 S. W. 932; Murphy *v.* Black, 78 Mo. App. 316.

Montana.— Gregg *v.* Kommers, 22 Mont. 511, 57 Pac. 92; Stafford *v.* Hornbuckle, 3 Mont. 485.

New Jersey.— Coil *v.* Wallace, 24 N. J. L. 291; Ward *v.* Ward, 22 N. J. L. 699.

New York.— Hard *v.* Ashley, 117 N. Y. 606, 23 N. E. 177, 28 N. Y. St. 601; Smith *v.* Nassau Electric R. Co., 57 N. Y. App. Div. 152,

excluded,[30] or stricken out, in the absence of a timely exception thereto, the ruling will not be reviewed.[31]

(3) DEPOSITIONS. Error in permitting a deposition, or parts thereof, to be read,[32] or in suppressing it, will not be considered unless the action of the court was duly excepted to.[33]

67 N. Y. Suppl. 1044; Schumaker *v.* Mather, 60 Hun (N. Y.) 576, 14 N. Y. Suppl. 411, 38 N. Y. St. 542 [*affirmed* in 133 N. Y. 590, 30 N. E. 755, 44 N. Y. St. 754].

North Carolina.— Thompson *v.* Olney, 96 N. C. 9, 1 S. E. 620.

Oregon.— O'Connor *v.* Van Hoy, 29 Oreg. 505, 45 Pac. 762.

Pennsylvania.— Philadelphia Trust, etc., Co. *v.* Purves, (Pa. 1888) 13 Atl. 936.

South Carolina.— Watts *v.* South Bound R. Co., 60 S. C. 67, 38 S. E. 240.

Tennessee.— Stacker *v.* Louisville, etc., R. Co., (Tenn. 1901) 61 S. W. 766; Graham *v.* McReynolds, 90 Tenn. 673, 18 S. W. 272.

Texas.— Collins *v.* Panhandle Nat. Bank, 75 Tex. 254, 11 S. W. 1053; Dyer *v.* Pierce, (Tex. Civ. App. 1901) 60 S. W. 441.

Virginia.— Lamberts *v.* Cooper, 29 Gratt. (Va.) 61.

Wisconsin.— Drury *v.* Mann, 4 Wis. 202.

United States.— Toplitz *v.* Hedden, 146 U. S. 252, 13 S. Ct. 70, 36 L. ed. 961; Felton *v.* Newport, 92 Fed. 470, 34 C. C. A. 470; Supreme Council, etc. *v.* New York Fidelity, etc., Co., 63 Fed. 48, 22 U. S. App. 439, 11 C. C. A. 96; Paxon *v.* Brown, 61 Fed. 874, 27 U. S. App. 49, 10 C. C. A. 135.

In North Carolina "the general rule undoubtedly is, . . . that this court will not review evidence as to its competency or incompetency where there is no exception." But where evidence is offered that has been made incompetent by statute to prove the fact for which it is offered, the court must reject it on its own motion, and no exception is necessary. Presnell *v.* Garrison, 122 N. C. 595, 597, 29 S. E. 839 [*citing* State *v.* Ballard, 79 N. C. 627].

30. *Arizona.*— Newark *v.* Marks, (Ariz. 1890) 28 Pac. 960.

Arkansas.— Texas, etc., R. Co. *v.* Kirby, 44 Ark. 103.

California.— Lucas *v.* Richardson, 68 Cal. 618, 10 Pac. 183.

Illinois.— Chicago Great Western R. Co. *v.* Mohan, 187 Ill. 281, 58 N. E. 395 [*affirming* 88 Ill. App. 151]; Mahany *v.* People, 138 Ill. 311, 27 N. E. 918; McGuire *v.* Gilbert, 80 Ill. App. 235.

Indiana.— McGee *v.* Robbins, 58 Ind. 463.

Iowa.— Souster *v.* Black, 87 Iowa 519, 54 N. W. 534.

Maryland.— Thorne *v.* Fox, 67 Md. 67, 8 Atl. 667.

Missouri.— Carle *v.* De Sota, 156 Mo. 443, 57 S. W. 113; Pierce *v.* Michel, 60 Mo. App. 187.

New York.— Hull *v.* Cronk, 55 N. Y. App. Div. 83, 67 N. Y. Suppl. 54; Brooks *v.* Christopher, 5 Duer (N. Y.) 216.

Pennsylvania.— Simpson *v.* Meyers, 197 Pa. St. 522, 47 Atl. 868; Warfel *v.* Knott, 128 Pa. St. 528, 24 Wkly. Notes Cas. (Pa.) 513, 18 Atl. 390.

Rhode Island.— Collier *v.* Jenks, 19 R. I. 137, 32 Atl. 208, 61 Am. St. Rep. 741.

Tennessee.— State *v.* Mitchell, 104 Tenn. 336, 58 S. W. 365; Chicago Bldg., etc., Co. *v.* Barry, (Tenn. Ch. 1898) 52 S. W. 451.

Texas.— Durham *v.* Atwell, (Tex. Civ. App. 1894) 27 S. W. 316.

An exception to the exclusion of evidence, to be available, should state what is expected to be elicited by the questions. Cox *v.* Rash, 82 Ind. 519; Jordan *v.* D'Heur, 71 Ind. 199; Huggins *v.* Hughes, 11 Ind. App. 465, 39 N. E. 298; Kendallville First Nat. Bank *v.* Stanley, 4 Ind. App. 213, 30 N. E. 799.

Futile exception.— If it is urged that an exception to the exclusion of evidence would have been futile because no other evidence could be offered, that fact should be clearly shown and not left to inference. Roehl *v.* Baasen, 8 Minn. 26.

31. Fleming *v.* Yost, 137 Ind. 95, 36 N. E. 705; Republican Valley R. Co. *v.* Boyse, 14 Nebr. 130, 15 N. W. 364; Rowe *v.* Lent, 62 Hun (N. Y.) 621, 17 N. Y. Suppl. 131, 42 N. Y. St. 483.

32. *Illinois.*— Gardner *v.* Haynie, 42 Ill. 291.

Kentucky.— Edmonson *v.* Kentucky Cent. R. Co. (Ky. 1898) 46 S. W. 679; Rhea *v.* Yoder, Ky. Dec. 87.

Mississippi.— Jones *v.* Loggins, 37 Miss. 546.

New York.— Fiske *v.* Ernst, 62 N. Y. Suppl. 429.

Tennessee.—Perry *v.* Clift, (Tenn. Ch. 1899) 54 S. W. 121; Birdsong *v.* Birdsong, 2 Head (Tenn.) 289; Looper *v.* Bell, 1 Head (Tenn.) 373.

Texas.— Noell *v.* Bonner, (Tex. Civ. App. 1892) 21 S. W. 553.

Virginia.— Fant *v.* Miller, 17 Gratt. (Va.) 187.

West Virginia.— Vanscoy *v.* Stinchcomb, 29 W. Va. 263, 11 S. E. 927; Hill *v.* Proctor, 10 W. Va. 59.

United States.— Paxson *v.* Brown, 61 Fed. 874, 27 U. S. App. 49, 10 C. C. A. 135.

See 2 Cent. Dig. tit. "Appeal and Error," § 1508.

Thus, it has been held that the fact that an objection to a deposition, instead of being made in writing before the trial, was made orally when the deposition was offered, cannot be urged on appeal unless exception was taken to such objection when made. Garner *v.* Cutler, 28 Tex. 175.

33. Houston *v.* Bruner, 59 Ind. 25; Hauck *v.* Grantham, 22 Ind. 53.

The suppression of interrogatories must be excepted to. Union City Electric Light, etc., Co. *v.* Jacqua, (Ind. App. 1900) 58 N. E. 508.

(4) VARIANCE. Variance between the pleading and proof will, in the absence of an exception to a ruling on an objection therefor, be disregarded.[34]

(D) *Instructions*—(1) IN GENERAL. The propriety of instructions generally, or of instructions which it is claimed erroneously permitted the jury to consider matters not in evidence and base their verdict thereon, cannot be questioned on appeal or error unless exception was duly taken in the trial court to the error complained of.[35] Such instructions will be regarded as

34. Tuson *v.* Crosby, 172 Mass. 478, 52 N. E. 744; Taylor *v.* Penquite, 35 Mo. App. 389; Dano *v.* Sessions, 65 Vt. 79, 26 Atl. 585.

35. *Alabama.*— Abbott *v.* Mobile, 119 Ala. 595, 24 So. 565; Alabama Great Southern R. Co. *v.* Tapia, 94 Ala. 226, 10 So. 236.

Arkansas.— St. Louis, etc., R. Co. *v.* Vincent, 36 Ark. 451.

California.— Clark *v.* His Creditors, 57 Cal. 639.

Colorado.— Sams Automatic Car Coupler Co. *v.* League, 25 Colo. 129, 54 Pac. 642; Bourke *v.* Van Keuren, 20 Colo. 95, 36 Pac. 882; Goldhammer *v.* Dyer, 7 Colo. App. 29, 42 Pac. 177.

Dakota.— Pielke *v.* Chicago, etc., R. Co., 6 Dak. 444, 43 N. W. 813.

District of Columbia.— Fulton *v.* Fletcher, 12 App. Cas. (D. C.) 1.

Florida.— Williams *v.* State, 32 Fla. 251, 13 So. 429.

Illinois.— Willard *v.* Petitt, 153 Ill. 663, 39 N. E. 991; Jefferson *v.* Chapman, 127 Ill. 438, 20 N. E. 33, 11 Am. St. Rep. 136; Chicago *v.* Hogan, 80 Ill. App. 344.

Indiana.— Lowell *v.* Gathright, 97 Ind. 313; Port Huron Engine, etc., Co. *v.* Smith, 21 Ind. App. 233, 52 N. E. 106.

Iowa.—Delmonica Hotel Co. *v.* Smith, (Iowa 1901) 84 N. W. 906; Plano Mfg. Co. *v.* McCoid, (Iowa 1899) 80 N. W. 659.

Kansas.— Wilson *v.* Jones, 48 Kan. 767, 30 Pac. 117; Barton *v.* Pond, 8 Kan. App. 859, 55 Pac. 519; Central State Bank *v.* Glenn, 6 Kan. App. 886, 50 Pac. 961.

Kentucky.— Sturm *v.* Meyer, 12 Ky. L. Rep. 350, 14 S. W. 359; Louisville, etc., R. Co. *v.* Bowcock, 21 Ky. L. Rep. 896, 53 S. W. 262; Davis *v.* Bailey, 21 Ky. L. Rep. 839.

Louisiana.— Bayon *v.* Vavasseur, 10 Mart. (La.) 61.

Maine.— Hatch *v.* Dexter First Nat. Bank, 94 Me. 348, 47 Atl. 908.

Maryland.— Travelers' Ins. Co. *v.* Parker, (Md. 1900) 47 Atl. 1042; Lewis *v.* Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385.

Massachusetts.— Hoyt *v.* Kennedy, 170 Mass. 54, 48 N. E. 1073; Rawson *v.* Plaisted, 151 Mass. 71, 23 N. E. 722.

Michigan.— Longyear *v.* Gregory, 110 Mich. 277, 68 N. W. 116; Bolton *v.* Riddle, 35 Mich. 13.

Minnesota.— Anderson *v.* St. Croix Lumber Co., 47 Minn. 24, 49 N. W. 407; Smith *v.* Pearson, 44 Minn. 397, 46 N. W. 849.

Mississippi.— Evans *v.* Clark, (Miss. 1899) 24 So. 532; Smokey *v.* Johnson, (Miss. 1888) 4 So. 788.

Missouri.— Feary *v.* Metropolitan St. R. Co., (Mo. 1901) 62 S. W. 452; Clark *v.* Hughes, 73 Mo. App. 633.

Montana.— McKinney *v.* Powers, 2 Mont. 466.

Nebraska.— Elkhorn Valley Lodge No. 57, etc. *v.* Hudson, 59 Nebr. 672, 81 N. W. 859; Humpert *v.* McGavock, 59 Nebr. 346, 80 N. W. 1038.

New Hampshire.— Conway *v.* Jefferson, 46 N. H. 521.

New York.—Farmers' L. & T. Co. *v.* Siefke, 144 N. Y. 354, 39 N. E. 358, 63 N. Y. St. 662.

North Carolina.— Barrett *v.* McCrummen, 128 N. C. 81, 38 S. E. 286; Redmond *v.* Mullenax, 113 N. C. 505, 18 S. E. 708.

North Dakota.— Colby *v.* McDermont, 6 N. D. 495, 71 N. W. 772.

Ohio.— Pittsburg, etc., R. Co. *v.* Porter, 32 Ohio St. 328.

Oklahoma.— Everett *v.* Akins, 8 Okla. 184, 56 Pac. 1062.

Rhode Island.— Stone *v.* Pendleton, 21 R. I. 332, 43 Atl. 643.

South Carolina.— Nohrden *v.* Northeastern R. Co., 59 S. C. 87, 37 S. E. 228; Winsmith *v.* Walker, 5 S. C. 473.

South Dakota.— Winn *v.* Sanborn, 10 S. D. 642, 75 N. W. 201; Landauer *v.* Sioux Falls Imp. Co., 10 S. D. 205, 72 N. W. 467.

Tennessee.— Gregory *v.* Allen, Mart. & Y. (Tenn.) 73.

Utah.— Lebcher *v.* Lambert, (Utah 1900) 63 Pac. 628; Thirkfield *v.* Mountain View Cemetery Assoc., 12 Utah 76, 41 Pac. 564.

Vermont.— Wheatley *v.* Waldo, 36 Vt. 237.

Virginia.— Montague *v.* Allan, 78 Va. 592, 49 Am. Rep. 384.

Washington.— Reiner *v.* Crawford, (Wash. 1901) 63 Pac. 516; Anderson *v.* Carothers, 18 Wash. 520, 52 Pac. 229.

West Virginia.— Dimmey *v.* Wheeling, etc., R. Co., 27 W. Va. 32, 55 Am. Rep. 292.

Wisconsin.— Brunette *v.* Gagen, 106 Wis. 618, 82 N. W. 564; Arndt *v.* Keller, 98 Wis. 274, 71 N. W. 651.

United States.— Eddy *v.* Lafayette, 163 U. S. 456, 16 S. Ct. 1082, 41 L. ed. 225; Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. ed. 485; Monarch Cycle Mfg. Co. *v.* Royer Wheel Co., 105 Fed. 324, 44 C. C. A. 523; Tinsman *v.* F. R. Patch Mfg. Co., 101 Fed. 373, 41 C. C. A. 388.

See 2 Cent. Dig. tit. "Appeal and Error," § 1516 *et seq.*

In Wisconsin it has been laid down that when a motion for a new trial is made at the same term at which the action is tried, and such motion is based in whole or in part upon the ground that the judge erred in his instructions to the jury, such motion is equivalent to an exception to the instruction, and properly brings its correctness before the court for consideration upon an appeal from

the law of the case in testing the sufficiency of the evidence to support the verdict.[36]

(2) Requested Instructions. The same principle is applicable to requested instructions which are given or refused,[37] and to the omission or failure of the court to submit issues to the jury,[38] or the refusal to present special questions.[39]

(3) Instructions in Absence of Parties. It has been held that it is no excuse for the want of an exception that neither of the counsel were present when the instructions were given;[40] but the contrary view has also been taken.[41]

(4) Taking Case from Jury — Directing Verdict. Alleged error on the part of the trial court in taking a case from the jury, or in directing or refusing to direct a verdict, must be saved by exception,[42] and the omission to do so will

a judgment rendered upon the verdict after such motion for a new trial is denied. Wells *v.* Perkins, 43 Wis. 160; Cohn *v.* Stewart, 41 Wis. 527; Nisbet *v.* Gill, 38 Wis. 657.

36. Peet *v.* Chicago, etc., R. Co., 88 Iowa 520, 55 N. W. 508; Bellows *v.* Litchfield, 83 Iowa 36, 48 N. W. 1062; Bennett *v.* Wabash, etc., R. Co., 61 Iowa 355, 16 N. W. 210; Sturm *v.* Meyer, 12 Ky. L. Rep. 350, 14 S. W. 359; Ohio Valley R. Co. *v.* Alves, 11 Ky. L. Rep. 811; Louisville, etc., R. Co. *v.* Connelly, 5 Ky. L. Rep. 926; Baugher *v.* Wilkins, 16 Md. 35, 77 Am. Dec. 279; Smith *v.* Pearson, 44 Minn. 397, 46 N. W. 849.

37. *Arkansas.*— Johnson *v.* West, 41 Ark. 535.

California.— Leahy *v.* Southern Pac. R. Co., 65 Cal. 150, 3 Pac. 622.

Colorado.— Layton *v.* Kirkendall, 20 Colo. 236, 38 Pac. 55.

Florida.— Huling *v.* Florida Sav. Bank, etc., Exch., 19 Fla. 695; Stewart *v.* Mills, 18 Fla. 57.

Illinois.— England *v.* Vandermark, 147 Ill. 76, 35 N. E. 465; Phillips *v.* Abbott, 52 Ill. App. 328.

Indiana.— Stewart *v.* Murray, 92 Ind. 543, 47 Am. Rep. 167.

Iowa.— Keokuk Stove Works *v.* Hammond, 94 Iowa 694, 63 N. W. 563; Cox *v.* Allen, 91 Iowa 462, 59 N. W. 335; State *v.* Brewer, 70 Iowa 384, 30 N. W. 646.

Kansas.— Werner *v.* Jewett, 54 Kan. 530, 38 Pac. 793.

Kentucky.— Kennedy *v.* Cunningham, 2 Metc. (Ky.) 538; Ruark *v.* Mansfield, 5 Ky. L. Rep. 851.

Maryland.— Cloud *v.* Needles, 6 Md. 501.

Massachusetts.— Burr *v.* Joy, 151 Mass. 295, 23 N. E. 838.

Michigan.— Runnells *v.* Pentwater, 109 Mich. 512, 67 N. W. 558; Thorn *v.* Maurer, 85 Mich. 569, 48 N. W. 640.

Mississippi.— Fisher *v.* Fisher, 43 Miss. 212.

Missouri.— O'Neil *v.* C. Young, etc., Seed, etc., Co., 58 Mo. App. 628.

Nebraska.— Omaha *v.* McCavock, 47 Nebr. 313, 66 N. W. 415; Sigler *v.* McConnell, 45 Nebr. 598, 63 N. W. 870.

New York.— Springer *v.* Westcott, 166 N. Y. 117, 59 N. E. 693 [*affirming* 19 N. Y. App. Div. 366, 46 N. Y. Suppl. 589]; Gracie *v.* Stevens, 56 N. Y. App. Div. 203, 67 N. Y. Suppl. 688; Roberts *v.* Lloyd, 56 N. Y. Super. Ct. 333, 4 N. Y. Suppl. 446, 21 N. Y. St. 908.

Ohio.— Monroeville *v.* Root, 54 Ohio St. 523, 44 N. E. 237; Ohio Mut. L. Assoc. *v.* Draddy, 8 Ohio N. P. 140, 10 Ohio Dec. 591; Loewenstein *v.* Bennet, 19 Ohio Cir. Cir. Ct. 616, 10 Ohio Cir. Dec. 530.

South Carolina.— Greene *v.* Duncan, 37 S. C. 239, 15 S. E. 956; Sherard *v.* Richmond, etc., R. Co., 35 S. C. 467, 14 S. E. 952.

Texas.— Texas Loan Agency *v.* Fleming, (Tex. Civ. App. 1898) 46 S. W. 63; Jones *v.* Thurmond, 5 Tex. 318.

Utah.— Lebcher *v.* Lambert, (Utah 1900) 63 Pac. 628.

Virginia.— Trumbo *v.* City Street-Car Co., 89 Va. 780, 17 S. E. 124.

Washington.— Blumberg *v.* McNear, 1 Wash. Terr. 141.

West Virginia.— Graham *v.* Carroll, 27 W. Va. 790.

Wisconsin.— Thrasher *v.* Postel, 79 Wis. 503, 48 N. W. 600.

United States.— Barrow *v.* Reab, 9 How. (U. S.) 366, 13 L. ed. 177; Monarch Cycle Mfg. Co. *v.* Royer Wheel Co., 105 Fed. 324, 44 C. C. A. 523.

Where appellant excepts to instructions given, but is content to subsequently accept them as the law, he cannot claim error for the refusal of the court to give instructions asked by him. Delmonica Hotel Co. *v.* Smith, (Iowa 1901) 84 N. W. 906.

The propriety of modifying a requested instruction cannot be questioned without an exception. Greene *v.* Duncan, 37 S. C. 239, 15 S. E. 956.

Where no requests for instructions were submitted below, and no exception taken to the final result, there can be no question raised as to the sufficiency of the facts to support the judgment. Green *v.* Gill, 47 Mich. 86, 10 N. W. 119.

38. Bowland *v.* Wilson, 71 Md. 307, 18 Atl. 536.

39. Bath *v.* Caton, 37 Mich. 199.

40. Stewart *v.* Wyoming Cattle Ranch Co., 128 U. S. 383, 9 S. Ct. 101, 32 L. ed. 439.

41. Wheeler *v.* Sweet, 137 N. Y. 435, 33 N. E. 483, 51 N. Y. St. 77; Watertown Bank, etc., Co. *v.* Mix, 51 N. Y. 558.

42. *Illinois.*— Stock Quotation Tel. Co. *v.* Board of Trade, 144 Ill. 370, 33 N. E. 42; Kennedy *v.* Illinois Cent. R. Co., 68 Ill. App. 601.

Minnesota.— Weinberg *v.* Steeves, (Minn. 1901) 84 N. W. 755.

preclude the complaining party from urging such refusal as error, so as to permit the appellate court to review the sufficiency of the evidence,[43] unless it appears that there was no evidence which would justify the submission of any fact to the jury.[44] To raise the question of the propriety of a direction to find a verdict, the complaining party should request the trial court to submit to the jury the facts claimed to be in issue, and, if the request is refused, should except to the refusal.[45] Although no request was made to submit a question to the jury, defendant may avail himself of an exception to a refusal to direct in his favor, and a direction in favor of the adverse party.[46] An exception to a direction to find a verdict for defendant brings up, on the appeal, the question whether, on any construction of the facts, the jury would have been warranted in finding for plaintiff, although the latter did not request the submission of any questions to the jury.[47] When no specific request is made for the submission of any question of fact to the jury, and a verdict is directed by the court, to which direction only a general exception is taken, the point that such question should have been submitted to the jury cannot be raised for the first time on appeal, if the evidence was not entirely clear and uncontradicted.[48]

(5) Signing, Marking, and Filing. The failure of the trial judge to sign instructions,[49] or any non-compliance with statutory requirements respecting the marking, numbering, or filing of written instructions, is, where no exception was taken, not a ground of reversal.[50]

(6) Exceptions to General Rule. In a number of jurisdictions the necessity of exceptions has, by express statutory provisions, been either wholly or partly done away with;[51] in others the general doctrine has, apparently, been

Missouri.— Haniford *v.* Kansas City, 103 Mo. 172, 15 S. W. 753.

New York.— Curtis *v.* Wheeler, etc., Mfg. Co., 141 N. Y. 511, 36 N. E. 596, 57 N. Y. St. 715 [*affirming* 65 Hun (N. Y.) 619, 19 N. Y. Suppl. 650, 47 N. Y. St. 187]; Elliott *v.* Van Schaick, 26 N. Y. App. Div. 587, 50 N. Y. Suppl. 432; Smith *v.* Simmons, 66 Hun (N. Y.) 628, 21 N. Y. Suppl. 47, 49 N. Y. St. 302; Schwarz *v.* Family Fund Soc., 59 N. Y. Super. Ct. 583, 13 N. Y. Suppl. 888, 38 N. Y. St. 1024, 58 N. Y. Super. Ct. 515, 12 N. Y. Suppl. 717, 35 N. Y. St. 79.

North Dakota.— De Lendrecia *v.* Peck, 1 N. D. 422, 48 N. W. 342.

Ohio.— Stegeman *v.* Humbers, 2 Ohio Cir. Ct. 51.

Pennsylvania.— Burke *v.* Noble, 48 Pa. St. 168.

Wisconsin.— Holum *v.* Chicago, etc., R. Co., 80 Wis. 209, 50 N. W. 99; Kirch *v.* Davies, 55 Wis. 287, 11 N. W. 689.

Contra, Loving *v.* Warren County, 14 Bush (Ky.) 316; Collins *v.* Potts, 9 Ky. L. Rep. 536; Morris *v.* National Protective Soc., 106 Wis. 92, 81 N. W. 1036.

Where the evidence was not voluminous, and the judge presumably had his notes before him, it was held not to be incumbent on plaintiff to point out error in an instruction to find for defendant in order to enable plaintiff to take advantage of the error. Asbury *v.* Fair, 111 N. C. 251, 16 S. E. 467.

43. Eckensberger *v.* Amend, 10 Misc. (N. Y.) 145, 30 N. Y. Suppl. 915, 62 N. Y. St. 479; Paige *v.* Chedsey, 4 Misc. (N. Y.) 183, 23 N. Y. Suppl. 879, 53 N. Y. St. 190.

44. Benson *v.* Gerlach, 4 N. Y. Suppl. 273, 20 N. Y. St. 939.

45. Stone *v.* Flower, 47 N. Y. 566; Sheldon *v.* Baumann, 19 N. Y. App. Div. 61, 45 N. Y. Suppl. 1016.

46. Wombough *v.* Cooper, 4 Thomps. & C. (N. Y.) 586.

47. Stone *v.* Flower, 47 N. Y. 566; Miner *v.* New York, 37 N. Y. Super. Ct. 171.

48. Schroff *v.* Bauer, 42 How. Pr. (N. Y.) 348.

Where the questions involved were treated by the court and counsel as questions of law, based on facts assumed to have been proved, and the only exception was to the direction of a verdict on the facts, it was held that it could not be urged that there were questions of fact which should have been submitted to the jury. Elwell *v.* Dodge, 33 Barb. (N. Y.) 336.

49. Jones *v.* Greeley, 25 Fla. 629, 6 So. 448; Fruchey *v.* Eagleson, 15 Ind. App. 88, 43 N. E. 146.

50. Minzer *v.* Willman Mercantile Co., 59 Nebr. 410, 81 N. W. 307; Herzog *v.* Campbell, 47 Nebr. 370, 66 N. W. 424; Chadron *v.* Glover, 43 Nebr. 732, 62 N. W. 62; Fry *v.* Tilton, 11 Nebr. 456, 9 N. W. 638.

51. *Alabama.*— In this state it is expressly provided by statute [Ala. Civ. Code (1896), § 613] that no exception need be taken to the giving or refusing of instructions and that exceptions will be presumed. Whitaker *v.* State, 106 Ala. 30, 17 So. 458. This statute, however, has no application to charges given by the court on its own motion. Abbott *v.* Mobile, 119 Ala. 595, 24 So. 565.

Montana.— Mont. Code Civ. Proc. (1895), § 1151. See also Gassert *v.* Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240.

North Carolina.— By Clark's Code Civ.

limited in the absence of any statutory provisions, so that alleged error in this respect may be inquired into, though not excepted to.[52]

(E) *Nonsuit — Dismissal.* Ordinarily, exceptions must be taken to nonsuits, or dismissals; thus, where the plaintiff is nonsuited or the cause dismissed,[53] or the court declines to take off a nonsuit assented to,[54] or a nonsuit is refused,[55]

Proc. N. C. (1900), § 412, it is provided: "If there shall be error, either in the refusal of the judge to grant a prayer for instructions, or in granting a prayer, or in his instructions generally, the same shall be deemed excepted to without the filing of any formal objections." This section does not, it is held, permit an exception to be taken for the first time in the supreme court, but makes it sufficient if set out in appellant's case on appeal, although the proper method of taking advantage of it is to assign error on a motion for a new trial. National Bank *v.* Sumner, 119 N. C. 591, 26 S. E. 129; Marriner *v.* John T. Roper Lumber Co., 113 N. C. 52, 18 S. E. 94; Lee *v.* Williams, 111 N. C. 200, 16 S. E. 175 [*citing* Clark's Code Civ. Proc. N. C. (1900), p. 382].

Pennsylvania.— Under the statute in this state the charge filed by the court, with or without request, becomes, by virtue of statute, a part of the record for the purpose of assignment of errors, and exceptions thereto are not necessary. Pa. Pamphl. L. (1877), p. 38; Brightly's Purd. Dig. Pa. (1894), p. 1624; Grugan *v.* Philadelphia, 158 Pa. St. 337, 27 Atl. 1000; Janney *v.* Howard, 150 Pa. St. 339, 24 Atl. 740. But *compare* Philadelphia Trust, etc., Co. *v.* Purves, (Pa. 1888) 13 Atl. 936.

Texas.—Sayles' Civ. Stat. Tex. (1897), art. 1318; Atchison, etc., R. Co. *v.* Click, 5 Tex. Civ. App. 224, 23 S. W. 833. The only cases excepted from the operation of the statute are prosecutions for misdemeanors. Otto *v.* State, (Tex. Crim. 1894) 25 S. W. 285; Garrett *v.* State, (Tex. Crim. 1894) 25 S. W. 285.

52. In New York, if a case is presented by the trial court to the jury upon an erroneous theory, the question may be reviewed in the appellate division of the supreme court even though no exception is taken in the lower court. Standard Oil Co. *v.* Amazon Ins. Co., 79 N. Y. 506; Vorce *v.* Oppenheim, 37 N. Y. App. Div. 69, 55 N. Y. Suppl. 596; Northrup *v.* Porter, 17 N. Y. App. Div. 80, 44 N. Y. Suppl. 814; Leach *v.* Williams, 12 N. Y. App. Div. 173, 42 N. Y. Suppl. 574; Whittaker *v.* Delaware, etc., Canal Co., 49 Hun (N. Y.) 400, 3 N. Y. Suppl. 576, 22 N. Y. St. 405.

In Ohio, if the overruling of a motion for a new trial is assigned for error, and all the evidence offered on the trial, together with the charge of the court, is properly brought up by bill of exceptions, a reviewing court will, in connection with the evidence, look to the charge of the court, whether excepted to or not; and, if there is reason to believe that the verdict was the result of erroneous instructions, will reverse the judgment and award a new trial. Baker *v.* Pendergast, 32 Ohio St. 494, 30 Am. Rep. 620.

53. *Alabama.*— Wyatt *v.* Evins, 52 Ala. 285; Vincent *v.* Rogers, 30 Ala. 471.

California.— Nelmes *v.* Wilson, (Cal. 1893) 34 Pac. 341; Malone *v.* Beardsley, 92 Cal. 150, 28 Pac. 218; Schroeder *v.* Schmidt, 74 Cal. 459, 16 Pac. 243.

Georgia.— McBride *v.* Latham, 79 Ga. 661, 4 S. E. 927; Killen *v.* Compton, 60 Ga. 117.

Indiana.— Heddy *v.* Driver, 6 Ind. 350.

Massachusetts.— Spaulding *v.* Alford, 1 Pick. (Mass.) 33.

Minnesota.— Stewart *v.* Davenport, 23 Minn. 346.

Missouri.— Harrison *v.* Illinois Bank, 9 Mo. 161.

New York.— Pendleton *v.* Weed, 17 N. Y. 72. And see Ross *v.* Caywood, 58 N. Y. Suppl. 1148 [*affirmed* in 162 N. Y. 259, 56 N. E. 629].

North Carolina.— Harper *v.* Dail, 92 N. C. 394.

Pennsylvania.— Finch *v.* Conrade, 154 Pa. St. 326, 32 Wkly. Notes Cas. (Pa.) 196, 26 Atl. 368; Pollock *v.* Harvey, 148 Pa. St. 536, 23 Atl. 1128; Owen's Petition, 140 Pa. St. 565, 21 Atl. 416.

See 2 Cent. Dig. tit. "Appeal and Error," § 1582 *et seq.*

In Deane *v.* Buffalo, 42 N. Y. App. Div. 205, 58 N. Y. Suppl. 810, when plaintiff first rested, the court intimated an intention to nonsuit him and to allow an exception. Thereupon plaintiff submitted further evidence, at the close of which he was nonsuited, but no exception was taken, and it was held that plaintiff was entitled to have the appellate division treat the case as though an exception had been taken where the exceptions are ordered to be heard by it in the first instance.

An exception to a dismissal of the complaint at the close of plaintiff's evidence is sufficient to present on appeal a question raised by the pleadings and proof, though not urged in opposition to the motion to dismiss. Witherow *v.* Slayback, 158 N. Y. 649, 53 N. E. 681, 70 Am. St. Rep. 507 [*reversing* 11 Misc. (N. Y.) 526, 32 N. Y. Suppl. 746, 64 N. Y. St. 456].

Limitations of rule — Order granted after trial.— To support a motion for a new trial on account of an alleged erroneous dismissal of an action, it is not necessary to except to the order of dismissal in a case in which the order was not granted upon the trial, but after the trial was concluded, and the case taken under advisement. Volmer *v.* Stagerman, 25 Minn. 234.

54. Taylor *v.* Switzer, 110 Mo. 410, 19 S. W. 735.

55. Witkowski *v.* Hern, 82 Cal. 604, 23 Pac. 132; Oakes *v.* Thornton, 28 N. H. 44; Eckensberger *v.* Amend, 10 Misc. (N. Y.) 145,

or the court declines to dismiss a cause,[56] the failure to except to the action of the court will be taken as an acquiescence therein.[57]

(F) *Verdict.* Where the verdict is defective as to form[58] or substance, an exception is necessary to preserve for review error therein.[59] But an exception to the verdict is not necessary to preserve for review errors in the court's rulings.[60]

(G) *Findings of Fact.* As a general rule, if the findings of fact of the court are in any respect erroneous or defective, they will not be reviewed in the absence of proper exceptions.[61] In the absence of exceptions the reviewing court

30 N. Y. Supppl. 915, 62 N. Y. St. 479; Kaminitsky *v.* Northeastern R. Co., 25 S. C. 53; Garrard *v.* Reynolds, 4 How. (U. S.) 123, 11 L. ed. 903.

In Pennsylvania it seems that the action of the court in overruling a motion for a nonsuit is not the subject of exception. Dougherty *v.* Loebelenz, 9 Pa. Super. Ct. 344, 43 Wkly. Notes Cas. (Pa.) 447.

56. Tuskaloosa Wharf Co. *v.* Tuskaloosa, 38 Ala. 514, wherein a dismissal was asked for the failure to give security for costs.

57. Train *v.* Holland Purchase Ins. Co., 62 N. Y. 598; Freund *v.* Importers, etc., Nat. Bank, 3 Hun (N. Y.) 689; Backman *v.* Jenks, 55 Barb. (N. Y.) 468.

Whether or not a nonsuit was properly allowed is brought up by an exception taken to such allowance, though no express request was made to have the facts upon which the nonsuit was based left to the jury to determine. Sheldon *v.* Atlantic F. & M. Ins. Co., 26 N. Y. 460, 84 Am. Dec. 213. But see Bidwell *v.* Lament, 17 How. Pr. (N. Y.) 357, wherein plaintiff excepted, but made no request that the question of fact be submitted to the jury, and it was held that he had waived the submission of the case to the jury, and that his exception did not avail to save the objection.

58. Schlencker *v.* Risley, 4 Ill. 483, 38 Am. Dec. 100.

So, an objection to a judgment on a verdict in the form suggested by the trial judge at the conclusion of the charge will not be considered on appeal where defendants neither excepted nor objected to the remarks of the judge as to the amount or form of the verdict, nor made any suggestions on the subject when the verdict was delivered. Ten Eyck *v.* Witbeck, 55 N. Y. App. Div. 165, 66 N. Y. Suppl. 921.

Necessity of exceptions to rulings preceding verdict.— Though no exception was taken to an instruction that three fourths of a jury may return a verdict, where the receiving and entering of such a verdict was objected to, and exception taken to the overruling of the objection, it brings the question of the validity of such a verdict regularly before the court on appeal. Rock Springs First Nat. Bank *v.* Foster, (Wyo. 1900) 61 Pac. 466.

59. Roach *v.* Hulings, 16 Pet. (U. S.) 319, 10 L. ed. 979; Campbell *v.* Strong, Hempst. (U. S.) 265, 4 Fed. Cas. No. 2,367*a*. See also Kuhlman *v.* Williams, 1 Okla. 136, 28 Pac. 867; and 2 Cent. Dig. tit. "Appeal and Error," § 1533.

Questions in special verdict.— Where no exceptions to the phraseology of questions in a special verdict are reserved, such exceptions cannot be considered on appeal. Dodge *v.* O'Dell, 106 Wis. 296, 82 N. W. 135.

60. French *v.* Hotchkiss, 60 Ill. App. 580; Thompson *v.* Seipp, 44 Ill. App. 515.

Where the evidence and the inferences drawn by the jury do not justify a verdict, questions arising on the facts shown may be considered on appeal, though such questions were not raised by special exceptions. Bigelow *v.* Bigelow, 93 Me. 439, 45 Atl. 513. And so where the verdict is in conflict with the evidence and instructions. Sullivan *v.* Otis, 39 Iowa 328.

61. *Arkansas.*— Woodruff *v.* McDonald, 33 Ark. 97.

California.— Richardson *v.* Dunne, (Cal. 1893) 31 Pac. 737; Lucas *v.* San Francisco, 28 Cal. 591.

Dakota.— Van Cise *v.* Merchants' Nat. Bank, 4 Dak. 485, 33 N. W. 897.

Illinois.— Martin *v.* Foulke, 114 Ill. 206, 29 N. E. 683; David M. Force Mfg. Co. *v.* Horton, 74 Ill. 310; Stein *v.* Rothermel, 79 Ill. App. 36.

Indiana.— Banner Cigar Co. *v.* Kamm, etc., Brewing Co., 145 Ind. 266, 44 N. E. 455.

Iowa.— Aldrich *v.* Paine, 106 Iowa 461, 76 N. W. 812.

Michigan.— Weist *v.* Morlock, 116 Mich. 606, 74 N. W. 1012; Hubbard *v.* Garner, 115 Mich. 406, 73 N. W. 390, 69 Am. St. Rep. 580.

Minnesota.— Hewitt *v.* Blumenkranz, 33 Minn. 417, 23 N. W. 858.

Missouri.— Leith *v.* Steamboat Pride of the West, 16 Mo. 181.

Montana.—Currie *v.* Montana Cent. R. Co., 24 Mont. 123, 60 Pac. 989; Haggin *v.* Saile, 23 Mont. 375, 59 Pac. 154.

Nebraska.— Harrington *v.* Latta, 23 Nebr. 84, 36 N. W. 364.

Nevada.— McClusky *v.* Gerhauser, 2 Nev. 47, 90 Am. Dec. 512.

New Hampshire.— Carter *v.* Stratford Sav. Bank, (N. H. 1901) 48 Atl. 1083.

Oregon.— Verdier *v.* Bigne, 16 Oreg. 208, 19 Pac. 64.

South Carolina.— British American Mortg. Co. *v.* Bates, 58 S. C. 551, 36 S. E. 917; Maxwell *v.* Bodie, 56 S. C. 402, 34 S. E. 692.

Washington.— Cole *v.* Price, 22 Wash. 18, 60 Pac. 153; Carstens *v.* Leidigh, etc., Lumber Co., 18 Wash. 450, 51 Pac. 1051, 63 Am. St. Rep. 906, 39 L. R. A. 548.

Wisconsin.— Merriman *v.* McCormick Harvesting Mach. Co., 101 Wis. 619, 77 N. W. 880; Wentworth *v.* Racine County, 99 Wis. iv, appendix, 77 N. W. 874.

United States.— Kirk *v.* U. S., 163 U. S. 49, 16 S. Ct. 911, 41 L. ed. 66; Humphreys *v.*

will not consider whether the findings are sufficiently specific or not,[62] or whether the findings are supported by the evidence;[63] nor will it review the action of the trial court in setting aside a finding and making a special finding.[64] So, a failure to make or file findings of fact will not be considered in the absence of a request therefor, and an exception to the court's refusal or non-compliance with the request.[65]

Cincinnati Third Nat. Bank, 75 Fed. 852, 43 U. S. App. 698, 21 C. C. A. 538; Press *v.* Davis, 54 Fed. 267, 9 U. S. App. 546, 4 C. C. A. 318.

See 2 Cent. Dig. tit. "Appeal and Error," § 1536 *et seq.*

In Illinois — Assignment of cross-errors.— A finding to which no exception is taken by appellee cannot be reviewed on appeal on the assignment of cross-errors by the appellee. Chicago, etc., R. Co. *v.* People, 190 Ill. 20, 60 N. E. 69.

In New York — Review in court of appeals. — Where a finding of fact is wholly unsustained by the evidence, it is deemed a ruling on a question of law which, if excepted to, presents a legal question which the court of appeals may pass upon. Daniels *v.* Smith, 130 N. Y. 696, 29 N. E. 1098, 42 N. Y. St. 644; Halpin *v.* Phenix Ins. Co., 118 N. Y. 165, 23 N. E. 482, 28 N. Y. St. 788; Naser *v.* New York City First Nat. Bank, 116 N. Y. 492, 22 N. E. 1077, 27 N. Y. St. 670. If, however, there is any evidence to support the findings, no question of law in relation thereto is presented, and the court of appeals cannot consider the findings for any purpose. Cox *v.* Stokes, 156 N. Y. 491, 51 N. E. 316; White *v.* Benjamin, 150 N. Y. 258, 44 N. E. 956.

In New York — Review by appellate division.— *In general.*— N. Y. Code Civ. Proc. § 992, provides that exceptions may be taken to the ruling of the court or referee upon a question of law, but not to a ruling upon a question of fact. Under this section findings of fact may, without exceptions, be reviewed by the appellate division. Roberts *v.* Tobias, 120 N. Y. 1, 23 N. E. 1105, 30 N. Y. St. 189; Porter *v.* Smith, 107 N. Y. 531, 14 N. E. 446; Barrett *v.* Kling, 16 N. Y. Suppl. 92, 40 N. Y. St. 823. But it is nevertheless the duty of an appellant desiring a review of questions of fact to see that the case contains a certificate that all the evidence has been included, or all bearing on the question so sought to be reviewed. Porter *v.* Smith, 107 N. Y. 531, 14 N. E. 446; Graff *v.* Ross, 47 Hun (N. Y.) 152. If, however, the question in relation to the findings of fact was whether there was any evidence at all to support the findings, a question of law would be presented, to obtain a review of which an exception would be necessary. See *supra*, this note, as to review in court of appeals.

Findings of surrogate.— To authorize a review in the appellate division of the findings of fact of a surrogate, an exception to the findings is neither necessary or proper. Burger *v.* Burger, 111 N. Y. 523, 19 N. E. 99, 21 N. E. 50, 20 N. Y. St. 105; Matter of Spratt, 4 N. Y. App. Div. 1, 38 N. Y. Suppl. 329, 73 N. Y. St. 790. See also Matter of McAleenan, 53 N. Y. App. Div. 193, 65 N. Y. Suppl. 907, in which it was held that where the surrogate sustains objections to a referee's report, and bases his decision on the facts found by such referee, it is not necessary, in order to present a question to the appellate court, that appellant should file exceptions, since the facts found by the referee stand in place of a finding of facts by the surrogate, and on appeal from the surrogate's decree the correctness of the surrogate's conclusions of law is presented for review. *Compare* Angevine *v.* Jackson, 103 N. Y. 470, 9 N. E. 56; Matter of Marsh, 45 Hun (N. Y.) 107.

In Pennsylvania, if no exception is taken to a determination on a reserved question of fact, the parties will be presumed to have assented to it, and will be concluded by its legal effect. Fulton *v.* Peters, 137 Pa. St. 613, 20 Atl. 936; Lower Providence Live-Stock Ins. Assoc. *v.* Weikel, (Pa. 1888) 13 Atl. 82; Mohan *v.* Butler, 112 Pa. St. 590, 4 Atl. 47; Supplee *v.* Herrman, 16 Pa. Super. Ct. 45; Ginther *v.* Yorkville, 3 Pa. Super. Ct. 403.

In Texas — Limitations of rule.— Exceptions to conclusions of law and fact are not necessary where a statement of facts and bill of exceptions are brought up in the record. Tudor *v.* Hodges, 71 Tex. 392, 9 S. W. 443; Wilkins *v.* Burns, (Tex. Civ. App. 1893) 25 S. W. 431; Connellee *v.* Roberts, 1 Tex. Civ. App. 363, 23 S. W. 187.

62. Smith *v.* Pendergast, 26 Minn. 318, 3 N. W. 978.

63. *Colorado.*— Farncomb *v.* Stern, 18 Colo. 279, 32 Pac. 612; Cox *v.* Sargent, 10 Colo. App. 1, 50 Pac. 201.

Illinois.— Parsons *v.* Evans, 17 Ill. 238.

Michigan.— Washtenaw County *v.* Rabbitt, 99 Mich. 60, 57 N. W. 1084.

Missouri.— Freeman *v.* Hemenway, 75 Mo. App. 617.

North Carolina.— Cox *v.* Jones, 110 N. C. 309, 14 S. E. 782.

Washington.— Mason *v.* MaGee, 15 Wash. 272, 46 Pac. 237.

Wisconsin.— Saukville *v.* Grafton, 68 Wis. 192, 31 N. W. 719; King *v.* Ritchie, 18 Wis. 554.

United States.— Haws *v.* Victoria Copper Min. Co., 160 U. S. 303, 16 S. Ct. 282, 40 L. ed. 436.

See 2 Cent. Dig. tit. "Appeal and Error," § 1543.

64. Banner Cigar Co. *v.* Kamm, etc., Brewing Co., 145 Ind. 266, 44 N. E. 455; and see 2 Cent. Dig. tit. "Appeal and Error," § 1545.

65. *California.*— Cook *v.* De la Guerra, 24 Cal. 237.

Iowa.— Kruck *v.* Prine, 22 Iowa 570.

(H) *Conclusions of Law.* To authorize a review of conclusions of law they must be duly excepted to.[66] To question the correctness of conclusions of law it is not necessary to except to the findings,[67] and, indeed, exceptions to the findings raise no question as to the correctness of conclusions of law.[68] So, excepting to the judgment raises no question as to the conclusions of law.[69] Exceptions are also necessary to authorize a review of the action of the court below in failing or refusing to file conclusions of law,[70] or for failure to file findings of fact or conclusions of law separately.[71]

(I) *Excessive Award.* The defeated party cannot, if he has failed to reserve any exception by which his claim may be tested, assert on appeal that the sum awarded by the verdict or judgment was excessive, and especially if the amount does not exceed that demanded.[72]

Kansas.— Crisfield *v.* Neal, 36 Kan. 278, 13 Pac. 272.

Nevada.— Warren *v.* Quill, 9 Nev. 259.

North Carolina.— Parks *v.* Davis, 98 N. C. 481, 4 S. E. 202.

Oregon.— Umatilla Irrigation Co. *v.* Barnhart, 22 Oreg. 389, 30 Pac. 37.

Texas.— Tackaberry *v.* City Nat. Bank, 85 Tex. 488, 22 S. W. 151, 299; American Cent. Ins. Co. *v.* Green, 16 Tex. Civ. App. 531, 41 S. W. 74; Alamo F. Ins. Co. *v.* Shacklett, (Tex. Civ. App. 1894) 26 S. W. 630; Scurry *v.* Fromer, (Tex. Civ. App. 1894) 26 S. W. 461.

Wisconsin.— Wrigglesworth *v.* Wrigglesworth, 45 Wis. 255; Sheldon *v.* Rockwell, 9 Wis. 166, 76 Am. Dec. 265.

See 2 Cent. Dig. tit. "Appeal and Error," § 1544.

Failure to find — Review in New York court of appeals.— Failure of the court or referee to find a material fact in a decision stating concisely the grounds upon which the issues have been decided instead of stating separately the facts found and the conclusions of law, either of which may be done under N. Y. Code Civ. Proc. § 1022, is not an error of law, and hence the court of appeals, which can review only questions of law since the provisions of the new constitution went into effect, has no authority to consider a failure to make such finding (National Harrow Co. *v.* Bement, 163 N. Y. 505, 57 N. E. 764); and even if it could consider the question, a request to find the omitted fact, and exception to the omission or refusal to do so, would be a condition precedent to such consideration (Clark *v.* National Shoe, etc., Bank, 164 N. Y. 498, 58 N. E. 659; National Harrow Co. *v.* Bement, 163 N. Y. 505, 57 N. E. 764). For practice in the court of appeals before the new constitution went into effect see Donovan *v.* Clark, 138 N. Y. 631, 33 N. E. 1066, 52 N. Y. St. 358; Daniels *v.* Smith, 130 N. Y. 696, 29 N. E. 1098, 42 N. Y. St. 644; Travis *v.* Travis, 122 N. Y. 449, 25 N. E. 920, 34 N. Y. St. 42.

66. *Arkansas.*— Dunnington *v.* Frick Co., 60 Ark. 250, 30 S. W. 212.

Indiana.— Nelson *v.* Cottingham, 152 Ind. 135, 52 N. E. 702; Nading *v.* Elliott, 137 Ind. 261, 36 N. E. 695.

Kentucky.— Day *v.* Adams, 20 Ky. L. Rep. 1827, 50 S. W. 2; Forbes *v.* Kentucky Mut. Security Fund Co., 14 Ky. L. Rep. 811; American Mut. Aid Soc. *v.* Bronger, 12 Ky. L. Rep. 971, 15 S. W. 1118.

Michigan.— Weist *v.* Morlock, 116 Mich. 606, 74 N. W. 1012; Feller *v.* Green, 26 Mich. 70; Peabody *v.* McAvoy, 23 Mich. 526; McMillan *v.* Gilt Edge Cheese Factory, 23 Mich. 544.

New York.— Hatch *v.* Fogerty, 7 Rob. (N. Y.) 488; Hedges *v.* Polhemus, 14 Misc. (N. Y.) 309, 35 N. Y. Suppl. 709, 70 N. Y. St. 444; Robertson *v.* Stillings, 18 Alb. L. J. 476.

North Carolina.— Smith *v.* Kron, 109 N. C. 103, 13 S. E. 859.

Washington.— Irwin *v.* Olympia Water Works, 12 Wash. 112, 40 Pac. 637.

Wisconsin.— But see Towsley *v.* Ozaukee County, 60 Wis. 251, 18 N. W. 840; King *v.* Ritchie, 18 Wis. 554, in which it is held that no exception is necessary to authorize the reviewing court to determine whether the conclusion of law is correct on the facts found.

United States.— Humphreys *v.* Cincinnati Third Nat. Bank, 75 Fed. 852, 43 U. S. App. 698, 21 C. C. A. 538.

See 2 Cent. Dig. tit. "Appeal and Error," § 1536 *et seq.*

Unless exceptions are taken to the conclusions of law or fact the only question determinable is whether the pleadings support the judgment. King *v.* Walker, 15 Ky. L. Rep. 605; Bridgeford *v.* Woodbury, 13 Ky. L. Rep. 636; Continental Ins. Co. *v.* Milliken, 64 Tex. 46; Biggerstaff *v.* Murphy, (Tex. Civ. App. 1893) 21 S. W. 773; McKee *v.* Price, 3 Tex. App. Civ. Cas. § 336. See also Weist *v.* Morlock, 116 Mich. 606, 74 N. W. 1012.

Where judgment is rendered on an agreed state of facts, exception must be taken to the conclusions of law upon such agreed state of facts. Pennsylvania Co. *v.* Niblack, 99 Ind. 149; Hall *v.* Pennsylvania Co., 90 Ind. 459; Lofton *v.* Moore, 83 Ind. 112.

67. Solomon *v.* Reese, 34 Cal. 28; Shaw *v.* Nachtwey, 43 Iowa 653; Brown *v.* Kern, 21 Wash. 211, 57 Pac. 798.

68. Lynch *v.* Jennings, 43 Ind. 276.

69. Midland R. Co. *v.* Dickason, 130 Ind. 164, 29 N. E. 775; Forbes *v.* Kentucky Mut. Security Fund Co., 14 Ky. L. Rep. 811; Smith *v.* Fowler, 5 Ky. L. Rep. 925.

70. Hess *v.* Dean, 66 Tex. 663, 2 S. W. 727; Glass *v.* Wiles, (Tex. 1890) 14 S. W. 225.

71. Ash *v.* Scott, 76 Iowa 27, 39 N. W. 924; Wrigglesworth *v.* Wrigglesworth, 45 Wis. 255.

72. Norris *v.* Wrenschall, 34 Md. 492; Hawver *v.* Bell, 141 N. Y. 140, 36 N. E. 6, 56 N. Y.

(J) *Judgment.* It is the general rule that a judgment based on a verdict need not be excepted to, to enable the appellate court to consider its propriety.[73] In some jurisdictions, however, by statute or rules of practice, in trials by the court without a jury, to challenge the conclusion of the court upon the facts, or to ascertain the propriety of the final judgment or decree, due exception must be taken thereto.[74] But such a requirement will not preclude the consideration of assign-

St. 674; Moore *v.* Higgins, 53 Hun (N. Y.) 629, 5 N. Y. Suppl. 895, 24 N. Y. St. 378; Carey *v.* Flack, 20 Misc. (N. Y.) 295, 45 N. Y. Suppl. 759; Briscoe *v.* Litt, 19 Misc. (N. Y.) 5, 42 N. Y. Suppl. 908; North *v.* Bunn, (N. C. 1901) 38 S. E. 814; James River, etc., Co. *v.* Adams, 17 Gratt. (Va.) 427.

Limitations of rule.— Where there is a palpable mistake in allowing a sum which is admittedly not due (Jones *v.* Gilman, 14 Wis. 450), or where an appeal is taken from an order denying a new trial as well as from the judgment (Bruce *v.* Fiss, etc., Horse Co., 47 N. Y. App. Div. 273, 62 N. Y. Suppl. 96), it seems that no exception is necessary in order to relieve appellant from an excessive liability.

73. It will be enough if exceptions were taken below to rulings or decisions upon which the validity of the judgment depends.

California.— Thompson *v.* Hancock, 51 Cal. 110.

Colorado.— Bradbury *v.* Alden, 13 Colo. App. 208, 57 Pac. 490.

Georgia.— Haskins *v.* State Bank, 100 Ga. 216, 27 S. E. 985; Parker *v.* Waycross, etc., R. Co., 81 Ga. 387, 8 S. E. 871. But see, *contra*, Achey *v.* Dodson, 105 Ga. 514, 31 S. E. 190; Baker *v.* Moor, 84 Ga. 186, 10 S. E. 737; Killen *v.* Compton, 60 Ga. 116.

Indiana.— Linsman *v.* Huggins, 44 Ind. 474.

Iowa.— Clement *v.* Drybread, 108 Iowa 701, 78 N. W. 235; Haefer *v.* Mullison, 90 Iowa 372, 57 N. W. 893, 48 Am. St. Rep. 451; What Cheer *v.* Hines, 86 Iowa 231, 53 N. W. 126; Gulliher *v.* Chicago, etc., R. Co., 59 Iowa 416, 13 N. W. 429; Aldrich *v.* Price, 57 Iowa 151, 9 N. W. 376, 10 N. W. 339. But see Ferguson *v.* Lucas County, 44 Iowa 701; Moore *v.* Daniels, 20 Iowa 596.

Kansas.— Wyandotte County *v.* Arnold, 49 Kan. 279, 30 Pac. 486; Brown *v.* Tuppeny, 24 Kan. 29; Kœhler *v.* Ball, 2 Kan. 160, 83 Am. Dec. 451.

Kentucky.— Craycraft *v.* Duncan, 6 Ky. L. Rep. 651.

Nebraska.— State *v.* Bartley, 56 Nebr. 810, 77 N. W. 438; Erck *v.* Omaha Nat. Bank, 43 Nebr. 613, 62 N. W. 67.

New York.— Dainese *v.* Allen, 36 N. Y. Super. Ct. 98, 14 Abb. Pr. N. S. (N. Y.) 363.

North Carolina.— An appeal is *per se* an exception to a judgment. Reade *v.* Street, 122 N. C. 301, 30 S. E. 124.

Ohio.— Justice *v.* Lowe, 26 Ohio St. 372; Commercial Bank *v.* Buckingham, 12 Ohio St. 402.

Oklahoma.— But see Kuhlman *v.* Williams, 1 Okla. 136, 28 Pac. 867.

Texas.— Gillespie *v.* Crawford, (Tex. Civ. App. 1897) 42 S. W. 621.

West Virginia.— Kyle *v.* Conrad, 25 W. Va. 760.

See 2 Cent. Dig. tit. "Appeal and Error," § 1572 *et seq.*

A judgment on a joint and several note against one defendant, without disposing of the cause as to the others, will not be disturbed when not excepted to below. Duncan *v.* Scott County, 64 Miss. 38, 8 So. 204.

1 Sayles' Civ. Stat. Tex. art. 1333, requiring an exception to the judgment "to be noted on the record in the judgment entry," is complied with by having the exception noted in the order overruling a motion for a new trial. Biggerstaff *v.* Murphy, 3 Tex. Civ. App. 363, 22 S. W. 768.

Judgments by default.— The general doctrine has also been held applicable to judgments taken by default. Laughlin *v.* Main, 63 Iowa 580, 19 N. W. 673; Robyn *v.* Chronicle Pub. Co., 127 Mo. 385, 30 S. W. 130; Tucker *v.* Inter-States L. Assoc., 112 N. C. 796, 17 S. E. 532. *Contra*, Brooks *v.* Breeding, 32 Tex. 752. See also 2 Cent. Dig. tit. "Appeal and Error," § 1578.

74. *Alabama.*— Alabama Fruit Growing, etc., Assoc. *v.* Garner, 119 Ala. 70, 24 So. 850 [*following* Hood *v.* Pioneer Min., etc., Co., 95 Ala. 461, 11 So. 10].

Colorado.—Norris *v.* Colorado Turkey Honestone Co., 22 Colo. 162, 43 Pac. 1024; Nelson *v.* Jenkins, 9 Colo. App. 420, 48 Pac. 826; Pedrick *v.* Anderson, 10 Colo. App. 541, 51 Pac. 1012.

Georgia.— See Davidson *v.* Rogers, 80 Ga. 287, 7 S. E. 264; Littleton *v.* Spell, 77 Ga. 227, 2 S. E. 935.

Illinois.— Bailey *v.* Smith, 168 Ill. 84, 48 N. E. 75; Harrison *v.* Boetter, 88 Ill. App. 549; Gilbert *v.* Sprague, 88 Ill. App. 508; Wehrheim *v.* Thiel Detective Co., 87 Ill. App. 565.

Indiana — Seitz *v.* Schmidt, Wilson (Ind.) 437.

Pennsylvania.— Hummel's Appeal, (Pa. 1886) 5 Atl. 669.

South Carolina.— Wilson *v.* Kelly, 19 S. C. 160.

But where the case is submitted to the court below on an agreed statement of facts, so that nothing is left for decision but questions of law, no exception to the decision of the trial court is necessary. George *v.* Tufts, 5 Colo. 162; Whitehead *v.* Jessup, 7 Colo. App. 460, 43 Pac. 1042. See Thatcher *v.* Ireland, 77 Ind. 486, holding that, where a case has been presented to the trial court upon an agreed statement of facts, an exception to its decision upon such facts must be taken in order to be able to present any question thereon to the appellate court.

ments of error based on the record proper, or on exceptions, duly reserved, to rulings made during the progress of the trial.[75]

f. Rulings or Decisions After Trial or Judgment — (I) *In General.* To obtain a review of rulings or decisions made after trial or judgment, exceptions thereto are generally necessary.[76] The rule has been applied to rulings and decisions on motions to open a default and set aside the judgment entered thereon,[77] on motions for a *venire de novo*,[78] on motions to set aside or quash an execution or sale thereunder,[79] to rulings or orders in proceedings supplementary to execution,[80] and to rulings on motion to dismiss an appeal.[81] It has also been held that the propriety of an allowance of costs will not be considered unless exceptions are duly taken.[82]

(II) *Applications for New Trial.* A decision granting or overruling a motion or application for a new trial will not be reviewed where no exception was taken thereto.[83] The effect of the omission to except to the refusal of a new

75. Farncomb *v.* Stern, 18 Colo. 279, 32 Pac. 612; Nelson *v.* La Junta First Nat. Bank, 8 Colo. App. 531, 46 Pac. 879; Colorado Springs Co. *v.* Hopkins, 5 Colo. 206; Patton *v.* Coen, etc., Carriage Mfg. Co., 3 Colo. 265.

76. See 2 Cent. Dig. tit. "Appeal and Error," § 1609 *et seq.*; and *infra*, notes 77–82.

77. Goodman *v.* Minear Min., etc., Co., 1 Ida. 131.

Under the Illinois practice a ruling on a motion to vacate a judgment and verdict is reviewable even though not excepted to. Patting *v.* Spring Valley Coal Co., 98 Fed. 811, 39 C. C. A. 308.

78. Zimmerman *v.* Gaumer, 152 Ind. 552, 53 N. E. 829.

79. Smith *v.* Curtis, 7 Cal. 584; St. Louis *v.* Brooks, 107 Mo. 380, 18 S. W. 22; American Wine Co. *v.* Scholer, 13 Mo. App. 345; Vernon *v.* Montgomery, (Tex. Civ. App. 1895) 33 S. W. 606.

In Nebraska the failure to except to the action of the court in overruling exceptions, and confirming a sheriff's sale, will not preclude a review, the order being final. Jones *v.* Null, 9 Nebr. 254, 2 N. W. 350.

80. Welch *v.* Pittsburgh, etc., R. Co., 11 Ohio St. 569; Welsh *v.* Monks, 12 Mo. App. 579.

81. Hines *v.* Board of Education, (W. Va. 1901) 38 S. E. 550.

82. Darst *v.* Collier, 86 Ill. 96; Sisson *v.* Pearson, 44 Ill. App. 81; State *v.* Brewer, 70 Iowa 384, 30 N. W. 646; Soup *v.* Smith, 26 Iowa 472; Allbright *v.* Corley, 54 Tex. 372; Cord *v.* Southwell, 15 Wis. 211.

83. *Arizona.*— Koons *v.* Phoenix Min. Co., (Ariz. 1890) 32 Pac. 266; Sutherland *v.* Putnam, (Ariz. 1890) 24 Pac. 320.

Arkansas.— Hicks *v.* Wilson, 24 Ark. 628; Moss *v.* Smith, 19 Ark. 683.

Georgia.— Augusta R. Co. *v.* Andrews, 89 Ga. 653, 16 S. E. 203.

Illinois.— Stern *v.* People, 96 Ill. 475; Illinois Cent. R. Co. *v.* O'Keefe, 49 Ill. App. 320; Brooks *v.* People, 11 Ill. App. 422.

Indiana.— Fletcher *v.* Waring, 137 Ind. 159, 36 N. E. 896; Cox *v.* Dill, 85 Ind. 334. *Compare* Haney *v.* Farnsworth, 149 Ind. 453, 49 N. E. 383, construing Ind. Rev. Stat. (1894), § 642.

Iowa.— Lewis *v.* Lewis, 75 Iowa 669, 37 N. W. 166.

Kansas.— Great Spirit Springs Co. *v.* Chicago Lumber Co., 47 Kan. 672, 28 Pac. 714; Atchison *v.* Byrnes, 22 Kan. 65; Longfellow *v.* Smith, (Kan. App. 1900) 61 Pac. 875.

Kentucky.— Gordon *v.* Ryan, 1 J. J. Marsh. (Ky.) 55.

Michigan.— Knop *v.* National F. Ins. Co., 101 Mich. 359, 59 N. W. 653.

Mississippi.— Campbell *v.* Pittman, (Miss. 1888) 3 So. 455; Fisher *v.* Fisher, 43 Miss. 212.

Missouri.— Wentzville Tobacco Co. *v.* Walker, 123 Mo. 662, 27 S. W. 639; Danforth *v.* Lindell R. Co., 123 Mo. 196, 27 S. W. 715; Pieper *v.* Neumeister, 63 Mo. App. 362; State *v.* Straszer, 8 Mo. App. 572.

Nebraska.— Tuömey *v.* Willman, 43 Nebr. 28, 61 N. W. 126; Murray *v.* School Dist. No. 3, 11 Nebr. 436, 4 N. W. 316.

Ohio.— Brown *v.* Ohio, etc., Coal Co., 48 Ohio St. 542, 28 N. E. 669.

Oklahoma.— Vaughn Lumber Co. *v.* Missouri Min., etc., Co., 3 Okla. 174, 41 Pac. 81.

Virginia.—Paul *v.* Paul, 2 Hen. & M. (Va.) 525.

West Virginia.— Snodgrass *v.* Copenhaver, 34 W. Va. 171, 12 S. E. 695; State *v.* Rollins, 31 W. Va. 363, 6 S. E. 923.

See 2 Cent. Dig. tit. "Appeal and Error," § 1759 *et seq.*

Limitation of rule—Errors apparent of record.— Notwithstanding no exception is saved to the action of the court in overruling a motion for new trial, the reviewing court may nevertheless examine such errors as are apparent from the record. Carpenter *v.* St. Louis, etc., R. Co., 80 Mo. 446; Jackson *v.* St. Louis, etc., R. Co., 80 Mo. 147; Dodd *v.* Wilson, 26 Mo. App. 462.

In Nevada, under a statutory provision defining an exception to be an objection taken, at the trial to a decision upon a matter of law, at any time "from the calling of the action for trial to the rendering of the verdict or decision," an order overruling a motion for a new trial need not be excepted to. State *v.* Central Pac. R. Co., 17 Nev. 259, 270, 30 Pac. 887.

In Wisconsin, to authorize a review of an order overruling a motion for new trial no exception to the order is necessary. Wis. Rev. Stat. § 3070; Doyle *v.* Gill, 59 Wis. 518, 18 N. W. 517.

trial will preclude an examination of the evidence to ascertain if it supports the finding,[84] and, in some jurisdictions, the presentation for review of any error or ruling at the trial.[85]

g. Provisional Remedies. The general rule governs the review of decisions affecting substantial rights made in proceedings ancillary to the principal action and wherein provisional remedies are sought. Of such a character are orders appointing receivers,[86] refusing a discovery,[87] setting aside an order of reference,[88] dissolving, or refusing to dissolve, an injunction[89] or an attachment.[90] But in the latter case it has been held that it need not appear that such an order was excepted to,[91] where it is appealable and constitutes a part of the record,[92] or where an exception was taken to a final order sustaining the attachment.[93]

h. Special Proceedings. Exceptions have been held necessary to obtain a review of orders or rulings in special proceedings, as quo warranto,[94] mandamus,[95] and partition proceedings,[96] and also proceedings for the removal of an administrator.[97]

i. Trials or Proceedings Before Referees, Masters, or Like Officers — (I) *Rulings.* If trials or other proceedings before referees, masters, or like officers are required to be conducted as are trials or proceedings in court, as a rule exceptions must be taken to the rulings of such officers in like manner as if the parties were in court,[98] and such exceptions must be preserved by certification, embodiment in

84. Hitt *v.* Sharer, 34 Ill. 9; Tuömey *v.* Willman, 43 Nebr. 28, 61 N. W. 126; National Ben. Assoc. *v.* Harding, 7 Ohio Cir. Ct. 438.

Under a statute authorizing the review of any intermediate order or determination of the trial court, involving the merits and necessarily affecting the judgment, appearing upon the record, whether the same were excepted to or not, the court may review the sufficiency of the evidence to sustain the verdict, though no exception to the order overruling a motion for a new trial was interposed. Tourville *v.* Nemadji Boom Co., 70 Wis. 81, 35 N. W. 330.

85. Great Spirit Springs Co. *v.* Chicago Lumber Co., 47 Kan. 672, 28 Pac. 714; Atchison *v.* Byrnes, 22 Kan. 65; Danforth *v.* Lindell R. Co., 123 Mo. 196, 27 S. W. 715; Vaughn Lumber Co. *v.* Missouri Min., etc., Co., 3 Okla. 174, 41 Pac. 81; State *v.* Rollins, 31 W. Va. 363, 6 S. E. 923.

In North Carolina it has been held that, while it is the better practice to move for a new trial, assigning errors, it is not essential. It is sufficient if the exceptions were taken in apt time and are set out in the case on appeal. Bernhardt *v.* Brown, 118 N. C. 702, 24 S. E. 527, 715, 36 L. R. A. 402; Blackburn *v.* St. Paul F., etc., Ins. Co., 116 N. C. 821, 21 S. E. 922.

86. Chicago, etc., R. Co. *v.* McBeth, 149 Ind. 78, 47 N. E. 678; Gray *v.* Oughton, 146 Ind. 285, 45 N. E. 191.

87. Peterson *v.* Gresham, 25 Ark. 380.

88. Casky *v.* January, Hard. (Ky.) 539; Trigg *v.* Shields, Hard. (Ky.) 168.

89. Slagle *v.* Bodmer, 58 Ind. 465.

90. Groth *v.* Kersting, 4 Colo. App. 395, 36 Pac. 156.

91. Teweles *v.* Lins, 98 Wis. 453, 74 N. W. 122.

92. Ely *v.* Titus, 14 Minn. 125.

93. Lynn *v.* Stark, 6 Ky. L. Rep. 586.

94. **In an information in the nature of** quo warranto to try title to an office, the action of the court in submitting certain questions of law and fact to the jury, and in not giving any formal decision on the issues not so submitted, is not reviewable on appeal when no exceptions to such action have been taken. People *v.* Cooper, 139 Ill. 461, 29 N. E. 872.

95. Lamkin *v.* Sterling, 1 Ida. 120, wherein the error complained of was the refusal to quash the writ.

96. Stith *v.* Carter, (Ky. 1901) 60 S. W. 725, the appointment of commissioners.

97. An administrator will, on appeal, in the absence of any exceptions to the same, be deemed to have acquiesced in a summary order removing him, issued by a court having jurisdiction, and directing that he forthwith account for and pay over the assets of the estate. *Ex p.* Simpson, 55 Ind. 415.

The irregular removal of a testamentary trustee may be reviewed without exception. Matter of Scott, 49 N. Y. App. Div. 130, 62 N. Y. Suppl. 1059.

98. *Alabama.*— Kinsey *v.* Kinsey, 37 Ala. 393; Pearson *v.* Darrington, 32 Ala. 227.

California.— Tyson *v.* Wells, 2 Cal. 122.

Illinois.—Hibernian Banking Assoc. *v.* Law, 88 Ill. App. 18; Cook *v.* Meyers, 54 Ill. App. 590.

Indiana.— Lee *v.* State, 88 Ind. 256.

Massachusetts.—Copeland *v.* Crane, 9 Pick. (Mass.) 73.

Michigan.— Abbott *v.* Mathews, 26 Mich. 176.

Mississippi.— Davis *v.* Foley, Walk. (Miss.) 43.

Nebraska.— Light *v.* Kennard, 11 Nebr. 129, 7 N. W. 539.

New York.—Ingersoll *v.* Bostwick, 22 N. Y. 425; Brewer *v.* Isish, 12 How. Pr. (N. Y.) 481.

the report, or in such other manner as may be required by the local practice;[99] otherwise, the only question which may be considered is whether the facts found are sufficient to support the conclusions.[1] In some jurisdictions it is necessary that objections to testimony, rulings, or other proceedings before the referee or corresponding officer be reviewed or brought to the attention of the court to which the report is made or the evidence returned or introduced, and proper exceptions saved therein, so that the question raised before the officer may be passed upon on appeal.[2] In some cases the report must be excepted to in order to authorize consideration of objections to the rulings of such officer.[3]

(II) *FINDINGS AND CONCLUSIONS.* In the absence of appropriate exceptions to findings of fact or conclusions of law of a referee, master, or like officer,[4] or

North Carolina.— Greensboro *v.* Scott, 84 N. C. 184.

North Dakota.—Illstad *v.* Anderson, 2 N. D. 167, 49 N. W. 659.

Pennsylvania.— Butterfield *v.* Lathrop, 71 Pa. St. 225.

See 2 Cent. Dig. tit. "Appeal and Error," § 1552 *et seq.*

Rulings denying a motion to dismiss an action, reserved by consent until the consideration of the case on the merits, to be reviewed, must be excepted to. Rhoades *v.* Siman, 24 Minn. 192.

99. Tyson *v.* Wells, 2 Cal. 122; Rhoades *v.* Siman, 24 Minn. 192; Davis *v.* Foley, Walk. (Miss.) 43.

1. Teller *v.* Bishop, 8 Minn. 226.

2. *Alabama.*— Gunn *v.* Brantley, 21 Ala. 633.

Michigan.— Abbott *v.* Mathews, 26 Mich. 176.

Minnesota.— Gill *v.* Russell, 23 Minn. 362. Where evidence is received, subject to objection, by a referee, to be afterward ruled upon, an exception must be taken to his action, or it will not be reviewed on appeal. Kumler *v.* Ferguson, 22 Minn. 117.

New York.— Boughton *v.* Flint, 74 N. Y. 476.

North Dakota.— Illstad *v.* Anderson, 2 N. D. 167, 49 N. W. 659.

Pennsylvania.— Potter *v.* Langstrath, 151 Pa. St. 216, 25 Atl. 76.

South Carolina.— Verner *v.* Perry, 45 S. C. 262, 22 S. E. 888; Wagener *v.* Mars, 27 S. C. 97, 2 S. E. 844.

Vermont.— Baxter *v.* Blodgett, 63 Vt. 629, 22 Atl. 625; Stevens *v.* Fullington, 59 Vt. 671, 10 Atl. 829. Unless the objection and exception is renewed, the action of the officer can be reviewed only by an appeal to the discretion of the court, and then only where the evidence is of such a decisive character that the court can see that there is danger that injustice has been done. Graham *v.* Stiles, 38 Vt. 578. In Johnson *v.* Dexter, 37 Vt. 641, the appellate court considered the admission of evidence of an incompetent witness by an auditor, the record showing that it was the only point about which any question was raised in the court below, the adverse counsel not denying that the point was raised and decided, and although the exception was only to the rendition of judgment upon the auditor's report.

Wisconsin.— Momsen *v.* Atkins, 105 Wis. 557, 81 N. W. 647; Hinz *v.* Van Dusen, 95 Wis. 503, 70 N. W. 657. An objection to evidence in a trial before a referee may be taken advantage of in the circuit court on a motion, by the other side, to modify the report on a point involving the admissibility of such evidence; and, where the party objecting excepts to a finding of the court based upon it, this saves the objection on appeal. Wilcox *v.* Bates, 45 Wis. 138.

See 2 Cent. Dig. tit. "Appeal and Error," § 1552 *et seq.*

3. *Alabama.*— Reynolds *v.* Pharr, 9 Ala. 560.

Massachusetts.— Leathe *v.* Bullard, 8 Gray (Mass.) 545.

Michigan.— Martin *v.* McReynolds, 6 Mich. 70.

Missouri.— Johnston *v.* Wingfield, 35 Mo. App. 437.

New York.— Ashley *v.* Marshall, 29 N. Y. 494; Boughton *v.* Flint, 74 N. Y. 476.

Pennsylvania.— Swoope *v.* Wakefield, 10 Pa. Super. Ct. 342, 44 Wkly. Notes Cas. (Pa.) 209.

Vermont.— Bourne *v.* Bourne, 69 Vt. 251, 37 Atl. 1049; Scofield *v.* Stoddard, 58 Vt. 290, 5 Atl. 314; Bruce *v.* Continental L. Ins. Co., 58 Vt. 253, 2 Atl. 710. An exception to the referee's admission of evidence, unless brought before the trial court by exception to, or motion to recommit, the report, saves no question for review. Manning *v.* Leighton, 66 Vt. 56, 28 Atl. 630; Baxter *v.* Blodgett, 63 Vt. 629, 22 Atl. 625; Hard *v.* Burton, 62 Vt. 314, 20 Atl. 269.

Wisconsin.— McDonnell *v.* Schricker, 44 Wis. 327; Riley *v.* Mitchell, 37 Wis. 612.

See 2 Cent. Dig. tit. "Appeal and Error," § 1552 *et seq.*

4. *Kansas.*— Hill *v.* Fisher, 6 Kan. App. 375, 50 Pac. 1099.

Massachusetts.— French *v.* Peters, 177 Mass. 568, 59 N. E. 449; Roosa *v.* Davis, 175 Mass. 117, 55 N. E. 809.

Missouri.— Thacker *v.* Tracy, 8 Mo. App. 315.

North Carolina.— Abernathy *v.* Withers, 99 N. C. 520, 6 S. E. 376; Weathersbee *v.* Farrar, 98 N. C. 255, 3 S. E. 482; Strauss *v.* Frederick, 98 N. C. 60, 3 S. E. 825.

Oregon.— State *v.* Grover, 10 Oreg. 66.

Wisconsin.— Dinsmore *v.* Smith, 17 Wis. 20.

See 2 Cent. Dig. tit. "Appeal and Error," § 1552 *et seq.*

For practice in New York courts in regard to exceptions to referee's findings and con-

to the sufficiency of the evidence to sustain such findings or conclusions,[5] their propriety cannot be considered on appeal.

(III) *Report or Decision.* The report or decision of a referee, master, commissioner, or like officer, to which no objection has been theretofore made and which does not disclose error on its face, cannot be excepted to, in whole or in part, for the first time in the appellate court.[6] The same rule is applicable to a second report, made after the original report has been sent back or recommitted

clusions see *supra*, V, B, 2, e, (III), (G), (H).

Exceptions to conclusions of law are insufficient to enable the court to question the correctness of the findings of facts upon which the conclusions are based. Kurtz *v.* Carr, 105 Ind. 574, 5 N. E. 692; Hunt *v.* Blanton, 89 Ind. 38; Dodge *v.* Kennedy, 93 Mich. 547, 53 N. W. 795; Brant *v.* Salisbury, 23 Wis. 515.

5. *Alabama.*— National Commercial Bank *v.* McDonnell, 92 Ala. 387, 9 So. 149; Nunn *v.* Nunn, 66 Ala. 35.

Colorado.—Poire *v.* Rocky Mountain Transp. Co., 7 Colo. 588, 4 Pac. 1179.

Illinois.— Cheltenham Imp. Co. *v.* Whitehead, 128 Ill. 279, 21 N. E. 569; McCasland *v.* Allen, 60 Ill. App. 285; Kaegebein *v.* Higgie, 51 Ill. App. 538.

Mississippi.— Murff *v.* Peterson, 57 Miss. 146.

Nebraska.— Whalen *v.* Brennan, 34 Nebr. 129, 51 N. W. 759.

Pennsylvania.—Torrey *v.* Scranton, 133 Pa. St. 173, 19 Atl. 351; Dickey's Appeal, 115 Pa. St. 73, 7 Atl. 577.

South Carolina.—Though a referee may not decide matters of fact from his own personal recollection, yet, if the only objection is to the effect of the evidence, and the judge below concurs with the referee, it must appear that the overbearing weight of the evidence is against their conclusion. Bradley *v.* Rodelsperger, 6 S. C. 290.

6. *Alabama.*— Bellinger *v.* Lehman, 103 Ala. 385, 15 So. 600.

Illinois.— Dolese *v.* McDougall, 182 Ill. 486, 55 N. E. 547; Snell *v.* De Land, 136 Ill. 533, 27 N. E. 183; Sharp *v.* Hull, 81 Ill. App. 400; Burke *v.* Tutt, 59 Ill. App. 678.

Indiana.— Kern *v.* Maginniss, 55 Ind. 459.

Iowa.— Bauder *v.* Hinckley, 60 Iowa 185, 14 N. W. 228; Blake *v.* Dorgan, 1 Greene (Iowa) 547.

Kentucky.— Farmer *v.* Samuel, 4 Litt. (Ky.) 187, 14 Am. Dec. 106; Hart *v.* Baylor, Hard. (Ky.) 597.

Maine.— Thompson *v.* Mason, 92 Me. 98, 42 Atl. 314.

Maryland.— Darby *v.* Rouse, 75 Md. 26, 22 Atl. 1110; Perkins *v.* Emory, 55 Md. 27.

Massachusetts.— Flitner *v.* Butler, 165 Mass. 119, 42 N. E. 503; Carew *v.* Stubbs, 161 Mass. 294, 37 N. E. 171.

Michigan.— Eaton *v.* Truesdail, 40 Mich. 1; Amboy, etc., R. Co. *v.* Byerly, 13 Mich. 439.

Mississippi.— Ricks *v.* Hilliard, 45 Miss. 359.

Missouri.— Ellison *v.* Bowman, 29 Mo. App. 439.

New Mexico.— Newcomb *v.* White, 5 N. M. 435, 23 Pac. 671.

New York.—Marshall *v.* Smith, 20 N. Y. 251; Van Vleck *v.* Ballou, 40 N. Y. App. Div. 489, 58 N. Y. Suppl. 125; Cowen *v.* West Troy, 43 Barb. (N. Y.) 48; Tyler *v.* Willis, 33 Barb. (N. Y.) 327; Ketchum *v.* Clark, 22 Barb. (N. Y.) 319; Rust *v.* Hauselt, 46 N. Y. Super. Ct. 22; Dainese *v.* Allen, 36 N. Y. Super. Ct. 98, 14 Abb. Pr. N. S. (N. Y.) 363; Carr *v.* Hills Archemedean Lawn Mower Co., 13 Daly (N. Y.) 211; Rosenstock *v.* Hoggarty, 13 N. Y. Suppl. 228, 36 N. Y. St. 92; Brewer *v.* Isish, 12 How. Pr. (N. Y.) 481; Delabigarre *v.* Bush, 2 Johns. (N. Y.) 490.

North Carolina.— Depriest *v.* Patterson, 94 N. C. 519.

Pennsylvania.— Southern Maryland R. Co. *v.* Moyer, 125 Pa. St. 506, 23 Wkly. Notes Cas. (Pa.) 554, 17 Atl. 461.

South Carolina.— Price *v.* Price, 45 S. C. 57, 22 S. E. 790; Thomas *v.* Poole, 19 S. C. 323; Cureton *v.* Mills, 13 S. C. 409, 36 Am. Rep. 700.

Tennessee.— Rogers *v.* Rogers, 101 Tenn. 428, 47 S. W. 701; Huntingdon *v.* Mullins, 16 Lea (Tenn.) 738.

Vermont.— Walton *v.* Walton, 63 Vt. 513, 22 Atl. 617; Smalley *v.* Corliss, 37 Vt. 486.

Virginia.—Preston *v.* National Exch. Bank, 97 Va. 222, 33 S. E. 546; Wilson *v.* Wilson, 93 Va. 546, 25 S. E. 596.

West Virginia.— Gardner *v.* Gardner, 47 W. Va. 368, 34 S. E. 792; Arbogast *v.* McGraw, 47 W. Va. 263, 34 S. E. 736; Ward *v.* Ward, 40 W. Va. 611, 21 S. E. 746, 52 Am. St. Rep. 911, 29 L. R. A. 449.

Wisconsin.— Thornton *v.* Eaton, 45 Wis. 618; Jenkins *v.* Esterly, 22 Wis. 128.

United States.— Coghlan *v.* South Carolina R. Co., 142 U. S. 101, 12 S. Ct. 150, 35 L. ed. 951 [*affirming* 32 Fed. 316]; Burns *v.* Rosenstein, 135 U. S. 449, 10 S. Ct. 817, 34 L. ed. 193; South Fork Canal Co. *v.* Gordon, 6 Wall. (U. S.) 561, 18 L. ed. 894; Kinsman *v.* Parkhurst, 18 How. (U. S.) 289, 15 L. ed. 385; New Orleans *v.* Fisher, 91 Fed. 574, 63 U. S. App. 455, 34 C. C. A. 15; Imperial L. Ins. Co. *v.* Newcomb, 62 Fed. 97, 19 U. S. App. 669, 10 C. C. A. 288; Tyler *v.* Angevine, 15 Blatchf. (U. S.) 536, 24 Fed. Cas. No. 14,306.

See 2 Cent. Dig. tit. "Appeal and Error," § 1552 *et seq.*

Thus no question is presented, on writ of error to review a judgment at law on a referee's report, where there was no written stipulation waiving a jury, no bill of exceptions, and no specific exceptions taken to the overruling of exceptions to the report or to the judgment. Dietz *v.* Lymer, 61 Fed. 792, 19 U. S. App. 663, 10 C. C. A. 71 [*followed* in Dundee Mortg., etc., Invest. Co. *v.* Hughes, 124 U. S. 157, 8 S. Ct. 377, 31 L. ed. 357].

for further action,[7] and it is immaterial that the same objectionable matters appeared in the first report and were excepted to,[8] or that exceptions to matters other than those as to which the report was sent back remain undisposed of.[9]

(iv) *Accountings.* Alleged errors on an accounting will not be reviewed in the absence of an exception to the allowance or disallowance of items thereof.[10]

(v) *Exceptions to General Rule.* There are numerous decisions wherein the courts, either because of the discretion vested in them, because of enactments designed to protect substantial rights, or for the purpose of preventing manifest injustice, refuse to hold parties to a strict observance of the general rule.[11] Thus, it has been held that, if the master does not furnish in his report the facts necessary to enable the court to proceed to a final decree on the merits of the case[12] or to examine into the correctness of an account,[13] or the master complies with the rules prescribed by the chancellor to be observed in the statement of the account,[14] or the report is made as to details in accordance with the instructions of the parties so as to represent their views and claims and not those of the officer,[15] exceptions are unnecessary to enable the appellate court to pass on the propriety of the action below. Nor are exceptions necessary where the right to recover is submitted by the referee to the court for its decision,[16] or where the report is, in effect, a special verdict — as a report of facts merely[17] — or where there is undoubted error,[18]

7. Kee *v.* Kee, 2 Gratt. (Va.) 116; Hooper *v.* Hooper, 29 W. Va. 276, 1 S. E. 280; Carskadon *v.* Minke, 26 W. Va. 729; and see 2 Cent. Dig. tit. "Appeal and Error," § 1557 *et seq.*

8. Carskadon *v.* Minke, 26 W. Va. 729.

9. Maloney *v.* Missouri Pac. R. Co., 122 Mo. 106, 26 S. W. 702.

If the recommital and directions of the court are erroneous, exceptions to the second report are not necessary to authorize a revision of improprieties in such report occasioned by action in accordance with such erroneous directions. Harbin *v.* Bell, 54 Ala. 389.

10. *Alabama.*— Long *v.* Easly, 13 Ala. 239.

Kentucky.— Collins *v.* Champ, 15 B. Mon. (Ky.) 118, 61 Am. Dec. 179; Bowling *v.* Cobb, 6 B. Mon. (Ky.) 356.

Michigan.— Clark *v.* Landon, 90 Mich. 83, 51 N. W. 357.

Mississippi.— Williamson *v.* Downs, 34 Miss. 402.

New Jersey.— Luse *v.* Rarick, 34 N. J. Eq. 212.

New York.— Matter of Kautsky, 56 N. Y. App. Div. 440, 67 N. Y. Suppl. 882.

Wisconsin.— Warner *v.* Cuckow, 90 Wis. 291, 63 N. W. 238.

See 2 Cent. Dig. tit. "Appeal and Error," § 1560 *et seq.*

Where a judge undertakes to state an account, without reference to a commissioner, he should proceed as a commissioner would upon charge and discharge accounts; and the parties should make exceptions to such of his conclusions as they object to, in order not only that he may have an opportunity to correct them, but also that, in case of appeal, the point in controversy may be clearly understood. Barnebee *v.* Beckley, 43 Mich. 613, 5 N. W. 976.

11. Though no exception is filed in the court below to a master's report failing to allow punitive damages on an injunction bond, such damages will be decreed on appeal where complicated accounts are not involved, and the whole matter is presented in the proof and discussed by counsel in their briefs; the rule that an exception to a master's report will not be considered unless made below being only one of practice, and the reference to a master on an injunction bond being a mere formality. South Penn Oil Co. *v.* Stone, (Tenn. Ch. 1900) 57 S. W. 374.

See 2 Cent. Dig. tit. "Appeal and Error," § 1552 *et seq.*

12. Lang *v.* Brown, 21 Ala. 179, 56 Am. Dec. 244.

13. Bobe *v.* Stickney, 36 Ala. 482; Blake *v.* Dorgan, 1 Greene (Iowa) 547; Ringgold *v.* Ringgold, 1 Harr. & G. (Md.) 11, 18 Am. Dec. 250.

14. Bobe *v.* Stickney, 36 Ala. 482.

The appellate court may examine into rights put in issue by the pleadings and which do not depend upon the state of the accounts, where an account may be necessary to determine the extent of a claim, although accounts have been stated, in an auditor's report directed below, involving a determination of those rights, and no exceptions have been filed. Wells *v.* Beall, 2 Gill & J. (Md.) 458.

15. Walter *v.* Foutz, 52 Md. 147; Anderson *v.* Tuck, 33 Md. 225; Dennis *v.* Dennis, 15 Md. 73.

16. Willey *v.* Laraway, 64 Vt. 559, 25 Atl. 436.

17. Marshall *v.* Smith, 20 N. Y. 251.

18. Maccubbin *v.* Cromwell, 2 Harr. & G. (Md.) 443; Clark *v.* Landon, 90 Mich. 83, 51 N. W. 357.

The Maryland act of 1825, c. 117, prohibiting the reversal of a decree in the appellate

or there is error in computation,[19] or failure to allow interest properly allowable,[20] or where the law is misapplied to facts stated correctly,[21] or where, upon the whole case, the judgment is erroneous.[22]

(IV) *JUDGMENT OR DECISION ON REPORT, ETC.* It may be stated, generally, that the rule requiring exceptions is applicable to judgments, decrees, or decisions rendered on the report, findings, or conclusions of referees or like officers, either in confirming or refusing to confirm, or in recommitting, the same.[23] But there are many decisions to the effect that, where the determination of the court below is based on an insufficient or erroneous report, no exception to it is necessary to enable the court to inquire into its correctness.[24] Likewise, this exception to the general rule has been held applicable to a judgment[25] or decree which was not warranted by the facts or matters reported,[26] to a decision adopting and confirming a referee's conclusions of law,[27] a decision based on a report sufficient to sustain it and as to which the court had no authority to entertain objections,[28] and to a finding by a court whose decision was reviewable without exception.[29]

court on exceptions to an account not appearing by the record to have been taken in the court below, does not apply to a formal account exhibiting merely a statement of the rights of the parties as solemnly adjudicated by the court below in a previous order. Miller *v.* Allison, 8 Gill & J. (Md.) 35.

19. Brooks *v.* Robinson, 54 Miss. 272; Wills *v.* Dunn, 5 Gratt. (Va.) 384.

An error in a registrar's report in computing the amount of interest can be corrected on appeal only to the extent of the exception taken thereto, although it is evident from the record that the registrar made a greater mistake than that pointed out by the exception. Lehman *v.* Levy, 69 Ala. 48.

20. Haynie *v.* American Trust Invest. Co., (Tenn. Ch. 1896) 39 S. W. 860.

21. Hurd *v.* Goodrich, 59 Ill. 450; Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 40 Fed. 476.

22. Wakeman *v.* Dalley, 44 Barb. (N. Y.) 498.

23. *Georgia.*— Merchants Nat. Bank *v.* Armstrong, 107 Ga. 479, 33 S. E. 473.

Illinois.—Hibernian Banking Assoc. *v.* Law, 88 Ill. App. 18.

Indian Territory.— The objection that exceptions to a master's report were overruled as a whole will not be considered on appeal where the record does not show that appellant demanded separate rulings on each exception, and excepted to each ruling. McCurtain *v.* Grady, 1 Indian Terr. 107, 38 S. W. 65.

Massachusetts.— Sullivan *v.* Arcand, 165 Mass. 364, 43 N. E. 198.

Missouri.— Wentzville Tobacco Co. *v.* Walker, 123 Mo. 662, 27 S. W. 639.

New York.— Matter of Buffalo Ice Co., 37 N. Y. App. Div. 144, 55 N. Y. Suppl. 783; Cheesbrough *v.* Agate, 26 Barb. (N. Y.) 603; Smith *v.* Smith, 4 Johns. Ch. (N. Y.) 445.

North Carolina.— Scroggs *v.* Stevenson, 100 N. C. 354, 6 S. E. 111; Strauss *v.* Frederick, 98 N. C. 60, 3 S. E. 825.

See 2 Cent. Dig. tit. "Appeal and Error," § 1552 *et seq.*

24. *Iowa.*— Washington County *v.* Jones, 45 Iowa 260.

Kentucky.— Slaughter *v.* Slaughter, 8 B. Mon. (Ky.) 482; Wintersmith *v.* Fairleigh, 5 Ky. L. Rep. 241.

Missouri.— Shore *v.* Coons, 24 Mo. 556.

North Carolina.— Hooks *v.* Sellers, 16 N. C. 61.

Virginia.—Cookus *v.* Peyton, 1 Gratt. (Va.) 431; White *v.* Johnson, 2 Munf. (Va.) 285. See, however, Hansucker *v.* Walker, 76 Va. 753, wherein, there having been no exception taken, the court refused to reverse a decree of sale because the commissioner's report showed that usurious interest had been taken.

West Virginia.— Ward *v.* Ward, 40 W. Va. 611, 21 S. E. 746, 52 Am. St. Rep. 911, 29 L. R. A. 449; Kanawha Valley Bank *v.* Wilson, 25 W. Va. 242.

United States.— Himely *v.* Rose, 5 Cranch (U. S.) 313, 3 L. ed. 111; Murray *v.* Schooner Charming Betsey, 2 Cranch (U. S.) 64, 2 L. ed. 208.

What may be reviewed.— On appeal from a judgment entered on a report to which no exception was taken exceptions at the trial can alone be reviewed. Rosenstock *v.* Hoggarty, 13 N. Y. Suppl. 228, 36 N. Y. St. 92 [*affirmed* in 131 N. Y. 647, 30 N. E. 867, 43 N. Y. St. 963]. Where the court, upon an exception to a commissioner's report, decides a point and by a decree refers the case back to the commissioner, who makes a report in accordance with the decision of the court, whereupon the court renders a final decree or decree settling the principle of the cause upon such reports so decided, such decree may be reviewed on appeal without an exception in the lower court on the matters embraced in the court's decision on such point. Kyle *v.* Conrad, 25 W. Va. 760.

25. Burpe *v.* Van Eman, 11 Minn. 327.

26. Strang *v.* Allen, 44 Ill. 428; Wood *v.* Lee, 5 T. B. Mon. (Ky.) 50; Ruhl *v.* Berry, 47 W. Va. 824, 35 S. E. 896. A decree confirming a report which was not excepted to may be revised, where the matter involved in the appeal was not submitted to, nor considered by, the referee. Hardin *v.* Hardin, 34 S. C. 77, 12 S. E. 936, 27 Am. St. Rep. 786.

27. Hodgin *v.* Toler, 70 Iowa 21, 30 N. W. 1, 59 Am. Rep. 435.

28. Headley *v.* Reed, 2 Cal. 322.

29. Matter of McAleenan, 53 N. Y. App. Div. 193, 65 N. Y. Suppl. 907.

In the United States courts on a writ of er-

j. Time of Taking — (I) *Proceedings During Trial.* In order to make an exception available it must be taken at the time the ruling or decision complained of is made, or within the time allowed by statute or rule of practice for taking such exception, where such a statute or rule exists.[30] Thus, this rule has

ror to a judgment on a referee's report in an action at law, where there is no written stipulation waiving a jury, and nothing showing a reference under a state statute, and where there is no bill of exceptions, and no specific exception was taken to the overruling of exceptions to the referee's report, or to the judgment thereon at the time it was entered, although these rulings were assigned as grounds of a motion for a new trial, no question is presented for review. Imperial L. Ins. Co. *v.* Newcomb, 62 Fed. 97, 19 U. S. App. 669, 10 C. C. A. 288.

30. *Arkansas.*— Prairie County *v.* Bancroft, 26 Ark. 526; Lyon *v.* Evans, 1 Ark. 349.

California.— Towle *v.* Clunie (Cal. 1890) 23 Pac. 314; McGuire *v.* Drew, 83 Cal. 225, 23 Pac. 312. *Compare* Pfister *v.* Wade, 59 Cal. 273, wherein it was held that exceptions taken to an order denying an injunction served more than ten days from the date of the order, but within ten days of final judgment, were seasonably served.

Connecticut.—Walsh *v.* Hayes, 72 Conn. 397, 44 Atl. 725.

Florida.— Godwin *v.* Bryan, 16 Fla. 396.

Georgia.— Berryman *v.* Haden, 112 Ga. 752, 38 S. E. 53; Clay *v.* Smith, 108 Ga. 189, 33 S. E. 963; Corniff *v.* Cook, 95 Ga. 61, 22 S. E. 47, 51 Am. St. Rep. 55.

Illinois.— Burns *v.* People, 126 Ill. 282, 18 N. E. 550; Sullivan *v.* Dollins, 13 Ill. 85.

Indiana.— Boyce *v.* Graham, 91 Ind. 420; Dickson *v.* Rose, 87 Ind. 103; Tecumseh Facing Mills *v.* Sweet, 25 Ind. App. 284, 58 N. E. 93; Thomas *v.* Griffin, 1 Ind. App. 457, 27 N. E. 754. *Compare* Wabash R. Co. *v.* Dykeman, 133 Ind. 56, 32 N. E. 823, which holds that the statute requiring an exception at the time of decision applies only to adversary proceedings, and not to proceedings for the appointment of a receiver without notice to defendant.

Iowa.— Young *v.* Rann, 111 Iowa 253, 82 N. W. 785; Souster *v.* Black, 87 Iowa 519, 54 N. W. 534.

Kansas.— Powers *v.* McCue, 48 Kan. 477, 29 Pac. 686; Gallagher *v.* Southwood, 1 Kan. 143.

Kentucky.—Cobb *v.* Stewart, 4 Metc. (Ky.) 255, 83 Am. Dec. 465; Burns *v.* Com., 3 Metc. (Ky.) 13.

Maine.— Fish *v.* Baker, 74 Me. 107.

Maryland.— Hagan *v.* Hendry, 18 Md. 177.

Massachusetts.— Troger *v.* Webster, 174 Mass. 580, 55 N. E. 318.

Mississippi.— Green *v.* Robinson, 3 How. (Miss.) 105; Wilson *v.* Owens, 1 How. (Miss.) 126.

Missouri.— Richardson *v.* Schuyler County Agricultural, etc., Assoc., 156 Mo. 407, 57 S. W. 117; McAnaw *v.* Matthis, 129 Mo. 142, 31 S. W. 344; Bond *v.* Finley, 74 Mo. App. 22; Ecton *v.* Kansas City, etc., R. Co., 56 Mo. App. 337.

Montana.— Randall *v.* Greenhood, 3 Mont. 506; Griswold *v.* Boley, 1 Mont. 545.

Nebraska.— Herzog *v.* Campbell, 47 Nebr. 370, 66 N. W. 424; Warrick *v.* Rounds, 17 Nebr. 411, 22 N. W. 785.

New Hampshire.— Fowler *v.* Towle, 49 N. H. 507; Foss *v.* Strafford, 25 N. H. 78.

New Mexico.— Laird *v.* Upton, 8 N. M. 409, 45 Pac. 1010; Territory *v.* Baker, 4 N. M. 117, 13 Pac. 30.

New York.— New York *v.* New York Refrigerating Constr. Co., 146 N. Y. 210, 40 N. E. 771, 66 N. Y. St. 590; Hunt *v.* Bloomer, 13 N. Y. 341, 12 How. Pr. (N. Y.) 567; Onondaga County Mut. Ins. Co. *v.* Minard, 2 N. Y. 98; Lanier *v.* Hoadley, 42 N. Y. App. Div. 6, 58 N. Y. Suppl. 665; Beach *v.* Raymond, 1 Hilt. (N. Y.) 201; Tremain *v.* Rider, 13 How. Pr. (N. Y.) 148.

North Carolina.—Virgin Cotton Mills *v.* Abernathy, 115 N. C. 402, 20 S. E. 522; Carr *v.* Alexander, 112 N. C. 783, 17 S. E. 577; Hemphill *v.* Morrison, 112 N. C. 756, 17 S. E. 535; Jones *v.* Jones, 94 N. C. 111.

Ohio.— Stuckey *v.* Bloomer, 2 Ohio Cir. Ct. 541, 1 Ohio Cir. Dec. 631.

Pennsylvania.— Constine's Appeal, 1 Grant (Pa.) 242.

South Carolina.— Stedham *v.* Creighton, 28 S. C. 609, 9 S. E. 465.

Texas.— Houston *v.* Jones, 4 Tex. 170; Goode *v.* State, 2 Tex. App. 520.

Vermont.— Gage *v.* Ladd, 6 Vt. 174.

Virginia.—Washington, etc., Tel. Co. *v.* Hobson, 15 Gratt. (Va.) 122.

Washington.— Ballard *v.* Slaughter First Nat. Bank, 13 Wash. 670, 43 Pac. 938.

West Virginia.— Gilmer *v.* Sydenstricker, 42 W. Va. 52, 24 S. E. 566.

Wisconsin.— Meier *v.* Morgan, 82 Wis. 289, 52 N. W. 174, 33 Am. St. Rep. 39; Buel *v.* Munger, 13 Wis. 327; Getty *v.* Rountree, 2 Pinn. (Wis.) 379, 54 Am. Dec. 138.

United States.— Merchants Exch. Bank *v.* McGraw, 76 Fed. 930, 48 U. S. App. 55, 22 C. C. A. 622. "The rule is peremptory, and without variation, that a court of error cannot consider an exception which was not tendered at the time of the ruling of the trial court complained of." This has been the uniform construction of the Statute of Westminster II (13 Edw. I, c. 31), whence came the modern practice in respect to bills of exceptions, and has always been understood to be the rule of law prevailing in appellate proceedings under the common law. Johnson *v.* Garber, 73 Fed. 523, 524, 43 U. S. App. 107, 19 C. C. A. 556 [*citing* 2 Tidd Pr. *863; Wright *v.* Sharp, 1 Salk. 288].

See 2 Cent. Dig. tit. "Appeal and Error," § 1611 *et seq.*

A motion to strike out exceptions because

been applied to the giving[31] or refusal of instructions,[32] to the admission or rejection of evidence,[33] and, indeed, the doctrine applies in case of any ruling or decision. Exceptions taken after the jury retires,[34] or after verdict,[35] or after decree or judgment rendered, come too late.[36]

(II) *Refusal of New Trial.* The action of the trial court in overruling a motion for a new trial cannot be assigned as error in the appellate court unless an exception to the decision on the motion was taken at the time of its entry.[37]

k. Waiver. Where, on a trial, a party takes a step or adopts a course directly inconsistent with an exception previously taken by him to some ruling of the trial court, he will be deemed to have waived such exception, and cannot take advantage of it upon his appeal or writ of error.[38]

they were not taken in time is not sanctioned by the practice of the supreme court. Home Sav., etc., Assoc. *v.* Burton, 20 Wash. 688, 56 Pac. 940.

Exceptions to the court's refusal to make findings proposed by appellant will be considered even though exceptions to the findings made were not taken within the time prescribed by statute. Home Sav., etc., Assoc. *v.* Burton, 20 Wash. 688, 56 Pac. 940.

The form of a reservation of a point cannot be objected to on appeal unless an exception thereto was taken at the trial. Velas *v.* Patton Coal Co., 197 Pa. St. 380, 47 Atl. 360.

In trials by court.— When it is desired to obtain a review of rulings made during the progress of a trial without the intervention of a jury, exceptions thereto must be taken at the time in the same manner as in a trial by jury. Glas *v.* Prewitt, 26 Mo. 121; Tremain *v.* Rider, 13 How. Pr. (N. Y.) 148; Gilchrist *v.* Stevenson, 7 How. Pr. (N. Y.) 273.

31. *California.*— Garoutte *v.* Williamson, 108 Cal. 135, 41 Pac. 35, 413; Mallett *v.* Swain, 56 Cal. 171.

Colorado.— McFeters *v.* Pierson, 15 Colo. 201, 24 Pac. 1076, 22 Am. St. Rep. 388.

Kentucky.—Poston *v.* Smith, 8 Bush (Ky.) 589.

Minnesota.— O'Connor *v.* Chicago, etc., R. Co., 27 Minn. 166, 6 N. W. 481, 38 Am. Rep. 288.

Montana.— Griswold *v.* Boley, 1 Mont. 545.

Vermont.— State *v.* Clark, 37 Vt. 471.

32. Garoutte *v.* Williamson, 108 Cal. 135, 41 Pac. 35, 413; Burns *v.* People, 126 Ill. 282, 18 N. E. 550; Dozier *v.* Jerman, 30 Mo. 216; Tagg *v.* Miller, 10 Nebr. 442, 6 N. W. 764; Branton *v.* O'Briant, 93 N. C. 99.

33. Benepe *v.* Wash, 38 Kan. 407, 16 Pac. 950; Downey *v.* Read, 125 Mo. 501, 28 S. W. 860; Griffith *v.* Hanks, 91 Mo. 109, 4 S. W. 508; Schumaker *v.* Mather, 14 N. Y. Suppl. 411, 38 N. Y. St. 542; Collins *v.* Panhandle Nat. Bank, 75 Tex. 254, 11 S. W. 1053.

34. *Alabama.*— Montgomery *r.* Gilmer, 33 Ala. 116, 70 Am. Dec. 562.

California.— Mallett *v.* Swain, 56 Cal. 171.

Florida.—Southern Express Co. *v.* Van Meter, 17 Fla. 783, 35 Am. Rep. 107.

Indiana.— Jones *v.* Van Patten, 3 Ind. 107.

Massachusetts.—Spooner *v.* Cummings, 151 Mass. 313, 23 N. E. 839.

North Carolina.— By statute there is this exception: that exceptions to the charge may be taken in ten days after adjournment of court. Clark's Code Civ. Proc. N. C. (1900), p. 513; State *v.* Harris, 120 N. C. 577, 26 S. E. 774.

35. Godwin *v.* Bryan, 16 Fla. 396; Phillips *v.* Lane, 4 How. (Miss.) 122; Warren *v.* Lagrone, 12 S. C. 45.

36. Joliet Iron, etc., Co. *v.* Chicago, etc., R. Co., 50 Iowa 455.

37. Burke *v.* Ward, 50 Ill. App. 283.

May be made during term.— An exception to an order denying a new trial may be made not later than the close of the term. Gilmer *v.* Sydenstricker, 42 W. Va. 52, 24 S. E. 566.

Insufficient exception.— On filing a motion for new trial, a request made to the trial judge to note an exception in the event the motion was overruled does not constitute an exception to the overruling of the motion, as an exception can only be taken after the occurrence of the matter complained of; and the court has no power, at a subsequent term, to make an entry *nunc pro tunc* that an exception was taken at the time the motion was overruled. Cincinnati *v.* Steadman, 8 Ohio Cir. Ct. 407.

38. *Iowa.*— Anson *v.* Dwight, 18 Iowa 241.

Kentucky.— Fuqua *v.* Moseley, 12 Ky. L. Rep. 989.

Maine.— King *v.* Robinson, 33 Me. 114, 54 Am. Dec. 614, holding, however, that a waiver of exceptions does not authorize an inference that the proceedings had on the trial were incorrect.

Maryland.— Boteler *v.* State, 8 Gill & J. (Md.) 359, holding that, where some of the exceptions properly taken in the trial court are waived or abandoned, an appellate court can only consider questions arising under the exceptions not so waived or abandoned.

Massachusetts.— Cook *v.* Castner, 9 Cush. (Mass.) 266.

Minnesota.— Sleser Bros. Co. *v.* Minneapolis Cold-Storage Co., 77 Minn. 186, 79 N. W. 680; Weide *v.* Davidson, 15 Minn. 327.

New York.— Lahr *v.* Metropolitan El. R. Co., 104 N. Y. 268, 10 N. E. 528; Byrnes *v.* Cohoes, 67 N. Y. 204.

See 2 Cent. Dig. tit. "Appeal and Error," § 1646 *et seq.*

Applications of rule.—Where a demurrer to the answer was sustained and defendant excepted, and plaintiff then asked leave to withdraw his demurrer but defendant objected, and this objection was sustained, it was held that the objection was, in effect, a waiver

3. MOTIONS FOR NEW TRIAL. In a number of jurisdictions a motion for new trial is in no event necessary to preserve for review errors committed during the course of the trial by the trial court. In most states, however, motions for new trial are necessary to preserve certain errors for review by the appellate court. The character of the errors which it is thus necessary to preserve is dependent, of course, entirely on the special statutory provisions of the jurisdiction in which the question arises.[39]

4. CERTIFICATION OF QUESTIONS AND CASES[40]— a. In Connecticut.[41] Questions of law may be reserved,[42] by the superior court, court of common pleas, or district court, for the advice of the supreme court, on consent[43] of all the parties to the record,[44] and the trial court shall conform to the advice of the supreme court in the judgment, decree, or decision rendered.[45]

b. In Illinois.[46] In any case where a majority of the judges of the appellate

of the exceptions to the error previously alleged. Anson *v.* Dwight, 18 Iowa 241.

Where evidence is admitted over objection and an exception is taken, the party excepting will waive the benefit of his exception if he afterward introduces the same evidence himself. Weide *v.* Davidson, 15 Minn. 327.

Where plaintiff, after excepting to the ruling of the judge, amends his declaration, changing the form of the action and the issue to be tried, and defendant obtains a verdict on the merits, such exception is no longer open to plaintiff. Cook *v.* Castner, 9 Cush. (Mass.) 266.

What does not constitute waiver.— Where defendants duly excepted to an erroneous order changing the venue, they did not waive their exception by going to trial in the new venue and failing to raise the question again by motion for new trial or in arrest of judgment. The error can only be reached on an appeal from the final judgment, as no appeal could be taken from the order changing the venue. Michaels *v.* Crabtree, 59 Iowa 615, 13 N. W. 752.

When a party has once properly made his exception to an adverse ruling on his demurrer, he does not waive it by failing to except to the final judgment. Jordan *v.* Kavanaugh, 63 Iowa 152, 18 N. W. 851.

An exception to instructions is not waived by subsequently asking the court to repeat them, in connection with certain answers made to questions propounded by the jury, as this merely asks the restatement so as to qualify those answers. New York Mut. L. Ins. Co. *v.* Phinney, 178 U. S. 327, 20 S. Ct. 906, 44 L. ed. 1088 [*reversing* 76 Fed. 617, 48 U. S. App. 78, 22 C. C. A. 425].

39. For the necessity, sufficiency, and effect of such motions for new trials, generally, see NEW TRIAL.

40. Scope of treatment.— The question of certification in relation to civil cases only will be considered here. For certification, so far as it affects criminal proceedings, see CRIMINAL LAW. Inasmuch as the statutes governing this practice are very dissimilar, it has been deemed best to consider the statutes of each jurisdiction, and the decisions thereunder, separately. See *infra*, V, 4, a, *et seq.*

41. Conn. Gen. Stat. (1888), § 1114.

42. It is necessary that the facts be distinctly found by the trial court. Dowd *v.* Ensign, 68 Conn. 318, 36 Atl. 810, holding that if this is not done the cause will be remanded for further and more explicit findings.

43. Written consent of the parties is necessary. New York, etc., R. Co. *v.* Boston, etc., R. Co., 36 Conn. 196.

44. While the statute provides that all parties to the record must consent, this includes merely such parties as choose to appear in the trial court. State Bank *v.* Bliss, 67 Conn. 317, 35 Atl. 255.

45. Decree or judgment rendered.— Where a case has been reserved and judgment rendered in accordance with the advice given, the supreme court will not afterward, upon proceedings in error, consider questions that the party had a full opportunity to make and be heard upon when the case was considered upon the reservation. Fowler *v.* Bishop, 32 Conn. 199. Where a case is reserved for advice upon the entire record, if the court discovers that the declaration is so insufficient that the judgment required by the facts would be a nullity, such a judgment ought not to be advised; but if the facts show a good cause of action, and the declaration, though defective, is amendable, the court will ordinarily advise judgment contingently upon such amendment. Camp *v.* Scott, 47 Conn. 366. So, where a case is heard upon a reservation of a question of law and judgment entered in accordance with the advice given, the supreme court will not, on the proceedings in error, again consider the question so decided. Derby *v.* Alling, 43 Conn. 255; Nichols *v.* Bridgeport, 27 Conn. 459.

46. Ill. Rev. Stat. (1899), c. 37, § 25; Starr & C. Anno. Stat. Ill. (1896), p. 3115, par. 8. *Compare* Ill. Rev. Stat. (1899), c. 110, par. 76.

The certificate of importance cannot be granted unless application is made within twenty days, the time limited for appeal (Kirkwood *v.* Steele, 168 Ill. 177, 49 N. E. 193; Ellis *v.* Von Ach, 14 Ill. App. 194), and the time is not extended by the time consumed upon a petition for a rehearing (Sholty *v.* McIntyre, 136 Ill. 33, 26 N. E. 655; MacLachlan *v.* McLaughlin, 126 Ill. 427, 18 N. E. 544; West Chicago Park Com'rs *v.* Kincade, 64 Ill. App. 113); and an order allowing an appeal entered after expiration of the time limited for taking an appeal confers no jurisdiction of the cause on the supreme court.

court shall be of the opinion that a case decided by them, involving a less sum than one thousand dollars, exclusive of costs, also involves questions of law of such importance, either on account of principal or collateral interest, that they should be passed upon by the supreme court,[47] they may in such cases grant appeals and writs of error to the supreme court, on petition of the parties to the cause, in which case the said appellate courts shall certify[48] to the supreme court the grounds of granting the appeal.[49]

c. In Indiana.[50] Either party may reserve any question of law arising during the progress of the cause for the decision of the supreme court.[51] Any question so reserved may be taken to the supreme court upon a bill of exceptions whenever it arises on demurrer upon the pleadings involved. When the question so involved is shown by the bill of exceptions, the party excepting shall notify the court that he intends to take the question of law to the supreme court, and upon the bill of exceptions only;[52] and the court shall thereupon cause the bill of exceptions to be so made that it will distinctly and briefly embrace so much of the record of the

Indiana, etc., R. Co. *v.* Sampson, 132 Ill. 527, 24 N. E. 609; Tibballs *v.* Libby, 97 Ill. 552.

47. Discretion of judges in granting certificate.— The question whether or not a certificate shall be granted is entirely within the discretion of the judges of the court of appeals. The supreme court has no power to compel the appellate court to certify. Fuller *v.* Bates, 96 Ill. 132. When, from the evidence as disclosed by the record, the court is unable to discover that there are involved questions of law of such importance, either on account of principal or collateral interests, that they should be passed upon by the supreme court, and they have not been settled by that court, the certificate of importance will be refused. Illinois Cent. R. Co. *v.* Louthan, 80 Ill. App. 579.

48. Necessity for certificate.— A certificate by a majority of the judges of the court of appeals is, where the amount involved is less than one thousand dollars, a condition precedent to a right of appeal to the supreme court. People *v.* Midkiff, 174 Ill. 323, 51 N. E. 785; Kirkwood *v.* Steele, 168 Ill. 177, 49 N. E. 193; MacLachlan *v.* McLaughlin, 126 Ill. 427, 18 N. E. 544; McNay *v.* Stratton, 109 Ill. 30; Umlauf *v.* Umlauf, 103 Ill. 651; Fuller *v.* Bates, 8 Ill. App. 32.

49. Requisites of certificate and what may be considered thereon.— The certificate must state that the questions involved are important. Indiana, etc., R. Co. *v.* Sampson, 132 Ill. 527, 24 N. E. 609. The certificate, unlike those required in most jurisdictions where questions are allowed to be certified, need not specifically point out the questions of law which are considered of sufficient importance to be passed upon by the supreme court. Steele *v.* Grand Trunk Junction R. Co., 125 Ill. 385, 17 N. E. 483. The entire case is before the supreme court, and the parties are not confined to the questions certified by the appellate division. Chicago, etc., R. Co. *v.* Guertin, 115 Ill. 466, 4 N. E. 507.

50. Thornton's Stat. Ind. (1897), § 647 *et seq.*

At any time within one year after final judgment in the cause, and not after, the party excepting may take the reserved question to the supreme court by appeal. The appeal in such case shall not stay proceedings upon the judgment unless so ordered by the supreme court or some judge thereof. Ind. Rev. Stat. (1897), § 648.

51. Only questions of law may be reserved (Woodard *v.* Baker, 116 Ind. 152, 18 N. E. 524; Fouty *v.* Morrison, 73 Ind. 333) which have been presented in the trial court (Woodard *v.* Baker, 116 Ind. 152, 18 N. E. 524; Love *v.* Carpenter, 30 Ind. 284), actually arose and were decided during the progress of the cause (Woodard *v.* Baker, 116 Ind. 152, 18 N. E. 524; Short *v.* Stutsman, 81 Ind. 115), and affect the merits of the litigation (Pierse *v.* West, 29 Ind. 266).

Final judgment is a condition precedent to the determination of reserved questions. Taylor *v.* Jay County, 120 Ind. 121, 22 N. E. 108.

Necessity of motion for new trial.— Where the reserved question of law arises on the trial of the cause, a motion for new trial is always necessary. Conner *v.* Marion, 112 Ind. 517, 14 N. E. 488; Rousseau *v.* Corey, 62 Ind. 250; Starner *v.* State, 61 Ind. 360; Love *v.* Carpenter, 30 Ind. 284; Garver *v.* Daubenspeck, 22 Ind. 238.

52. Notice of intention to reserve questions.— In order to reserve a question of law for the decision of the supreme court, notice must be given to the trial court of such intention (Shugart *v.* Miles, 125 Ind. 445, 25 N. E. 551); but it is not necessary, where the rulings are made on the trial and duly excepted to, to notify the court at that time that the party intends to reserve questions; it is sufficient if there is due exception at the time the ruling is made and the declaration of intention to reserve questions is made, and notice of intention to appeal on those questions is given at the time the rulings upon which the questions arose are brought before the trial court for review (Shugart *v.* Miles, 125 Ind. 445, 25 N. E. 551). If the lower court, pursuant to the notice, fully and correctly prepares the special bill of exceptions so as to present briefly and distinctly each question urged for reversal, no question as to the sufficiency of the notice given to the court can arise. Loesch *v.* Koehler, 144 Ind. 278, 41 N. E. 326, 43 N. E. 129, 35 L. R. A. 682.

cause only, and a statement of the cause, as will enable the supreme court to apprehend the particular question involved.[53]

d. In Iowa.[54] No appeal shall be taken from the superior and district courts in any cause in which the amount in controversy, as shown by the pleadings, does not exceed one hundred dollars, unless the trial judge shall, during the term in which the judgment is entered, certify that the cause is one in which the appeal should be allowed,[55] and upon such certificate being filed the same shall be appealable, regardless of the amount in controversy. This limitation shall not affect the

53. Where the reserved question arises on evidence admitted at the trial all the evidence which has any bearing thereon must be made part of the record by the bill of exceptions in order to enable the supreme court to apprehend the particular question involved. Connor *v.* Marion, 112 Ind. 517, 14 N. E. 488. See also Bissell *v.* Wert, 35 Ind. 54.

54. Iowa Code (1897), § 4110; Miller's Code Iowa (1888), § 3173; Iowa Code (1873), § 3173; Iowa Code (1851), § 1973.

55. Necessity for certificate.— The certificate is a prerequisite to the jurisdiction of the supreme court where the amount in controversy is less than one hundred dollars, and where the case does not involve an interest in realty. Johnson *v.* Marshall, (Iowa 1899) 80 N. W. 395; Sibley Loaning Co. *v.* McCausland, 81 Iowa 757, 46 N. W. 1072; Colby *v.* Cedar Rapids Ins. Co., (Iowa 1884) 19 N. W. 891; Barnes *v.* Independent Dist. No. 2, 51 Iowa 700, 1 N. W. 618; Jeffries *v.* Singer Mfg. Co., 40 Iowa 702; Dean *v.* McTaggart, 40 Iowa 688.

This certificate must appear in the record. — It is not sufficient to give the supreme court jurisdiction that the abstract recites that the proper certificate was signed by the judge and is on file among the papers of the case. Barnes *v.* Independent Dist. No. 2, 51 Iowa 700, 1 N. W. 618.

The certificate must state that it involves the determination of a question of law (Kierulff *v.* Adams, 40 Iowa 31), and that the question or questions are involved in the case. Brown *v.* Lloyd, (Iowa 1897) 73 N. W. 604; Hiatt *v.* Nelson, 100 Iowa 750, 69 N. W. 553; Connor *v.* Bennke, 100 Iowa 748, 69 N. W. 414; Smith *v.* Smith, 99 Iowa 747, 68 N. W. 721; Tucker *v.* Anderson, 97 Iowa 452, 66 N. W. 754; Ellis *v.* Keokuk County, 94 Iowa 199, 62 N. W. 660; Lamb *v.* Ross, 84 Iowa 578, 51 N. W. 48; Beeler *v.* Garrett, 76 Iowa 231, 40 N. W. 724; Ball *v.* Van Riper, 74 Iowa 146, 37 N. W. 120; Van Sickle *v.* Downs, 72 Iowa 624, 34 N. W. 449. It must also clearly and specifically indicate what the question or questions are. Benge *v.* Eppard, 110 Iowa 86, 81 N. W. 183; Sloss *v.* Bailey, 104 Iowa 696, 74 N. W. 17; Stern *v.* Sample, 96 Iowa 341, 65 N. W. 304; Bennett *v.* Parker, 67 Iowa 451, 25 N. W. 700; Votaw *v.* Corwin, 62 Iowa 39, 17 N. W. 142. It should recite the ultimate facts which the evidence establishes and upon which the questions certified depend. Hull *v.* Loughlin, 82 Iowa 725, 47 N. W. 985; Des Moines Ins. Co. *v.* Briley, 79 Iowa 485, 44 N. W. 715. The court will not determine a question certified where it is necessary to examine the record to find out what are the facts which should have been stated in the certificate. Brown *v.* Lloyd, (Iowa 1897) 73 N. W. 604; Stern *v.* Sample, 96 Iowa 341, 65 N. W. 304; Long *v.* Chicago, etc., R. Co., 64 Iowa 541, 21 N. W. 23; White *v.* Beatty, 64 Iowa 331, 20 N. W. 459; Bower *v.* Kavanaugh, 62 Iowa 757, 17 N. W. 488; Buchanan County Bank *v.* Cedar Rapids, etc., R. Co., 62 Iowa 494, 17 N. W. 737; Votaw *v.* Corwin, 62 Iowa 39, 17 N. W. 142. Hence, the certificate must show when it was made. Merely entitling a case as of a certain term is not sufficient. Babcock *v.* Chickasaw County, 60 Iowa 752, 14 N. W. 315.

The following questions have been held not sufficiently specific: "Can judgment be rendered in favor of plaintiff, and against defendant, upon the agreed statement of facts?" Dawley *v.* Houck, 53 Iowa 733, 6 N. W. 70. "Were the defendants, who were at the beginning of this suit residents of Carroll county, Iowa, legally sued in Dallas county, Iowa, under the circumstances described in the petition?" White *v.* Beatty, 64 Iowa 331, 332, 20 N. W. 459. So a certificate consisting of a statement of facts and concluding as follows: "Upon said facts, did the court err in rendering judgment against plaintiffs?" is not sufficiently specific to present any particular question of law. Johnson *v.* Singleton, (Iowa 1899) 80 N. W. 394.

Time of making certificate.— In a number of the earlier decisions it is declared that the certificate must be made at the term at which the judgment or order appealed from is rendered. Fallon *v.* Johnson Dist. Tp., 51 Iowa 206, 1 N. W. 478; Rose *v.* Wheeler, 49 Iowa 52; Independence *v.* Purdy, 48 Iowa 675; Lomax *v.* Fletcher, 40 Iowa 705. Later decisions further restrict the time within which the certificate can be made. The rule announced by these decisions is that the certificate must be made and filed when the case is decided and judgment entered (Smith *v.* Smith, 99 Iowa 747, 68 N. W. 721; Powers *v.* Illinois Cent. R. Co., 97 Iowa 736, 66 N. W. 76; Callanan *v.* Kossuth County, 94 Iowa 408, 62 N. W. 784; Schultz *v.* Holbrook, 86 Iowa 569, 53 N. W. 285; Brown *v.* Grundy County, 78 Iowa 561, 43 N. W. 529 Angus *v.* Snannon, 60 Iowa 311, 14 N. W. 315), and it has accordingly been held that a certificate made eight days after trial is too late (Angus *v.* Shannon, 60 Iowa 311, 14 N. W. 315); that a certificate cannot be made *nunc pro tunc* after the trial term (Hinesley *v.* Mahaska County, 69 Iowa 511, 29 N. W. 433); and that the court has no power to grant leave during the

right of appeal in any action in which an interest in real estate is involved, nor shall the right of appeal be affected by the remission of any part of the verdict or judgment returned or rendered.[56]

e. In Kansas.[57] No appeal or proceeding in error shall be had or taken to the supreme court in any civil action in any case involving less than one hundred dollars, exclusive of costs, except in cases involving the tax or revenue laws, or the title to real estate, or an action for damages in which slander, libel, malicious prosecution, or false imprisonment is declared upon, or the constitution of this state, or the constitution,[58] laws, or treaties of the United States, and when the judge of the district or superior court trying a case involving less than one hundred dollars shall certify to the supreme court that the case is one belonging to the excepted classes.[59]

f. In Louisiana. The Louisiana constitution provides that the courts of appeal shall have power to certify to the supreme court any question or proposition of law arising in any cause pending before them concerning which they desire the instruction of the court.[60]

term to have a certificate applied for and made in vacation (Morrison *v.* Ross, 90 Iowa 524, 58 N. W. 880).

If the certificate is defective for failure to comply with the statutory requirements, it will be dismissed (Johnson *v.* Singleton, (Iowa 1899) 80 N. W. 394; Bradenberger *v.* Rigler, 68 Iowa 300, 27 N. W. 247; Wheaton *v.* Foster, 58 Iowa 661, 12 N. W. 629; Fitch *v.* Flynn, 58 Iowa 159, 11 N. W. 649; Thompson *v.* French, 57 Iowa 559, 10 N. W. 900; Throckmorton *v.* Horton, 52 Iowa 737, 3 N. W. 461), and that, too, although appellee does not make any objection because of the defects (Wilson *v.* Iowa County, 52 Iowa 339, 1 N. W. 490, 3 N. W. 156).

56. What questions considered.— Only questions of law are reviewable. Questions of fact or of mixed law and fact cannot be considered. Ross *v.* Hardin County, 94 Iowa 252, 62 N. W. 844; Gillooby *v.* Chicago, etc., R. Co., 61 Iowa 53, 15 N. W. 604; Libby *v.* Chicago, etc., R. Co., 60 Iowa 323, 14 N. W. 316; Centerville *v.* Drake, 58 Iowa 564, 12 N. W. 594; Kierulff *v.* Adams, 40 Iowa 31. So the question certified must be involved in the case. Abstract propositions will not be considered. Parker *v.* Michaels, 74 Iowa 209, 37 N. W. 161; Miller *v.* Buena Vista County, 68 Iowa 711, 28 N. W. 31; Cunningham *v.* Chicago, etc., R. Co., 67 Iowa 514, 25 N. W. 756. Only questions presented will, as a general rule, be considered (Chilton *v.* Chicago, etc., R. Co., 72 Iowa 689, 34 N. W. 473; Ardery *v.* Chicago, etc., R. Co., 65 Iowa 723, 23 N. W. 141; Miller *v.* Haley, 66 Iowa 260, 23 N. W. 657; Colby *v.* Cedar Rapids Ins. Co., (Iowa 1884) 19 N. W. 891; Thorpe *v.* Dickey, 51 Iowa 676, 2 N. W. 581); but it has been held that the court may inquire into the jurisdiction, although no question in relation thereto is certified (Hodges *v.* Tama County, 91 Iowa 578, 60 N. W. 185). While more than one question may be certified (Centerville *v.* Drake, 58 Iowa 564, 12 N. W. 594), the whole case cannot be presented by certified questions. Hawkeye Ins. Co. *v.* Erlandson, 84 Iowa 193, 50 N. W. 881.

What are questions of fact.— The following questions are not reviewable as being questions of fact or of mixed law and fact: Sufficiency of evidence to support the verdict (Hudson *v.* Chicago, etc., R. Co., 59 Iowa 581, 13 N. W. 735, 44 Am. Rep. 692); rulings granting or refusing instructions (Bensley *v.* Chicago, etc., R. Co., 79 Iowa 266, 44 N. W. 544); the question: "Does the evidence legally establish an 'express contract of payment' and 'does the evidence legally establish a release of the defendant from payment'" (Landers *v.* Boyd, 59 Iowa 758, 12 N. W. 740).

57. Kan. Gen. Stat. (1899), § 4834.

58. Only the principle involved in the exception certified by the court below will be considered in proceedings in error in the court of appeals, where such proceedings are based upon a judgment for less than one hundred dollars. Chicago, etc., R. Co. *v.* Campbell, 5 Kan. App. 423, 49 Pac. 321.

If the certificate states that a constitutional question is involved, no other question will be considered than the one so assigned; and, if the constitutional question has already been passed upon adversely to the plaintiff in error, the judgment must be affirmed. Missouri Pac. R. Co. *v.* Kimball, 48 Kan. 384, 29 Pac. 604.

59. Necessity of certificate.— The record must affirmatively show jurisdiction (Loomis *v.* Bass, 48 Kan. 26, 28 Pac. 1012), and the certificate must be a part of the record and filed therewith (Packard *v.* Packard, 56 Kan. 132, 42 Pac. 335, holding that where the amount involved does not appear, and there is no certificate showing that the case belongs to one of the excepted classes, the case will be dismissed).

Petition for certification must be filed within forty days after judgment is first entered, unless a rehearing is in fact granted. Gilmore *v.* Gilmore, 59 Kan. 19, 51 Pac. 891.

60. La. Const. (1898), art. 101.

Questions of fact are not reviewable.— Pugh *v.* St. Louis, etc., R. Co., 50 La. Ann. 1378, 24 So. 881; Maffaletta *v.* Wildenstein, 50 La. Ann. 1377, 24 So. 881. In Le Seigneur *v.* Bessan, 52 La. Ann. 187, 26 So. 865, it was held that the supreme court will, for the purpose of expressing an opinion of a question of

g. In Maine. Upon a hearing in any cause in equity, the justice of the supreme court hearing the same may report the cause to the next law court heard within the district in which it is pending, if he is of opinion that any question of law is involved of sufficient importance or doubt to justify the same, and the parties agree thereto. The cause shall be entered and copies furnished by complainant, and shall be heard and decided by said law court in like manner and with like results as in case of appeals.[61]

h. In Massachusetts. A justice of the supreme court by whom a case is heard for final decree may reserve and report the findings and all questions of law therein for the consideration of the full court, and thereupon like proceedings shall be had as on appeals from final decrees.[62] Another statute requires the justice of the supreme court, on appeal from a decree in equity on request of appellant, to report the facts found by him,[63] and a further provision in respect to the practice in the superior court provides that it may, at any time before judgment in an action and after verdict or decision, report the case for determination by the supreme court.[64]

law certified, take as true the findings of fact of the court of appeals, but will stand uncommitted as to the actual facts, and the law applicable thereto, in case they should be ultimately found otherwise than as declared by the court of appeals.

61. Me. Rev. Stat. (1883), c. 77, § 23; Me. Rev. Stat. (1881), c. 68, § 13.

Equity cases should not be reported to the law court, without a hearing before a single justice, until the pleadings are sufficiently perfected to enable the law court to make a final decision upon the merits (Merrill *v.* Washburn, 83 Me. 189, 22 Atl. 118); and where the case is submitted to the law court on a report of findings or on an agreed statement of facts, all technical questions relating to pleading are waived, unless the contrary appears (Pillsbury *v.* Brown, 82 Me. 450, 19 Atl. 858, 9 L. R. A. 94; Machias Hotel Co. *v.* Fisher, 56 Me. 321). So, by submitting a cause to a law court on a report, objections that an account annexed is uncertain and indefinite are considered as waived, unless the contrary appears in the report. Elm City Club *v.* Howes, 92 Me. 211, 42 Atl. 392.

In the superior courts, cases certified upon agreed statements of facts, and reports and motions for new trials, shall be entered, heard, and determined at the next law term in the district; but any case for the law court may, by agreement of parties, be entered at the next law term held in either district. And all exceptions arising in cases within the exclusive jurisdiction of either of said superior courts may be certified at once by the justice thereof to the chief justice of the supreme judicial court, and shall, when so certified, be argued in writing on both sides within thirty days thereafter, unless the justice of such superior court, for good cause, enlarges the time; and exceptions so certified shall be considered and determined by the justices of the supreme judicial court as soon as may be. Decisions of the law court on all exceptions and questions from said superior courts shall be certified to the clerk of either of said superior courts with the same effect as in cases originating in the supreme judicial court in the county. Me. Rev. Stat. (1883), c. 77, § 75. In cases reported from the superior court, the law court will not entertain the case unless the report is signed by the justice of the superior court. Blodgett *v.* Dowe, (Me. 1888) 13 Atl. 580.

62. Mass. Pub. Stat. (1882), c. 151, § 20; Mass. Gen. Stat., c. 113, § 15. By Mass. Stat. (1883), c. 323, § 2, this provision is also made applicable to proceedings in the superior court. Taft *v.* Stoddard, 141 Mass. 150, 6 N. E. 836.

By the Massachusetts statute of 1869, c. 438, it was provided that "questions of law, whether arising upon trial or other proceeding before the superior court, may, by consent of the parties to the suit, be reported before verdict" for the determination of the supreme court of the state. Shea *v.* Boston, etc., R. Co., 154 Mass. 31, 27 N. E. 672; Cowley *v.* Train, 124 Mass. 226; Hogan *v.* Ward, 115 Mass. 130; Bearce *v.* Bowker, 115 Mass. 129; Taylor *v.* Taunton, 113 Mass. 290; Jaha *v.* Belleg, 105 Mass. 208; Higbee *v.* Bacon, 11 Pick. (Mass.) 423.

Report of case by supreme court justice.—Questions not raised or decided cannot be reserved on report for the full court. Nowell *v.* Boston Academy, 130 Mass. 209; Nash *v.* New England Mut. L. Ins. Co., 127 Mass. 91; Stuart *v.* Stuart, 123 Mass. 370; Sparhawk *v.* Sparhawk, 120 Mass. 390.

63. Mass. Stat. (1883), c. 323, § 7.

Report of evidence to supreme court.—The presiding justice may, if he chooses, in deciding a motion for new trial, report the evidence to the full court, to determine the sufficiency thereof to support a certain finding of the jury, though the party against whom the finding was made did not request a determination of such question at the trial. Capper *v.* Capper, 172 Mass. 262, 52 N. E. 98.

64. Mass. Pub. Stat. (1882), c. 153, § 6; Mass. Stat. (1878), c. 231, § 1; Mass. Gen. Stat. c. 115, § 6. See also Murray *v.* Fitchburg R. Co., 130 Mass. 99.

Report of case by superior court.—Under this last-mentioned provision, the report of a case after determination will be discharged when it does not contain a verdict or decision by the superior court. Johnston *v.* Faxon, 167 Mass. 473, 46 N. E. 2; Terry *v.* Bright-

i. In Minnesota. In proceedings to enforce a tax against real estate the judgment shall be final, except that upon application of either party the court may, if in its opinion the point is of great public importance or likely to arise frequently, make a brief statement of the facts established bearing on the point and on its decision, and forthwith transmit the same to the clerk of the supreme court.[65]

j. In Missouri.[66] When any of the courts of appeals shall in any cause or proceeding render a decision which any one of the judges therein sitting[67] shall deem contrary to any previous decision of any one of said courts of appeals, or of the supreme court,[68] the said court of appeals must, of its own motion,[69] pending the same term and not afterward, certify and transfer said cause or proceeding and the original transcript therein to the supreme court; and thereupon the supreme court must rehear and determine said cause or proceeding, as in case of jurisdiction obtained by ordinary appellate process; and the last previous rulings of the supreme court on any question of law or equity shall, in all cases, be controlling authority in said courts of appeals.[70]

man, 129 Mass. 535, 538, wherein it is said: "This statute clearly manifests the intention of the Legislature that cases in the Superior Court, whether tried with or without a jury, should be there decided, both upon the law and upon the facts, in the first instance, and that a verdict of the jury, or an equivalent finding of the judge, upon which judgment might be rendered, should be entered of record, before any question of law should be reported from that court to this."

Only questions of law can be considered (Churchill *v.* Palmer, 115 Mass. 310; Hubner *v.* Hoffman, 106 Mass. 346), and questions of law which might have been, but which were not raised before verdict, cannot be reported for the decision of the supreme court. (Aldrich *v.* Springfield, etc., R. Co., 125 Mass. 404).

The report should be so framed as to state the nature of the case, the questions of law intended to be reserved, and so much of the evidence as may be necessary to present such question. Churchill *v.* Palmer, 115 Mass. 310.

65. Minn. Stat. (1894), § 1589.

The mode provided is the only mode for reviewing a judgment in a proceeding of this character. Washington County *v.* German-American Bank, 28 Minn. 360, 10 N. W. 21; State *v.* Jones, 24 Minn. 86.

Mandamus does not lie to compel a court to certify a case; but, if the court declines to do so in a proper case, the writ of certiorari may issue. Brown County *v.* Winona, etc., Land Co., 38 Minn. 397, 37 N. W. 949.

The trial court must state what point or points were certified up for decision, and, except as to points so certified, the judgment of the trial court is final. State *v.* St. Croix Boom Corp., 49 Minn. 450, 52 N. W. 44; Morrison County *v.* St. Paul, etc., R. Co., 42 Minn. 451, 44 N. W. 982. The justice should also make a statement of the facts bearing upon such points, together with his decision or conclusion (Morrison County *v.* St. Paul, etc., R. Co., 42 Minn. 451, 44 N. W. 982), and this statement has the effect of the findings and decisions of the trial court in ordinary cases (Ramsey County *v.* Chicago, etc., R. Co., 33 Minn. 537, 24 N. W. 313).

No costs are allowed either party in cases certified under this statute. Olmstead County *v.* Barber, 31 Minn. 256, 17 N. W. 473, 944.

66. Mo. Const. art. 6, amendm. (1884), § 6 [Mo. Rev. Stat. (1889), p. 93]; Leonard *v.* Sparks, 117 Mo. 103, 22 S. W. 899, 38 Am. St. Rep. 646; Dowdy *v.* Wamble, 110 Mo. 280, 19 S. W. 489.

67. One of the judges should judicially determine that the decision is in conflict with a previous decision of the supreme court (Smith *v.* Missouri Pac. R. Co., 143 Mo. 33, 44 S. W. 718; State *v.* Rombauer, 125 Mo. 632, 28 S. W. 968), and his opinion should be communicated to a majority of the court by an explicit statement in the form of an opinion filed by him in the cause (State *v.* Philips, 96 Mo. 570, 10 S. W. 182). Hence, it has also been decided that the court of appeals cannot certify a case to the supreme court on the ground, which all the judges seem to have concurred in, that the unanimous decision rendered seems opposed to a former decision of the supreme court — the judges being unanimous in the interpretation of such decision, their decision must be controlled by it. Seaboard Nat. Bank *v.* Woesten, 144 Mo. 407, 46 S. W. 201; Schafer *v.* St. Louis, etc., R. Co., 144 Mo. 170, 45 S. W. 1075.

68. Citing supreme court opinions in dissenting opinion.—The mere fact that a judge of the court of appeals has cited opinions of the supreme court in argument in a dissenting opinion is not sufficient to indicate that he deems the opinion from which he dissents in conflict with such citations, and in such case it is not the duty of the court of appeals to certify the case to the supreme court. State *v.* Smith, 107 Mo. 527, 16 S. W. 401, 17 S. W. 901.

Dissent merely as to the sufficiency of the evidence to support the verdict rendered in the trial court will not compel a certification. State *v.* Smith, 129 Mo. 585, 31 S. W. 917.

69. Mandamus will not lie to compel a certification. State *v.* Rombauer, 140 Mo. 121, 40 S. W. 763, 125 Mo. 632, 28 S. W. 968.

70. If the decision of the court of appeals concurs with the last previous decision of the supreme court, but not with an earlier one, there is no authority to certify the case up. Wood *v.* Hall, 23 Mo. App. 110.

k. In New Hampshire. Questions arising upon exceptions, upon a special verdict, an issue of law, motion for a new trial or in arrest of judgment, or other motion or proceeding,[71] or upon a statement of facts agreed to and signed by the parties,[72] may be reserved and assigned by the presiding justice or by any justice of the court in vacation, if he think fit, to the determination of the court at the next law term.[73]

l. In New Jersey. A circuit judge may, in his discretion, direct any case of doubt or difficulty to be made and stated, and certified by him for argument before the supreme court, and shall render judgment in conformity with the opinion certified to him. On proceedings in error to reverse such judgment, the opinion shall be returned with the writ as part of the record, and errors may be assigned thereon; if errors are found therein, the judgment may be reversed.[74]

71. N. H. Pub. Stat. (1901), c. 204, § 13.

Clerks of court shall furnish reserved cases, etc., to the state library (N. H. Pub. Stat. (1901), c. 208, § 11), and to the reporter and members of the court (N. H. Pub. Stat. (1901), c. 214, § 3).

Questions of fact will not be decided on a reservation (Whitcher *v.* Dexter, 61 N. H. 91); and a transferred case raising no question of law will be discharged (Cox *v.* Johnson, 61 N. H. 642).

Questions arising on pleadings will not be considered until the facts have been found. Fellows *v.* Fellows, 68 N. H. 611, 44 Atl. 752. See also Kaulbach *v.* Kaulbach, 63 N. H. 615.

Additional evidence.— The court will not receive and consider additional evidence upon the hearing of questions reserved either in equity or in law. Cole *v.* Winnipisseogee Lake Cotton, etc., Mfg. Co., 54 N. H. 242.

72. **For the practice on the transfer on an agreed state of facts** see Perkins *v.* Langmain, 36 N. H. 501.

73. **Showing decision of court and exception.**— In preparing a case it is not necessary to specially state a decision of the court of common pleas and exception thereto. It will be understood by the transfer upon a motion that there was a decision. Claggett *v.* Simes, 31 N. H. 56.

Conclusiveness of certificate.— The certificate sent from the superior court to the common pleas on questions, and transferred by the latter, is conclusive upon the common pleas to the extent of the questions presented, but no further. The action remains in the common pleas, to be disposed of by that court. Stevenson *v.* Cofferin, 20 N. H. 288.

Correction of certificate.— The common pleas may retransfer the matter, for the correction of the certificate, either upon their own motion or at the request of the superior court. Stevenson *v.* Cofferin, 20 N. H. 288. The correction may be made in vacation by a judge who tried the case, and even by a judge after his retirement from the bench. Tappan *v.* Tappan, 31 N. H. 41.

74. N. J. Gen. Stat. (1895), p. 2575, §§ 247, 249. See also N. J. Gen. Stat. (1895), p. 1030, § 66 *et seq.*, for a similar provision relating to inferior courts of common pleas.

The circuit court must settle all questions of fact before it can send up a certified case as one of doubt and difficulty. Bunn *v.* New York, etc., R. Co., (N. J. 1900) 47 Atl. 440; Wentink *v.* Board of Chosen Freeholders, (N. J. 1900) 45 Atl. 1031; Murray *v.* Paterson R. Co., 61 N. J. L. 301, 39 Atl. 648; Destefano *v.* Calandirie, 57 N. J. L. 483, 31 Atl. 385; Delaware, etc., R. Co. *v.* Nevelle, 51 N. J. L. 332, 17 Atl. 836, 19 Atl. 538. If this is not done, the case will be dismissed and returned to the circuit court to the end that all questions of fact be first settled, and a certificate be made of the questions of law. Bunn *v.* New York, etc., R. Co., (N. J. 1900) 47 Atl. 440. To the same effect see Shepard, etc., Lumber Co. *v.* Burroughs, 62 N. J. L. 469, 41 Atl. 695.

Reserving right to turn case reserved into special verdict.— In a case decided in the court of errors and appeals, since the enactment of the provision allowing assignments of error on the opinion of the court on a case reserved, it was held that, in order to review error in a judgment founded on a case reserved, it is necessary to reserve at the circuit the right to turn such case reserved into a special verdict, so that the points involved may appear on the record, and that no party to a suit can bring a writ of error to a judgment founded on a case reserved at the circuit. Pray *v.* Jersey City, 33 N. J. L. 506 [*citing* Archbold Pr. (2d Eng. ed.) 452], assigning as a reason for this rule "that neither party can have the advantage of a review of the opinion of the court on a case stated . . . In practice, this imperfection of proceeding is amended by the judge, at *nisi prius*, granting permission for either party to turn such case into a special verdict. But unless such power be expressly reserved, it has been repeatedly held that the change cannot be made, unless by the consent of the parties." So, in a very recent decision of the supreme court, the same view seems to obtain. Traflet *v.* Empire L. Ins. Co., 64 N. J. L. 387, 46 Atl. 204. See also Wentink *v.* Board of Chosen Freeholders, (N. J. 1900) 45 Atl. 1031. If these decisions are correct it is not easy to understand why the legislature inserted in the statute the provision that such certified opinion shall be returned with the writ of error as part of the record and that errors may be assigned thereon; and, indeed, it has been held in another decision of the court of appeals, prior to the decision of the supreme court just cited, that "error can be assigned upon the opinion of the Supreme Court rendered on cases stated or reserved,

m. In New York — (i) *Certification from Appellate Division of Supreme Court to Court of Appeals.* In this state there are statutory provisions for the certification of questions from the appellate division of the supreme court to the court of appeals.[75]

(ii) *Certification of Exceptions Taken on Jury Trial to Appellate Division of Supreme Court.* It is also provided by statute in this state that, on the application of a party who has taken one or more exceptions, the judge presiding at a trial by jury may at any time during the same term direct an order to be entered that the exceptions so taken be heard in the first instance by the appellate division of the supreme court, and that judgment be suspended in the

and certified by the Circuit without their being turned into special verdicts, and without the parties having leave to so turn them, for such cases are within the plain language of the act." Delaware, etc., R. Co. *v.* Nevelle, 51 N. J. L. 332, 17 Atl. 836, 19 Atl. 538.

To warrant a reversal of the judgment rendered in conformity with the opinion of the supreme court, the plaintiff in error must show that the opinion was in conflict with some rule of law — all assignments which do not present questions of this character should be stricken out. Delaware, etc., R. Co. *v.* Nevelle, 51 N. J. L. 332, 17 Atl. 836, 19 Atl. 538.

Where a case is certified, the clerk shall file the certificate, enter a rule as of course, setting the cause down for argument, and place the same on the paper, giving it priority according to the date of filing the certificate. N. J. Gen. Stat. (1895), p. 2574, § 248.

75. N. Y. Code Civ. Proc. §§ 190, 191. The original provision has been amended four times since 1895.

What questions considered.— Under these provisions only questions of law will be considered. Matter of Westerfield, 163 N. Y. 209, 57 N. E. 403; Commercial Bank *v.* Sherwood, 162 N. Y. 310, 56 N. E. 834. Nor will the court answer abstract questions (Schenck *v.* Barnes, 156 N. Y. 316, 50 N. E. 967, 41 L. R. A. 395; Hearst *v.* Shea, 156 N. Y. 169, 50 N. E. 788; Baxter *v.* McDonnell, 154 N. Y. 432, 48 N. E. 816; Grannan *v.* Westchester Racing Assoc., 153 N. Y. 449, 47 N. E. 896), or questions not passed upon by the court below (Schenck *v.* Barnes, 156 N. Y. 316, 50 N. E. 967, 41 L. R. A. 395). No other questions than those certified will be considered (Salisbury *v.* Slade, 160 N. Y. 278, 54 N. E. 741; Hearst *v.* Shea, 156 N. Y. 169, 50 N. E. 788; Baxter *v.* McDonnell, 154 N. Y. 432, 48 N. E. 816; Grannan *v.* Westchester Racing Assoc., 153 N. Y. 449, 47 N. E. 896); and the questions should be such that the answers may determine the particular controversy involved in the appeal, and not merely a part of it (Blaschko *v.* Wurster, 156 N. Y. 437, 51 N. E. 303, in which it was further said that, where the decision below may stand upon several grounds, it is not enough that the questions certified present only the weak propositions involved in the particular ground claimed to be affected with error, ignoring all the grounds upon which the decision may well stand). But see Baxter *v.* McDonnell, 154 N. Y. 432, 48 N. E. 816, wherein it was held that while the court of appeals will be confined to the question certified, it must examine the record not only to see that the question actually arose, but also to see how it arose, so that it can be decided as it was presented to the courts below.

Limitations of rule.— Where the question certified was passed upon by the court below and made the basis of the order appealed from, it will be considered although it may be doubtful whether it presents any propositions which were in issue between the parties. Hearst *v.* Shea, 156 N. Y. 169, 50 N. E. 788.

Certificate should state that there is a question or questions of law involved which should be considered by the court of appeals (Bastable *v.* Syracuse, 72 N. Y. 64), and what the question is (Squire *v.* McDonald, 138 N. Y. 554, 34 N. E. 398, 53 N. Y. St. 269).

If several questions are certified, each question should be separately stated so that it can be answered yes or no. Devlin *v.* Hinman, 161 N. Y. 115, 55 N. E. 386.

Question should be clearly stated.— The court will decline to answer any question certified unless it is sufficiently definite to prevent different answers under different circumstances (Schenck *v.* Barnes, 156 N. Y. 316, 50 N. E. 967, 41 L. R. A. 395), and the court of appeals will examine the record, not only to see that the question actually arose, but also to see how it arose, so that the appellate court can decide it as it was presented to the court below (Hearst *v.* Shea, 156 N. Y. 169, 50 N. E. 788; Baxter *v.* McDonnell, 154 N. Y. 432, 48 N. E. 816).

Time of applying for certificate.— Application for leave to appeal under these provisions must be made at the term of the appellate division at which the order or judgment appealed from was granted, or before the end of the next succeeding term, and, if the order allowing the appeal was not obtained within that time, no order can be subsequently granted. Porter *v.* International Bridge Co., 163 N. Y. 79, 57 N. E. 174. The right to appeal does not become absolute until the appellate division has made the proper order allowing it, and the sixty days within which an appeal from an order of the appellate court must be taken (N. Y. Code Civ. Proc. § 1325) does not begin to run until such order is granted (Porter *v.* International Bridge Co., 163 N. Y. 79, 57 N. E. 174).

meantime.[76] This order may be revoked or modified on notice at any time before the hearing of the exceptions, in court or out of court, by the judge who made it, or it may be set aside for irregularity by the court at any term thereof. Unless it is so revoked or set aside, the exceptions must be heard upon a motion for new trial which must be decided by the appellate division. The motion is deemed to have been made when the order is granted, and either party may notice it for hearing upon the exceptions at a term for the appellate division.[77]

n. In Ohio. Any judge of the superior court of Cincinnati, sitting in superior term, may reserve and adjourn for the decision of such court in general term any question of law or fact arising in any case upon the record, or upon evidence in writing, and, when the decision of such question authorizes or requires a final order or judgment, the same may be entered by the court in general term.[78]

o. In Pennsylvania.[79] A judge of the district court of Philadelphia, or of the court of common pleas of any county, may, on the trial of the case, reserve questions of law for the consideration of the judges of said court sitting together.[80]

76. The record should contain a formal order that the exceptions be originally heard in the appellate division of the supreme court. Campbell *v.* Jughardt, 50 N. Y. App. Div. 460, 64 N. Y. Suppl. 198 (a case under Bliss' Anno. Code Civ. Proc. N. Y. § 1000); Webster *v.* Cole, 17 Hun (N. Y.) 507. But it seems that the entry of a formal order was not necessary under N. Y. Code Proc. § 265. This requisite is sufficiently complied with when the minutes of the trial, signed by the clerk, contain a statement that defendant's exceptions are to be heard in the appellate division in the first instance, and that entry of judgment be suspended in the meantime. Sedgwick *v.* Macy, 24 N. Y. App. Div. 1, 49 N. Y. Suppl. 154. The order can be made only in cases of trial by jury. See Malloy *v.* Wood, 3 Abb. Pr. (N. Y.) 369.

The order should not provide for the service of a notice of appeal.—Where exceptions are ordered to be heard and judgment is suspended until the hearing and decision, there is nothing to appeal from. Battersby *v.* Collier, 34 N. Y. App. Div. 347, 54 N. Y. Suppl. 363.

Only questions of law can be determined (Martin *v.* Platt, 51 Hun (N. Y.) 429, 4 N. Y. Suppl. 359, 21 N. Y. St. 330; Hotchkins *v.* Hodge, 38 Barb. (N. Y.) 117; Fey *v.* Smith, 3 Daly (N. Y.) 386), and only exceptions duly taken at the trial will be considered (Emmons *v.* Wheeler, 3 Hun (N. Y.) 545; Hoxie *v.* Greene, 37 How. Pr. (N. Y.) 97).

All controverted questions of fact are to be regarded as settled by the verdict, and neither the general term nor the court of appeals may consider the weight of evidence or set aside the verdict on the facts, unless there is such an absence of evidence to support a material finding that the court may determine as a matter of law that the fact was not proved. Metropolitan Nat. Bank *v.* Sirret, 97 N. Y. 320.

The court has power only on a hearing of the exceptions to grant or deny a motion for new trial. It cannot, on sustaining the exceptions, dismiss the complaint on the merits. Matthews *v.* American Cent. Ins. Co., 154 N. Y. 449, 48 N. E. 751, 61 Am. St. Rep. 627, 39 L. R. A. 433. If the exceptions are not well taken the motion should be denied and judgment entered on the verdict, or the order of nonsuit as the case may be. Matthews *v.* American Cent. Ins. Co., 154 N. Y. 449, 48 N. E. 751, 61 Am. St. Rep. 627, 39 L. R. A. 433; Huda *v.* American Glucose Co., 151 N. Y. 549, 45 N. E. 942.

77. N. Y. Code Civ. Proc. § 1000 [this section being, apparently, an amendment of N. Y. Code Civ. Proc. § 1000, as contained in Bliss' Anno. Code Civ. Proc. N. Y. § 1000, which in turn was an amendment of the old N. Y. Code Civ. Proc. § 265].

78. Bates' Anno. Stat. Ohio (1897), § 503.

In Cincinnati *v.* Cincinnati Inclined Plane R. Co., 56 Ohio St. 675, 47 N. E. 560, it is held that when a question of law or fact is reserved by the superior court upon a bill of evidence, and final judgment is rendered thereon, the general term has no power to remand such judgment to the special term for further proceedings; but that the cause may be remanded to the special term for trial as to matters left unadjudicated, but in such trial the judgment must be taken and held as final as to the questions on which it was rendered; but it may be used as a factor in molding the decree covering the whole case.

79. Brightly's Purd. Dig. Pa. (1894), p. 1695.

80. Questions considered.— The question reserved must be a pure question of law, and not a question of fact or a mixed question of law and fact. Mayne *v.* Maryland Fidelity, etc., Co., 198 Pa. St. 490, 48 Atl. 469; Casey *v.* Pennsylvania Asphalt Paving Co., 198 Pa. St. 348, 47 Atl. 1128; Buckley *v.* Duff, 111 Pa. St. 223, 3 Atl. 823; Com. *v.* McDowell, 86 Pa. St. 377; Koons *v.* McNamee, 6 Pa. Super. Ct. 445, 42 Wkly. Notes Cas. (Pa.) 21. It must not be an abstract proposition, but must rule the case so completely that its decision will warrant a binding instruction. Mayne *v.* Maryland Fidelity, etc., Co., 198 Pa. St. 490, 48 Atl. 469; Casey *v.* Pennsylvania Asphalt Paving Co., 198 Pa. St. 348, 47 Atl. 1128; Wild *v.* Trainor, 59 Pa. St. 439.

Questions of law and fact illustrated.— The question whether the bond of a bank

The questions may be decided by three or by two of said judges sitting together for that purpose, and either party has the right to a bill of exceptions to the opinion of the court thereon.

p. In Rhode Island. The statutes of this state provide that in all civil cases in the district court, except certain ones therein enumerated, a jury trial may, on payment of costs, be claimed within two days after the decision of such court, and that the clerk shall certify the record to the common pleas division of the supreme court on the next court day of the district court.[81] It is also provided that where a cause is certified up, either party may, within ten days after the date of certification, file such further pleas as he may see fit.[82]

trustee was valid is a question of mixed law and fact and cannot be reserved. Com. *v.* McDowell, 86 Pa. St. 377. So, also, the question whether, under all the evidence, the plaintiff is entitled to recover, is improper. Newhard *v.* Pennsylvania R. Co., 153 Pa. St. 417, 26 Atl. 105, 19 L. R. A. 563. But the question whether there is any evidence of a fact essential to recovery is a question of law which may be reserved. Casey *v.* Pennsylvania Asphalt Paving Co., 198 Pa. St. 348, 47 Atl. 1128; Williams *v.* Crystal Lake Water Co., 191 Pa. St. 98, 43 Atl. 206; Boyle *v.* Mahanoy City, 187 Pa. St. 1, 40 Atl. 1093; Fisher *v.* Scharadin, 186 Pa. St. 565, 40 Atl. 1091 [*overruling* Yerkes *v.* Richards, 170 Pa. St. 346, 32 Atl. 1089]; Newhard *v.* Pennsylvania R. Co., 153 Pa. St. 417, 26 Atl. 105, 19 L. R. A. 563; Koons *v.* Western Union Tel. Co., 102 Pa. St. 164.

Requisites of reservation.— The question must be clearly stated (Mayne *v.* Maryland Fidelity, etc., Co., 198 Pa. St. 490, 48 Atl. 469; Casey *v.* Pennsylvania Asphalt Paving Co., 198 Pa. St. 348, 47 Atl. 1128; Central Bank *v.* Earley, 115 Pa. St. 359, 10 Atl. 33; Henry *v.* Heilman, 114 Pa. St. 499, 6 Atl. 921; Wilson *v.* Steamboat Tuscarora, 25 Pa. St. 317), and the facts on which it arises must be apparent on the record or found by the jury in order that exceptions may be taken and a review had (Mayne *v.* Maryland Fidelity, etc., Co., 198 Pa. St. 490, 48 Atl. 469; Casey *v.* Pennsylvania Asphalt Paving Co., 198 Pa. St. 348, 47 Atl. 1128; Yerkes *v.* Richards, 170 Pa. St. 346, 32 Atl. 1089; Blake *v.* Metzgar, 150 Pa. St. 291, 24 Atl. 755; Henry *v.* Heilman, 114 Pa. St. 499, 6 Atl. 921; Smith *v.* Arsenal Bank, 104 Pa. St. 518; Ferguson *v.* Wright, 61 Pa. St. 258; Wilde *v.* Trainor, 59 Pa. St. 439; Winchester *v.* Bennett, 54 Pa. St. 510; Wilson *v.* Steamboat Tuscarora, 25 Pa. St. 317; Irwin *v.* Wickersham, 25 Pa. St. 316; Koons *v.* McNamee, 6 Pa. Super. Ct. 445, 42 Wkly. Notes Cas. (Pa.) 21). An omission in this respect is not cured by a reference to the statement of facts and law in the opinion of the court appealed from. Johnston *v.* United Presb. Board of Publication, (Pa. 1886) 7 Atl. 92. Finally, when there is a judgment on reserved points, it is always desirable that there should be a written opinion to indicate to the court of errors the ground of the judgment. Mayne *v.* Maryland Fidelity, etc., Co., 198 Pa. St. 490, 48 Atl. 469; Wilde *v.* Trainor, 59 Pa. St. 439. The judgment should be pronounced upon the solution of the question of law reserved, and should also be certified as in the case stated. Yerkes *v.* Richards, 170 Pa. St. 346, 32 Atl. 1089.

Presumption as to correctness of statement of facts.— Where a point is reserved the parties will be presumed to have consented to the correctness of the statement of facts embraced in the reservation, and a party not excepting to it at the time is estopped from denying its accuracy. Central Bank *v.* Earley, 113 Pa. St. 477, 6 Atl. 236; Mohan *v.* Butler, 112 Pa. St. 590, 4 Atl. 47; Koons *v.* Western Union Tel. Co., 102 Pa. St. 164; Pennsylvania Ins. Co. *v.* Phœnix Ins. Co., 71 Pa. St. 31; Ginther *v.* Yorkville, 3 Pa. Super. Ct. 403. Very great injustice might be done if a party not objecting at the time of the reservation should be permitted afterward to take the ground that there was no evidence of the facts, or that they ought to have been submitted to the jury. Pennsylvania Ins. Co. *v.* Phœnix Ins. Co., 71 Pa. St. 31.

Effect of defective reservation.— A reservation which violates any of the rules mentioned in the two preceding sections "is incurably bad, and a judgment entered in pursuance of it will be reversed whether an exception has been taken or not: but in considering whether a reservation is good, the appellate court will look at its substance notwithstanding the form in which it has been made: and if no exception has been taken to the form it will be conclusively presumed that the parties acquiesced in the statement of facts as they appear in the point, and assented to the reservation as made." Casey *v.* Pennsylvania Asphalt Paving Co., 198 Pa. St. 348, 47 Atl. 1128 [*citing* Velas *v.* Patton Coal Co., 197 Pa. St. 380, 47 Atl. 360; Rynd *v.* Baker, 193 Pa. St. 486, 44 Atl. 551; Boyle *v.* Mahanoy City, 187 Pa. St. 1, 40 Atl. 1093; Pennsylvania Ins. Co. *v.* Phœnix Ins. Co., 71 Pa. St. 31]. This does not mean, however, that a failure to except cures all defects in a point. It is defects of form only, and not defects of substance, which are cured by failure to except. Casey *v.* Pennsylvania Asphalt Paving Co., 198 Pa. St. 348, 47 Atl. 1128.

81. R. I. Gen. Laws (1896), c. 237, §§ 7, 8.

Neglect of the clerk to comply with these provisions does not defeat the jurisdiction of the common pleas division of the supreme court from the subsequent certification of the record thereto. Wilbur *v.* Best, (R. I. 1901) 48 Atl. 824.

82. R. I. Gen. Laws (1896), c. 238, § 3.

This statute has been held to be directory only as to the time of filing such pleas, and

q. In Texas.[83] The Texas statutes provide for the certification of questions from the court of civil appeals to the supreme court in two cases: First, where one of the judges of the former court dissents from its decision;[84] and, second, when an issue of law arises in the court of civil appeals, which such court deems it advisable to present to the supreme court for adjudication. In the first case the court shall, upon motion of the party to the cause or on its own motion, certify the point or points of dissent, and the clerk shall send up a certified copy of the conclusions of fact and law as found by the court, the questions of law on which there is a division, and the original transcript, when so ordered by the supreme court, and the decision of the supreme court on the question shall be entered as the judgment of the court of civil appeals. In the second case, the presiding judge must certify the very question to be decided by the supreme court, and during the pendency of the decision by the latter court the cause shall be retained for final adjudication in accordance with such decision.[85]

that, where the party applying for jury trial fails to have the certification sent up within the prescribed time, the court will make such order as to the filing of pleas as will preserve the rights of the parties. Wilbur *v.* Best, (R. I. 1901) 48 Atl. 824.

83. Tex. Rev. Stat. (1895), arts. 967, 1040–1043. What is known as certification of questions is provided to bring questions of law upon which the court of appeals is unable to agree before the supreme court for its decision; but it has been held that this proceeding is not compulsory, and does not supersede the writ of error. Campbell *v.* Wiggins, 85 Tex. 451, 22 S. W. 5. And it has been held that the court of civil appeals will not certify questions to the supreme court when a writ of error will lie. Magill *v.* Brown, (Tex. Civ. App. 1899) 50 S. W. 642. The effect of certifying questions to the supreme court is to preclude the party from subsequently taking the cause up by writ of error, except where the court certified the questions of its own motion. Campbell *v.* Wiggins, 85 Tex. 451, 22 S. W. 5.

84. Necessity for dissent by one judge.— In the first case in which the certificate of questions is authorized there must be a dissent by one of the judges. The supreme court has no jurisdiction to revise a ruling in which all the judges of the court of civil appeals concurred. Campbell *v.* Wiggins, 85 Tex. 424, 451, 21 S. W. 599, 22 S. W. 5.

85. What questions considered.— Under these provisions only questions of law can be considered (Laughlin *v.* Fidelity Mut. Ins. Co., 87 Tex. 115, 26 S. W. 1064; Kelley-Goodfellow Shoe Co. *v.* Liberty Ins. Co., 87 Tex. 112, 26 S. W. 1063), and the question certified must not be purely abstract. The court has no jurisdiction to decide questions which do not arise upon the facts in the cause (Western Union Tel. Co. *v.* Burgess, (Tex. 1900) 54 S. W. 1021; Berlin Iron Bridge Co. *v.* San Antonio, 92 Tex. 388, 49 S. W. 211; Roy *v.* Whitaker, 93 Tex. 346, 48 S. W. 892, 49 S. W. 367; Allen *v.* Tyson-Jones Buggy Co., 91 Tex. 22, 40 S. W. 393, 714; Farmers' Nat. Bank *v.* Templeton, 90 Tex. 503, 39 S. W. 914; Cleveland *v.* Carr, 90 Tex. 393, 38 S. W. 1123; Missouri R. Co. *v.* Belcher, 88 Tex. 549, 32 S. W. 518). Only those questions which are presented in the certificate will be considered (Galveston, etc., R. Co. *v.* Zantzinger, 92 Tex. 365, 48 S. W. 563, 71 Am. St. Rep. 859, 44 L. R. A. 553), and, while the court is at liberty to certify more than one question (Wettermark *v.* Campbell, 93 Tex. 517, 56 S. W. 331; Kelley-Goodfellow Shoe Co. *v.* Liberty Ins. Co., 87 Tex. 112, 26 S. W. 1063; Waco Water, etc., Co. *v.* Waco, 86 Tex. 661, 26 S. W. 943, 31 L. R. A. 392), the whole case cannot be certified for the decision of the supreme court (Mann *v.* Dublin Cotton-Oil Co., 91 Tex. 617, 45 S. W. 373; Bassett *v.* Sherrod, 89 Tex. 272, 34 S. W. 600; Laughlin *v.* Fidelity Mut. Ins. Co., 87 Tex. 115, 26 S. W. 1064; Kelley-Goodfellow Shoe Co. *v.* Liberty Ins. Co., 87 Tex. 112, 26 S. W. 1063).

Requisites of certificate.— The exact question or questions upon which the decision of the supreme court is desired must be certified. Mann *v.* Dublin Cotton-Oil Co., 91 Tex. 617, 45 S. W. 373; Eustis *v.* Henrietta, 90 Tex. 254, 38 S. W. 165; Waco Water, etc., Co. *v.* Waco, 86 Tex. 661, 26 S. W. 943, 31 L. R. A. 392; Union Cent. L. Ins. Co. *v.* Chowning, 86 Tex. 654, 26 S. W. 982, 24 L. R. A. 504. The question or questions must be clearly stated (Wettermark *v.* Campbell, 93 Tex. 517, 56 S. W. 331; Kelley-Goodfellow Shoe Co. *v.* Liberty Ins. Co., 87 Tex. 112, 26 S. W. 1063), and if there are several questions, a separate statement is necessary (Wettermark *v.* Campbell, 93 Tex. 517, 56 S. W. 331). So, the facts in regard to which the question arises must be found and certified with the questions. Galveston, etc., R. Co. *v.* Zantzinger, 92 Tex. 365, 48 S. W. 563, 71 Am. St. Rep. 859, 44 L. R. A. 553; Roy *v.* Whitaker, 92 Tex. 346, 48 S. W. 892, 94 S. W. 367; Allen *v.* Tyson-Jones Buggy Co., 91 Tex. 22, 40 S. W. 393, 714; Farmers' Nat. Bank *v.* Templeton, 90 Tex. 503, 39 S. W. 914; Cleveland *v.* Carr, 90 Tex. 393, 38 S. W. 1123; Missouri, etc., R. Co. *v.* Belcher, 88 Tex. 549, 32 S. W. 518.

Questions held not sufficiently specific.— Five charges asked by plaintiff were refused, and these charges being copied in the certificate, the following questions were propounded thereon: "Do any of the special charges requested announce correct propositions of law in this case; and if so, which of them should have been given in charge to the

r. In Wisconsin.[86] There shall be no appeal to the supreme court in cases involving, exclusive of costs, less than one hundred dollars, except where the title to a tract of land is in question, or the case involves the construction of some provision of the federal or state constitutions, unless the judge[87] of the court where the judgment was rendered shall certify that the case necessarily involves the decision of some question or point of law of such doubt and difficulty as to require the decision of the supreme court.[88]

s. In Wyoming. When an important question arises[89] in the district court, the judge may cause the same to be reserved and sent to the supreme court for decision.[90]

t. In the Federal Courts — (1) *Statutory Enactments.* Statutes authorizing the certification of questions for review by the supreme court have existed for a long period of time. The first of these statutes was enacted on April 29, 1802;[91]

jury?" It was held that this interrogatory was not sufficiently specific. Laughlin *v.* Fidelity Mut. Ins. Co., 87 Tex. 115, 26 S. W. 1064. So, it has been held that a certificate which presents the question whether the court erred in sustaining a demurrer to a petition to enjoin the collection of a tax will be dismissed, as the decision of that question involves the decision of many others. Waco Water, etc., Co. *v.* Waco, 86 Tex. 661, 26 S. W. 943, 31 L. R. A. 392.

Necessity for final judgment.— It is also necessary, to give the court jurisdiction, that there should have been a final decision, and, pending a motion for rehearing, the case is not finally decided so as to render proper a certification of points of dissent. Johnson *v.* Portwood, 89 Tex. 235, 34 S. W. 596, 787.

When case dismissed.— A certificate which does not certify the exact question to be decided will be dismissed (Eustis *v.* Henrietta, 90 Tex. 254, 38 S. W. 165; Waco Water, etc., Co. *v.* Waco, 86 Tex. 661, 26 S. W. 943, 31 L. R. A. 392. See also Mann *v.* Dublin Cotton-Oil Co., 92 Tex. 377, 48 S. W. 567), and the court of civil appeals will be required to again certify the questions so as to conform to the statute (Eustis *v.* Henrietta, 90 Tex. 254, 38 S. W. 165).

86. Wis. Laws (1895), c. 215, as amended by Wis. Laws (1897), c. 183; Sanborn & B. Anno. Stat. Wis. (1889), § 4721 *et seq.*

87. In making the certificate the trial judge shall act judicially and with some degree of discretion, and not, in a merely perfunctory way, sign a certificate in order to enable a party to appeal where no disputable question of law is involved. Rosenow *v.* Gardner, 99 Wis. 358, 74 N. W. 982.

88. The certificate must state the ultimate facts on which the particular questions of law are raised, so that the court may determine the same from such statement alone, without reference to the record (Field *v.* Elroy, 99 Wis. 412, 75 N. W. 68; Burkhardt *v.* Elgee, 95 Wis. 375, 70 N. W. 296; Leppla *v.* Reed, 94 Wis. 307, 68 N. W. 991; Independence Creamery Co. *v.* Lockway, 94 Wis. 148, 68 N. W. 656), and the question or questions of law must be clearly stated (Field *v.* Elroy, 99 Wis. 412, 75 N. W. 68).

The bill of exceptions will not serve the purpose of such certificate where it states the evidence only, and not the ultimate facts. State *v.* Kellogg, 99 Wis. 532, 73 N. W. 22.

89. Question held sufficiently difficult and important.— The question as to the validity of fifty-five thousand dollars of bonds of a county is sufficiently important and difficult to authorize its reference to the supreme court. Crook County *v.* Rollins Invest. Co., 3 Wyo. 470, 27 Pac. 683.

90. Wyo. Laws (1888), c. 66.

The district court should distinctly state the question found to have arisen in the case, and deemed to be either important or difficult, or both. Merely stating that there is an important question, and not stating what it is, brings up nothing for review. Carbon County *v.* Rollins, (Wyo. 1900) 62 Pac. 351; Corey *v.* Corey, 3 Wyo. 210, 19 Pac. 443. It has been held, however, that, where the question sought to be reserved was clearly stated in a stipulation of counsel, this was sufficient to present the question for review. Carbon County *v.* Rollins, (Wyo. 1900) 62 Pac. 351.

The reservation may be made before judgment.— Schenck *v.* Union Pac. R. Co., 5 Wyo. 430, 40 Pac. 840.

91. The act of congress of April 29, 1802, so changed the judicial system that the circuit court is composed of two, instead of three, judges; and, in order to provide a means to remove the obstacle to the trial of a cause which would arise whenever the judges failed to agree upon a question arising during the course of the trial, it was enacted that such questions might be certified to the supreme court for its decision. 2 U. S. Stat. at L. p. 159; and see also U. S. Rev. Stat. (1878), §§ 651, 697.

This provision was not repealed by the act of congress of April 10, 1869 [16 U. S. Stat. at L., p. 144], changing the *personnel* of the circuit court. In discussing the effect of the latter act Mr. Justice Bradley, in New England Mar. Ins. Co. *v.* Dunham, 11 Wall. (U. S.) 1, 20 L. ed. 90, pointed out the fact that, while the *personnel* of the court was changed by this act, which created a judge to take the place of the justice of the supreme court, the court still consisted of only two members, so that the mischief which the certificate of division was intended to meet remained the same.

the second of these statutes on June 1, 1872;[92] and the third and last statute on March 3, 1891.[93]

(II) *Certifying Whole Case.* Under the acts of April 29, 1802, and June 1, 1872, the whole case could not be certified up to the supreme court,[94] even when its decision turned upon matters of law only,[95] and the rule could not be evaded by this, in connection with the further fact that the provisions of the latter act are apparently inconsistent with those of the former acts, furnishes a strong inference to that effect. Nevertheless, it has been said that in civil cases the intention of congress as to the certification provided for in the act of June 1, 1891, is to be arrived at in the light of the rules prevailing prior to that date in relation to certificates of division under the two older statutes. Graver *v.* Faurot, 162 U. S. 435, 16 S. Ct. 799, 40 L. ed. 1030; Maynard *v.* Hecht, 151 U. S. 324, 14 S. Ct. 353, 38 L. ed. 179. Hence, it would seem that the court will look to the former decisions to determine what questions may be certified, the manner of preparing the certificate, stating the questions, etc.

92. The act of congress of June 1, 1872, provides that whenever, in any civil suit or proceeding in a circuit court held by a circuit justice and a circuit or district judge, or by a circuit judge and a district judge, there occurs any difference of opinion between the judges as to any matter or thing to be decided, proved, or ordered by the court, the opinion of the presiding justice or judge shall prevail, and be considered the opinion of the court for the time being (17 U. S. Stat. at L., p. 196; U. S. Rev. Stat. (1878), §§ 650, 693), and that, when a final judgment or decree is entered, the question shall be certified, and the certificate entered of record (17 U. S. Stat. at L., p. 196; U. S. Rev. Stat. (1878), § 652).

With respect to civil cases the act of June 1, 1872, has superseded the act of April 29, 1802, allowing questions to be certified up before judgment. Bartholow Banking House *v.* School Trustees, 105 U. S. 6, 26 L. ed. 937; Dow *v.* Johnson, 100 U. S. 158, 25 L. ed. 632.

93. The act of congress of March 3, 1891, contains two distinct provisions for certification. 26 U. S. Stat. at L. c. 517, U. S. Rev. Stat. Suppl. (1891), p. 901, c. 517. See also, generally, Certiorari; and *Ex p.* Woods, 143 U. S. 202, 12 S. Ct. 417, 36 L. ed. 125 [*quoting Ex p.* Lau Ow Bew, 141 U. S. 583, 12 S. Ct. 43, 35 L. ed. 868].

Section five of the act reads: "Appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court. . . . In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

Section six of the act in effect provides that in any case in which the judgment of the circuit court of appeals is made final it may at any time certify to the supreme court any questions or propositions of law concerning which it desires the instructions of that court for its proper decision, and thereupon the supreme court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit court of appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it has been brought there for review by writ of error or appeal.

Effect of statute.— While there has been no decision expressly declaring that the provisions of the act of March 3, 1891, superseded the acts of April 29, 1802, and June 1, 1872, it is to be noted that no attempt has been made to certify questions under the acts of April 29, 1802, and June 1, 1872, since the enactment of the act of March 3, 1891, and

94. Cincinnati, etc., R. Co. *v.* McKeen, 149 U. S. 259, 13 S. Ct. 840, 37 L. ed. 725; Hosford *v.* Germania F. Ins. Co., 127 U. S. 399, 8 S. Ct. 1199, 32 L. ed. 196; Smith *v.* Craft, 123 U. S. 436, 8 S. Ct. 196, 31 L. ed. 267; State Nat. Bank *v.* St. Louis Rail Fastening Co., 122 U. S. 21, 7 S. Ct. 1054, 30 L. ed. 1121; U. S. *v.* Northway, 120 U. S. 327, 7 S. Ct. 580, 30 L. ed. 664; California Artificial Stone Paving Co. *v.* Molitor, 113 U. S. 609, 5 S. Ct. 618, 28 L. ed. 1106; Weeth *v.* New England Mortg. Security Co., 106 U. S. 605, 1 S. Ct. 91, 27 L. ed. 99; Daniels *v.* Chicago, etc., R. Co., 3 Wall. (U. S.) 250, 18 L. ed. 224; Dennistoun *v.* Stewart, 18 How. (U. S.) 565, 15 L. ed. 489; Sadler *v.* Hoover, 7 How. (U. S.) 646, 12 L. ed. 855; Adams *v.* Jones, 12 Pet. (U. S.) 207, 9 L. ed. 1058; Harris *v.* Elliott, 10 Pet. (U. S.) 25, 9 L. ed. 333; U. S. *v.* Bailey, 9 Pet. (U. S.) 267, 9 L. ed. 124; Saunders *v.* Gould, 4 Pet. (U. S.) 392, 7 L. ed. 897; Wayman *v.* Southard, 10 Wheat. (U. S.) 1, 6 L. ed. 253.

Thus, a question which asks the supreme court to decide whether, upon all the evidence in the case, defendant was entitled to a verdict cannot be properly certified. London F. Ins. Assoc. *v.* Wickham, 128 U. S. 426, 9 S. Ct. 113, 32 L. ed. 503.

95. London F. Ins. Assoc. *v.* Wickham, 128 U. S. 426, 9 S. Ct. 113, 32 L. ed. 503; Jewell *v.* Knight, 123 U. S. 426, 8 S. Ct. 193, 31 L. ed. 190.

Reason for rule.— When a certificate of division brings up the whole case it would be, if the court should decide it, in effect, the exercise of original rather than appellate jurisdiction. White *v.* Turk, 12 Pet. (U. S.) 238, 9 L. ed. 1069.

The object of the statutes was to meet a case where two judges differ on a clear and distinct proposition of law material to the decision of the case. If in reality more than one such question occurs they may be embraced in the certificate; but this does not mean that the whole case can be presented

splitting up the whole case in the form of questions.[96] Where it was evident from the record that the whole cause had been sent up the practice was to dismiss it for want of jurisdiction.[97] By the express wording, however, of the fifth section of the act of March 3, 1891, the sole question which may be certified from the district court or circuit court to the supreme court is that of the jurisdiction of the district or circuit court.[98]

(III) *Questions Which May Be Certified* — (A) *Questions Arising During Trial.* The question which may be certified upon a division of opinion must be upon some matter arising on the trial of the cause.[99] Questions arising incidentally, or in relation to a collateral matter after rendition of a judgment or decree, cannot be certified.[1]

(B) *Questions of Law and Fact.* So the question certified must be a question of law, not one of fact, or one of mixed law and fact.[2] It must not involve or

for decision, with all its propositions of fact and of law. Waterville *v.* Van Slyke, 116 U. S. 699, 6 S. Ct. 622, 29 L. ed. 772.

96. U. S. *v.* Reilly, 131 U. S. 58, 9 S. Ct. 664, 33 L. ed. 75; Dublin Tp. *v.* Milford Five Cent Sav. Inst., 128 U. S. 510, 9 S. Ct. 148, 32 L. ed. 533; Webster *v.* Cooper, 10 How. (U. S.) 54, 13 L. ed. 325; Nesmith *v.* Sheldon, 6 How. (U. S.) 41, 12 L. ed. 335; U. S. *v.* Briggs, 5 How. (U. S.) 208, 12 L. ed. 119; White *v.* Turk, 12 Pet. (U. S.) 238, 9 L. ed. 1069.

97. Waterville *v.* Van Slyke, 116 U. S. 699, 6 S. Ct. 622, 29 L. ed. 772; Daniels *v.* Chicago, etc., R. Co., 3 Wall. (U. S.) 250, 18 L. ed. 224; Nesmith *v.* Sheldon, 6 How. (U. S.) 41, 12 L. ed. 335.

The rule applies with equal force to the certification of questions by the circuit court of appeals, under section 6 of the act of March 3, 1891. Warner *v.* New Orleans, 167 U. S. 467, 17 S. Ct. 892, 42 L. ed. 239; Cross *v.* Evans, 167 U. S. 60, 17 S. Ct. 733, 42 L. ed. 77; Graver *v.* Faurot, 162 U. S. 435, 16 S. Ct. 799, 40 L. ed. 1030; Fabre *v.* Cunard Steamship Co., 59 Fed. 500, 11 U. S. App. 616, 8 C. C. A. 199.

But, while it is not permitted to certify the whole case, the supreme court may, by the express provisions of that section, require such certification to be made when questions are certified, or may bring up by certiorari any case in which the decision of that court would otherwise be final. Graver *v.* Faurot, 162 U. S. 435, 16 S. Ct. 799, 40 L. ed. 1030; Maynard *v.* Hecht, 151 U. S. 324, 14 S. Ct. 353, 38 L. ed. 179; Farmers', etc., State Bank *v.* Armstrong, 49 Fed. 600, 6 U. S. App. 4, 1 C. C. A. 394. When questions or propositions are certified, accompanied by a proper statement of the facts on which they arise, it is for the supreme court to determine whether it will answer such questions or propositions as are propounded, or direct the whole record to be placed before it in order to decide the matter in controversy in the same manner as if the case had been brought up by writ of error or appeal. Cincinnati, etc., R. Co. *v.* McKeen, 149 U. S. 259, 13 S. Ct. 840, 37 L. ed. 725.

98. Carey *v.* Houston, etc., R. Co., 150 U. S. 170, 14 S. Ct. 63, 37 L. ed. 1041; McLish *v.* Roff, 141 U. S. 661, 12 S. Ct. 118, 35 L. ed. 893. See also Barling *v.* Bank of British North America, 50 Fed. 260, 7 U. S. App. 194, 1 C. C. A. 510.

99. U. S. Bank *v.* Green, 6 Pet. (U. S.) 26, 8 L. ed. 307. See also Davis *v.* Braden, 10 Pet. (U. S.) 286, 9 L. ed. 427, in which it is said: "The court do not mean to decide, definitely, that no question can be brought here upon a certificate of a division of opinion unless the point arose upon the trial of the cause, but are very much induced to think that such is the true construction of the act; but from the general words used, cases may possibly arise that we do not foresee." Thus, the division being upon a mere matter arising upon the service of execution and a mere question, upon a collateral contest between the marshal and the bank, as to the marshal's right to fees, the supreme court acquires no jurisdiction. U. S. Bank *v.* Green, 6 Pet. (U. S.) 26, 8 L. ed. 307.

Habeas corpus proceedings.— The United States circuit court has authority to certify questions in a proceeding for a writ of habeas corpus to inquire into the sentence of a military commission, and the supreme court has jurisdiction to hear and determine them. *Ex p.* Milligan, 4 Wall. (U. S.) 2, 18 L. ed. 281.

1. Daniels *v.* Chicago, etc., R. Co., 3 Wall. (U. S.) 250, 18 L. ed. 224; Devereaux *v.* Marr, 12 Wheat. (U. S.) 212, 6 L. ed. 605.

Abstract or hypothetical questions.— A proposition which is merely abstract or hypothetical will not be considered. Pelham *v.* Rose, 9 Wall. (U. S.) 103, 19 L. ed. 602; Havemeyer *v.* Iowa County, 3 Wall. (U. S.) 294, 18 L. ed. 38; Ward *v.* Chamberlain, 2 Black (U. S.) 430, 17 L. ed. 319; Ogilvie *v.* Knox Ins. Co., 18 How. (U. S.) 577, 15 L. ed. 490. The supreme court will not decide a question certified where the decision will avail nothing. U. S. *v.* Buzzo, 18 Wall. (U. S.) 125, 21 L. ed. 812.

2. Warner *v.* New Orleans, 167 U. S. 467, 17 S. Ct. 892, 42 L. ed. 239; Graver *v.* Faurot, 162 U. S. 435, 16 S. Ct. 799, 40 L. ed. 1030; U. S. *v.* Perrin, 131 U. S. 55, 9 S. Ct. 681, 33 L. ed. 88; London F. Ins. Assoc. *v.* Wickham, 128 U. S. 426, 9 S. Ct. 113, 32 L. ed. 503, 141 U. S. 564, 12 S. Ct. 84, 35 L. ed. 860; Jewell *v.* Knight, 123 U. S. 426, 8 S. Ct. 193, 31 L. ed. 190; Williamsport Nat. Bank *v.* Knapp, 119 U. S. 357, 7 S. Ct. 274, 30 L. ed.

imply a conclusion or judgment upon the weight or effect of testimony or facts adduced in the cause.[3]

(c) *Questions Relating to Matters of Discretion of Trial Court* — (1) STATEMENT OF RULE. So, the general rule is that the court cannot, upon a certificate of a division of opinion, acquire jurisdiction relating to matters of pure discretion in the trial court.[4]

(2) LIMITATION OF RULE. The rule stated in the preceding section is subject to this limitation: that where a motion resting in the discretion of the court presents for consideration a question going directly to the merits, the decision of which may determine the points in controversy, the reviewing court will, nevertheless, consider the question on a certificate of division.[5]

(D) *Only Questions Certified Considered.* The court can look to the certificate alone for the question which occurred and for the points on which the decision of the court below differed.[6]

(IV) *CONTENTS AND REQUISITES OF CERTIFICATES* — (A) *Statement of Questions on Which Instruction Is Desired.* The question certified must be a distinct point or proposition of law and stated clearly, so that it can be definitely answered,[7]

446; Waterville *v.* Van Slyke, 116 U. S. 699, 6 S. Ct. 622, 29 L. ed. 772; California Artificial Stone Paving Co. *v.* Molitor, 113 U. S. 609, 5 S. Ct. 618, 28 L. ed. 1106; Weeth *v.* New England Mortg. Security Co., 106 U. S. 605, 1 S. Ct. 91, 27 L. ed. 99; Brobst *v.* Brobst, 4 Wall. (U. S.) 2, 18 L. ed. 387; Daniels *v.* Chicago, etc., R. Co., 3 Wall. (U. S.) 250, 18 L. ed. 224; Silliman *v.* Hudson River Bridge Co., 1 Black (U. S.) 582, 17 L. ed. 81; Dennistoun *v.* Stewart, 18 How. (U. S.) 565, 15 L. ed. 489; Wilson *v.* Barnum, 8 How. (U. S.) 258, 12 L. ed. 1070; Nesmith *v.* Sheldon, 6 How. (U. S.) 41, 12 L. ed. 335; U. S. *v.* Bailey, 9 Pet. (U. S.) 267, 9 L. ed. 124.

3. McHenry *v.* Alford, 168 U. S. 651, 18 S. Ct. 242, 42 L. ed. 614; Maynard *v.* Hecht, 151 U. S. 324, 14 S. Ct. 353, 38 L. ed. 179; London F. Ins. Assoc. *v.* Wickham, 128 U. S. 426, 9 S. Ct. 113, 32 L. ed. 503; Jewell *v.* Knight, 123 U. S. 426, 8 S. Ct. 193, 31 L. ed. 190; Weeth *v.* New England Mortg. Security Co., 106 U. S. 605, 1 S. Ct. 91, 27 L. ed. 99; Dennistoun *v.* Stewart, 18 How. (U. S.) 565, 15 L. ed. 489.

Questions of fact illustrated.— Thus, the question of fraud is necessarily a compound of fact and of law, and, upon a certificate of division of opinion, the fact must be distinctly found before the supreme court can decide the law. Jewell *v.* Knight, 123 U. S. 426, 8 S. Ct. 193, 31 L. ed. 190. The following question has also been held one of fact: "Whether, according to the true construction of the Woodworth patent, as amended, the machines made or used by the defendant at the time of filing the bill, or either of them simply, do or do not infringe the said amended letters patent." Wilson *v.* Barnum, 8 How. (U. S.) 258, 12 L. ed. 1070.

4. U. S. *v.* Rosenberg, 7 Wall. (U. S.) 580, 19 L. ed. 263; Wiggins *v.* Gray, 24 How. (U. S.) 303, 16 L. ed. 688; Jones *v.* Van Zandt, 5 How. (U. S.) 215, 12 L. ed. 122; Davis *v.* Braden, 10 Pet. (U. S.) 286, 9 L. ed. 427.

Illustrations.— Accordingly, the court will not determine, upon a certificate of division of opinion, whether or not a new trial shall be granted (U. S. *v.* Thomas, 151 U. S. 577, 14 S. Ct. 426, 38 L. ed. 276; U. S. *v.* Daniel, 6 Wheat. (U. S.) 542, 5 L. ed. 326; Lanning *v.* London, 4 Wash. (U. S.) 332, 14 Fed. Cas. No. 8,075; Taylor *v.* Carpenter, 2 Woodb. & M. (U. S.) 1, 23 Fed. Cas. No. 13,785); whether plaintiff in ejectment shall be permitted to enlarge the demise (Smith *v.* Vaughan, 10 Pet. (U. S.) 366, 9 L. ed. 457), or any question in any equity cause relating to the practice in the circuit court and depending upon the exercise of sound discretion in the application of the rules which regulate the courts of equity in the circumstances of the particular case (Packer *v.* Nixon, 10 Pet. (U. S.) 408, 9 L. ed. 473). But see Daniels *v.* Chicago, etc., R. Co., 3 Wall. (U. S.) 250, 18 L. ed. 224; U. S. *v.* Kelly, 11 Wheat. (U. S.) 417, 6 L. ed. 508, from both of which cases it seems that a division of opinion may be certified on a motion in arrest of judgment.

5. U. S. *v.* Thomas, 151 U. S. 577, 14 S. Ct. 426, 38 L. ed. 276; U. S. *v.* Rosenberg, 7 Wall. (U. S.) 580, 19 L. ed. 263; U. S. *v.* Chicago, 7 How. (U. S.) 185, 12 L. ed. 660; U. S. *v.* Wilson, 7 Pet. (U. S.) 150, 8 L. ed. 640.

Of this character is a motion to continue a temporary injunction until a final hearing on the merits. U. S. *v.* Chicago, 7 How. (U. S.) 185, 12 L. ed. 660.

6. U. S. *v.* Ambrose, 108 U. S. 336, 2 S. Ct. 682, 27 L. ed. 746; Dennistoun *v.* Stewart, 18 How. (U. S.) 565, 15 L. ed. 489; Kennedy *v.* Georgia Bank, 8 How. (U. S.) 586, 12 L. ed. 1209; U. S. *v.* Briggs, 5 How. (U. S.) 208, 12 L. ed. 119.

Even though the entire record is sent up, only such parts as relate to the questions certified will be considered — irrelevant matter will be disregarded. U. S. *v.* Thomas, 151 U. S. 577, 14 S. Ct. 426, 38 L. ed. 276.

7. McHenry *v.* Alford, 168 U. S. 651, 18 S. Ct. 242, 42 L. ed. 614; U. S. *v.* Union Pac. R. Co., 168 U. S. 505, 18 S. Ct. 167, 42 L. ed. 559; Columbus Watch Co. *v.* Robbins, 148 U. S. 266, 13 S. Ct. 594, 37 L. ed. 445; U. S. *v.* Brewer, 139 U. S. 278, 11 S. Ct. 538, 35 L. ed.

without regard to the other issues of law or fact in the case.[8] If the certificate contains several questions, each one must be separately stated, and stated with reference to that part of the case on which it arose.[9]

(B) *Statement of Facts on Which Questions Arose.* The certificate must contain a statement of the facts on which the questions or propositions of law certified arose,[10] and this statement should consist of ultimate facts, leaving nothing but a conclusion of law to be drawn.[11]

(C) *Statement That Instruction Is Desired.* In order to invoke the exercise of the jurisdiction of the supreme court in the instruction of the circuit court of appeals as to the proper decision of questions or propositions of law, the certificate must show that the instruction of the supreme court as to the proper decision of such questions or propositions was desired.[12]

(V) *Necessity for Actual Division of Opinion.* As a general rule, in order to authorize the consideration of a question certified there must be an actual division of opinion, and if it appears upon the record that no such disagreement actually existed, the question will not be considered.[13]

(VI) *Necessity for Final Judgment.* Under the act of June 1, 1872, no questions could be certified until after final judgment,[14] and this is also the rule under the fifth section of the act of March 3, 1891.[15] Under the sixth sec-

190; U. S. *v.* Chase, 135 U. S. 255, 10 S. Ct. 756, 34 L. ed. 117; U. S. *v.* Lacher, 134 U. S. 624, 10 S. Ct. 625, 33 L. ed. 1080; U. S. *v.* Hall, 131 U. S. 50, 9 S. Ct. 663, 33 L. ed. 97; London F. Ins. Assoc. *v.* Wickham, 128 U. S. 426, 9 S. Ct. 113, 32 L. ed. 503; Jewell *v.* Knight, 123 U. S. 426, 8 S. Ct. 193, 31 L. ed. 190; U. S. *v.* Northway, 120 U. S. 327, 7 S. Ct. 580, 30 L. ed. 664; Williamsport Nat. Bank *v.* Knapp, 119 U. S. 357, 7 S. Ct. 274, 30 L. ed. 446; U. S. *v.* Waddell, 112 U. S. 76, 5 S. Ct. 35, 28 L. ed. 673; Daniels *v.* Chicago, etc., R. Co., 3 Wall. (U. S.) 250, 18 L. ed. 224; Sadler *v.* Hoover, 7 How. (U. S.) 646, 12 L. ed. 855; U. S. *v.* Briggs, 5 How. (U. S.) 208, 12 L. ed. 119; Perkins *v.* Hart, 11 Wheat. (U. S.) 237, 6 L. ed. 463.

8. U. S. *v.* Union Pac. R. Co., 168 U. S. 505, 18 S. Ct. 167, 42 L. ed. 559; London F. Ins. Assoc. *v.* Wickham, 128 U. S. 426, 9 S. Ct. 113, 32 L. ed. 503; Jewell *v.* Knight, 123 U. S. 426, 8 S. Ct. 193, 31 L. ed. 190.

If the questions are too imperfectly stated to enable the supreme court to pronounce any opinion upon them, that court will not give an opinion, but will certify that they are too imperfectly stated for consideration. Perkins *v.* Hart, 11 Wheat. (U. S.) 237, 6 L. ed. 463. See also Sadler *v.* Hoover, 7 How. (U. S.) 646, 12 L. ed. 855.

The following questions have been held too general for consideration: Whether an indictment charges the defendant with an offense (U. S. *v.* Chase, 135 U. S. 255, 10 S. Ct. 756, 34 L. ed. 117; U. S. *v.* Lacher, 134 U. S. 624, 10 S. Ct. 625, 33 L. ed. 1080; U. S. *v.* Northway, 120 U. S. 327, 7 S. Ct. 580, 30 L. ed. 664); whether a demurrer to counts of an indictment ought to be sustained; whether the first three counts to an indictment charge an offense under the laws of the United States (U. S. *v.* Brewer, 139 U. S. 278, 11 S. Ct. 538, 35 L. ed. 190); whether a decree should be rendered for complainants or for defendants (Sadler *v.* Hoover, 7 How. (U. S.) 646, 12 L. ed. 855).

9. Daniels *v.* Chicago, etc., R. Co., 3 Wall. (U. S.) 250, 18 L. ed. 224.

10. Cincinnati, etc., R. Co. *v.* McKeen, 149 U. S. 259, 13 S. Ct. 840, 37 L. ed. 725; Waterville *v.* Van Slyke, 116 U. S. 699, 6 S. Ct. 622, 29 L. ed. 772; Havemeyer *v.* Iowa County, 3 Wall. (U. S.) 294, 18 L. ed. 38; U. S. *v.* Columbus City Bank, 19 How. (U. S.) 385, 15 L. ed. 662; Ogilvie *v.* Knox Ins. Co., 18 How. (U. S.) 577, 15 L. ed. 490.

11. Thus, a statement of particular facts, in the nature of matters of evidence, upon which no decision can be made without inferring a fact which is not found, is not sufficient. Jewell *v.* Knight, 123 U. S. 426, 8 S. Ct. 193, 31 L. ed. 190; Sigafus *v.* Porter, 85 Fed. 689, 56 U. S. App. 62, 29 C. C. A. 391.

12. Columbus Watch Co. *v.* Robbins, 148 U. S. 266, 13 S. Ct. 594, 37 L. ed. 445.

13. Colorado Cent. R. Co. *v.* White, 101 U. S. 98, 25 L. ed. 860; Daniels *v.* Chicago, etc., R. Co., 3 Wall. (U. S.) 250, 18 L. ed. 224; Webster *v.* Cooper, 10 How. (U. S.) 54, 13 L. ed. 325; U. S. *v.* Stone, 14 Pet. (U. S.) 524, 10 L. ed. 572. In U. S. *v.* Stone, 14 Pet. (U. S.) 524, 10 L. ed. 572, it was said: "In some cases, where the point arising is one of importance, the judges of the Circuit Court have sometimes, by consent, certified the point to the Supreme Court — as upon a division of opinion — when, in truth, they both rather seriously doubted, than differed, about it. They must be cases sanctioned by the judgment of one of the judges of the Supreme Court, in this circuit."

14. *Ex p.* Clodomira Cota, 110 U. S. 385, 4 S. Ct. 25, 28 L. ed. 172; *Ex p.* Tom Tong, 108 U. S. 556, 2 S. Ct. 871, 27 L. ed. 826; Bartholow Banking House *v.* School Trustees, 105 U. S. 6, 26 L. ed. 937.

15. Maynard *v.* Hecht, 151 U. S. 324, 14 S. Ct. 353, 38 L. ed. 179; Carey *v.* Houston, etc., R. Co., 150 U. S. 170, 14 S. Ct. 63, 37 L. ed. 1041; McLish *v.* Roff, 141 U. S. 661, 12 S. Ct. 118, 35 L. ed. 893.

tion of the act of March 3, 1891, the questions are certified up before final judgment,[16] and, when instructions are received as to the questions certified, the cause will be finally disposed of.[17]

(VII) *JURISDICTIONAL AMOUNT.* The original act of April 29, 1802, was always held to apply to material questions of law arising in all cases, regardless of the amount in controversy,[18] and the same was the case under the law of June 1, 1872,[19] nor is there anything in the law of March 3, 1891, to change the rule in this regard.

(VIII) *COMPOSITION OF COURT FROM WHICH QUESTIONS ARE CERTIFIED.* The division of opinion must arise between two judges[20] who are competent to take part in the judgment. A case cannot be brought to the supreme court on a certificate of division between a judge who is qualified and one who is disqualified to take part in the judgment.[21]

VI. PARTIES.

A. In General. The general rule with regard to parties is that every person to be directly affected in his interests or rights by a judgment on appeal or writ of error is entitled to be named or described in the application or writ, to have notice thereof, and an opportunity of being heard and of defending his rights.[1]

B. Appellants or Plaintiffs in Error — 1. PROPER PARTIES — a. In General. When one of two or more plaintiffs or defendants, against whom a judgment or

16. Sigafus *v.* Porter, 84 Fed. 430, 51 U. S. App. 693, 28 C. C. A. 443; Andrews *v.* National Foundry, etc., Works, 77 Fed. 774, 46 U. S. App. 619, 23 C. C. A. 454, 36 L. R. A. 139.

17. Sigafus *v.* Porter, 84 Fed. 430, 51 U. S. App. 693, 28 C. C. A. 443.

18. Dow *v.* Johnson, 100 U. S. 158, 25 L. ed. 632.

19. See Lawrence *v.* Nelson, 143 U. S. 215, 12 S. Ct. 440, 36 L. ed. 130; Union Nat. Bank *v.* Kansas City Bank, 136 U. S. 223, 10 S. Ct. 1013, 34 L. ed. 341; Hosford *v.* Germania F. Ins. Co., 127 U. S. 399, 8 S. Ct. 1199, 32 L. ed. 196; Dow *v.* Johnson, 100 U. S. 158, 25 L. ed. 632.

20. **That the reason for the provision for certification** of questions to the supreme court is to be found in the fact that the circuit court consisted of only two judges, in consequence of which, should they disagree, the division of opinion would remain and the question continue unsettled, is pointed out in New England Mar. Ins. Co. *v.* Dunham, 11 Wall. (U. S.) 1, 20 L. ed. 90; *Ex p.* Milligan, 4 Wall. (U. S.) 2, 18 L. ed. 281; U. S. *v.* Daniel, 6 Wheat. (U. S.) 542, 5 L. ed. 326.

21. U. S. *v.* Emholt, 105 U. S. 414, 26 L. ed. 1077; Nelson *v.* Carland, 1 How. (U. S.) 265, 11 L. ed. 126; U. S. *v.* Lancaster, 5 Wheat. (U. S.) 434, 5 L. ed. 127. See also New England Mar. Ins. Co. *v.* Dunham, 11 Wall. (U. S.) 1, 20 L. ed. 90.

Hence, a certificate of questions or propositions of law concerning which a circuit court of appeals desires the instruction of the supreme court is irregular when a quorum of its members does not sit in the case. Cincinnati, etc., R. Co. *v.* McKeen, 149 U. S. 259, 13 S. Ct. 840, 37 L. ed. 725, wherein it appeared that the case came on to be heard before the circuit judge and two district judges, the circuit justice not being in attendance or able at that time to attend; that one of said judges was unwilling to sit upon the final hearing, and, it appearing to the court that the appeal involved questions of great importance, it was ordered that these questions be certified to the supreme court for instruction. The supreme court held that this was irregular, and ordered the case dismissed.

1. *California.*— Senter *v.* De Bernal, 38 Cal. 637.

Georgia.— Carey *v.* Giles, 10 Ga. 1; Harrington *v.* Roberts, 7 Ga. 510.

Kentucky.— Miller *v.* Cabell, 81 Ky. 178, 4 Ky. L. Rep. 962. See also Adams *v.* Com., 2 Bibb (Ky.) 242.

Massachusetts.— Porter *v.* Rummery, 10 Mass. 64.

Missouri.— Paxton *v.* Humber, 39 Mo. 521.

Texas.— Stephenson *v.* Texas, etc., R. Co., 42 Tex. 162.

United States.— St. Louis United Elevator Co. *v.* Nichols, 91 Fed. 832, 34 C. C. A. 90; Dodson *v.* Fletcher, 78 Fed. 214, 49 U. S. App. 61, 24 C. C. A. 69; Andrews *v.* National Foundry, etc., Works, 76 Fed. 166, 46 U. S. App. 281, 22 C. C. A. 110, 36 L. R. A. 139.

See 2 Cent. Dig. tit. "Appeal and Error," § 1795.

As to persons entitled to review see *supra*, IV, A.

A party who occupies the position of a stake-holder, and by his answer submits to whatever judgment the court may render in the case, need not join in an appeal or writ of error; but his rights will be protected by the court. Fowler *v.* Morrill, 8 Tex. 153.

Where a defendant suffers judgment by default he is not a necessary party to an appeal prosecuted by a co-defendant, although a reversal may affect him adversely. Garnsey *v.* Knights, 1 Thomps. & C. (N. Y.) 259. But see Midland R. Co. *v.* St. Clair, 144 Ind. 363, 42 N. E. 214; Lee *v.* Mozingo, 143 Ind. 667, 41 N. E. 454.

decree has been rendered, appeals or sues out a writ of error, he should usually join his co-plaintiffs or co-defendants as appellants or plaintiffs in error; and upon the trial they may unite with him and assign error, or they may sever and be heard in defense of the judgment or decree.[2]

b. Nominal or Useless Parties. The omission of nominal and useless parties will not deprive the real party in interest of his right to have the question reëxamined on its merits by the appellate court.[3]

2. *District of Columbia.*— Godfrey *v.* Roessle, 5 App. Cas. (D. C.) 299.

Georgia.— Western Union Tel. Co. *v.* Griffith, 111 Ga. 551, 36 S. E. 859; Bird *v.* Harris, 63 Ga. 433.

Illinois.— Christy *v.* Marmon, 163 Ill. 225, 45 N. E. 150.

Indiana.— Stults *v.* Gibler, 146 Ind. 501, 45 N. E. 340; Anderson Glass Co. *v.* Brakeman, (Ind. App. 1896) 45 N. E. 193; Perry *v.* Botkin, 15 Ind. App. 83, 42 N. E. 964.

Kansas.— Daughters *v.* German-American Ins. Co., (Kan. App. 1900) 62 Pac. 428; Miller *v.* Pickering, (Kan. App. 1900) 61 Pac. 975.

United States.— Davis *v.* Mercantile Trust Co., 152 U. S. 590, 14 S. Ct. 693, 38 L. ed. 563; Downing *v.* McCartney, 131 U. S. xcviii, appendix, 19 L. ed. 757; Shannon *v.* Cavazos, 131 U. S. lxxi, appendix, 15 L. ed. 929; Johnson *v.* Trust Co. of America, 104 Fed. 174.

See 2 Cent. Dig. tit. "Appeal and Error," § 1796; and *infra*, VI, B, 4, a, (I).

Reason of rule may be found stated in Jacques *v.* Cesar, 2 Saund. 100; 2 Tidd Pr. 1053.

In partition suit part of defendants filed a cross-complaint claiming all the land against their co-defendants and plaintiff, and obtained a decree in their favor. Upon an appeal by plaintiff from the decree it was held that his co-defendants to the cross-complaint should have been made co-appellants, and his failure to do this rendered the appeal subject to dismissal. Benbow *v.* Garrard, 139 Ind. 571, 39 N. E. 162.

The surety on an injunction bond or an appeal bond in the court below, against whom judgment has been rendered, should be made a party to an appeal or writ of error. Lamar *v.* Grier, 3 Ga. 121; Coffee *v.* Newsom, 2 Ga. 439. See also Psalmonds *v.* Barksdale, 3 Ga. 584. But see, apparently *contra*, Johnson *v.* Wilson, 68 Ga. 290. And see Crawford *v.* Jones, 65 Ga. 523; and Stump *v.* Sheppard, Cooke (Tenn.) 190, in which it is said that usage and practice have sanctioned the idea in appeals that the principal acts as an agent of his securities in the steps which are necessary to be taken. The court will, therefore, presume that when the principal obtains an appeal it is for his securities as well as for himself. While it would be more regular for the suit to appear in the higher court in the name of the principal and securities, it is sufficient if it appears in the name of the principal alone. The securities appearing upon the record, judgment may be rendered against them if necessary.

See 2 Cent. Dig. tit. "Appeal and Error," § 1797.

Where, on the trial of two foreclosure suits, brought by different parties against the same defendant and consolidated, it was adjudged that both mortgages were invalid, but only one of plaintiffs appealed, making his co-plaintiff an appellee together with defendant, and both plaintiffs assigned as sole error the conclusion against the validity of their respective mortgages, it was held that the failure to make both plaintiffs appellants was a ground for dismissing the appeal. Smith *v.* Wells Mfg. Co., 144 Ind. 266, 43 N. E. 131. See also, to like effect, Lee *v.* Mozingo, 143 Ind. 667, 41 N. E. 454; Gregory *v.* Smith, 139 Ind. 48, 38 N. E. 395.

In Mississippi it has been held that the rule requiring all parties to a judgment at law to join in prosecuting a writ of error does not apply to the decrees of chancery and probate courts. Thompson *v.* Toomer, 50 Miss. 394; Overstreet *v.* Trainer, 24 Miss. 484.

Term and vacation appeals.— In some jurisdictions a distinction is made between appeals taken during the term at which the decree or judgment sought to be reversed is rendered, and those taken during vacation. In the former case it is not necessary to make all the co-parties below parties to the appeal (Roach *v.* Baker, 145 Ind. 330, 43 N. E. 932, 44 N. E. 303; Coco *v.* Thienman, 25 La. Ann. 236; Sevier *v.* Sargent, 25 La. Ann. 220; and see also Francis *v.* Lavina, 26 La. Ann. 311); while in the latter, the general rule, as above stated, applies in all its force (Owen *v.* Dresback, 154 Ind. 392, 56 N. E. 22, 848; McKee *v.* Root, 153 Ind. 314, 54 N. E. 802; and see also Ind. Rev. Stat. (1897), §§ 652, 657, and cases cited *supra*, notes 1, 2).

3. *District of Columbia.*— Raub *v.* Masonic Mut. Relief Assoc., 3 Mackey (D. C.) 68.

Georgia.— Western Union Tel. Co. *v.* Griffith, 111 Ga. 551, 36 S. E. 859; De Vaughn *v.* Byrom, 110 Ga. 904, 36 S. E. 267; Mohr-Weil Lumber Co. *v.* Russell, 109 Ga. 579, 34 S. E. 1005.

Missouri.— Gray *v.* Dryden, 79 Mo. 106.

New Mexico.— Albuquerque *v.* Zeiger, 5 N. M. 518, 25 Pac. 787.

United States.— Norwich, etc., R. Co. *v.* Johnson, 15 Wall. (U. S.) 8, 21 L. ed. 118; Galveston, etc., R. Co. *v.* House, 102 Fed. 112; Mercantile Trust Co. *v.* Kanawha, etc., R. Co., 58 Fed. 6, 16 U. S. App. 37, 7 C. C. A. 3.

As to right of nominal party to review see *supra*, IV, A, b, (IV).

An unnecessary and improper party in the court below need not be made a party to a proceeding in error. Howard *v.* Levering, 8 Ohio Cir. Ct. 614. See also Culver *v.* Mullally, 94 Ga. 644, 21 S. E. 895, in which it was held that a co-plaintiff, forced upon the orig-

2. Separate Proceedings by One or More Co-Parties — a. In General. While, as a general rule, all co-parties should be joined in an appeal or writ of error, this does not preclude any one or more of them from prosecuting an appeal where they alone are affected by the judgment or decree complained of, or where the interests of the parties are separate, or upon the failure or refusal of their co-parties to join. Usually, though not invariably, it is required that notice shall be served upon the parties not appealing, and that they must be designated as appellants or plaintiffs in error in the petition or writ, in order not only that the record may be identified, but also to prevent their subsequently taking an appeal in case of their refusal to join.[4]

b. Appeal or Writ Maintainable by Only a Part of Co-Parties. When less

inal plaintiff by illegal amendment, was not a necessary party to a writ of error, more especially if he disclaimed at the trial all ownership and interest in the subject-matter of the litigation and asserted no interest whatever relatively to either party.

A defendant against whom no judgment has been rendered need not be joined as an appellant with his co-defendant. Watkins *v.* Vrooman, 51 Hun (N. Y.) 175, 5 N. Y. Suppl. 172, 21 N. Y. St. 586 [*reversed*, as to another point, in 123 N. Y. 211, 25 N. E. 322, 33 N. Y. St. 173]. See also, to like effect, Coe *v.* Turner, 5 Conn. 86; Berghoff *v.* McDonald, 87 Ind. 549; Easter *v.* Severin, 78 Ind. 540; Hammon *v.* Sexton, 69 Ind. 37.

Similarly, persons not parties to the judgment below cannot properly be joined in a writ of error. Gary *v.* Wood, 4 Ala. 296; Adams *v.* Robinson, Minor (Ala.) 285.

A railroad company, which is hopelessly insolvent and practically defunct, and all of whose property, rights, and franchises have been transferred to a purchaser at a foreclosure sale, is not a necessary party to an appeal by such purchaser from a decree distributing the proceeds of the sale. Galveston, etc., R. Co. *v.* House, 102 Fed. 112.

4. *Alabama.*— *Ex p.* Webb, 58 Ala. 109; Garlick *v.* Dunn, 42 Ala. 404.

Colorado,— Davidson *v.* Jennings, (Colo. 1900) 60 Pac. 354, 48 L. R. A. 340.

Connecticut.— Coe *v.* Turner, 5 Conn. 86.

Florida.— Jacksonville, etc., R., etc., Co. *v.* Broughton, 38 Fla. 139, 20 So. 829.

Georgia.— Connally *v.* Rice, 77 Ga. 312; Ruffin *v.* Paris, 75 Ga. 653. See also Patterson *v.* Barrow, 99 Ga. 166, 25 S. E. 398.

Idaho.— Alexander *v.* Leland, 1 Ida. 425.

Illinois.— Thorp *v.* Thorp, 40 Ill. 113.

Indiana.—Pritchett *v.* McGaughey, 151 Ind. 638, 52 N. E. 397.

Iowa.— Barlow *v.* Scott, 12 Iowa 63, construing Iowa Code (1897), § 4111 *et seq.*

Maryland.— Alexander *v.* Worthington, 5 Md. 471; Barnes *v.* Dodge, 7 Gill (Md.) 109.

Michigan.— People *v.* Wayne Cir. Judge, 36 Mich. 331.

Mississippi.—Thompson *v.* Toomer, 50 Miss. 394; Saunders *v.* Saunders, 49 Miss. 327.

Missouri.— Gray *v.* Dryden, 79 Mo. 106; Home Sav. Bank *v.* Traube, 6 Mo. App. 221.

New Jersey.— Peer *v.* Cookerow, 14 N. J. Eq. 361.

New York.— Brown *v.* Richardson, 4 Rob. (N. Y.) 603; Fenner *v.* Bettnar, 22 Wend. (N. Y.) 621; People *v.* Judges, 1 Wend. (N. Y.) 90.

North Carolina.— Smith *v.* Calloway, 35 N. C. 477.

Oregon.— Cox *v.* Alexander, 30 Oreg. 438, 46 Pac. 794.

Pennsylvania.— Bonner *v.* Campbell, 48 Pa. St. 286; Finney *v.* Crawford, 2 Watts (Pa.) 294; Gallagher *v.* Jackson, 1 Serg. & R. (Pa.) 492.

Texas.— Wiederanders *v.* State, 64 Tex. 133; Gooch *v.* Parker, 16 Tex. Civ. App. 256, 41 S. W. 662.

Virginia.— Purcell *v.* McCleary, 10 Gratt. (Va.) 246.

Washington.—Garrison *v.* Cheeney, 1 Wash. Terr. 489.

See 2 Cent. Dig. tit. "Appeal and Error," § 1798.

As to splitting appeals see *supra*, I, J.

Notice to co-party unnecessary.— Under the New York code any one or more co-plaintiffs or co-defendants may appeal alone, and no notice is required to be given to anyone but the opposite party and the clerk. Brown *v.* Richardson, 4 Rob. (N. Y.) 603; Mattison *v.* Jones, 9 How. Pr. (N. Y.) 152, 4 E. D. Smith (N. Y.) 427.

Use of name of co-party.— Under Ill. Rev. Stat. (1845), p. 420, it has been held that either of several defendants, against whom a decree may be rendered, may remove the suit to the supreme court by appeal or writ of error, and for that purpose has a right to use the names of others not joining in the appeal. Willenborg *v.* Murphy, 40 Ill. 46. *Compare* Garrison *v.* Cheeney, 1 Wash. Terr. 489, where it was held, under Wash. Code (1869), § 44, that the writ need only be prosecuted in the name of the party aggrieved by the decision of the lower court.

Withdrawal by acting appellant.— In Bonner *v.* Campbell, 48 Pa. St. 286, the record showed that the appeal from the award of arbitrators was by all of defendants, though only one of them acted in taking it. The recognizance entered into by that one recognized all, and, after the appeal, the record showed all as the subjects of the orders of the court for the payment of costs. Subsequently the defendant who acted in taking the appeal undertook to withdraw it on the ground that he was the only appellant. This withdrawal the court vacated as to the other defendants, and the case went to trial between them and plaintiff.

than the full number of co-appellants or co-plaintiffs in error can alone maintain the proceedings, the others should be dismissed without prejudice to those who may maintain the proceedings.[5]

c. Joint Liability or Joint Interest — (I) *In General.* Where a judgment or decree is rendered against parties jointly liable, or having a joint interest in the subject-matter of the litigation, one of the parties may appeal or sue out a writ of error though his co-parties do not join.[6]

(II) *Effect of Separate Appeal.* Where there has been a joint judgment or decree against several, the effect of an appeal or writ of error by one or more, without the concurrence of their co-parties, is to carry up the whole case, and a reversal will enure to the benefit of all.[7]

d. Judgment Against One or More Only. Where a judgment or decree is rendered against a part only of the co-plaintiffs or co-defendants, an appeal or writ of error should be prosecuted only in the names of those prejudiced. Where those not prejudiced are joined therein, the petition or writ will be dismissed.[8]

e. On Refusal of Co-Parties to Join in or Prosecute. Where one or more of the co-plaintiffs or co-defendants refuse to join in or prosecute an appeal or

5. Malaer *v.* Damron, 31 Ill. App. 572.

6. *District of Columbia.*— Raub *v.* Masonic Mut. Relief Assoc., 3 Mackey (D. C.) 68.

Kentucky.— Johnson *v.* Johnson, 1 Dana (Ky.) 364.

Missouri.— Morgner *v.* Birkhead, 34 Mo. 214.

Nebraska.— But see Wolf *v.* Murphy, 21 Nebr. 472, 32 N. W. 303.

New Jersey.— Peer *v.* Cookerow, 14 N. J. Eq. 361.

New Mexico.— New Mexico, etc., R. Co. *v.* Madden, 7 N. M. 215, 34 Pac. 50.

Ohio.— Ewers *v.* Rutledge, 4 Ohio St. 210; Emerick *v.* Armstrong, 1 Ohio 513. *Compare* Smetters *v.* Rainey, 14 Ohio St. 287.

Texas.— Dickson *v.* Burke, 28 Tex. 117; Willie *v.* Thomas, 22 Tex. 175.

Virginia.— Purcell *v.* McCleary, 10 Gratt. (Va.) 246.

See 2 Cent. Dig. tit. "Appeal and Error," § 1802.

It is well-settled law in Illinois that where two defendants join in praying an appeal, which appeal is allowed on condition that both defendants enter into an appeal bond in a given sum within a certain time, one alone cannot perfect an appeal. If a party desires a separate appeal he must pray for it, and obtain an order accordingly. Bamberger *v.* Golden, 87 Ill. App. 156.

Where, in an action in tort against two defendants, judgment is rendered against both jointly, one defendant may bring error to review the same without joining therein his co-defendant. New Mexico, etc., R. Co. *v.* Madden, 7 N. M. 215, 34 Pac. 50.

The co-parties should, however, be summoned, and, upon their refusal to join, the court will enter an order of severance against them. See *infra*, VI, B, 3.

7. Johnson *v.* Johnson, 1 Dana (Ky.) 364; Peer *v.* Cookerow, 14 N. J. Eq. 361; Ewers *v.* Rutledge, 4 Ohio St. 210; Emerick *v.* Armstrong, 1 Ohio 513; Dickson *v.* Burke, 28 Tex. 117; Willie *v.* Thomas, 22 Tex. 175; Wood *v.* Smith, 11 Tex. 367; Burleson *v.* Henderson, 4 Tex. 49.

Extent of rule.— Even where the right of appeal has been lost by the co-parties, as where the statutory limitation has run against them, and appellant has had the right of appeal saved owing to infancy or other disability, a reversal as to him will apply to the whole case. Peer *v.* Cookerow, 14 N. J. Eq. 361.

8. *Arkansas.*— Hay *v.* State Bank, 5 Ark. 250.

Colorado.— Venner *v.* Denver Union Water Co., (Colo. App. 1900) 63 Pac. 1061; Diamond Tunnel Gold, etc., Min. Co. *v.* Faulkner, 14 Colo. 438, 24 Pac. 548.

Connecticut.— Coe *v.* Turner, 5 Conn. 86.

Georgia.— Wyche *v.* Greene, 16 Ga. 47.

Indiana.— Lowe *v.* Turpie, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233.

Kansas.— Leavenworth *v.* Duffy, (Kan. App. 1900) 62 Pac. 433.

Massachusetts.— Shaw *v.* Blair, 4 Cush. (Mass.) 97.

Mississippi.— Coffee *v.* Planters' Bank, 11 Sm. & M. (Miss.) 458, 49 Am. Dec. 68.

New York.— Jaqueth *v.* Jackson, 17 Wend. (N. Y.) 434.

North Carolina.— Stephens *v.* Batchelor, 23 N. C. 60; Sharpe *v.* Jones, 7 N. C. 306.

Ohio.— Emerick *v.* Armstrong, 1 Ohio 513.

Oklahoma.— Outcalt *v.* Collier, 8 Okla. 473, 58 Pac. 642 [*reversing* 6 Okla. 615, 52 Pac. 738].

England.— Cannon *v.* Abbot, 1 Lev. 210; Parker *v.* Lawrence, Hob. 70 note; Barnwell *v.* Grant, Style 190; Vaughan *v.* Loriman, Cro. Jac. 138.

See 2 Cent. Dig. tit. "Appeal and Error," § 1803.

See also *infra*, VI, H, 2 *et seq.*

Where one joint defendant in trespass is acquitted, and one found guilty, the latter may appeal the cause as to himself, without affecting the former. Emerick *v.* Armstrong, 1 Ohio 513.

writ of error, upon notice or process regularly served, or, after having perfected the appeal, abandon it, the others may prosecute the proceedings alone.[9]

f. Parties in a Representative or Official Capacity. Parties in a representative or official capacity may bring separate proceedings in error to protect the interests represented by them.[10]

g. Several Liability or Separate Interests. Where a decree or judgment is several both in form and in substance, and the interest represented by each of the co-parties, plaintiff or defendant, is separate and distinct from that of the others, any party may appeal or sue out a writ of error separately, to protect his own interests, without joining his co-parties in the appeal, and without a summons and severance.[11]

Where one named as a party defendant in the lower court has not been served with process, nor appeared and answered, he is not a necessary party to an appeal or writ of error prosecuted by the other defendant or defendants. Searcy *v.* Tillman, 75 Ga. 504; Macon, etc., R. Co. *v.* Washington, 69 Ga. 764; Winters *v.* Hughes, 3 Utah 438, 24 Pac. 907. *Compare* Thompson *v.* Valarino, 3 Den. (N. Y.) 179; Mason *v.* Denison, 11 Wend. (N. Y.) 612, 15 Wend. (N. Y.) 64.

9. *Georgia.*— Jordan *v.* Gaulden, 73 Ga. 191.

Illinois.— Willenborg *v.* Murphy, 40 Ill. 46. And see Bartlett *v.* Keating, 79 Ill. App. 642.

Iowa.— Barlow *v.* Scott, 12 Iowa 63.

Louisiana.— Jaffray *v.* Moss, 41 La. Ann. 548, 6 So. 520; Walton *v.* Police Jury, 26 La. Ann. 355.

Michigan.— Detroit Sav. Bank *v.* Truesdail, 38 Mich. 430; People *v.* Wayne Cir. Judge, 36 Mich. 331.

Missouri.— Gray *v.* Dryden, 79 Mo. 106; Home Sav. Bank *v.* Traube, 6 Mo. App. 221.

New Jersey.— Peer *v.* Cookerow, 14 N. J. Eq. 361.

New York.— Bockes *v.* Hathorn, 78 N. Y. 222; Mattison *v.* Jones, 9 How. Pr. (N. Y.) 153, 4 E. D. Smith (N. Y.) 427. See Fenner *v.* Bettner, 22 Wend. (N. Y.) 621.

Texas.— Ruhl *v.* Kauffman, 65 Tex. 723; Simmons *v.* Fisher, 46 Tex. 126.

Virginia.— Reno *v.* Davis, 4 Hen. & M. (Va.) 283.

Washington.— Kelley *v.* Kitsap County, 5 Wash. 521, 32 Pac. 554.

Wisconsin.— *In re* Luscombe, (Wis. 1901) 85 N. W. 341.

United States.— Todd *v.* Daniel, 16 Pet. (U. S.) 521, 10 L. ed. 1054; Farmers' L. & T. Co. *v.* McClure, 78 Fed. 211, 49 U. S. App. 46, 24 C. C. A. 66.

But see Wilkinson *v.* Gilchrist, 27 N. C. 228; Hicks *v.* Gilliam, 15 N. C. 217; Dunns *v.* Jones, 20 N. C. 154.

See 2 Cent. Dig. tit. "Appeal and Error," § 1799.

Abandonment of appeal.— Where a writ of error has been sued out by several, a portion of the plaintiffs in error may dismiss the suit as to themselves, leaving the remaining plaintiffs to prosecute their suit if the latter so desire to do. Thorp *v.* Thorp, 40 Ill. 113.

Declination and waiver of notice.— Under Horner's Stat. Ind. (1897), § 635, it was held that where a husband, co-defendant with his wife, filed a declination to join in the wife's appeal, and waived notice, he was not a necessary party to the appeal. Pritchett *v.* McGaughey, 151 Ind. 638, 52 N. E. 397.

10. Prince *v.* Bates, 19 Ala. 105; State *v.* Moore County, 24 N. C. 430, which last was a proce ding against the justices of a county, in their official capacity as justices of the county court, a judgment being rendered against them. It was held that they might appeal although a minority refused to join in the proceedings. The rule as to appeals in relation to joint individuals, defendants to a suit, was held not to apply.

11. *Alabama.*— Farr *v.* State, 6 Ala. 794; Howie *v.* State, 1 Ala. 113.

Florida.— Jacksonville, etc., R., etc., Co. *v.* Broughton, 38 Fla. 139, 20 So. 829; Guarantee Trust, etc., Co. *v.* Buddington, 23 Fla. 514.

Georgia.— Pupke *v.* Meador, 72 Ga. 230. See also Bates *v.* Harris, 112 Ga. 32, 37 S. E. 105.

Illinois.— Farrell *v.* Patterson, 43 Ill. 52.

Indiana.— Larsh *v.* Test, 48 Ind. 130.

Kentucky.— Campbell *v.* Johnston, 4 Dana (Ky.) 177; Wells *v.* Wells, 4 T. B. Mon. (Ky.) 152, 16 Am. Dec. 150.

Massachusetts.— Porter *v.* Rummery, 10 Mass. 64.

Nebraska.— Polk *v.* Covell, 43 Nebr. 884, 62 N. W. 240.

New York.— Williams *v.* Western Union Tel. Co., 93 N. Y. 162; Genet *v.* Davenport, 60 N. Y. 194.

Ohio.— Hull *v.* Bell, 54 Ohio St. 228, 43 N. E. 584; Pruden *v.* Sewell, 5 Cinc. L. Bul. 517.

Oregon.— South Portland Land Co. *v.* Munger, 36 Oreg. 457, 54 Pac. 815.

Pennsylvania.— Adamson's Appeal, 110 Pa. St. 459, 1 Atl. 327.

Tennessee.—Ragon *v.* Howard, 97 Tenn. 334, 37 S. W. 136.

Texas.— Curlin *v.* Canadian, etc., Mortg., etc., Co., 90 Tex. 376, 38 S. W. 766; Cheatham *v.* Riddle, 8 Tex. 162.

United States.— Gilfillan *v.* McKee, 159 U. S. 303, 16 S. Ct. 6, 40 L. ed. 161; City Nat. Bank *v.* Hunter, 129 U. S. 557, 9 S. Ct. 346, 32 L. ed. 752; Hanrick *v.* Patrick, 119 U. S. 156, 7 S. Ct. 147, 30 L. ed. 396; Milner *v.* Meek, 95 U. S. 252, 24 L. ed. 444; Grand Island, etc., R. Co. *v.* Sweeney, 103 Fed. 342; Gray *v.* Havemeyer, 53 Fed. 174, 10 U. S. App. 456, 3 C. C. A. 497; Louisville, etc., R. Co. *v.* Pope, 74 Fed. 1, 76 U. S. App. 25, 20 C. C. A. 253.

3. Summons and Severance or Some Equivalent Proceeding — a. When Authorized or Required. All parties against whom a joint judgment or decree has been rendered must join in the writ of error or petition for appeal, if any one of them takes out such writ or files such petition, or else there must be a proper summons and severance, or some equivalent proceeding, in order to allow the prosecution of the petition or writ by any less than the whole number of those adversely affected.[12]

b. Proceedings to Obtain — (1) *Former Practice.* Formerly, the remedy by summons and severance was the usual mode of proceeding when more than one person was interested jointly in a cause of action or other proceeding, and one

See 2 Cent. Dig. tit. "Appeal and Error," § 1800.

Persons who have several interests or liabilities may sever, and prosecute different writs of error to the same judgment. Cheatham *v.* Riddle, 8 Tex. 162.

Where judgment is rendered against one defendant personally, he may bring a writ of error to review it without joining other defendants in the writ, notwithstanding the fact that the judgment also establishes the debt as a lien on real property as against the other defendants. Germain *v.* Mason, 12 Wall. (U. S.) 259, 20 L. ed. 392.

Vendors and vendees.— In suits affecting the title to land in which both vendor and vendee are made parties, either may appeal from an adverse decision without joining the other. Simon *v.* Richard, 42 La. Ann. 842, 8 So. 629; Simkins *v.* Searcy, 10 Tex. Civ. App. 406, 32 S. W. 849.

See 2 Cent. Dig. tit. "Appeal and Error," § 1801.

In a suit, by an obligee on a bond to make title, against the obligor and a subsequent purchaser, such purchaser may appeal from an adverse decision without being joined by the obligor himself. Daniel *v.* Hill, 23 Tex. 571.

12. *Alabama.*— Moore *v.* McGuire, 26 Ala. 461; Knox *v.* Steele, 18 Ala. 815, 54 Am. Dec. 181.

Colorado.— See McClure *v.* Sanford, 3 Colo. 514, construing Colorado act of 1872, p. 105.

Florida.— Knight *v.* Weiskopf, 20 Fla. 140.

Illinois.— Bartlett *v.* Keating, 79 Ill. App. 642.

Indiana.— Shulties *v.* Keiser, 95 Ind. 159; Henry *v.* Hunt, 52 Ind. 114.

Kentucky.— Watson *v.* Whaley, 2 Bibb (Ky.) 392.

Maryland.— Cumberland Coal, etc., Co. *v.* Jeffries, 21 Md. 375.

Massachusetts.— Shirley *v.* Lunenburg, 11 Mass. 379.

Mississippi.— Saunders *v.* Saunders, 49 Miss. 327; Henderson *v.* Wilson, 4 Sm. & M. (Miss.) 732.

Missouri.— Fagan *v.* Long, 30 Mo. 222.

Nebraska.— Wolf *v.* Murphy, 21 Nebr. 472, 32 N. W. 303.

New Jersey.—Van Buskirk *v.* Hoboken, etc., R. Co., 31 N. J. L. 367.

New York.— Thompson *v.* Valarino, 2 How. Pr. (N. Y.) 259; Bradshaw *v.* Callaghan, 8 Johns. (N. Y.) 558. See also Clapp *v.* Bromagham, 9 Cow. (N. Y.) 304.

Ohio — Smetters *v.* Rainey, 14 Ohio St. 287.

Wisconsin.—Doty *v.* Strong, 1 Pinn. (Wis.) 165.

United States.— Beardsley *v.* Arkansas, etc., R. Co., 158 U. S. 123, 15 S. Ct. 786, 39 L. ed. 919; Sipperley *v.* Smith, 155 U. S. 86, 15 S. Ct. 15, 39 L. ed. 79; Davis *v.* Mercantile Trust Co., 152 U. S. 590, 14 S. Ct. 693, 38 L. ed. 563; Inglehart *v.* Stansbury, 151 U. S. 68, 14 S. Ct. 237, 38 L. ed. 76; Hardee *v.* Wilson, 146 U. S. 179, 13 S. Ct. 39, 36 L. ed. 933; Estes *v.* Trabue, 128 U. S. 225, 9 S. Ct. 58, 32 L. ed. 437; Humes *v.* Chattanooga Third Nat. Bank, 54 Fed. 917, 13 U. S. App. 86, 4 C. C. A. 668; Hedges *v.* Seibert Cylinder Oil Cup Co., 50 Fed. 643, 3 U. S. App. 25, 1 C. C. A. 594.

See 2 Cent. Dig. tit. "Appeal and Error," § 1810 *et seq.*

Actions against partners.— Summons and severance is necessary to authorize one partner to bring error in an action by both partners for damages for the unlawful seizure of the firm's property. Feibelman *v.* Packard, 108 U. S. 14, 1 S. Ct. 138, 27 L. ed. 634.

Rule to show cause.— In New Jersey, if a judgment is rendered against two defendants, and one takes an appeal, the latter's proper course is to take a rule on the other defendant to show cause why he should not prosecute his appeal alone. Sheppard *v.* Fenton, 9 N. J. L. 8.

Summons and severance is not necessary where the interest of each defendant is separate and distinct, and the decree is several, both in form and substance. Gilfillan *v.* McKee, 159 U. S. 303, 16 S. Ct. 6, 40 L. ed. 161. See *supra*, VI, B, 2, a.

Effect of failure to summon and sever.— Where only one of several co-parties appeals or sues out a writ of error, and fails to procure a writ of summons and severance, or to take some equivalent action, the appeal will be dismissed, or the writ of error quashed, on motion, and the cause stricken from the docket. Henderson *v.* Wilson, 4 Sm. & M. (Miss.) 732.

What record must show.— An appeal or writ of error, prosecuted by one or more of several co-parties, will be dismissed where the record does not show either that the other defendants were notified in writing and failed to appear, or that they appeared and refused to join in the appeal or writ. Hardee *v.* Wilson, 146 U. S. 179, 13 S. Ct. 39, 36 L. ed. 933; Masterson *v.* Howard, 10 Wall. (U. S.) 416, 19 L. ed. 953.

or more of them refused to participate in the legal assertion of the joint rights involved in the matter.[13]

(II) *Modern Practice.* But this practice nas fallen into disuse in the American courts, and any equivalent proceedings which will have the same effect as the more formal summons and severance are sufficient.[14]

c. Effect. After a judgment of severance has been entered in the lower court, one party may appeal or sue out a writ of error without joining the other party or parties.[15]

4. Joinder — a. When Authorized or Required — (I) *In General.* All co-parties, whether plaintiffs or defendants in the original suit, should, as a rule,

13. Masterson *v.* Howard, 10 Wall. (U. S.) 416, 19 L. ed. 953; Andrews *v.* Cromwell, Cro. Eliz. 891, 892.

See 2 Cent. Dig. tit. "Appeal and Error," § 1807.

14. *Missouri.*— Fagan *v.* Long, 30 Mo. 222.

Virginia.— Reno *v.* Davis, 4 Hen. & M. (Va.) 283.

Washington.—Nelson *v.* Territory, 1 Wash. 125, 23 Pac. 1013.

Wisconsin.—Doty *v.* Strong, 1 Pinn. (Wis.) 165, 168, wherein it was said: "The practice of summons and severance is not familiar to the American courts of error. The more easy and equally legitimate practice would be to enter a rule against those persons named in the writ of error as plaintiffs and not appearing, either to appear and assign error or submit to be served. In any practice, however, all the defendants in the judgment must first join in suing out the writ of error."

United States.— Masterson *v.* Howard, 10 Wall. (U. S.) 416, 19 L. ed. 953 (wherein Miller, J., says: "We do not attach importance to the technical mode of proceeding called 'summons and severance'"); Mercantile Trust Co. *v.* Kanawha, etc., R. Co., 58 Fed. 6, 16 U. S. App. 37, 7 C. C. A. 3.

See 2 Cent. Dig. tit. "Appeal and Error," § 1807.

Joining co-parties as appellees.— In some jurisdictions a co-party who refuses to join in an appeal or writ of error may properly be cited as an appellee. Lobelle *v.* Lobelle, 5 La. Ann. 174; Farrar *v.* Newport, 17 La. 346; Traverso *v.* Row, 10 La. 500; Polk *v.* Covell, 43 Nebr. 884, 62 N. W. 240; Wolf *v.* Murphy, 21 Nebr. 472, 32 N. W. 303; Smetters *v.* Rainey, 14 Ohio St. 287; Simmons *v.* Fisher, 46 Tex. 126.

See 2 Cent. Dig. tit. "Appeal and Error," § 1808.

See also *infra*, VI, C, 3.

Severance on motion.— In Missouri, on appeal, the court may, on motion, order a severance of a defendant who does not join in the appeal. Fagan *v.* Long, 30 Mo. 222.

Severance without summons.— Where all the parties to an appeal, writ of error, or supersedeas are before the court, an order of severance may be made without a summons. Reno *v.* Davis, 4 Hen. & M. (Va.) 283.

Substituted service.— Where one of the necessary parties to an appeal cannot be found within the jurisdiction of the court, an affidavit to that effect, by the other appellants, attached to the latter's petition for a writ of error, is not a sufficient compliance with the requirement that notice and an opportunity to be heard should be given to all parties appellant. In such a case those desiring to appeal should make diligent efforts to serve the proper notice upon the other party, and, in the event of their being unable to make such service as is required by law, to make a showing to the court having jurisdiction of what they have done, and obtain an order for such substituted service as the court may think proper. Nelson *v.* Territory, 1 Wash. 125, 23 Pac. 1013.

Written notice.— Where there is more than one party to a judgment below, the mere allegation, by one of the appellants in his petition, that the other failed to appear or refused to join, is not sufficient. There should be a written notice and due service, or the record should show his appearance and refusal, and that the court, on that ground, granted an appeal to the party who prayed for it, as to his own interest. Masterson *v.* Howard, 10 Wall. (U. S.) 416, 19 L. ed. 953.

15. Hargraves *v.* Lewis, 7 Ga. 110.

See 2 Cent. Dig. tit. "Appeal and Error," § 1809.

Effect upon appellants or plaintiffs in error. — After a summons and severance, or other equivalent proceedings, the parties who assign error will be treated as the only appellants or plaintiffs in error, and they will not be heard to complain of errors which are only prejudicial to the parties who refuse to join in the assignment. Millsap *v.* Stanley, 50 Ala. 319; Savage *v.* Walsh, 24 Ala. 293.

Effect upon those not joining.— After a judgment of severance, a party who has refused to proceed is barred from prosecuting the same right in another appeal or writ of error. Saunders *v.* Saunders, 49 Miss. 327; Thompson *v.* Valarino, 2 How. Pr. (N. Y.) 259; Masterson *v.* Howard, 10 Wall. (U. S.) 416, 19 L. ed. 953 [*citing* 2 Rolle Abr. 488; 1 Tidd Pr. 129; 2 Tidd Pr. 1136, 1169].

In Indiana and Iowa, when notice of appeal by one defendant is served upon a co-defendant, the latter will be held to have joined in the appeal unless he appears and declines to do so (Cambria Iron Co. *v.* Union Trust Co., 154 Ind. 291, 56 N. E. 665, 48 L. R. A. 41 [*denying rehearing* in 55 N. E. 745]; Engleken *v.* Webber, 47 Iowa 558); and unless he so appears, he cannot afterward appeal, and will be liable for his proportion of the costs (Barlow *v.* Scott, 12 Iowa 63).

be joined in a writ of error or petition for appeal, and this must be done even though some of them may choose to abide by the judgment or decree sought to be modified or reversed.[16]

(II) *Parties Jointly Liable, or Having Joint Interests*—(A) *In General.* All parties against whom a joint judgment or decree is rendered must join in a writ of error or appeal, unless there has been a severance of the parties in interest effected by summons and severance, or by an equivalent proceeding appearing in the record.[17]

16. *Alabama.*— Collins *v.* Baldwin, 109 Ala. 402, 19 So. 862; Griffin *v.* Wilson, 19 Ala. 27, discussing the effect of a discontinuance as to one defendant.

Colorado.— Chapman *v.* Pocock, 7 Colo. 204, 3 Pac. 219.

District of Columbia.— Godfrey *v.* Roessle, 5 App. Cas. (D. C.) 299.

Florida.—Whitlock *v.* Willard, 18 Fla. 156.

Georgia.— McNulty *v.* Pruden, 62 Ga. 135; Harrington *v.* Roberts, 7 Ga. 510.

Illinois.— Christy *v.* Marmon, 163 Ill. 225, 45 N. E. 150; Bartlett *v.* Keating, 79 Ill. App. 642.

Indiana.— Stults *v.* Gibler, 146 Ind. 501, 45 N. E. 340; Anderson Glass Co. *v.* Brakeman, (Ind. App. 1896) 45 N. E. 193. And see Zimmerman *v.* Ganmer, 152 Ind. 552, 53 N. E. 829.

Kansas.— Buck *v.* Gallienne, 6 Kan. App. 919, 49 Pac. 686; Walker *v.* Blount, 5 Kan. App. 610, 49 Pac. 98.

Kentucky.— Young *v.* Ditto, 2 J. J. Marsh. (Ky.) 72.

Louisiana.— State *v.* Judge, 39 La. Ann. 1041, 6 So. 27; Pasley *v.* McConnell, 38 La. Ann. 470.

Maryland.— Bouldin *v.* Bank of Commerce, 21 Md. 44; Lovejoy *v.* Irelan, 17 Md. 525, 79 Am. Dec. 667.

Massachusetts.— Shirley *v.* Lunenburg, 11 Mass. 379.

Nebraska.— Bates-Smith Invest. Co. *v.* Scott, 56 Nebr. 475, 76 N. W. 1063.

New York.— Van Vleck *v.* Ballou, 40 N. Y. App. Div. 489, 58 N. Y. Suppl. 125; Sheridan *v.* Sheridan Electric Light Co., 38 Hun (N. Y.) 396; Cooperstown Bank *v.* Corlies, 1 Abb. Pr. N. S. (N. Y.) 412.

Rhode Island.— Gencarelle *v.* New York, etc., R. Co., 21 R. I. 216, 44 Atl. 174.

Texas.— Hancock *v.* Metz, 15 Tex. 205; Yarnell *v.* Bennett, (Tex. Civ. App. 1901) 61 S. W. 153.

Vermont.— Priest *v.* Hamilton, 2 Tyler (Vt.) 44.

West Virginia.— Frank *v.* Zeigler, 46 W. Va. 614, 33 S. E. 761.

Wisconsin.— Kaehler *v.* Halpin, 59 Wis. 40, 17 N. W. 868, joint contempt defendants.

United States.— Nash *v.* Harshman, 149 U. S. 263, 13 S. Ct. 845, 37 L. ed. 727; Andrews *v.* National Foundry, etc., Works, 76 Fed. 166, 46 U. S. App. 281, 22 C. C. A. 110, 36 L. R. A. 139.

See 2 Cent. Dig. tit. "Appeal and Error," § 1810 *et seq.*

As to joinder of appeals see *supra*, I, I.

As to misjoinder of appellants or plaintiffs in error see *infra*, VI, H, 2, a.

As to nonjoinder of appellants or plaintiffs in error see *infra*, VI, H, 3.

Errors affecting part of defendants only.— It is no ground of objection to a joinder of defendants as plaintiffs in error that some of the errors complained of affect one of the defendants only. Auld *v.* Kimberlin, 7 Kan. 601.

New parties.— Where new parties are made by supplemental bill, they should be joined with the original parties in an appeal from an adverse decree. Toulmin *v.* Hamilton, 7 Ala. 362.

Appeal from several decree.— Though a decree is several in its operation, an appeal therefrom should be in the name of all the parties against whom it has been rendered. Young *v.* Ditto, 2 J. J. Marsh. (Ky.) 72.

17. *Alabama.*— Decatur Branch Bank *v.* McCollum, 20 Ala. 280; Swift *v.* Hill, 1 Port. (Ala.) 277.

Arkansas.— Miller *v.* Heard, 6 Ark. 73.

Colorado.— Fuller *v.* Swan River Placer Co., 5 Colo. 123.

Connecticut.— Phelps *v.* Ellsworth, 3 Day (Conn.) 144.

Delaware.— Whitaker *v.* Parker, 2 Harr. (Del.) 413.

Florida.— McCallum *v.* Culpepper, 41 Fla. 107, 26 So. 187; Jones *v.* Stewart, 37 Fla. 369, 19 So. 657.

Georgia.— Harrington *v.* Roberts, 7 Ga. 510.

Illinois.— McIntyre *v.* Sholty, 139 Ill. 171, 29 N. E. 43; Kingsbury *v.* Sperry, 119 Ill. 279, 10 N. E. 8.

Indiana.— Pearse *v.* Redman, 51 Ind. 539; Anheuser-Busch Brewing Assoc. *v.* George, 14 Ind. App. 1, 42 N. E. 245.

Iowa.— Huner *v.* Reeves, 2 Greene (Iowa) 190.

Kansas.—Goodwin *v.* Wyeth Hardware, etc., Co., (Kan. App. 1900) 62 Pac. 11; Miller *v.* Pickering, (Kan. App. 1900) 61 Pac. 975.

Kentucky.— Riney *v.* Riney, 1 B. Mon. (Ky.) 69; Castleman *v.* Homes, 7 T. B. Mon. (Ky.) 591.

Massachusetts.— Gay *v.* Richardson, 18 Pick. (Mass.) 417; Andrews *v.* Bosworth, 3 Mass. 223.

Minnesota.— Babcock *v.* Sanborn, 3 Minn. 141.

Mississippi.— Thomas *v.* Wyatt, 9 Sm. & M. (Miss.) 308; Preira *v.* Silva, 4 Sm. & M. (Miss.) 735.

New York.— Jaqueth *v.* Jackson, 17 Wend. (N. Y.) 434.

North Carolina.— Kelly *v.* Muse, 33 N. C. 182; Mastin *v.* Porter, 32 N. C. 1. But this is otherwise since N. C. Code (1883), § 547.

(B) *Principal and Surety.* Where a judgment or decree is rendered against both the principal and his sureties, they should all join in a writ of error or appeal.[18]

b. Proceedings by One in Name of All. One of several co-parties aggrieved by a judgment or decree may, in the name of all and without the consent of his co-parties, sue out a writ of error or appeal.[19]

C. Appellees, Respondents, or Defendants in Error — 1. In General. All parties in favor of whom a judgment or decree has been rendered below, or who are interested in having such judgment or decree sustained, or whose interests will necessarily be affected by a reversal or modification of such judgment or decree, should be made appellees, respondents, or defendants in error. For lack of proper or necessary parties a petition or writ of error will be dismissed.[20] This

Ohio.—Loewenstein *v.* Rheinstrom, 10 Ohio Dec. 587; Abair *v.* Merchants' Nat. Bank, 3 Ohio Cir. Ct. 290, 2 Ohio Cir. Dec. 165.

Pennsylvania.— Fotterall *v.* Floyd, 6 Serg. & R. (Pa.) 315.

Rhode Island.— Curry *v.* Stokes, 12 R. I. 52.

Tennessee.— Barksdale *v.* Butler, 6 Lea (Tenn.) 450; Garrett *v.* Cocke, 8 Baxt. (Tenn.) 274.

Wisconsin.— Doty *v.* Strong, 1 Pinn. (Wis.) 165.

United States.— Feibelman *v.* Packard, 108 U. S. 14, 1 S. Ct. 138, 27 L. ed. 634; Simpson *v.* Greeley, 20 Wall. (U. S.) 152, 22 L. ed. 338.

See 2 Cent. Dig. tit. "Appeal and Error," § 1811.

In a suit by partners for damages for the unlawful seizure of firm property, their interest is joint, and they should join in the appeal from an adverse decree. Feibelman *v.* Packard, 108 U. S. 14, 1 S. Ct. 138, 27 L. ed. 634.

Joint verdict upon separate pleas.— In an action, whether on contract or in tort, against two or more, if they plead separately, but the jury finds a verdict and assesses damages against them jointly, one cannot appeal without the other. Smith *v.* Cunningham, 30 N. C. 460; Donnell *v.* Shields, 30 N. C. 371; Dunns *v.* Jones, 20 N. C. 154. But either party can now appeal. Clark's Code Civ. Proc. N. C. (1900), § 547.

Tenants in common may join in an appeal. Sangamon County *v.* Brown, 13 Ill. 207.

18. Eastland *v.* Jones, Minor (Ala.) 275; Thomas *v.* Wyatt, 9 Sm. & M. (Miss.) 308; Humes *v.* Chattanooga Third Nat. Bank, 54 Fed. 917, 13 U. S. App. 86, 4 C. C. A. 668.

See 2 Cent. Dig. tit. "Appeal and Error," § 1812.

19. *Alabama.*— Vaughan *v.* Higgins, 68 Ala. 546; Deslonde *v.* Carter, 28 Ala. 541.

Florida.— Nash *v.* Haycraft, 34 Fla. 449, 16 So. 324; Standley *v.* Jaffray, 13 Fla. 596.

Illinois.—Willenborg *v.* Murphy, 40 Ill. 46; Moore *v.* Capps, 9 Ill. 315.

New Jersey.— Van Buskirk *v.* Hoboken, etc., R. Co., 31 N. J. L. 367; Pharo *v.* Parker, 21 N. J. L. 332.

Tennessee.— Patterson *v.* Butterworth, 4 Yerg. (Tenn.) 157; Stump *v.* Shephard, Cooke (Tenn.) 190.

Wisconsin.— Doty *v.* Strong, 1 Pinn. (Wis.) 165.

See 2 Cent. Dig. tit. "Appeal and Error," § 1813.

Effect of appeal by one in name of all.— Where one of several co-parties appeals in the name of all, and gives a bond superseding the whole judgment, this will not discharge from their liability those not joining with him in the prosecution of the appeal. They are necessarily co-parties in order to the due identification of the record; but, unless they join in the prosecution of the proceeding, the original judgment or decree will remain in force as to them. Duncan *v.* Hargrove, 22 Ala. 150. See also Webster *v.* Yancy, Minor (Ala.) 183. And *compare* Hammond *v.* People, 164 Ill. 455, 46 N. E. 796, construing Ill. Prac. Act, § 70.

20. *Alabama.*—Clark *v.* Knox, 65 Ala. 401; Tombeckbee Bank *v.* Freeman, Minor (Ala.) 285.

California.— Vincent *v.* Collins, 122 Cal. 387, 55 Pac. 129; Hibernia Sav., etc., Soc. *v.* Lewis, 111 Cal. 519, 44 Pac. 175. *Compare* McKeany *v.* Black, (Cal. 1896) 46 Pac. 381.

Colorado.— Standley *v.* Hendrie, etc., Mfg. Co., 25 Colo. 376, 55 Pac. 723.

District of Columbia.—Slater *v.* Hamacher, 15 App. Cas. (D. C.) 294.

Georgia.— Tiner *v.* Carter, 110 Ga. 285, 34 S. E. 567; Inman *v.* Estes, 104 Ga. 645, 30 S. E. 800.

Illinois.— State Bank *v.* Wilson, 8 Ill. 89.

Indiana.— Capital Nat. Bank *v.* Reid, 154 Ind. 54, 55 N. E. 1023; Bozeman *v.* Cale, 139 Ind. 187, 35 N. E. 828.

Iowa.— McIntyre *v.* Clemans, (Iowa 1899) 79 N. W. 369.

Kansas.— Miles *v.* Lackey, (Kan. 1901) 63 Pac. 738; Leverton *v.* Kneisel, (Kan. App. 1901) 63 Pac. 291; Sheridan *v.* Snyder, 4 Kan. App. 214, 45 Pac. 1007; Foreman *v.* Ward, 2 Kan. App. 739, 43 Pac. 1139.

Kentucky.— Wilson's Petition, 21 Ky. L. Rep. 231, 51 S. W. 149; Mitchell *v.* Tyler, 20 Ky. L. Rep. 1249, 49 S. W. 422.

Louisiana.— Andrus *v.* His Creditors, 46 La. Ann. 1351, 16 So. 215; Murphy *v.* Factor's, etc., Ins. Co., 36 La. Ann. 953.

Minnesota.— Kells *v.* Nelson-Tenney Co., 74 Minn. 8, 76 N. W. 790.

Nebraska.— See Richardson *v.* Thompson, 59 Nebr. 299, 80 N. W. 909; Kuhl *v.* Pierce County, 44 Nebr. 584, 62 N. W. 1066.

rule has been applied to all intervening parties to a suit;[21] to all members of a partnership, where the decree or judgment affects the firm or a part of its members as such;[22] to debtors, creditors, and claimants;[23] to garnishees, on appeals in garnishment proceedings;[24] to parties in default, or who have confessed judgment in the court below;[25] to parties in a representative or official capacity,[26] such as

Ohio.— Wangerien *v.* Aspell, 47 Ohio St. 250, 24 N. E. 405; Smetters *v.* Rainey, 13 Ohio St. 568.

Texas.— Cates *v.* Sparkman, 66 Tex. 155, 18 S. W. 446; Thompson *v.* Pine, 55 Tex. 427.

Wisconsin.— Kemp *v.* Hein, 48 Wis. 32, 3 N. W. 831.

United States.— Kidder *v.* Fidelity Ins., etc., Co., 105 Fed. 821; Railroad Equipment Co. *v.* Southern R. Co., 92 Fed. 541, 34 C. C. A. 519.

See 2 Cent. Dig. tit. "Appeal and Error," § 1814 *et seq.*

21. All intervening parties.— Swearingen *v.* McDaniel, 12 Rob. (La.) 203; Kellogg *v.* Clark, 15 La. 362; Hayden *v.* Mitchell, (Tex. Civ. App. 1893) 24 S. W. 1085; Fairfield *v.* Binnian, 13 Wash. 1, 42 Pac. 632; and 2 Cent. Dig. tit. "Appeal and Error," § 1824.

See also, generally, INTERPLEADER.

But where the intervener claims only a part of the property in dispute, and the appeal relates to the remainder of the property only, such intervener is not a necessary party. Gibson *v.* White, 4 La. Ann. 14.

22. Partners.—Crosthwait *v.* James, 95 Ga. 570, 20 S. E. 494; Hammitt *v.* Payne, 27 La. Ann. 100; Tupery *v.* Lafitte, 19 La. Ann. 296; and see 2 Cent. Dig. tit. "Appeal and Error," § 1831.

23. Debtors, creditors, and claimants.— *Georgia.*— Davis *v.* Peel, 97 Ga. 342, 22 S. E. 525 (special lien); Baker *v.* Thompson, 78 Ga. 742, 4 S. E. 107 (marshaling assets).

Indiana.— Garside *v.* Wolf, 135 Ind. 42, 34 N. E. 810, foreclosure.

Kansas.— Kellam *v.* Manspeaker, 61 Kan. 857, 58 Pac. 990 (creditor's suit); Van Laer *v.* Kansas Triphammer Brick Works, 56 Kan. 545, 43 Pac. 1134 (mechanic's lien); Hyde Park Invest. Co. *v.* Atchison First Nat. Bank, 56 Kan. 49, 42 Pac. 321 (foreclosure); Hodgson *v.* Billson, 11 Kan. 357 (joint judgment creditors).

Kentucky.— Murphy *v.* O'Reiley, 78 Ky. 263 (creditor's suit); Barnett *v.* Feichheimer, 5 Ky. L. Rep. 183 (order appointing receiver).

Louisiana.— Treadwell's Succession, 38 La. Ann. 260; Taylor *v.* Calloway, 14 La. Ann. 688 (intervention); Elder *v.* Rogers, 11 La. Ann. 606 (garnishment); Garcia *v.* Their Creditors, 3 Rob. (La.) 436 (distribution).

New York.— Whiteside *v.* Prendergast, 2 Barb. Ch. (N. Y.) 471, order filing receiver's bond *nunc pro tunc.*

Ohio.— Veach *v.* Kerr, 41 Ohio St. 179; Buckingham *v.* Commercial Bank, 21 Ohio St. 131 (creditors' suits).

Texas.— Blackman *v.* Harry, (Tex. Civ. App. 1896) 35 S. W. 290, foreclosure.

Washington.— Radebaugh *v.* Tacoma, etc., R. Co., 8 Wash. 570, 36 Pac. 460, receivership.

United States.— Gray *v.* Havemeyer, 53 Fed. 174, 10 U. S. App. 456, 3 C. C. A. 497, foreclosure and mechanic's lien.

See 2 Cent. Dig. tit. "Appeal and Error," § 1822.

24. Garnishees.— Juilliard *v.* May, 130 Ill. 87, 22 N. E. 477; Yerkes *v.* McGuire, 54 Kan. 614, 38 Pac. 781; Gregg *v.* Baldwin, (Kan. App. 1900) 62 Pac. 727; Tuthill *v.* Moulton, 9 Kan. App. 434, 58 Pac. 1031; Reese *v.* Couyers, 16 La. Ann. 39; Copley *v.* Snow, 3 La. Ann. 623; Greenman *v.* Melbye, 78 Minn. 361, 81 N. W. 21. *Compare* Barner *v.* Gorden, 16 La. Ann. 324.

See 2 Cent. Dig. tit. "Appeal and Error," § 1823; and, generally, GARNISHMENT.

Joinder of garnishees.— Under proceedings against the same defendant, each of five garnishees answered that he owed defendant nothing, and asked to be allowed a certain sum as expenses of answering. A joint judgment was rendered in their favor against plaintiff for the aggregate amount of their claims. It was held that a writ of error by plaintiff would not be dismissed on the ground that the case of each garnishee was separate and should have been brought up by a separate writ of error. Sulter *v.* Brooks, 74 Ga. 401.

25. Parties in default or who have confessed judgment.— *California.*— Matter of Castle Dome Min., etc., Co., 79 Cal. 246, 21 Pac. 746.

Florida.— Megin *v.* Filor, 4 Fla. 203.

Georgia.— Bower *v.* Thomas, 69 Ga. 47.

Indiana.— Midland R. Co. *v.* St. Clair, 144 Ind. 363, 42 N. E. 214.

Louisiana.— King *v.* Atkins, 33 La. Ann. 1057.

See 2 Cent. Dig. tit. "Appeal and Error," § 1819.

But where such parties never had any interest in the subject-matter in dispute, or their interest is of such a character as to be unaffected by the result of the proceeding, they are not necessary to the appellate jurisdiction. Bostwick *v.* Blair, 2 Kan. App. 89, 43 Pac. 297; Toledo *v.* Schulters, 11 Ohio Cir. Ct. 528, 5 Ohio Cir. Dec. 269.

Presumption of lack of interest.— In Phelps, etc., Windmill Co. *v.* Baker, 49 Kan. 434, 30 Pac. 472, it was held that, on appeal by plaintiff in an action to foreclose a mechanic's lien, where it appeared that the parties made defendants by him as having an interest in the land failed to appear, though properly served, it would be presumed that the court found that such parties had no interest in the land, and that consequently they were not necessary parties to an appeal.

26. See 2 Cent. Dig. tit. "Appeal and Error," § 1825 *et seq.*

attorneys,[27] guardians,[28] personal representatives,[29] public officers,[30] or trustees;[31] to purchasers at judicial sales;[32] to sureties;[33] to states and political divisions;[34] and to vendors, purchasers, and warrantors.[35] But parties who have no interests

27. South Carolina R. Co. *v.* Moore, 28 Ga. 398, 73 Am. Dec. 778; Gaines' Succession, 46 La. Ann. 695, 15 So. 80; Peck *v.* Peck, 23 Hun (N. Y.) 312; Campbell *v.* Western, 3 Paige (N. Y.) 124.

28. Whitaker *v.* Patton, 1 Port. (Ala.) 9 (guardian *ad litem*); Parks *v.* Honeywell, 55 Kan. 615, 40 Pac. 896 (guardian); Moodie *v.* Cambot, 14 La. Ann. 153 (tutor); Andat *v.* Gilly, 12 Rob. (La.) 323 (curator and tutrix).

29. Miltenberger *v.* Pipes, 23 La. Ann. 267; Embley *v.* Hunt, 28 N. J. Eq. 421; McAllister *v.* Godbold, (Tex. Civ. App. 1894) 29 S. W. 417; Taylor *v.* Savage, 2 How. (U. S.) 395, 11 L. ed. 313, 1 How. (U. S.) 282, 11 L. ed. 132.

30. Prestridge *v.* Officers of Ct., 42 Ala. 405; Eschert *v.* Harrison, 29 La. Ann. 860.

Clerk of court.— Cox *v.* Rees, 16 La. 109.

Commissioner.— McKee *v.* Hann, 9 Dana (Ky.) 526.

County treasurer.—Soukup *v.* Union Invest. Co., 84 Iowa 448, 51 N. W. 167, 35 Am. St. Rep. 317.

Receiver.— Scannell *v.* Felton, 57 Kan. 468, 46 Pac. 948.

Sheriff.— Loring *v.* Wittich, 16 Fla. 495; Moore *v.* Brown, 81 Ga. 10, 6 S. E. 833; White *v.* Bird, 20 La. Ann. 282.

31. Allen *v.* Cravens, 68 Ga. 554; Long-Bell Lumber Co. *v.* Haines, 3 Kan. App. 316, 45 Pac. 97; Collins *v.* Marshall, 10 Rob. (La.) 112 (assignee in bankruptcy); Renick *v.* Western Union Bank, 13 Ohio 298, 42 Am. Dec. 203 (trustees of defunct corporation); Hammond *v.* Mays, 45 Tex. 486.

32. **A purchaser at a judicial sale** is a proper and necessary party, appellee, or defendant in error, to any appellate proceedings relating to the property sold, or to the validity of the proceedings under which the sale was held.

Alabama.— Thompson *v.* Campbell, 52 Ala. 583. *Compare* Hoard *v.* Hoard, 41 Ala. 590.

California.— Hibernia Sav., etc., Soc. *v.* Lewis, 111 Cal. 519, 44 Pac. 175.

Illinois.— Sprague *v.* Hards, 17 Ill. App. 104.

Kansas.— Kellam *v.* Manspeaker, 61 Kan. 857, 58 Pac. 990.

Kentucky.—McKee *v.* Hann, 9 Dana (Ky.) 526; Sanders *v.* Wade, 17 Ky. L. Rep. 205, 30 S. W. 656.

New York.— Barnes *v.* Stoughton, 6 Hun (N. Y.) 254.

See 2 Cent. Dig. tit. "Appeal and Error," § 1832.

Devisee of deceased purchaser.— Where an estate was sold on the petition of infant owners, in a writ of error by them to reverse the decree, the devisee of the deceased purchaser and the commissioner who sold the estate and holds the proceeds are the only necessary parties defendant. McKee *v.* Hann, 9 Dana (Ky.) 526.

Purchase under an irregular decree.—Where a person bought mortgaged premises sold under an irregular decree, on a writ of error to reverse the decree and sale it was held that the court could not, where the purchaser was not a party to the record, decide on the validity of the sale. Crocket *v.* Hanna, 6 J. J. Marsh. (Ky.) 335. See also Coger *v.* Coger, 2 Dana (Ky.) 270.

33. **Wherever the rights and interests of a surety** may be affected by the result of an appeal or writ of error, he is a proper and necessary party to the proceedings on review, but, where the surety has no interest in the result, he should not be made a party.

Alabama.— De Sylva *v.* Henry, 3 Port. (Ala.) 132.

Arkansas.— Long *v.* State, 13 Ark. 289.

Iowa.— Fisher *v.* Chaffee, 96 Iowa 15, 64 N. W. 662.

Kansas.—Bonebrake *v.* Aetna L. Ins. Co., 3 Kan. App. 708, 41 Pac. 67.

Louisiana.— Tilton *v.* Vignes, 33 La. Ann. 240; Battalora *v.* Erath, 25 La. Ann. 318.

Ohio.— King *v.* Bell, 36 Ohio St. 460.

Texas.— Lange *v.* Tritze, (Tex. Civ. App. 1899) 53 S. W. 583; Wright *v.* Red River County Bank, 2 Tex. Civ. App. 97, 20 S. W. 879.

Washington.— Cline *v.* Mitchell, 1 Wash. 24, 23 Pac. 1013.

Compare Thomas *v.* Price, 88 Ga. 533, 15 S. E. 11; and see also 2 Cent. Dig. tit. "Appeal and Error," § 1833.

34. **Where a state or a political division** is adverse in interest to the party aggrieved by a judgment or decree, it should be made an appellee or defendant in error to proceedings on review. Weissinger *v.* State, 11 Ala. 540; Pearson *v.* Yewdall, 95 U. S. 294, 24 L. ed. 436.

See 2 Cent. Dig. tit. "Appeal and Error," § 1834.

Actions by state on relation of individual.— In Rogers *v.* State, (Ind. 1901) 59 N. E. 334, it was held that, in an action by the state on the relation of an individual, it is not necessary or proper to make any party other than the state an appellee on an appeal from a judgment in its favor.

Under Sandels & H. Dig. Ark. (1894), § 1270, providing that, where appeals are prosecuted in the circuit court or supreme court in cases in which the county is interested, the judge of the county court shall defend the same, it is not error for the circuit court to refuse to make the county a party in a case in which the county is interested, on an appeal to that court from an order of the county judge, since the judge could defend his order on appeal by virtue of the statute without the county being formally made a party to the proceedings. Cleburne County *v.* Morton, (Ark. 1900) 60 S. W. 307.

35. **Where vendors, vendees, or warrantors** are made parties below, they should also, in all cases where a reversal or modification will

to maintain,[36] or persons who are not parties below, although interested in the judgment as rendered,[37] have been held not to be proper or necessary parties within the rule.

adversely affect their interests, be made parties, appellee or defendant in error, in proceedings to review the judgment of the lower court. Richardson *v.* Great Western Mfg. Co., 3 Kan. App. 445, 43 Pac. 809; Lee *v.* Campbell, 8 Ky. L. Rep. 421, 1 S. W. 873; Baird *v.* Russ, 33 La. Ann. 920.

See 2 Cent. Dig. tit. "Appeal and Error," § 1835.

The vendor of a mortgagor, who has been called in as warrantor in an action to foreclose the mortgage, is not a necessary party to an appeal from a judgment enforcing the mortgage. Rachel *v.* Rachel, 11 La. Ann. 687.

Where a warrantor is cited by a defendant, the plaintiff, on appeal from the judgment against him, should cite such warrantor as well as defendant. Hutchinson *v.* Johnson, 19 La. Ann. 141; Long *v.* Barnes, 13 La. Ann. 392; Nouvet *v.* Armant, 12 La. Ann. 71; Hewson *v.* Creswell, 10 La. Ann. 232. But, when there is an agreement of record that the case shall first be tried between the original parties, warrantors need not be made parties. Beard *v.* Poydras, 13 La. 82.

Abandonment of right against warrantor.— An appeal will not be dismissed, because the warrantor has not been made a party to the appeal, where the defendant has abandoned all right of appeal against his warrantor. Scuddy *v.* Shaffer, 14 La. Ann. 569.

36. Mere nominal parties, or parties who have no interests that can be affected by the judgment on appeal, are neither necessary nor proper parties to an appeal or writ of error.

Alabama.— Thompson *v.* Campbell, 52 Ala. 583; Creighton *v.* Paine, 2 Ala. 158.

Florida.— Guarantee Trust, etc., Co. *v.* Buddington, 23 Fla. 514, 2 So. 885.

Indiana.— Clements *v.* Davis, 155 Ind. 624, 57 N. E. 905; Mueller *v.* Stinesville, etc., Stone Co., 154 Ind. 230, 56 N. E. 222; Hogan *v.* Robinson, 94 Ind. 138.

Iowa.— Brundage *v.* Cheneworth, 101 Iowa 256, 70 N. W. 211, 63 Am. St. Rep. 382.

Kansas.— Washburn *v.* Thomas, 8 Kan. App. 856, 56 Pac. 539.

Kentucky.— Francis *v.* Burnett, 7 Ky. L. Rep. 715.

Louisiana.— Gaines' Succession, 46 La. Ann. 695, 15 So. 80; Hart's Succession, 25 La. Ann. 583.

Maryland.— Bouldin *v.* Bank of Commerce, 21 Md. 44.

Ohio.— Renick *v.* Western Union Bank, 15 Ohio 298, 42 Am. Dec. 203, defunct corporation.

Texas.— Wilson *v.* Trueheart, 14 Tex. 31.

United States.— Basket *v.* Hassell, 107 U. S. 602, 2 S. Ct. 415, 27 L. ed. 500; Edgell *v.* Felder, 99 Fed. 324, 39 C. C. A. 540.

See 2 Cent. Dig. tit. "Appeal and Error," § 1815.

Remainder-men after life-interest.—In Phillips *v.* Phillips, 2 Ky. L. Rep. 217, it was held that remainder-men, who were the children of mortgagors having a life-interest were not affected by the judgment foreclosing the mortgage, and consequently, were not necessary parties to an appeal from a judgment ordering a sale of the land.

37. The rule is limited in its operation to the parties to the suit, and does not extend to third persons interested in the judgment as rendered.

Alabama.—Roberts *v.* Taylor, 4 Port. (Ala.) 421.

California.—Herrimann *v.* Menzies, 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 56 Am. St. Rep. 81, 35 L. R. A. 318.

Georgia.—See Epping *v.* Aiken, 71 Ga. 682.

Indiana.— McAllister *v.* State, 81 Ind. 256.

Kansas.— Barton *v.* Hanauer, 4 Kan. App. 531, 44 Pac. 1007.

Kentucky.— Smith *v.* Craft, (Ky. 1900) 58 S. W. 500; Broseke *v.* Pendleton Bldg. Assoc., 7 Ky. L. Rep. 660.

Louisiana.—Tyson's Succession, 21 La. Ann. 117; Patten *v.* Powell, 16 La. Ann. 128.

New York.— Gardner *v.* Gardner, 5 Paige (N. Y.) 170.

United States.— Payne *v.* Niles, 20 How. (U. S.) 219, 15 L. ed. 895; Davenport *v.* Fletcher, 16 How. (U. S.) 142, 14 L. ed. 879.

See 2 Cent. Dig. tit. "Appeal and Error," § 1820.

However the orders of the court in the case are entitled, none are parties in the appellate court to a complainant's appeal from a dismissal of his bill except those who are parties below. Lyle *v.* Bradford, 7 T. B. Mon. (Ky.) 111.

Assignees.— The assignment of an interest in a judgment or decree does not make the assignee a party to the action so as to entitle him to service of notice of appeal from the decree or judgment. Littleton Sav. Bank *v.* Osceola Land Co., 76 Iowa 660, 39 N. W. 201; Medyaski *v.* Theiss, 36 Oreg. 397, 59 Pac. 871. But it has been held that where a judgment is transferred according to law, and an execution is levied on the property, and another person interposes a claim, the assignee is the proper party to a writ of error. Slayton *v.* Jones, 15 Ga. 89. See also *infra*, VI, F.

In surrogate proceedings all the parties interested in sustaining the decision of the surrogate should be made parties to a petition of appeal therefrom, even though such parties did not appear before the surrogate, unless it appears that they had notice to appear. Gilchrist *v.* Rea, 9 Paige (N. Y.) 66. Persons, not parties to proceedings before a surrogate, who have been awarded sums by his decree, are rightly made parties respondent in an appeal to the supreme court. Willcox *v.* Smith, 26 Barb. (N. Y.) 316.

On appeals from orders disposing of motions for new trials, to quash executions and the like, only the parties to the motion are necessary parties to the appellate proceedings.

2. In Proceedings by Interveners. In proceedings for review by an intervener, or other indirect party, all the parties to the action, both plaintiff and defendant, should usually be made appellees or defendants in error.[38]

3. In Separate Proceedings by One or More Co-Parties. Where one or more co-parties desire to appeal or sue out a writ of error, they should, as a general rule, make their fellows co-appellants or plaintiffs in error.[39] But, in some jurisdictions, if the co-parties decline to join in the appeal or writ, it is permissible for those appealing to join them in the proceedings as appellees or defendants in error, and, properly, this course should be pursued where the interests of the parties are adverse.[40]

4. Where Judgment Is Favorable to One or More Co-Defendants. As a general rule, where a judgment is favorable to one or more co-defendants, and adverse as to others, the latter should be joined in an appeal or writ of error brought by plaintiff to review the action in favor of the former.[41]

Herriman *v.* Menzies, 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 56 Am. St. Rep. 81, 35 L. R. A. 318; McAllister *v.* State, 61 Ind. 256.

Persons as to whom action has been dismissed.— Where an action has been dismissed in the lower court as to some of the defendants before trial, they are not necessary parties. Hogan *v.* Robinson, 94 Ind. 138; Masters *v.* Martin, 3 B. Mon. (Ky.) 176; Watson *v.* Sawyer, 12 Wash. 35, 40 Pac. 413, 41 Pac. 43. See also Casey *v.* Oakes, 13 Wash. 38, 42 Pac. 621.

Persons as to whom decision has been had. — Where an action has been decided as to some of the parties, and their rights fully adjudicated, they are not parties to a judgment afterward rendered therein disposing of the claims of the remaining parties. Doyle *v.* McLeod, 4 Wash. 732, 31 Pac. 96.

38. *Kansas.*— Frankfort First Nat. Bank *v.* Westmoreland First Nat. Bank, 1 Kan. App. 159, 41 Pac. 976.

Kentucky.— Radly *v.* Shower, 3 Ky. L. Rep. 329.

Louisiana.— Guilbeau *v.* Cormier, 21 La. Ann. 629; Allen *v.* Rodgers, 16 La. Ann. 372.

Texas.— Greenwade *v.* Smith, 57 Tex. 195.

United States.— Davis *v.* Mercantile Trust Co., 152 U. S. 590, 14 S. Ct. 693, 38 L. ed. 563.

See 2 Cent. Dig. tit. "Appeal and Error," § 1818.

But where the interest of any party can in no wise be affected by the result of the proceedings on review, it is unnecessary to join him. What Cheer *v.* Hines, 86 Iowa 231, 53 N. W. 126; Hanrick *v.* Patrick, 119 U. S. 156, 7 S. Ct. 147, 30 L. ed. 396. This latter was a case of trespass to try title to real estate. Third persons intervened, setting up a claim of title derived through plaintiffs. There was a judgment in favor of plaintiffs and against interveners and defendants, and it was held that, although such judgment was joint in form, it was not so in substance, and that, consequently, the interveners were not obliged to join defendants in their writ of error.

A third party, on appealing from a final judgment on the ground of his liability to contribute, must cite plaintiff and defendant as appellees; otherwise the appeal will be dismissed for want of proper parties. Guilbeau *v.* Cormier, 21 La. Ann. 629.

39. See *supra*, VI, B, 2, a.

40. *Indiana.*— Clear Creek Tp. *v.* Rittger, 12 Ind. App. 355, 39 N. E. 1052.

Kansas.— Marburg *v.* Douglass, (Kan. 1896) 45 Pac. 599; Long-Bell Lumber Co. *v.* Haines, 3 Kan. App. 316, 45 Pac. 97.

Louisiana.— Broussard *v.* Guidry, 21 La. Ann. 618; Noble *v.* Logan, 21 La. Ann. 515.

Nebraska.— Polk *v.* Covell, 43 Nebr. 884, 62 N. W. 240; Andres *v.* Kridler, 42 Nebr. 784, 60 N. W. 1014.

Ohio.— Jones *v.* Marsh, 30 Ohio St. 20; Smetters *v.* Rainey, 14 Ohio St. 287. See also Rider *v.* Fritchey, 49 Ohio St. 285, 30 N. E. 692, 15 L. R. A. 513.

Texas.— Simmons *v.* Fisher, 46 Tex. 126.

Wyoming.— Johnston *v.* Little Horse Creek Irrigating Co., 4 Wyo. 164, 33 Pac. 22.

See 2 Cent. Dig. tit. "Appeal and Error," § 1817.

41. *Alabama.*— Duncan *v.* Hargrove, 22 Ala. 150.

Arkansas.—State Bank *v.* Kerby, 9 Ark. 345.

Illinois.— Bradley *v.* Gilbert, 155 Ill. 154, 39 N. E. 593 [*affirming* 46 Ill. App. 623].

Louisiana.— Bourbon *v.* Castera, 8 La. Ann. 383.

Michigan.— Mills *v.* Bunce, 26 Mich. 101.

Ohio.— Means *v.* Clark, 7 Ohio Cir. Ct. 276.

Pennsylvania.— Campbell *v.* Floyd, 153 Pa. St. 84, 32 Wkly. Notes Cas. (Pa.) 1, 25 Atl. 1033.

Texas.— Cates *v.* Sparkman, 66 Tex. 155, 18 S. W. 446; Barnard *v.* Tarleton, 57 Tex. 402.

Compare Egan *v.* Esbrada, (Ariz. 1899) 56 Pac. 721.

See 2 Cent. Dig. tit. "Appeal and Error," § 1816.

Similarly, where the unsuccessful defendants appeal from a judgment or decree unfavorable to them, they should join their successful co-parties as appellees or defendants in error. Humphrey *v.* Hunt, 9 Okla. 196, 59 Pac. 971.

Distinct interests.— But where the result of the proceedings on review can in no wise affect the rights and liabilities of those against whom judgment has been rendered, they are not necessary parties. Fouche *v.* Harison, 78 Ga. 359, 3 S. E. 330; McGaughey *v.* Latham, 63 Ga. 67; Wilson *v.* Stewart, 63 Ind. 294; Payne *v.* Raubinek, 82 Iowa 587, 48

D. Death of Party — 1. Before Appeal or Writ of Error — a. Effect in General. Where one of the parties to a suit or action dies before the taking of an appeal or writ of error, if the cause of action survives, the appeal or writ should be prosecuted by or against the legal representatives of the decedent.[42]

b. Of Sole Appellant or Plaintiff in Error. At common law, in both personal and real actions, when plaintiff in error dies before the assignment of error the writ of error will abate.[43] The modern practice generally authorized by statute is that, where a sole appellant or plaintiff in error dies before taking his appeal or writ of error, the appeal or writ may be prosecuted in the name of the heirs or legal representatives of the deceased.[44]

N. W. 995; Merrill *v.* Packer, 80 Iowa 542, 45 N. W. 1076; Elam *v.* Barr, 14 La. Ann. 671; Dow *v.* Hardy, 13 La. Ann. 441.

Severance in defense.— In Gordon *v.* Dreux, 6 Rob. (La.) 399, defendants sued as maker and indorser severed in their defense; there was judgment in favor of plaintiff against the maker, but against him as to the indorser, and he appealed from the latter alone. On a motion to dismiss on the ground that the maker was not a party, it was held that the defendants having severed in their defense, and their interests being distinct, it was unnecessary to cite the party who had no interest in the matter in controversy between his co-defendant and plaintiff.

Where an action against two defendants is dismissed as to one upon demurrer, the judgment being final in its nature, plaintiff may take the case up on writ of error without making the other defendant a party thereto, although the action is still pending in the court below against them. McGaughey *v.* Latham, 63 Ga. 67. See also Wilson *v.* Stewart, 63 Ind. 294. Similarly, where a petition has been filed against several defendants, and a separate demurrer thereto by one or more of them is overruled, the remaining defendants need not be made parties to, or be served with, a copy of a bill of exceptions assigning as error the overruling of the demurrer. Jones *v.* Hurst, 91 Ga. 338, 17 S. E. 635.

42. See Abatement and Revival, III, and the following cases:

California.— Sanchez *v.* Roach, 5 Cal. 248.

Georgia.— Neves *v.* Scott, 15 Ga. 510. See also Rogers *v.* Smith, 63 Ga. 172.

Indiana.— Liming *v.* Nesbitt, 66 Ind. 602. But see Taylor *v.* Elliott, 52 Ind. 588.

Kansas.— Bridge *v.* Main St. Hotel Co., (Kan. 1900) 61 Pac. 754; Kuhnert *v.* Conde, 39 Kan. 265, 18 Pac. 193.

Louisiana.— Myers *v.* Brigham, 33 La. Ann. 1013; Kerr *v.* Hays, 9 La. Ann. 241.

Maryland.— Harryman *v.* Harryman, 49 Md. 67.

Missouri.—Murphy *v.* Redmond, 46 Mo. 317.

Ohio.— Welton *v.* Williams, 28 Ohio St. 472; Keek *v.* Jenney, 1 Cleve. L. Rep. 90, 4 Ohio Dec. 173.

Tennessee.— Daniel *v.* East Tennessee Coal Co., 105 Tenn. 470, 58 S. W. 859; Smith *v.* Cunningham, 2 Tenn. Ch. 565. *Compare* 5 Heisk. (Tenn.) 770, index, tit. Appeal 1.

Texas.—Bissell *v.* Lavaca, 6 Tex. 54. *Compare* Conn *v.* Hogan, 93 Tex. 334, 55 S. W. 323, a case of death before appeal from judgment in appellate court.

Virginia.— *Compare* Booth *v.* Dotson, 93 Va. 233, 24 S. E. 935, construing Va. Code (1887), §§ 3305, 3307.

United States.— But see State *v.* Demarest, 110 U. S. 400, 4 S. Ct. 25, 28 L. ed. 191.

See 2 Cent. Dig. tit. "Appeal and Error," § 1842.

As to death of party as affecting time for taking appeal see *infra*, VII, A, 1, a, (IV).

As to objections to revival on death of party see *supra*, V, B, 1, t.

In divorce proceedings an appeal lies from a decree entered after the death of one party, though it was apparently entered in the party's lifetime, and thus is valid on its face. Wilson *v.* Wilson, 73 Mich. 620, 41 N. W. 817.

43. Lillard *v.* Fields, 7 J. J. Marsh. (Ky.) 148; Booth *v.* Dotson, 93 Va. 233, 24 S. E. 935 [*disapproving* Buckner *v.* Blair, 2 Munf. (Va.) 336]; Green *v.* Watkins, 6 Wheat. (U. S.) 260, 5 L. ed. 256; and see also 2 Cent. Dig. tit. "Appeal and Error," § 1843.

44. *Alabama.*— Armstrong *v.* Adams, 6 Ala. 751; *Ex p.* Norris, 2 Ala. 385.

California.— Sanch z *v.* Roach, 5 Cal. 248.

Georgia.— Neves *v.* Scott, 15 Ga. 510.

Indiana.— Moore *v.* Slack, 140 Ind. 38, 39 N. E. 237; Liming *v.* Nesbitt, 66 Ind. 602.

Kansas.— Kuhnert *v.* Conde, 39 Kan. 265, 18 Pac. 193.

Louisiana.— Kerr *v.* Hays, 9 La. Ann. 241.

Maryland.— Owings *v.* Owings, 3 Gill & J. (Md.) 1.

Missouri.— Murphy *v.* Redmond, 46 Mo. 317.

Ohio.— Kennard *v.* Kennard, 35 Ohio St. 660.

Pennsylvania.— Ulshafer *v.* Stewart, 71 Pa. St. 170 [*disapproving* Boas *v.* Heister, 3 Serg. & R. (Pa.) 271].

Virginia.— Booth *v.* Dotson, 93 Va. 233, 24 S. E. 935 [*disapproving* Buckner *v.* Blair, 2 Munf. (Va.) 336].

Canada.— Muirhead *v.* Shirreff, 14 Can. Supreme Ct. 735.

See 2 Cent. Dig. tit. "Appeal and Error," § 1843.

Waiver of objection.— A judgment on appeal in the name of a deceased plaintiff, rendered without objection on the part of appellee, is not a nullity, though it should properly have been prosecuted in the name of the legal representative of the deceased. Spalding *v.* Wathen, 7 Bush (Ky.) 659.

Where, in an action ex delicto, the plaintiff dies before appeal, the action will abate, and no appeal will lie in favor of his personal

c. Of One of Several Appellants or Plaintiffs in Error. While, at common law, a writ of error sued out by two or more plaintiffs in error abated upon the death of either plaintiff before errors assigned,[45] the better rule now seems to be that, where one of several appellants or plaintiffs in error dies before taking his appeal or writ, the cause may be prosecuted in the name of his legal representatives.[46]

d. Of Appellee or Defendant in Error. An appeal or writ of error will not abate by reason of the death of appellee or defendant in error before the taking of the appeal or writ.[47] The appeal or writ should, however, be prosecuted in the names of the legal representatives of the deceased.[48]

2. Pending Appeal or Writ of Error — a. Effect in General. An appeal or writ of error will not abate on the death of a party while the proceedings are pending in the appellate court.[49] In such a case the executor or administrator of the decedent should, by the practice which obtains in some jurisdictions, be made a party to prosecute or defend the suit.[50] There are jurisdictions, however, in which

representatives. Stout *v.* Indianapolis, etc., R. Co., 41 Ind. 149.

45. Boas *v.* Heister, 3 Serg. & R. (Pa.) 271; Sappington *v.* Philips, 1 Yerg. (Tenn.) 105; Howard *v.* Pitt, 1 Salk. 261; Pennoyer *v.* Bruce, 1 Ld. Raym. 244; 2 Tidd Pr. 1134.

46. Morrow *v.* Taggart, 45 Ala. 293; Branham *v.* Johnson, 62 Ind. 259; Sappington *v.* Philips, 1 Yerg. (Tenn.) 105; Sappington *v.* Crockett, 1 Yerg. (Tenn.) 103. See also Churchwell *v.* East Tennessee Bank, 7 Heisk. (Tenn.) 780; Holland *v.* Harris, 2 Sneed (Tenn.) 68; Young *v.* Officer, 7 Yerg. (Tenn.) 137. But see Boas *v.* Heister, 3 Serg. & R. (Pa.) 271 [*disapproved* in Ulshafer *v.* Stewart, 71 Pa. St. 170].

See 2 Cent. Dig. tit. "Appeal and Error," § 1844.

The survivors may appeal or sue out a writ of error. Huff *v.* Miller, 2 Swan (Tenn.) 84. See also Grove *v.* Swartz, 45 Md. 227. But see Smith *v.* Cunningham, 2 Tenn. Ch. 565, to the effect that such an appeal, taken by the survivors, is void as to the estate of the deceased.

47. Hutchcraft *v.* Gentry, 2 J. J. Marsh. (Ky.) 499; Carroll *v.* Bowie, 7 Gill (Md.) 34; Green *v.* Watkins, 6 Wheat. (U. S.) 260, 5 L. ed. 256. But see Shartzer *v.* Love, 40 Cal. 93; and 2 Cent. Dig. tit. "Appeal and Error," § 1845.

Actions ex delicto.— A writ of error cannot be maintained by plaintiff on a judgment founded on a tort after the death of the tortfeasor. Barret *v.* Gaston, 1 Ill. 255.

But, in an action of tort against two, the judgment may be reversed after the death of one without making the representatives of that one parties. Potter *v.* Gratiot, 1 Mo. 368.

48. Wesson *v.* Crook, 24 Ala. 478; Hopkins *v.* Hopkins, 91 Ky. 310, 12 Ky. L. Rep. 945, 15 S. W. 854; Harryman *v.* Harryman, 49 Md. 67. *Compare* Garrison *v.* Burden, 40 Ala. 513. And see Reeves *v.* Davis, 6 Ky. L. Rep. 288, in which it was held that the death of plaintiff does not prevent or obstruct the granting of an appeal, though no personal representative has qualified.

49. *Delaware.*— Gregg *v.* Banner, 2 Harr. (Del.) 407 [*following* Summerl *v.* Dauphin, (Del.) Aug. 6, 1814].

Kentucky.— Marshall *v.* Peck, 1 Dana (Ky.) 609.

Mississippi.— Burns *v.* Stanton, 24 Miss. 580.

New York.— Vroom *v.* Ditmas, 5 Paige (N. Y.) 528.

South Carolina.— Denoon *v.* O'Hara, 1 Brev. (S. C.) 500. *Compare* King *v.* Clarke, McMull. Eq. (S. C.) 48.

Tennessee.—Erwin *v.* Foster, 6 Lea (Tenn.) 187.

Virginia.— Reid *v.* Strider, 7 Gratt. (Va.) 76, 54 Am. Dec. 120.

Contra, Pruden *v.* Mansfield, 2 West. L. Month. 577, 2 Ohio Dec. 385.

For a full discussion of the effect of the death of a party pending an appeal or writ of error see Abatement and Revival, III, A, 18.

See 2 Cent. Dig. tit. "Appeal and Error," § 1846.

50. *Connecticut.*— Stiles' Appeal, 41 Conn. 329.

Louisiana.— Anderson *v.* Arnette, 30 La. Ann. 72; Olinde *v.* Gougis, 4 Mart. (La.) 96.

Maryland.— See Carroll *v.* Bowie, 7 Gill (Md.) 34.

New York.— Mapes *v.* Knorr, 47 N. Y. App. Div. 639, 62 N. Y. Suppl. 303; Wilson *v.* Hamilton, 9 Johns. (N. Y.) 442; Vroom *v.* Ditmas, 5 Paige (N. Y.) 528. *Compare* Rogers *v.* Paterson, 4 Paige (N. Y.) 409.

Tennessee.— Erwin *v.* Foster, 6 Lea (Tenn.) 187.

Texas.— Gibbs *v.* Belcher, 30 Tex. 79.

In Kentucky, if the plaintiff in a judgment dies after an appeal has been granted therefrom, defendant may abandon that appeal and, without revivor, have an appeal granted by the clerk against plaintiff's executor. Magee *v.* Frazier, 21 Ky. L. Rep. 254, 51 S. W. 174.

Actions which do not survive.— In Maryland it has been held that Md. Acts (1815), c. 149, providing that appellate causes shall not abate by reason of the death of a party before rule argument, applies to cases which, before the passage of the act, did not survive. Carroll *v.* Bowie, 7 Gill (Md.) 34.

Contest for administration.— In Williams *v.* Mullins, 43 Tex. 610, it was held that when, pending an appeal by one of the contestants

it has been held that the substitution of the deceased party's personal representatives is not necessary.[51]

b. Of Sole Appellant or Plaintiff in Error. The death of a sole appellant or plaintiff in error pending his appeal or writ of error will not, under the statutes of most of the states, abate the appeal or writ, but the legal representatives of such party will be permitted to prosecute the proceedings to final judgment.[52]

c. Of One of Several Appellants or Plaintiffs in Error. The death of one of several appellants or plaintiffs in error does not abate a suit, nor necessitate a revival of it in the appellate court. The cause survives to, and may be prosecuted by, the other plaintiffs in error.[53]

of the administration, one of the parties dies, the appeal abates, under the probate law of 1870.

Remandment of cause to bring in proper parties.—In Wilson *v.* Hamilton, 9 Johns. (N. Y.) 442, upon petition of one of the respondents showing that one of the respondents had married, and that another respondent and one of appellants had died, pending the appeal, the cause was remanded to the lower court without prejudice to either party, in order that the proper parties might be brought in.

51. *California.*— Phelan *v.* Tyler, 64 Cal. 80, 28 Pac. 114.

Maryland.— Carroll *v.* Bowie, 7 Gill (Md.) 34; Roche *v.* Johnson, 2 Harr. & J. (Md.) 37 note.

Vermont.— Walker *v.* King, 2 Aik. (Vt.) 204.

Virginia.— Reid *v.* Strider, 7 Gratt. (Va.) 76, 54 Am. Dec. 120.

United States.— U. S. Bank *v.* Weisiger, 2 Pet. (U. S.) 481, 7 L. ed. 492.

Case under rule argument.— In Maryland, if either of the parties in the court of appeals dies after the cause has been put under rule argument, the writ of error will not abate. Roche *v.* Johnson, 2 Harr. & J. (Md.) 37 note. See also Carroll *v.* Bowie, 7 Gill (Md.) 34.

Effect of ignorance of death — Judgment entered nunc pro tunc.— Where complainant died after the entry of an appeal from the decision of a vice-chancellor, and after the cause was ready for a hearing on the appeal, but, the fact of his death being unknown to counsel, the cause was afterward heard and decided by the chancellor upon the appeal, it was held that the decree upon the appeal might be entered *nunc pro tunc* as of a day previous to the death of complainant, and after his entering of the appeal. Vroom *v.* Ditmas, 5 Paige (N. Y.) 528. See also Rogers *v.* Paterson, 4 Paige (N. Y.) 409; U. S. Bank *v.* Weisiger, 2 Pet. (U. S.) 481, 7 L. ed. 492. In the latter case respondent died a few days before the argument, but his death was not known to the court or counsel until after the appeal had been argued and decided against him, and then the court, upon a suggestion of the fact, and after hearing the objection of the counsel who had argued the cause for the decedent, ordered the decree to be entered as of the first day of the term, which was previous to respondent's death.

52. *Alabama.*— *Ex p.* Norris, 2 Ala. 385.

Kentucky.— Marshall *v.* Peck, 1 Dana (Ky.) 609.

Indiana.— Hahn *v.* Behrman, 73 Ind. 120.

Louisiana.— Hoggatt's Succession, 36 La. Ann. 337.

Maryland.— Carroll *v.* Bowie, 7 Gill (Md.) 34.

New Hampshire.— Holt *v.* Rice, 51 N. H. 370.

Pennsylvania.— Ulshafer *v.* Stewart, 71 Pa. St. 170.

Texas.— Hohenthal *v.* Turnure, 50 Tex. 1.

United States.— Green *v.* Watkins, 6 Wheat. (U. S.) 260, 5 L. ed. 256.

See 2 Cent. Dig. tit. "Appeal and Error," § 1847.

But see Hanney *v.* Murray, 9 Gill & J. (Md.) 157, in which it was held that if an appellant dies before commencement of the term to which the appeal is taken, the appeal will abate. And see also Maskall *v.* Maskall, 3 Sneed (Tenn.) 207, in which it was held that where the appeal is taken from the chancery to the supreme court, and appellant does not dismiss or abandon his appeal, the cause stands for hearing *de novo*, and an abatement caused by his death is an abatement of the suit, and not of the appeal.

In case of actions which do not survive, a distinction is drawn between those in which the judgment below has been for plaintiff and those in which it has been for defendant. In the former case the general rule applies, since by the judgment the cause of action is merged therein (see ABATEMENT AND REVIVAL, III, A, 18, b, (I) [but see, *contra*, Long *v.* Hitchcock, 3 Ohio 274]); in the latter, not only the appeal or writ, but the action itself, abates. Harrison *v.* Moseley, 31 Tex. 608; and see ABATEMENT AND REVIVAL, III, A, 18, b, (II).

53. *Alabama.*— Alexander *v.* Rea, 50 Ala. 64; Gregg *v.* Bethea, 6 Port. (Ala.) 9.

Connecticut.— Norris *v.* Sullivan, 47 Conn. 474.

Kentucky.— Clay *v.* Gibson, 13 Ky. L. Rep. 414, 17 S. W. 220; Clay *v.* Grayson, 13 Ky. L. Rep. 415, 17 S. W. 219.

Maryland.— Grove *v.* Swartz, 45 Md. 227.

Missouri.— Hunleth *v.* Leahy, 146 Mo. 408, 48 S. W. 459; Maguire *v.* Moore, 108 Mo. 267, 18 S. W. 897.

New York.— McGregor *v.* Comstock, 28 N. Y. 237; Camp *v.* Bennett, 16 Wend. (N. Y.) 48.

Tennessee.— Banks *v.* Brown, 4 Yerg. (Tenn.) 198. See also Patterson *v.* Butterworth, 4 Yerg. (Tenn.) 157. And *compare* Sappington *v.* Philips, 1 Yerg. (Tenn.) 105.

d. **Of Sole Appellee, Respondent, or Defendant in Error** — (I) *In Actions Which Survive.* The death of a sole appellee, respondent, or defendant in error pending an appeal or writ of error, where the action survives, will not abate the appeal or writ of error, but it will survive against the decedent's personal representatives.[54]

(II) *In Actions Which Do Not Survive* — (A) *Judgment for Plaintiff.* Where judgment below has been rendered in favor of plaintiff, and he dies pending an appeal or writ of error prosecuted by defendant, there is no abatement of the appellate proceedings.[55]

(B) *Judgment for Defendant.* But where the judgment below is for defendant, and he dies pending an appeal or writ of error prosecuted by plaintiff, the appellate proceedings will abate.[56]

e. **Of One of Several Appellees, Respondents, or Defendants in Error.** The death of one of several appellees or defendants in error pending an appeal or writ of error will not abate the appeal or writ, which may be prosecuted against the survivors, to the exclusion of the decedent's representatives.[57]

Texas.— Bingham *v.* Nyse, 14 Tex. 241.

United States.— McKinney *v.* Carroll, 12 Pet. (U. S.) 66, 9 L. ed. 1002.

See 2 Cent. Dig. tit. "Appeal and Error," § 1848.

But see Stell *v.* Glass, 1 Ga. 475, in which it was held that if, before trial on appeal, one of three defendants dies, the representatives of that one must be made parties, although the appeal was taken by one of deceased's co-defendants alone.

Action by husband and wife for slander of wife — Death of wife.— Where the court below arrested a judgment obtained by a husband and wife for slander of the wife, for which they sued out a writ of error, on the death of the wife the writ was abated. Stroop *v.* Swarts, 12 Serg. & R. (Pa.) 76.

Election by defendant in error.—Where one of the plaintiffs in error dies, the defendant in error may either revive or elect to proceed to the hearing with the surviving plaintiff, or abate the appeal. Patterson *v.* Butterworth, 4 Yerg. (Tenn.) 157.

54. *Arkansas.*— Ragsdale *v.* Stuart, 8 Ark. 268.

Delaware.— Newcastle County Common *v.* Holcomb, 1 Houst. (Del.) 293.

Louisiana.— Howard *v.* Walsh, 28 La. Ann. 847; Howard *v.* Yale, 27 La. Ann. 621.

Maryland.— Carroll *v.* Bowie, 7 Gill (Md.) 34.

New York.— Schuschard *v.* Reimer, 1 Daly (N. Y.) 459; Delaplaine *v.* Bergen, 7 Hill (N. Y.) 591; Rogers *v.* Paterson, 4 Paige (N. Y.) 409.

Ohio.— Spurk *v.* Vangundy, 3 Ohio 307.

Oregon.— Long *v.* Thompson, 34 Oreg. 359, 55 Pac. 978.

Texas.— Pullman Palace Car Co. *v.* Fowler, 6 Tex. Civ. App. 755, 27 S. W. 268; Compton *v.* Ashley, 4 Tex. Civ. App. 406, 23 S. W. 487.

See 2 Cent. Dig. tit. "Appeal and Error," § 1849.

When, on reversal of a judgment for appellee, it appears that the latter has died since the commencement of the suit and that an administrator has been appointed, the judgment will be certified to the probate court, to be there settled in the due course of administration. Boggess *v.* Lilly, 18 Tex. 200.

55. Pope *v.* Welsh, 18 Ala. 631; Galveston City R. Co. *v.* Nolan, 53 Tex. 139; Gibbs *v.* Belcher, 30 Tex. 79 [*overruling* Taney *v.* Edwards, 27 Tex. 224, previously *questioned* in Cherry *v.* Speight, 28 Tex. 503].

56. Marguard *v.* Rieter, 30 Mo. 248. And see ABATEMENT AND REVIVAL, III, A, 18, b, (II).

Real action.— Where there is a judgment in defendant's favor in action for the conveyance of real estate, but defendant died after plaintiff has removed the cause into the supreme court, the supreme court cannot, on reversing the decision, and where the heirs are not before the court, render such judgment as should be entered, although the administrator has been made a party. Long *v.* Fuller, 21 Wis. 121.

57. *Illinois.*— Bostwick *v.* Williams, 40 Ill. 113.

Kentucky.— Marshall *v.* Peck, 1 Dana (Ky.) 609.

Missouri.— Maguire *v.* Moore, 108 Mo. 267, 18 S. W. 897. See also Prior *v.* Kiso, 96 Mo. 303, 9 S. W. 898.

Oklahoma.— Ranney-Alton Mercantile Co. *v.* Hanes, 9 Okla. 471, 60 Pac. 284.

Virginia.— Cunningham *v.* Smithson, 12 Leigh (Va.) 32.

West Virginia.— See also Rittenhouse *v.* Harman, 7 W. Va. 380.

See 2 Cent. Dig. tit. "Appeal and Error," § 1850.

Under Mo. Rev. Stat. (1879), § 3767, which provides that, if one of several appellees or defendants in error die after errors assigned, his death shall be suggested on the record, and the cause shall proceed against the surviving appellee, a judgment of reversal, rendered after the death of one of several defendants in error, is binding on the personal representative of the deceased, though such personal representative is not made a party in the supreme court, and he may be made a party in the circuit court, after the cause is remanded. Prior *v.* Kiso, 96 Mo. 303, 9 S. W. 898.

f. Substitution of Parties. In some jurisdictions the proper practice, when the action survives, is to substitute the decedent's personal representatives as parties;[58] while, in others, an appeal or writ of error may be prosecuted to judgment in the name of the decedent.[59]

3. Continuance or Revival of Proceedings — a. Necessity — (i) *Death Before Appeal or Writ of Error.* Where a party to an action or suit dies before a writ of error has been sued out, or an appeal taken, the practice in most jurisdictions requires that there shall be a suggestion of such death, and a revival of the action or suit in the name of the legal representatives of the decedent, as a condition precedent to proceedings for review.[60]

58. *Alabama.*—Pope *v.* Welsh, 18 Ala. 631.

Delaware.— Newcastle County Common *v.* Holcomb, 1 Houst. (Del.) 293.

Illinois.— Upham *v.* Richey, 61 Ill. App. 650.

Louisiana.— Howard *v.* Walsh, 28 La. Ann. 847; Howard *v.* Yale, 27 La. Ann. 621.

Maryland.— Carroll *v.* Bowie, 7 Gill (Md.) 34.

New York.— See Schuschard *v.* Reimer, 1 Daly (N. Y.) 459, in which it was held that the representatives of a decedent have a right to be made parties if they so wish.

59. Harwood *v.* Murphy, 13 N. J. L. 193; Miller *v.* Gunn, 7 How. Pr. (N. Y.) 159; Delaplaine *v.* Bergen, 7 Hill (N. Y.) 591; Spurk *v.* Vangundy, 3 Ohio 307; Pullman Palace Car Co. *v.* Fowler, 6 Tex. Civ. App. 755, 27 S. W. 268; Compton *v.* Ashley, 4 Tex. Civ. App. 406, 23 S. W. 487; Galveston City R. Co. *v.* Nolan, 53 Tex. 139. *Compare* Gibbs *v.* Belcher, 30 Tex. 79, in which it was held that, where plaintiff recovers judgment in assault and battery, and, pending writ of error, dies, the writ does not abate, but survives in favor of such plaintiff's personal representative, who may properly be made a party.

60. *California.*— Judson *v.* Love, 35 Cal. 463.

Georgia.— Gardner *v.* Granniss, 57 Ga. 539.

Idaho.— Coffin *v.* Edgington, 2 Idaho 595, 23 Pac. 80.

Iowa.— Tracy *v.* Roberts, 59 Iowa 624, 13 N. W. 713.

Kentucky.—Callaghan *v.* Carr, 2 Litt. (Ky.) 153.

Louisiana.— Hearing *v.* Mound City L. Ins. Co., 29 La. Ann. 832.

Massachusetts.— Andrews *v.* Bosworth, 3 Mass. 223.

Missouri.— Childers *v.* Goza, 1 Mo. 394.

New York.— Anderson *v.* White, 10 Paige (N. Y.) 575.

Ohio.—Cisna *v.* Beach, 15 Ohio 300, 45 Am. Dec. 576.

United States.— Bigler *v.* Waller, 12 Wall. (U. S.) 142, 20 L. ed. 260.

See 2 Cent. Dig. tit. "Appeal and Error," § 1851.

As to the necessity of suggesting death see Abatement and Revival, III, A, 20, a.

But see New Orleans R. Co. *v.* Rollins, 36 Mo. 384; Phares *v.* Saunders, 18 W. Va. 336, in the former case it being held that, where plaintiff dies after judgment in his favor, error lies against his administrator without proceedings to revive; and, in the latter, it was held that, in case of the death of a party to a suit, his personal representative can bring a writ of error without reviving the judgment. And see Stone *v.* Ringer, 4 Heisk. (Tenn.) 265, in which it was held that, where plaintiff dies after judgment and before the end of the term, defendant may appeal without revival, the decision being based upon the ground that in contemplation of law the appeal is prayed and granted, and the bond executed as of the day on which judgment was rendered, although of actual date subsequent.

Before judgment or decree.— In all cases where a judgment or decree is rendered subsequent to the death of a party to the suit, a writ of error or appeal will not lie until there shall have been a substitution of the legal representatives of the deceased. Tracy *v.* Roberts, 59 Iowa 624, 13 N. W. 713; Bates *v.* Weathersby, 2 La. Ann. 484; Cisna *v.* Beach, 15 Ohio 300, 45 Am. Dec. 576. See also Callaghan *v.* Carr, 2 Litt. (Ky.) 153, in which it was held that, where a decree is rendered against a dead man and his heirs prosecute error, if the decree is otherwise erroneous, the heirs need not institute new proceedings in the circuit court to have it set aside before they bring error to the court of appeals.

Death of one of several co-parties.— An appeal taken after the death of one of two coplaintiffs, and before the substitution of his personal representative, is premature. Sheldon *v.* Dalton, 57 Cal. 19.

Remandment for substitution of parties.— Where one of the defendants in an action of partition died while the case was pending in the lower court, and the cause was afterward decided without his heirs having been joined, the appeal was not dismissed, but the cause was remanded in order that the heirs might be made parties to the action. Bates *v.* Weathersby, 2 La. Ann. 484.

Where suggestion of death requires no new parties to be made.— Where the suggestion of the death of a part of the persons affected by the judgment requires no new parties to be made, a writ of error may be sued in the name of the survivors, without application to the supreme court. Perine *v.* Babcock, 6 Port. (Ala.) 391.

Relaxation of rule.— In Anderson *v.* Anderson, 20 Wend. (N. Y.) 585, it is said that perhaps an appeal may be prosecuted, before the suit has been duly revived, where the appeal is necessary to preserve the right to ap-

(II) *Death Pending Appeal or Writ of Error.* The practice under the statutes of the various states is not uniform as to suggesting the death of a party pending an appeal or writ of error, and the substituting of his personal representatives. As has been previously stated,[61] in some jurisdictions the appeal or writ must be prosecuted or defended in the name of the decedent's administrator or executor;[62] while in others the cause is continued to judgment as though the party were still living.[63]

b. **Persons to Be Substituted** — (I) *In General.* Where, upon the death of the party to a suit or action, substitution is required before the commencement or further prosecution of appellate proceedings, the decedent's heirs,[64] devisees,[65] personal representatives,[66] or privies, as the case may be, are the proper parties required or entitled to be substituted.[67]

peal, as if the suit abates after notice of the decree has been given to the opposite party.

61. See *supra*, VI, D, 2.

62. *Alabama.*—English *v.* Andrews, 4 Port. (Ala.) 319.

Connecticut.— Stiles' Appeal, 41 Conn. 329.

Louisiana.— Louisiana Mut. Ins. Co. *v.* Costa, 32 La. Ann. 1; Anderson *v.* Arnette, 30 La. Ann. 72.

Maryland.—Siacik *v.* Northern Cent. R. Co., (Md. 1901) 48 Atl. 149. *Compare* Carroll *v.* Bowie, 7 Gill (Md.) 34; Roche *v.* Johnson, 2 Harr. & J. (Md.) 37 note.

Tennessee.—Erwin *v.* Foster, 6 Lea (Tenn.) 187.

Texas.— Gibbs *v.* Belcher, 30 Tex. 79.

In New York the decisions are not uniform. In some of the cases substitution has been required (Warren *v.* Eddy, 13 Abb. Pr. (N. Y.) 28, 32 Barb. (N. Y.) 664; Wilson *v.* Hamilton, 9 Johns. (N. Y.) 442; Renwick *v.* Cooper, 10 Paige (N. Y.) 303; Vroom *v.* Ditmas, 5 Paige (N. Y.) 528); while, in others, it has been held that the proceedings will go on as if the original party were living, unless the representatives of the deceased party apply for an order that the appeal may stand revived in their names (Rogers *v.* Paterson, 4 Paige (N. Y.) 409. See also Miller *v.* Gunn, 7 How. Pr. (N. Y.) 159; Delaplaine *v.* Bergen, 7 Hill (N. Y.) 591.)

Under N. Y. Code Civ. Proc. § 764, providing that an action for personal injuries shall not abate by reason of a party's death after verdict, report, or decision, but the subsequent proceedings shall be the same as in a case where the cause of action survives, it was held that an administratrix was not entitled to prosecute an appeal, in an action for personal injuries taken by her intestate, from a judgment of nonsuit, since such judgment was not a verdict, report, or decision within the meaning of said section. Lutz *v.* Third Ave. R. Co., 44 N. Y. App. Div. 256, 60 N. Y. Suppl. 761.

63. *California.*— Phelan *v.* Tyler, 64 Cal. 80, 28 Pac. 114. *Compare* Black *v.* Shaw, 20 Cal. 68, in which it was held that, on the death of appellant before argument, further proceedings in the cause could only be had upon leave, after suggestion of death had been made.

Kentucky.— Harrison *v.* Taylor, 2 Ky. L. Rep. 287, 51 S. W. 193.

Maryland.— Carroll *v.* Bowie, 7 Gill (Md.) 34; Roche *v.* Johnson, 2 Harr. & J. (Md.) 37 note. But see Siacik *v.* Northern Cent. R. Co., (Md. 1901) 48 Atl. 149.

New Jersey.—Harwood *v.* Murphy, 13 N. J. L. 193.

Ohio.— Spurk *v.* Vangundy, 3 Ohio 307.

Vermont.— Walker *v.* King, 2 Aik. (Vt.) 204.

Virginia.— Reid *v.* Strider, 7 Gratt. (Va.) 76, 54 Am. Dec. 120.

United States.— U. S. Bank *v.* Weisiger, 2 Pet. (U. S.) 481, 7 L. ed. 492.

Death of nominal or uninterested party.— No substitution will be ordered in case of the death of a nominal or uninterested party pending an appeal or writ of error. Davies Henderson Lumber Co. *v.* Gottschalk, 81 Cal. 641, 22 Pac. 860.

Where substitution will not affect result.— A motion in the appellate court, to substitute another person in place of a party who has died pending an appeal or writ of error, will be overruled. Kinney *v.* Kinney, 94 Iowa 672, 63 N. W. 452.

64. See *infra*, note 67.

65. See *infra*, note 67.

66. See *infra*, note 67.

67. *District of Columbia.*— Cake *v.* Woodbury, 3 App. Cas. (D. C.) 60.

Indiana.— Vail *v.* Lindsay, 67 Ind. 528.

Louisiana.— Stith *v.* Winbush, 3 La. 442.

Massachusetts.— Porter *v.* Rummery, 10 Mass. 64.

New York.— McLachlin *v.* Brett, 2 N. Y. Civ. Proc. 194, 27 Hun (N. Y.) 18; Jauncey *v.* Rutherford, 9 Paige (N. Y.) 273. See also Coit *v.* Campbell, 82 N. Y. 509 [*overruling* 20 Hun (N. Y.) 50].

Ohio.— A privy, by operation of law, may file a petition in error upon the death of a party to a judgment without being himself first made party by revival. Hanover *v.* Sperry, 35 Ohio St. 244. See also Hammond *v.* Hammond, 21 Ohio St. 620.

Tennessee.—Stone *v.* Ringer, 4 Heisk. (Tenn.) 265.

Texas.— Simmons *v.* Fisher, 46 Tex. 126. See also Teas *v.* Robinson, 11 Tex. 774; Wheeler *v.* State, 8 Tex. 228.

Virginia.— See Braxton *v.* Andrews, 2 Call (Va.) 357.

Wyoming.— McNamara *v.* O'Brien, 2 Wyo. 441.

(II) *Executors and Administrators.* The executor or administrator of a deceased party to a suit or action affecting the personal estate of the decedent is the proper party to be substituted to prosecute or defend a writ of error or appeal where the suit or action survives.[68]

United States.— Moses *v.* Wooster, 115 U. S. 285, 6 S. Ct. 38, 29 L. ed. 391; Hook *v.* Linton, 10 Pet. (U. S.) 107, 9 L. ed. 363.

See 2 Cent. Dig. tit. "Appeal and Error," § 1852 *et seq.*

An appeal taken by an attorney after his client's death will be dismissed. The legal representatives alone have that right. Stith *v.* Winbush, 3 La. 442.

Successors to right of action.— A notice of appeal from a motion to revive an action, where all the plaintiffs are dead, is properly made in the name of the parties who have succeeded to the right of action. McLachlin *v.* Brett, 2 N. Y. Civ. Proc. 194, 27 Hun (N. Y.) 18. See also Coit *v.* Campbell, 82 N. Y. 509 [*overruling* 20 Hun (N. Y.) 50].

Surety upon a supersedeas bond cannot be allowed, after defendant's death, to prosecute a petition in error, filed by defendant before his death, if defendant's administrator, against whom the action is revived, defaults. McNamara *v.* O'Brien, 2 Wyo. 441.

The assignee of the interests of a party who dies pending an appeal or writ of error may be substituted in the appellate court in place of his deceased assignor, and there prosecute or defend the suit. Neilon *v.* Kansas City, etc., R. Co., 85 Mo. 599; Riley *v.* Gitterman, 24 Abb. N. Cas. (N. Y.) 89, 55 Hun (N. Y.) 605, 10 N. Y. Suppl. 38, 28 N. Y. St. 983 [*affirmed* in 125 N. Y. 727, 26 N. E. 757, 35 N. Y. St. 995]. *Contra*, Barribeau *v.* Brant, 17 How. (U. S.) 43, 15 L. ed. 34. And see Taylor *v.* Elliott, 53 Ind. 441, 52 Ind. 588; and 2 Cent. Dig. tit. "Appeal and Error," § 1854.

Widow assignee.— Where plaintiff died after judgment, and the judgment was assigned to the widow, by commissioners, as part of her year's support, and defendant appealed, it was held that the widow might revive, and proceed in the appeal in her own name. Stone *v.* Ringer, 4 Heisk. (Tenn.) 265.

In Texas, though there is no statute expressly authorizing the widow and heirs, or an administrator of the estate, of a party to a judgment who has died to sue out a writ of error, the right exists as resulting from the right of appeal, which is secured by law. Simmons *v.* Fisher, 46 Tex. 126. See also Teas *v.* Robinson, 11 Tex. 774; Wheeler *v.* State, 8 Tex. 228.

68. *Alabama.*— Savage *v.* Walsh, 24 Ala. 293; Lewis *v.* Lewis, Minor (Ala.) 35.

Indiana.— Hahn *v.* Behrman, 73 Ind. 120.

Mississippi.—Carmichael *v.* West Feliciana R. Co., 2 How. (Miss.) 817.

New York.— Warren *v.* Eddy, 13 Abb. Pr. (N. Y.) 28, 32 Barb. (N. Y.) 664.

Tennessee.—Smith *v.* Smith, 15 Lea (Tenn.) 93; Sappington *v.* Philips, 1 Yerg. (Tenn.) 105.

Texas.—Tucker *v.* Anderson, 25 Tex. Suppl. 155.

Vermont.— Adams *v.* Newell, 8 Vt. 190.

Wisconsin.—Jefferson County Bank *v.* Robbins, 67 Wis. 68, 29 N. W. 209, 893; Downer *v.* Howard, 44 Wis. 82.

See 2 Cent. Dig. tit. "Appeal and Error," § 1855.

Attorney entering appearance for executors. — On the death of appellee, his attorneys may enter their appearance for his executors. Hook *v.* Linton, 10 Pet. (U. S.) 107, 9 L. ed. 363.

Death of formal party.— Where a husband was made party to a bill in right of his wife's interest, adopted her answer as his own, and acted as her agent and representative in the suit, it was held that such facts did not render his representatives necessary parties to a writ of error sued out after his death, as no decree could be rendered against him for costs incurred by him. Colvin *v.* Owens, 22 Ala. 782.

Divorce proceedings.— In case of the death of a wife pending her husband's appeal from a judgment for divorce awarding her costs or suit-money, her administrator is presumed to have such interest in behalf of her creditors as to have the appeal continued in his name. Downer *v.* Howard, 44 Wis. 82.

Executor a non-resident.— Where the executor of a deceased appellee is a non-resident, the appellant must procure the appointment of an administrator within the jurisdiction, against whom the action may be revived. Warren *v.* Eddy, 13 Abb. Pr. (N. Y.) 28, 32 Barb. (N. Y.) 664.

Officer of court.— Where an appellant dies, and no one will administer on his estate, so that the court orders the sergeant to take possession of it, a scire facias will not lie against the sergeant to revive the appeal. Braxton *v.* Andrews, 2 Call (Va.) 357.

Representatives of deceased partner.— On appeal from a final decree for an injunction in a suit by a partnership, where one of the partners dies, the survivors may, after notice to his legal representatives to appear, and their failure to do so, move that the appeal abate as to such deceased partner, and proceed at their suit as survivors. Moses *v.* Wooster, 115 U. S. 285, 6 S. Ct. 38, 29 L. ed. 391.

Substitution after perfection of appeal by co-parties.— In Branham *v.* Johnson, 62 Ind. 259, it was held that, after the death of one of the defendants, his executor might be admitted as a party to the appeal from the judgment after the appeal had been perfected as to the other defendants.

Void appeal.— Where error was brought by the attorney after appellant's death, the attorney being in ignorance of the fact of the death, it was held that the administrator could not revive the writ. Squibb *v.* McFarland, 11 Heisk. (Tenn.) 563.

(III) *Heirs and Personal Representatives.* Where a judgment or decree affects both the personalty and realty of a party to an action or a suit, who subsequently dies, upon an appeal or writ of error from such judgment or decree the personal representatives and heirs of the decedent should be substituted as parties to prosecute or defend the appellate proceedings.[69]

(IV) *Heirs or Devisees.* In real actions the heirs or devisees of the deceased party are proper and necessary parties to be substituted to prosecute or defend a writ of error or appeal.[70]

(V) *In Case of Death of Party in Representative Capacity.* On the death of a party in a representative or official capacity, an appeal or writ of error should be prosecuted or defended by his successor in office, and not by his heirs or personal representatives,[71] unless the judgment or decree below was rendered for or against such party personally.[72]

Where a personal representative has no interest in the subject-matter of the suit he need not be made a party to prosecute or defend an appeal. Bassett *v.* Messner, 30 Tex. 604.

69. Jordan *v.* Abercrombie, 15 Ala. 580; Benoit *v.* Schneider, 39 Ind. 591. *Compare* Jauncey *v.* Rutherford, 9 Paige (N. Y.) 273.

See 2 Cent. Dig. tit. "Appeal and Error," § 1857.

Divorce proceedings — Right of dower.— In a divorce case brought by the husband, an appeal taken by the wife from a decree against her within the statutory period, but after the death of the husband, is authorized by statute where the husband at his death left a considerable estate; but before such appeal can be brought to a hearing, or any further proceedings had in it, the proper step must be taken to bring in as parties the representatives and heirs of the deceased complainant. Shafer *v.* Shafer, 30 Mich. 163.

In Kentucky, prior to 1792, an heir could not maintain a writ to reverse a judgment in covenant against his ancestor without joining the executor or administrator. South *v.* Hoy, 3 Bibb (Ky.) 522.

70. *Kentucky.*— Satterfield *v.* Crow, 8 B. Mon. (Ky.) 553; Callaghan *v.* Carr, 1 A. K. Marsh. (Ky.) 22.

Louisiana.— Waddil *v.* Thompson, 7 La. Ann. 592; McMicken *v.* Smith, 5 Mart. N. S. (La.) 427.

Massachusetts.— Porter *v.* Rummery, 10 Mass. 64.

New York.— Van Horne *v.* France, 32 Hun (N. Y.) 504.

Ohio.— Valley R. Co. *v.* Bohn, 29 Ohio St. 633; Hammond *v.* Hammond, 21 Ohio St. 620.

Texas.— Egery *v.* Power, 38 Tex. 373. But see Perryman *v.* Rayburn, (Tex. Civ. App. 1895) 30 S. W. 915.

See 2 Cent. Dig. tit. "Appeal and Error," § 1856.

Partial substitution.— Where, pending an appeal from a judgment in favor of defendant in ejectment, plaintiff died, and defendant obtained an order requiring the heirs to show cause why the judgment should not be affirmed, and one only of the heirs appeared, such heir was entitled to be substituted as plaintiff as to the interest in the property of the decedent claimed by him. Van Horne *v.* France, 32 Hun (N. Y.) 504.

Under Ohio Rev. Stat. § 6098, authorizing the heirs of a deceased person, in an action against the administrator, on a claim against the estate of such deceased person, "to make any defense to such action which such administrator or executor could make," carries with it the right to institute and carry on proceedings in error. Spaulding *v.* Allen, 19 Ohio Cir. Ct. 609, 610, 10 Ohio Cir. Dec. 259.

71. *Alabama.*—McDougald *v.* Carey, 38 Ala. 320.

Georgia.— Title Guarantee, etc., Co. *v.* Holverson, 95 Ga. 707, 22 S. E. 533.

Indiana.— Losey *v.* Bond, 81 Ind. 510; Benoit *v.* Schneider, 39 Ind. 591.

Louisiana.— Hardy *v.* Irwin, 10 La. Ann. 703; Mitchell *v.* Cooley, 12 Rob. (La.) 370.

Mississippi.— Mayer *v.* McLure, 36 Miss. 389, 72 Am. Dec. 190.

New York.— Dale *v.* Roosevelt, 8 Cow. (N. Y.) 333.

Vermont.— Wentworth *v.* Wentworth, 12 Vt. 244.

An administrator de bonis non may bring his writ as the sole plaintiff in error, even though the judgment was against the previous representative in the usual form. Dale *v.* Roosevelt, 8 Cow. (N. Y.) 333. See also Mayer *v.* McLure, 36 Miss. 389, 72 Am. Dec. 190.

Infants — Death of next friend.— Where an estate was sold on the petition of infant owners by "their father, friend, and natural guardian"— such father being dead, the infants are the proper plaintiffs in a writ of error to reverse the decree. McKee *v.* Hann, 9 Dana (Ky.) 526. See also Power *v.* Barbee, 8 Dana (Ky.) 154; Coger *v.* Coger, 2 Dana (Ky.) 270.

On the death of a sole trustee of an express trust pending an appeal in chancery from a decree obtained by him, the appeal must be revived against his successors in the trust who were appointed in his stead. McDougald *v.* Carey, 38 Ala. 320. See also Losey *v.* Bond, 81 Ind. 510.

72. In the latter case, the legal representatives of the decedent are the proper parties to prosecute or defend the proceedings on review. Cake *v.* Woodbury, 3 App. Cas. (D. C.) 60. See also Title Guarantee, etc., Co. *v.* Holverson, 95 Ga. 707, 22 S. E. 533; Hardy *v.* Irwin, 10 La. Ann. 703. *Compare* Wentworth *v.* Wentworth, 12 Vt. 244.

c. Procedure for Revival or Substitution — (1) *In General.* The procedure for revival or substitution of parties, in the event of the death of a party to a suit or action, is determined by the statutes of the several states.[73] The revival and substitution is accomplished, in some jurisdictions, by filing the writ and transcript in the appellate court, and citing the parties to appear;[74] in others, by motion and order in the appellate court;[75] in others, by petition and prayer to answer;[76] in others, by suggestion of death and issuance, by appellate court, of a writ of scire facias;[77] and in others by suing out a writ of error and citing the parties to appear.[78]

73. See the statutes of the several states; and 2 Cent. Dig. tit. "Appeal and Error," § 1858 *et seq.*; and *infra*, note 74 *et seq.*

Continuance to allow a revival.— Where, pending an appeal from an order of the special term denying a motion, the death of a party respondent appeared by suggestion in the points of counsel, the hearing was directed to stand over to enable appellant to bring before the court the proceedings in revivor, or to bring the representatives of the deceased before the court. Jay *v.* De Groot, 1 Hun (N. Y.) 118.

Declaration of authorization by counsel.— In Stafford *v.* Mead, 9 Rob. (La.) 142, it was held that a suggestion of the appellee's death before commencement of the action, made by appellant, will not be noticed where the opposing counsel declares in open court that he is authorized to appeal for the representatives of the deceased, and waives the right to have them called upon to defend the cause. The objection, to have weight, should have come from them.

Denial of capacity to prosecute.— If appellant's death be suggested to the supreme court and, upon leave given, the executor be cited to prosecute the appeal, but denies his capacity, the issue must be sent for trial to the court below. Anselm *v.* Wilson, 8 La. 35.

In Ohio, independently of statute, the supreme court has power, in the exercise of a sound discretion, to direct the revivor of a proceeding in error. Black *v.* Hill, 29 Ohio St. 86.

Laches of petitioner.— In Matter of Pearsall, 58 Hun (N. Y.) 610, reported in full in 12 N. Y. Suppl. 604, 25 N. Y. St. 202, on an application for leave to revive an appeal alleged to have been taken from an order appointing an additional trustee under a will, the evidence that an appeal had been taken, or that notice of appeal had been served on the opposing parties, being very indefinite and uncertain, and it appearing that three years had elapsed since the order was made, it was held that the application was properly denied.

Power of clerk to issue writ.— If a party dies after judgment in the court below, the clerk of that court cannot issue a writ of error. Wesson *v.* Crook, 24 Ala. 478; Sewall *v.* Bates, 2 Stew. (Ala.) 462.

74. By filing writ and transcript.— *Ex p.* Norris, 2 Ala. 385. And see Wise *v.* Brocker, 1 Colo. 550.

75. By motion and order.— In some states revival and substitution may be had, on motion to the appellate court, where the death takes place pending appeal or writ of error. Hyde Park Invest. Co. *v.* Atchison First Nat. Bank, 56 Kan. 49, 42 Pac. 321; McCurdy *v.* Agnew, 8 N. J. Eq. 728; Daniel *v.* Robinson, 1 Wash. (Va.) 154; Strong *v.* Eldridge, 8 Wash. 595, 36 Pac. 696.

By conditional order.—In Ohio, proceedings in error may be revived against the representative of a deceased party by a conditional order. Foresman *v.* Haag, 37 Ohio St. 143; Pavey *v.* Pavey, 30 Ohio St. 600; Black *v.* Hill, 29 Ohio St. 86.

76. By petition and prayer to answer.— Renwick *v.* Cooper, 10 Paige (N. Y.) 303; Hanover *v.* Sperry, 35 Ohio St. 244, in which latter case it was held that the petition must be verified.

77. By scire facias.— *Alabama.*— Dettis *v.* Taylor, 6 Port. (Ala.) 333. But see Wesson *v.* Crook, 24 Ala. 478, in which it was held, under Ala. Civ. Code, § 3039, that, when either party to a judgment dies after judgment and before appeal taken thereon, an appeal may be prosecuted in the name of, or against, the legal representatives of the deceased on producing evidence to the clerk, judge of probate, etc., of the death of the party, and the grant of letters testamentary. In such a case the parties are made in the court below.

Delaware.— Newcastle County Common *v.* Holcomb, 1 Houst. (Del.) 293.

Mississippi.— Mayer *v.* McLure, 36 Miss. 389, 72 Am. Dec. 190.

Tennessee.—Huff *v.* Miller, 2 Swan (Tenn.) 84.

Virginia.— Keel *v.* Herbert, 1 Wash. (Va.) 138.

78. By writ and citation from appellate court.— If leave to revive against a decedent's representatives is refused below, the proper practice, in the supreme court of the United States, is to sue out a writ of error from that court against such representatives, citing them to appear at the next term. McClan *v.* Boon, 6 Wall. (U. S.) 244, 18 L. ed. 835.

Waiver and consent.—The legal representatives of a deceased party may waive formal notice, and consent to an immediate revival of the proceedings, which may then proceed to final issue. Smith *v.* Allen, 5 Day (Conn.) 337; Pruden *v.* Mansfield, 2 West. L. Month. 577, 2 Ohio Dec. 385.

Where no administration has been granted.— A party desiring to appeal or sue out a writ of error against an opposing party who has died after judgment or decree, and over whose estate no administrator has been appointed, should apply to the proper court for

(II) *Method of Suggesting Death.* The method of suggesting the death of a party and notifying interested parties, depending, as it does, upon the statutes of the various states, is not uniform, and no general rule can be laid down upon the subject.[79]

(III) *Proof of Death and Appointment of Representatives.* There must not only be adequate proof of a party's death, but also of the appointment and qualification of his personal representatives.[80]

(IV) *Persons Required or Entitled to Revive.* Where a party to a suit or action dies, whether such death occur before or after the perfection of an appeal or writ of error, the persons interested in the prosecution of the appellate proceedings are the proper parties to revive the cause.[81]

(V) *In What Court Prosecuted.* The proceedings for revival or substitution must be prosecuted in the lower court, where the death of a party occurs before the perfection of an appeal or proceedings in error;[82] but where a party

the appointment of an administrator, against whom a revivor may then be had. Richardson *v.* Williams, 5 Port. (Ala.) 515.

79. *Alabama.*— Wesson *v.* Crook, 24 Ala. 478 (prosecution of appeal under Ala. Civ. Code, § 3039); Bettis *v.* Taylor, 6 Port. (Ala.) 333 (motion to appellate court, and scire facias to show cause why writ shall not issue).

California.— Judson *v.* Love, 35 Cal. 463, suggestion of death by affidavit.

Delaware.— Newcastle County Common *v.* Holcomb, 1 Houst. (Del.) 293, scire facias.

Illinois.— West *v.* Biggs, 26 Ill. 533, ten days' notice to adverse parties required before grant of a rule of joinder in error.

Iowa.— In Barney *v.* Barney, 14 Iowa 189, it was held that the entry of record, in the supreme court, of a suggestion of death of a party to an action and a continuance for notice to the survivor does not of itself operate as a revivor of the cause.

Kansas.— Guess *v.* Briggs, 54 Kan. 32, 37 Pac. 121, notice of application for revivor, to be served in the same manner, and returned within the same time, as a summons.

Michigan.— Van Valkenburg *v.* Rogers, 17 Mich. 322, by service of copy of writ.

Mississippi.— Mayer *v.* McLure, 36 Miss. 389, 72 Am. Dec. 190, by scire facias ad audiendum errores.

New Jersey.— Peer *v.* Cookerow, 13 N. J. Eq. 136, by bill in the nature of bill of revivor.

New York.— Shaler, etc., Quarry Co. *v.* Brewster, 32 N. Y. 472 (by affidavit); Jauncey *v.* Rutherford, 9 Paige (N. Y.) 273 (by petition and notice).

Tennessee.— Foster *v.* Burem, 1 Heisk. (Tenn.) 783 (discussing and enumerating various modes of revivor); Huff *v.* Miller, 2 Swan (Tenn.) 84 (writ of error, scire facias).

Texas.—Teas *v.* Robinson, 11 Tex. 774, suggestion in writ and prayer for citation.

Virginia.—Keel *v.* Herbert, 1 Wash. (Va.) 138, by scire facias.

See 2 Cent. Dig. tit. "Appeal and Error," § 1859.

80. Magarrell *v.* Magarrell, 74 Iowa 378, 37 N. W. 961; Sickman *v.* Diamond, 34 La. Ann. 1218.

See 2 Cent. Dig. tit. "Appeal and Error," § 1860.

Certificate of appointment insufficient.—On the death of plaintiff, and the dismissal of his petition for appeal for want of prosecution, no offer to revive having been made, plaintiff's administrator cannot appeal from the judgment by merely filing in the appellate court, with a copy of the judgment, a certificate of the county court clerk showing his appointment as administrator. This is not sufficient to show his right to appeal. Buckler *v.* Brewer, 13 Ky. L. Rep. 236.

In Colorado, if, after judgment, plaintiff die, defendant, in suing out a writ of error, may make the decedent's personal representative a party without preliminary proof of the death of the original party, or the appointment of the person sued. Wise *v.* Brocker, 1 Colo. 550.

81. Raine *v.* State Bank, 4 Gratt. (Va.) 150; and see also 2 Cent. Dig. tit. "Appeal and Error," § 1861.

Where an appellee dies after an appeal is perfected and before the filing of the record in the supreme court, the law does not require his executor or administrator to enter an appearance; but it is the duty of appellant to get such executor or administrator into court by the service of a writ or notice. Palmer *v.* Gardiner, 77 Ill. 143. See also Anderson *v.* White, 10 Paige (N. Y.) 575, in which the successful party below had died before the institution of appellate proceedings, and it was held that the adverse party might revive the suit, in case the representatives of the decedent should neglect to do so, for the purpose of enabling defendant to appeal, if he had no other remedy, and an appeal would lie. But see Teas *v.* Robinson, 11 Tex. 774, in which it was held that where, after obtaining judgment in the district court, plaintiff dies before defendant prosecutes his writ of error, defendant cannot revive the judgment against himself in favor of the representatives of the deceased in order to prosecute the writ of error. The proper practice in such a case is to sue out the writ of error, stating in the petition the fact of plaintiff's death, and pray a citation to the party authorized by law to represent and maintain such plaintiff's interests.

82. *Ex p.* Trapnall, 29 Ark. 60; Thomas *v.* Thomas, 57 Md. 504. But see Foresman *v.*

dies after the cause has been removed to the appellate court by a perfected appeal or writ of error, that court is the proper one in which to prosecute proceedings for revival or substitution.[83]

d. Time for Revival or Substitution — (I) *In General* — (A) *Discretion of Court.* Where not regulated by statute or by rules of court, the time within which proceedings for revival or substitution of parties are to be commenced is limited only by the discretion of the court.[84]

(B) *Laches.* In those jurisdictions where no limitation is fixed by statute or rules of court, an application to revive or substitute parties may be refused by the court, in the exercise of a sound discretion, where the applicant has been guilty of laches in the institution of the proceedings.[85]

(II) *Limitations by Statute or Rules of Court.* In some states a limitation as to the time within which such proceedings may be instituted has been fixed by statute, and a failure to apply for a revival or substitution of parties within the prescribed period will usually be fatal.[86] In other states, rules of

Haag, 37 Ohio St. 143, in which it was held that the revivor may be in the supreme court, though the party died before the reservation of the case by the district court.

See 2 Cent. Dig. tit. "Appeal and Error," § 1862.

83. Lyons *v.* Roach, 72 Cal. 85, 13 Pac. 151; Hastings *v.* McKinley, 8 How. Pr. (N. Y.) 175; Wayne Justices *v.* Crawford, 8 N. C. 16. *Compare* Reid *v.* Strider, 7 Gratt. (Va.) 76, 54 Am. Dec. 120, in which it was held that it is not necessary to revive a cause in the supreme court on the death of one of the parties pending appeal, but the cause may be revived when it is sent to the court below, after final judgment.

After judgment on appeal.— In Latham *v.* Hodges, 35 N. C. 267, it was held that where an appeal is taken to the supreme court, and a final judgment rendered there, a writ of error coram nobis, upon the ground that one of the parties died before the trial in the supreme court, cannot be allowed in that court.

Where a cause is in the appellate court on a special or feigned issue only, the lower court has jurisdiction of questions arising from the death of a party. Matter of Hicks, 2 Code Rep. (N. Y.) 128. This case was an appeal from the decree of the surrogate refusing to admit a will to probate. The decree was set aside and a feigned issue awarded, and the case remained in the supreme court, general term, only for the purpose of trying such issue. Upon the death of appellant it was held that the question whether the appeal abated could be disposed of only in the surrogate's court.

84. *Alabama.*— Evans *v.* Boggs, Minor (Ala.) 354.

Louisiana.— Bell *v.* Mix, 17 La. 467.

Missouri.— Mathewson *v.* St. Louis, etc., R. Co., 44 Mo. App. 97.

New York.— Shaler, etc., Quarry Co. *v.* Brewster, 32 N. Y. 472; Holcomb *v.* Hamilton, Col. & C. Cas. (N. Y.) 67, 1 Johns. Cas. (N. Y.) 29.

Ohio.— Black *v.* Hill, 29 Ohio St. 86.

Virginia.— Hughes *v.* Johnston, 12 Gratt. (Va.) 479.

United States.— Noonan *v.* Bradley, 10 Wall. (U. S.) 121, 20 L. ed. 279; Phillips *v.* Preston, 11 How. (U. S.) 294, 13 L. ed. 702.

See 2 Cent. Dig. tit. "Appeal and Error," § 1863.

In Illinois, where the death of an appellant is suggested, and his administrator is made a party, such administrator is entitled to a continuance to the next term. Warren *v.* Ball, 40 Ill. 117.

85. *Alabama.*— Evans *v.* Boggs, Minor (Ala.) 354, abatement upon the failure of representative to appear at next term after suggestion of death and order for revival.

Louisiana.— Bell *v.* Mix, 17 La. 467, dismissal upon expiration of more than twelve months after leave granted to make necessary parties.

Missouri.— Mathewson *v.* St. Louis, etc., R. Co., 44 Mo. App. 97, dismissal after expiration of two years.

Ohio.— Black *v.* Hill, 29 Ohio St. 86.

Virginia.— Hughes *v.* Johnston, 12 Gratt. (Va.) 479. In this case an interlocutory decree was rendered on June 1, 1836, confirming a contract of sale, and a conveyance of the land sold was directed, and the case continued until 1855 without any further proceedings beyond the suggestion of the death of one of the parties and the marriage of another. The court refused to act upon the appeal lest it should do injustice.

United States.— Noonan *v.* Bradley, 10 Wall. (U. S.) 121, 20 L. ed. 279, refusal of motion to set aside a decree in favor of an administrator who had been substituted as appellee without opposition after the expiration of nine terms from date of decree. Phillips *v.* Preston, 11 How. (U. S.) 294, 13 L. ed. 702, abatement of writ upon expiration of four years after leave granted to substitute.

Conditional order.— Where several terms have elapsed since the suggestion of plaintiff's death and the making of an order authorizing the revivor of the action in the name of the heirs, and without appearance by such heirs or anyone authorized to represent them, the court will, on motion, order a dismissal upon the failure of the heirs to appear at the next term. Martin *v.* Williams, 3 La. Ann. 582.

86. In Kansas, the period is fixed at one year, unless the adverse party consents to a revival or substitution after the lapse of such period. Kelley *v.* Degeer, (Kan. 1896) 44

court have been adopted regulating the time within which revival or substitution of parties may be had, and a failure to comply with the provisions of such rules may entail a dismissal.[87]

(III) *After Final Judgment in Appellate Court.* Motions for revival or substitution of parties will not be entertained after judgment has been rendered in the appellate court, since the appeal is no longer pending.[88]

E. Intervention or Addition of New Parties. The practice as to the intervention or addition of new parties in an appellate court is not uniform. In some jurisdictions, the power to allow intervention is exercised as one inherent in the court, or enuring under statutory authority;[89] while, in other jurisdictions, the power is denied.[90]

Pac. 684; Tibbetts *v.* Deck, 41 Kan. 492, 21 Pac. 586; Kuhnert *v.* Conde, 39 Kan. 265, 18 Pac. 193; Houghton *v.* Lannon, 1 Kan. App. 510, 40 Pac. 819.

In Maryland.— See Carroll *v.* Bowie, 7 Gill (Md.) 34, construing Md. Acts (1815), c. 149, § 6, and Md. Acts (1806), c. 90, § 11.

In North Carolina.— Before end of first five days of next term. Clark's Code Civ. Proc. N. C. (1900), pp. 938, 939.

In Tennessee, revivor is allowed when the application is made at any time during the second term after the suggestion of the death, and at any time after the second term, if suggestion be made before the abatement is entered. Churchwell *v.* East Tennessee Bank, 1 Heisk. (Tenn.) 780; Sappington *v.* Philips, 1 Yerg. (Tenn.) 105; Sappington *v.* Crockett, 1 Yerg. (Tenn.) 103.

87. Atlanta City Brewing Co. *v.* Hare, 73 Ga. 17; Rayne *v.* O'Brien, 12 La. Ann. 400.

Conditional order.— Where a suit abated, after appeal, by the death of one of appellants, which deceased party had previously assigned all his interest in the suit, it was held that, the suit not having been revived, either by the surviving appellant or the assignees of the party deceased, within the time mentioned in the statute, such parties must be directed to revive within a limited time, or the bill must be dismissed, with costs, such costs to be paid by the surviving appellant. Renwick *v.* Cooper, 10 Paige (N. Y.) 303.

When limitation begins to run.— Where defendant dies after the argument of an appeal and before the decision, and the judgment of affirmance is thereupon entered *nunc pro tunc* as of a day before his death, the thirty days limited by Rule 18 for turning the case into a bill of exceptions do not begin to run until the personal representatives of the deceased are made parties to the suit. The plaintiff may meanwhile proceed to collect his judgment, and the representatives must, at their peril, cause themselves to be made parties, or the judgment must be enforced against them. Beach *v.* Gregory, 2 Abb. Pr. (N. Y.) 203, 3 Abb. Pr. (N. Y.) 78.

88. Aultman *v.* Utsey, 35 S. C. 596, 14 S. E. 351. See also Outlaw *v.* Cherry, 88 Tenn. 367, 12 S. W. 725, in which it was held that where defendant appealed from a judgment, and, pending the appeal, died, and the judgment was affirmed without the court having notice of his death, the supreme court would not revive the action on scire facias after such action had become barred by the statute of limitations [Milliken & V. Code Tenn. § 381], against the deceased's administrator, the judgment not being void on its face, and the case having ceased to be pending since the rendition of the judgment.

89. *Delaware.*— Gregg *v.* Banner, 2 Harr. (Del.) 407.

Georgia.— Macon Nav. Co. *v.* Schofield, 111 Ga. 881, 36 S. E. 965.

Louisiana.— Planters' Bank *v.* Bass, 2 La. Ann. 430.

Minnesota.— Keough *v.* McNitt, 7 Minn. 29.

New York.— See Glenville Woolen Co. *v.* Ripley, 11 Abb. Pr. N. S. (N. Y.) 87.

North Carolina.— Hocutt *v.* Wilmington, etc., R. Co., 124 N. C. 214, 32 S. E. 681.

Ohio.—Morgan *v.* Spangler, 20 Ohio St. 38; Babcock *v.* Camp, 12 Ohio St. 11; Barr *v.* Chapman, 5 Ohio Cir. Ct. 69 (decided under the provisions of Ohio Rev. Stat. § 5225). *Compare* Moore *v.* Lancaster, Wright (Ohio) 35.

South Carolina.— Gibbs *v.* Greenville, etc., R. Co., 14 S. C. 385; Whaley *v.* Charleston, 8 Rich. (S. C.) 344.

Vermont.— Wyman *v.* Wilcox, 63 Vt. 487, 21 Atl. 1103, decided under Vt. Rev. Laws, § 939, as amended by Vt. Acts (1888), No. 47.

Virginia.— Cogbill *v.* Cogbill, 2 Hen. & M. (Va.) 467.

Canada.— Dube, etc., 6 Quebec Q. B. 424.

See 2 Cent. Dig. tit. "Appeal and Error," § 1836.

It is too late to intervene in a case finally decided on its merits by the supreme court, when the contest still pending relates merely to the execution of the judgment. Thompson *v.* Mylne, 4 La. Ann. 212.

Appeals improperly taken.— Where an appeal, from an order refusing to ratify a sale made by trustees appointed by the court, is taken by the trustees only, it should be dismissed, the trustees being merely ministerial officers, and having no appealable interest in the case; and the parties to the original bill will not be permitted to become parties to the appeal. Hallam *v.* Oppenheimer, 3 App. Cas. (D. C.) 329.

90. *California.*— Leonis *v.* Biscailuz, 101 Cal. 330, 35 Pac. 875.

F. Transfer or Devolution of Interest[91]— **1. In General.** Where a party to an appeal or writ of error transfers, or otherwise loses, his interest in the subject-matter in controversy, the appeal will, as a rule, be dismissed when the fact is properly brought to the attention of the appellate court.[92]

2. Bankruptcy. The bankruptcy, after judgment, of either plaintiff or defendant cannot be made available on appeal by plea in abatement of the suit in the supreme court.[93]

3. Expiration of Corporate Charter. Where, pending an appeal or writ of error, a corporation, which is one of the parties, has gone out of existence by reason of the expiration of its charter, the appellate court will direct the dismissal of the cause.[94]

4. Marriage. The marriage of a *feme sole* party to a suit or action will not have the effect of abating an appeal or writ of error perfected before her marriage.[95]

5. Removal of Parties in Official or Representative Capacity. The removal of parties in a representative or official capacity will not affect their right to

Illinois.— Blatchford *v.* Newberry, 100 Ill. 484.

New Jersey.— New Jersey Franklinite Co. *v.* Ames, 12 N. J. Eq. 507.

Tennessee.— Cowan *v.* Lowry, 7 Lea (Tenn.) 620.

United States.— U. S. *v.* Patterson, 15 How. (U. S.) 10, 14 L. ed. 578, wherein it is said that it is not the practice of the supreme court of the United States to allow intervention by persons not parties in the court below.

As to right of intervener to review see *supra*, IV, A, 2, a, (IV).

Intervention by an original party.— In Cowan *v.* Lowry, 7 Lea (Tenn.) 620, the defendant's land was found insufficient to satisfy an execution, and the officer garnisheed A, who appealed from the judgment against him. It was held that defendant could not intervene on appeal in the garnishment proceedings. If he wished the judgment reviewed he, himself, should have appealed.

91. See Abatement and Revival, IV.

As to right of review by party whose interest has determined see *supra*, IV, A, 1, b, (V).

92. Faucher *v.* Grass, 60 Iowa 505, 15 N. W. 302; Churchill *v.* Grundy, 5 Dana (Ky.) 99; Fleischman *v.* Fleischman, 80 Hun (N. Y.) 90, 30 N. Y. Suppl. 22, 61 N. Y. St. 772; Yeaw *v.* Searle, 2 R. I. 164.

See 2 Cent. Dig. tit. "Appeal and Error," § 1837.

Conditional transfer of interest.— In Maxwell *v.* Bryant, 10 Ky. L. Rep. 174, 10 S. W. 279, appellant transferred his interest in the property in controversy to a third party for a money consideration, and upon the further condition that the transferee was to pay certain counsel fees and costs. The transferee and appellees moved to dismiss the appeal, but there was no tender or offer to pay the stipulated sum; it was held that a compliance with the terms of settlement must be shown before the appeal would be dismissed over the objections of appellant and his counsel.

That one of plaintiffs has become defendant's administrator since the petition in error will not affect the right of the other parties to the judgment in error, whatever effect it may have on the further prosecution of the cause. Gebhart *v.* Sorrels, 9 Ohio St. 461.

93. And this is true though the bankruptcy may have occurred, and discharge may have been granted, before the filing of the petition for appeal, or of the record for writ of error. Booker *v.* Adkins, 48 Ala. 529; Longley *v.* Swayne, 4 Heisk. (Tenn.) 506 note. See, generally, Bankruptcy; and *supra*, IV, A, 1, b, (V), (B).

94. Logan *v.* Western, etc., R. Co., 87 Ga. 533, 13 S. E. 516; Rider *v.* Nelson, etc., Union Factory, 7 Leigh (Va.) 154, 30 Am. Dec. 495; Greenbrier County *v.* Livesay, 6 W. Va. 44. *Compare* Alexandria Bank *v.* Patton, 1 Rob. (Va.) 528, in which it was held that where, before the expiration of its charter, a corporation assigns its rights in the subject of controversy, the court, upon being satisfied as to the assignment, would permit the case to proceed without noticing on the record the dissolution of the corporation. See also Hodnett *v.* Central R., etc., Co., 68 Ala. 562; and 2 Cent. Dig. tit. "Appeal and Error," § 1840.

95. U. S. Mutual Acc. Assoc. *v.* Weller, 30 Fla. 210, 11 So. 786; Townshend *v.* Townshend, 10 Gill & J. (Md.) 373.

Prosecution of appeal in married name.— Under Ala. Civ. Code (1896), § 37, the marriage of a *feme sole* will not abate an action brought by her; but, upon suggestion of record of her marriage, the action must subsequently be prosecuted in her married name, and if, after such suggestion, an appeal is brought in her maiden name, it will on motion be dismissed. Lamkin *v.* Dudley, 34 Ala. 116.

Husband a necessary party to fieri facias.— Where a *feme sole* executrix obtained a judgment from which there was an appeal, and, pending the appeal, she married, it was held that a scire facias was necessary to make the husband a party before a fieri facias could regularly be issued on a judgment of affirmance. Townshend *v.* Townshend, 10 Gill & J. (Md.) 373.

prosecute a pending appeal or writ of error, or even to commence appellate proceedings subsequent to removal.[96]

6. Substitution of Parties. Where the interests of a party to an appeal or writ of error devolve upon another, either by operation of law or by act of the parties, a person acquiring such interests will usually be allowed to prosecute or defend the appeal or writ in place of the original party.[97]

G. Designation and Description — 1. In General. All parties to an appeal or writ of error should be designated by name, and the record should show their respective positions as appellants or plaintiffs in error, or as appellees, respondents, or defendants in error. No one not specifically named and designated can be regarded as a party to the appellate proceedings.[98] Appeals or writs or error

96. Overseers of Poor *v.* Beedle, 1 Barb. (N. Y.) 11; Place *v.* Hayward, 55 N. Y. Super. Ct. 208. *Compare* Kerns *v.* Dean, 77 Cal. 555, 19 Pac. 717, in which it was held that where an administrator defendant, pending his appeal, is removed, his successor can prosecute the appeal and defend the action. See also Iowa L. & T. Co. *v.* Holderbaum, 86 Iowa 1, 52 N. W. 550; 2 Cent. Dig. tit. "Appeal and Error," § 1838; and *supra*, IV, A, 1, b, (v), (E); *infra*, VI, H, 6.

97. *California.*— Kerns *v.* Dean, 77 Cal. 555, 19 Pac. 817.

Indiana.— Wolfe *v.* Pirree, 23 Ind. App. 591, 55 N. E. 872.

Iowa.— Iowa L. & T. Co. *v.* Holderbaum, 86 Iowa 1, 52 N. W. 550.

Kansas.— McKinnis *v.* Scottish American Mortg. Co., 55 Kan. 259, 39 Pac. 1018.

Louisiana.— Gidde : *v.* Mobley, 37 La. Ann. 900.

Texas.— Gulf, etc., R. Co. *v.* Mitchell, 21 Tex. Civ. App. 463, 51 S. W. 662.

United States.— Adams *v.* Johnson, 107 U. S. 251, 2 S. Ct. 246, 27 L. ed. 386.

See 2 Cent. Dig. tit. "Appeal and Error," § 1841.

An assignee in bankruptcy of an appellant in the supreme court, who has become bankrupt since his appeal was taken, may be substituted as appellant in the case. Herndon *v.* Howard, 9 Wall. (U. S.) 664, 19 L. ed. 809, 40 How. Pr. (N. Y.) 288.

New parties interested to lose suit.— But only the most positive law can justify the court in permitting substitution where the parties substituted have an interest to lose the suit they ask to be permitted to prosecute. Ward *v.* Brandt, 9 Mart. (La.) 625.

Where an administrator defendant is removed pending his appeal, his successor can prosecute the appeal and defend the action. Kerns *v.* Dean, 77 Cal. 555, 19 Pac. 817. See also Iowa L. & T. Co. *v.* Holderbaum, 86 Iowa 1, 52 N. W. 550.

Procedure.— An order substituting one party for another will not be made by an appellate court upon a mere suggestion. There must be proof, or an admission by the adverse party, of the facts claimed, in order to make it proper to substitute a new party. Kemper *v.* King, 11 Mo. App. 116. See also Herndon *v.* Howard, 9 Wall. (U. S.) 664, 19 L. ed. 809, 40 How. Pr. (N. Y.) 288.

Contested motion for substitution.—An appellate court will not entertain a contested motion for the substitution of an assignee as party to the suit, especially where the assignor retains an interest in the result of the appellate proceedings, even though such interest may refer only to the costs already accrued. Golden Terra Min. Co. *v.* Smith, 2 Dak. 374, 11 N. W. 97.

Where a substitution is allowed on motion of the adverse party, there must be proper notice to the party substituted. Such notice will stand in the place of process, and, without it, the court will acquire no jurisdiction of the person. Sturtevant *v.* Milwaukee, etc., R. Co., 11 Wis. 61. See also La Junta, etc., Canal Co. *v.* Hess, 25 Colo. 513, 55 Pac. 729 [vacating order granted in La Junta, etc., Canal Co. *v.* Ft. Lyon Canal Co., 25 Colo. 515, 55 Pac. 728], in which a notice of a motion for substitution was held insufficient where the time when it would be made was not stated.

98. *Alabama.*— De Graffenreid *v.* Pearsall, 1 Ala. 526.

Florida.— Continental Nat. Bldg., etc., Assoc. *v.* Miller, 41 Fla. 418, 26 So. 725; Alston *v.* Rowles, 13 Fla. 110.

Georgia.— Irvine's Georgia Music House *v.* Wynn, 107 Ga. 402, 33 S. E. 415; Cameron *v.* Sheppard, 71 Ga. 781; Beall *v.* Fox, 4 Ga. 403.

Indiana.— Barnett *v.* Bromley Mfg. Co., 149 Ind. 606, 49 N. E. 160; Washburn *v.* Kline, 47 Ind. 128. *Compare* Stewart *v.* Adam, etc., Co., (Ind. 1899) 55 N. E. 760.

Kentucky.— Mitchell *v.* Kinnaird, 17 Ky. L. Rep. 1250, 29 S. W. 309, 34 S. W. 226; Newcome *v.* Turner, 15 Ky. L. Rep. 573.

New York.— Kellett *v.* Rathbun, 4 Paige (N. Y.) 102.

North Carolina.— See Walton *v.* McKesson, 101 N. C. 428, 7 S. E. 566.

Change in entitlement of suit.— In New York, upon appeal from a decision or order of the vice-chancellor, the title of the suit is not changed upon appeal; but upon appeal from the decision of the circuit judge, when not acting as an officer of the court of chancery, or from the decision of a surrogate, all proceedings subsequent to the filing of the appeal must be entitled in the appeal cause. Hawley *v.* Donnelly, 8 Paige (N. Y.) 415.

See 2 Cent. Dig. tit. "Appeal and Error," § 1864 *et seq.*

Appeals in name of injured party.—Appeals should be prosecuted, as a rule, in the name

prosecuted by or against political divisions should be entitled in the names of such divisions, and not in the names of the officers through whom they sue or are sued.[99]

2. Disclosure of Name by Unknown Judgment Defendant. Where the name of defendant below is unknown, upon an appeal by him from the judgment or decree rendered, he must disclose, and appeal in, his proper name.[1]

3. Partners. Appeals or writs of error, prosecuted by or against partnerships without setting out the names of the individual members, are nugatory, and should be dismissed.[2] *E converso*, a member of a firm cannot, in his individual capacity, prosecute an appeal where suit had been brought and judgment rendered in the court below in the name of the firm.[3]

4. Parties in Representative Capacity. Persons in a representative capacity, when prosecuting or defending an appeal or writ of error, should be properly described as parties in that capacity,[4] though it has been held sufficient where the record shows the representative capacity of the party, even if he is not so designated.[5]

of the party injured, as appellant. American Board of Com'rs' Appeal, 27 Conn. 344; Boal's Appeal, 2 Rawle (Pa.) 37.

Only those named are to be deemed parties to a writ of error. It is not enough to name some and describe the rest as "others." National Bank *v.* Newheart, 41 Fla. 470, 27 So. 297; Cameron *v.* Sheppard, 71 Ga. 781; Barnett *v.* Bromley Mfg. Co., 149 Ind. 606, 49 N. E. 160. *Compare* Frick Co. *v.* Falk, (Kan. App. 1899) 62 Pac. 167.

Parties designated in both capacities.— Where parties are designated in the record both as appellants or plaintiffs in error, and appellees, respondents, or defendants in error, but submit and brief their case in one capacity only, they must be regarded as parties only in that capacity. McKee *v.* Hungate, 99 Ind. 168.

99. Moon *v.* Cline, 11 Ind. App. 460, 39 N. E. 432. See Mathe *v.* Plaquemines Parish, 28 La. Ann. 77, in which it was held that when a judgment is against a parish, cited through the president of its police jury, and the appeal bond recites that "the above-bound parish of Plaquemines, cited through the president of the police jury thereof, shall prosecute," etc., it is the parish that is appellant, not the jury president. And see Meunier's Succession, 52 La. Ann. 79, 26 So. 776, 48 L. R. A. 77; and 2 Cent. Dig. tit. "Appeal and Error," § 1867.

Presumption as to name of parties.—Where remonstrants in a drainage proceeding signed themselves as "Hosmer & Hildreth," an appeal by Stephen R. Hosmer and Charles C. Hildreth was presumably by the parties entitled thereto. Munson *v.* Blake, 101 Ind. 78.

Refusal of appellant to join.— Where a person is named in the assignments of error as an appellant, and his name nowhere appears as appellee, upon his refusal to join in the appeal he cannot be considered as a party to it. Walls *v.* Baird, 91 Ind. 429.

Under a statute providing that the owners of a vessel may be sued in the name of the vessel, it has been held that a writ of error, prosecuted by such owners from an adverse judgment, cannot be in the name of the vessel, but must be in the name of the owners. Steamboat Kentucky *v.* Hine, 1 Greene (Iowa) 379.

1. Fuller *v.* Unknown Owner, 9 Iowa 430.

Where one sued as "John Doe" appears, discloses his name, and defends the suit, he has the right to appeal in his true name from a judgment against "John Doe." McCabe *v.* Doe, 2 E. D. Smith (N. Y.) 64.

2. Hanauer *v.* Oberlin, 15 Ky. L. Rep. 878; Freeborn *v.* The Ship Protector, 11 Wall. (U. S.) 82, 20 L. ed. 47; The Spark *v.* Lee Choi Chum, 1 Sawy. (U. S.) 713, 22 Fed. Cas. No. 13,206. *Compare* Garland *v.* Bartels, 2 N. M. 1, in which it was held that the description of defendants on an appeal by their firm-name merely, where they had been described by their individual names in the action below, though erroneous, was not ground for reversal, since the irregularity in no wise adversely affected plaintiff. And see Marshal *v.* Sims, McGloin (La.) 223, in which it was held that, where defendants are sued as an existing firm, and judgment is rendered against said firm and its members *in solido*, they may appeal and give bond in the firm-name, though the firm has in fact been dissolved.

3. Where suit is brought and judgment rendered against C B & Co., a firm doing business as the B S Ice Company, a petition in error cannot be prosecuted by C B individually. Buschhausen *v.* Schlick, 2 Cinc. L. Bul. 95.

See 2 Cent. Dig. tit. "Appeal and Error," § 1865.

4. Bazergue *v.* Faucheux, 15 La. Ann. 393. See also Roundtree *v.* Stone, 81 Tex. 299, 16 S. W. 1035; and 2 Cent. Dig. tit. "Appeal and Error," § 1866.

Wardens and vestry are the known and recognized representatives and committees of Episcopal societies; and it is immaterial whether appeals from probate decrees, taken for the benefit of such societies, are taken in the names of such societies, or in the names of such wardens and vestry. Trinity Church *v.* Hall, 22 Conn. 125.

5. Chandler *v.* Cushing-Young Shingle Co., 13 Wash. 89, 42 Pac. 548.

5. CLERICAL ERRORS. Mere clerical errors in naming the parties to an appeal, which errors, however, cannot mislead, are not sufficient cause for dismissal.[6]

H. Defects, Objections, and Amendments — 1. DETERMINATION OF PARTIES. The parties to an appeal or writ of error are determined from the record of the suit.[7]

2. MISJOINDER OF PARTIES[8] — **a. Appellants or Plaintiffs in Error.** The joinder of a person not a party to the action below as an appellant or plaintiff in error will not invalidate an appeal or writ of error as to the proper parties.[9]

b. Appellees or Defendants in Error. An appeal or writ of error will be dismissed, on motion, for a misjoinder of appellees, respondents, or defendants in error.[10]

3. NON-JOINDER OF PARTIES[11] — **a. In General.** Unless joinder is essential to the jurisdiction of the appellate court, the non-joinder of parties, either as appellants or plaintiffs in error, or as appellees, respondents, or defendants in error, will generally have no further effect than to preclude any investigation or adjudication which will affect the rights and liabilities of the parties not joined.[12]

b. Defect of Parties Below. A want of proper parties below appearing upon

Appeal by heir in name of representative.— Where the personal representative of a decedent refuses to appeal from a judgment affecting the estate, an heir may appeal in the name of such representative, and is entitled to the management and control of the appeal. King *v.* Gridley, 69 Mich. 84, 37 N. W. 50; Fritz *v.* Evans, 13 Serg. & R. (Pa.) 9.

Appeal in name of decedent's estate.— On an appeal from an allowance or disallowance by the lower court of a claim against the estate of a deceased person, the cause may properly be entitled by the name of the claimant as plaintiff, with the estate of the decedent, giving such decedent's name, as defendant. McKnight *v.* McKnight, 20 Wis. 446.

6. Hendry *v.* Crandall, 131 Ind. 42, 30 N. E. 789; Homer College *v.* Vaughn, 18 La. Ann. 525. See also Smith *v.* Chaney, 93 Me. 214, 44 Atl. 897.

Omission of word "defendants."—In Adams *v.* Law, 17 How. (U. S.) 417, 15 L. ed. 149, it was held that a mere clerical error, such as the omission of the word "defendants," will not sustain a motion to dismiss an appeal on the ground that the parties to the action are not parties to the appeal.

7. Bozeman *v.* Cale, 139 Ind. 187, 35 N. E. 828.

Defective record cured by affidavit.— The omission of the record to show that plaintiffs are parties to the suit is cured by an affidavit, made by plaintiffs on motion to dismiss the appeal, wherein they describe themselves as parties to the suit. Sewell *v.* Laurance, 2 Tex. Unrep. Cas. 376.

It is the petition for a writ of error, and not the bond given to obtain the supersedeas, which gives the court jurisdiction over the parties on an appeal, and from the petition the parties to the writ are to be determined. Thompson *v.* House, 23 Tex. 178.

Variance between petition and writ.— Where a petition for a writ of error omits the name of one of the parties in whose favor the judgment was rendered, but the writ as issued contains such name, a motion to dismiss will not be granted. But if the writ of error omits to name such party, and he is not cited to appear, the motion will be granted. Summerlin *v.* Reeves, 29 Tex. 85.

In Kentucky, a statement of parties is required to be made on the transcript, and no one is a party to an appeal unless named as such in the statement (Reinhardt *v.* Louisville Banking Co., 17 Ky. L. Rep. 982, 33 S. W. 198; Hersperger *v.* Smith, 15 Ky. L. Rep. 605; Newcome *v.* Turner, 15 Ky. L. Rep. 573; Barnett *v.* Feichheimer, 5 Ky. L. Rep. 183); but the mere insertion of their names in the statement of parties will not make persons parties to the appeal when such persons have not excepted to the order appealed from. Daum *v.* Hackett, 10 Ky. L. Rep. 38. See also Alford *v.* Stanford, 13 Ky. L. Rep. 876.

8. As to amendment of defects or waiver of objections relating to misjoinder of parties see *infra*, VI, H, 6, 7.

As to dismissals for misjoinder of parties see *infra*, VI, H, 4, 5.

9. Walker *v.* Gibson, 35 Ill. App. 49; State *v.* Isabel, 40 La. Ann. 340, 4 So. 1. See also Hileman *v.* Beale, 115 Ill. 355, 5 N. E. 108; Willenborg *v.* Murphy, 40 Ill. 46; and 2 Cent. Dig. tit. "Appeal and Error," § 1868 *et seq.*

10. Brown *v.* Levins, 6 Port. (Ala.) 414; Davenport *v.* Fletcher, 16 How. (U. S.) 142, 14 L. ed. 879. But see Higgs *v.* Huson, 8 Ga. 317, in which it was held, under the Georgia act of Feb. 23, 1850, that a misjoinder of parties defendant in error might be cured by striking out the improper parties. And see, to like effect, Neher *v.* Armijo, 9 N. M. 325, 54 Pac. 236, under N. M. Comp. Laws (1897), § 2685, subsec. 94.

See 2 Cent. Dig. tit. "Appeal and Error," § 1868 *et seq.*

11. As to amendment of defects or waiver of objections relating to non-joinder of parties see *infra*, VI, H, 6.

As to dismissals for non-joinder of parties see *infra*, VI, H, 4, 5.

12. *Alabama.*— Craig *v.* Carswell, 4 Stew. & P. (Ala.) 267.

Illinois.— Culver *v.* Cougle, 62 Ill. App. 583.

Indiana.—Easter *v.* Acklemire, 81 Ind. 163.

Iowa.— Daniels *v.* Clark, 38 Iowa 556.

the face of the record requires a reversal or dismissal on appeal, unless the objection has been waived.[13]

c. Refusal of Co-Parties to Join. Where parties, after proper citation, refuse to join in an appeal or writ of error brought by one or more of their co-parties, the appeal or writ will not be dismissed on a suggestion of non-joinder.[14]

d. Uninterested or Formal Parties. The objection of defect of parties is not available on appeal in a case where the omitted parties are not interested in the result of the proceedings.[15]

4. DISMISSAL — a. In General. Unless sufficient cause is shown for the non-joinder of all parties against whom a joint judgment or decree has been rendered, the writ of error or appeal will be dismissed.[16]

Kentucky.— Seeley *v.* Mitchell, 85 Ky. 508, 9 Ky. L. Rep. 86, 4 S. W. 190.

Louisiana.— Lee *v.* His Creditors, 2 La. Ann. 599; Oliver *v.* Williams, 12 Rob. (La.) 180; Maigny *v.* Perret, 6 La. 695; McCalep *v.* Hart, 8 Mart. N. S. (La.) 155.

Mississippi.— Morton *v.* Simmons, 2 Sm. & M. (Miss.) 601.

Nevada.— Nesbitt *v.* Chisholm, 16 Nev. 39; Matter of Smith, 4 Nev. 254, 97 Am. Dec. 531.

New York.— Valentine *v.* Valentine, 2 Barb. Ch. (N. Y.) 430.

Ohio.— Athens First Nat. Bank *v.* Green, 40 Ohio St. 431; Glass *v.* Greathouse, 20 Ohio 503; Barr *v.* Chapman, 7 Ohio Cir. Ct. 364.

Tennessee.— Williams *v.* Palmer, 2 Baxt. (Tenn.) 488.

Texas.— Cannon *v.* McDaniel, 46 Tex. 303; Stokes *v.* Williams, 32 Tex. 211.

Wisconsin.—Williams *v.* Starr, 5 Wis. 534.

United States.— Sage *v.* Central R. Co., 93 U. S. 412, 23 L. ed. 933; Terry *v.* Merchants', etc., Bank, 93 U. S. 38, 23 L. ed. 794; McLeod *v.* New Albany, 66 Fed. 378, 24 U. S. App. 601, 13 C. C. A. 525.

See 2 Cent. Dig. tit. "Appeal and Error," § 1868 *et seq.*

Parties as to whom no adjudication has been had.— An appeal of one branch of a case will not bring into the appellate court parties whose cause has not been adjudicated in the court below, though such parties are necessary in the appellate court to enable it to render a decree. In such a case the appeal is a nullity and should be revoked on motion to the lower court. Dougherty *v.* Walters, 1 Ohio St. 201.

Separate appeals.— Where the sureties on a forthcoming bond have not joined with their principal in an appeal from the judgment against him, they will not be affected by the supreme court judgment, but may prosecute their writ of error for errors by the trial court in refusing to quash the writ of sequestration. Cheatham *v.* Riddle, 8 Tex. 162.

When the heirs of part of an intestate estate appeal from the allowance of a claim against the estate, the whole question is opened just the same as if all the heirs had joined in the appeal. Glenn *v.* Kimbrough, 70 Tex. 147, 8 S. W. 81.

13. Crickard *v.* Crouch, 41 W. Va. 503, 23 S. E. 727; Hill *v.* Proctor, 10 W. Va. 59. See also Friedman *v.* Podolski, 185 Ill. 587, 57 N. E. 818.

Remandment for amendment.— In Duncanson *v.* National Bank, 7 Mackey (D. C.) 348, it was held that a cause, defective for want of necessary parties below, would, upon motion, be remanded to the lower court for amendment of the pleadings.

Where a suit below is tried in the absence of some of the parties, and only as to those parties before the court, an appeal or writ of error may be prosecuted in the same form. Miltenberger *v.* McGuire, 15 La. Ann. 486.

14. Such parties will not, however, be entitled to the benefit of a reversal or modification of the judgment or decree appealed from. Pierce *v.* Chapman, 31 Ga. 674; Truman *v.* Scott, 72 Ind. 258. See also Olcott *v.* State, 10 Ill. 481, in which it was held that where a judgment is rendered against several tracts of land taken for taxes, and certain persons interested in the land join in a writ of error, the court will inquire into the regularity of the proceedings only so far as it relates to the lands of the parties before the court. To the same effect see Gage *v.* Bloomington Town Co., 37 Nebr. 699, 56 N. W. 491.

15. Flint, etc., Mfg. Co. *v.* Douglass Sugar Co., 54 Kan. 455, 38 Pac. 566; Richardson *v.* Great Western Mfg. Co., 3 Kan. App. 445, 43 Pac. 809; Denegre *v.* Mushet, 46 La. Ann. 90, 14 So. 348; McLeod *v.* New Albany, 66 Fed. 378, 24 U. S. App. 601, 13 C. C. A. 525.

Formal party.—In an action against a married woman to which her husband is made a formal party, as is required by the law of the state, a writ of error will not be dismissed, for failure to make him a party, where the citation has been served on him, and he was not a party to the judgment rendered in favor of the wife. Marchand *v.* Livaudais, 127 U. S. 775, 8 S. Ct. 1389, 32 L. ed. 324. See also Wachter's Case, 1 Walk. (Pa.) 267, where it was held that a judgment will not be reversed on appeal, for the non-joinder of the husband as a party, where the wife's coverture at the time of the judgment does not appear of record.

16. *Alabama.*— Garlick *v.* Dunn, 42 Ala. 404; Billinslea *v.* Abercrombie, 2 Stew. & P. (Ala.) 24.

Indiana.— Moore *v.* Franklin, 145 Ind. 344, 44 N. E. 459; Roach *v.* Baker, 145 Ind. 330, 43 N. E. 932, 44 N. E. 303; Ledbetter *v.* Winchel, 142 Ind. 109, 40 N. E. 1065. *Compare* Forsythe *v.* Hammond, 142 Ind. 505, 40 N. E. 267, 41 N. E. 950, 30 L. R. A. 576, in which it was held, under Burns' Anno. Stat.

b. Only as to Parties Not Joined or Improperly Joined. Appeals or writs of error may be dismissed on motion as to parties not joined, or improperly joined, who are not necessary to give jurisdiction to the appellate court, without affecting the proceedings as to the parties properly before the court.[17]

5. Withdrawal — a. In General. Where several persons have appealed or sued out a writ of error, any one of them, unless he is a necessary party, may dismiss as to himself, and leave the remaining appellants or plaintiffs in error to prosecute the suit.[18]

Ind. (1894), § 647, that where a co-party, who was not made an appellant and who did not decline to join, was, within the time for an appeal, notified of the appeal, the appeal would not be dismissed, the time having passed within which appeals might be taken.

Kansas.— Pratt *v.* Fairfield, 56 Kan. 144, 42 Pac. 350; Bain *v.* Connecticut Mut. L. Ins. Co., 3 Kan. App. 346, 40 Pac. 817. See also Richardson *v.* Great Western Mfg. Co., 3 Kan. App. 445, 43 Pac. 809. *Compare* Flint, etc., Mfg. Co. *v.* Douglass Sugar Co., 54 Kan. 455, 38 Pac. 566.

Kentucky.— Castleman *v.* Homes, 7 T. B. Mon. (Ky.) 591.

Louisiana.— State *v.* Wickliffe, 21 La. Ann. 755; Swearinger *v.* McDaniel, 12 Rob. (La.) 203. See also Osborn's Tutorship, 23 La. Ann. 178, and *compare* Cox *v.* Bradley, 15 La. Ann. 529, in which it was held that where an appeal has been brought up informally as to one appellant, but he has been made an appellee by his co-appellant, the appeal will not be dismissed.

Maryland.— Walter *v.* Baltimore Second Nat. Bank, 56 Md. 138.

Nebraska.— Curten *v.* Atkinson, 29 Nebr. 612, 46 N. W. 91; Hendrickson *v.* Sullivan, 28 Nebr. 790, 44 N. W. 1135.

North Carolina.— Dunns *v.* Jones, 20 N. C. 154; Hicks *v.* Gillian, 15 N. C. 217. *Compare* Stiner *v.* Cawthorn, 20 N. C. 501, in which it was held that if, upon an appeal by one alone of two or more parties to a judgment in the county court, the superior court proceeds in the cause, and renders a judgment therein against appellant, and he thereupon appeals to the supreme court, the latter court will not dismiss the appeal for want of jurisdiction to entertain it. To same purport see *Ex p. Moore*, 64 N. C. 90; Smith *v.* Cunningham, 30 N. C. 460; Donnell *v.* Shields, 30 N. C. 371.

Texas.— Young *v.* Russell, 60 Tex. 684; Greenwade *v.* Smith, 57 Tex. 195.

Washington.— Smith *v.* Beard, 21 Wash. 204, 57 Pac. 796.

Wisconsin.—Doty *v.* Strong, 1 Pinn. (Wis.) 165.

United States.— Simpson *v.* Greeley, 20 Wall. (U. S.) 152, 22 L. ed. 338; Hampton *v.* Rouse, 13 Wall. (U. S.) 187, 20 L. ed. 593.

See 2 Cent. Dig. tit. "Appeal and Error," § 1869 *et seq.*; and *infra*, XIV.

In Louisiana it is no ground for dismissal of an appeal that some of appellants have not perfected the appeal and given bonds. Where the appeal is taken in open court all parties not appellants are appellees. Coco *v.* Thieman, 25 La. Ann. 236; Sevier *v.* Sargent, 25 La. Ann. 220. See also Francis *v.* Lavine, 26 La. Ann. 311.

In Pennsylvania, if a joint judgment is entered against several joint plaintiffs and one of them appeals, and defendant enters plea as to the party appealing, all plaintiffs may stand on the appeal if they so desire. Godfrey *v.* Moosic Mountain, etc., R. Co., 3 Lack. Jur. (Pa.) 121.

In Vermont, if two or more are made defendants under the processes provided in the statute against forcible entry and detainer, and all are found guilty, and one appeals, it will be considered by the court that he appeals for all. Hurlbutt *v.* Meachum, 2 Tyler (Vt.) 397.

Presence of attorney in court.— Where the attorney of absent heirs is necessary as a party, his presence in court is sufficient to sustain the appeal. Clark's Succession, 11 La. Ann. 124.

Summons and severance against non-joining parties.— Where, upon a motion to dismiss for the non-joinder of a defendant in the appeal, the appellants move the court for a writ of summons and severance against the non-joining party, the court may properly overrule the motion to dismiss, and order the writ of summons and severance. Mottu *v.* Primrose, 23 Md. 482.

Citation in erroneous capacity.— Where an appellee or defendant in error is cited erroneously — as where he is cited as an individual when he occupies only a representative capacity — the appeal or writ will be dismissed on motion. Osborn's Tutorship, 23 La. Ann. 178.

Omission to state by whom taken.— The failure to state in the petition or record by which party, plaintiff or defendant, an appeal or writ of error is taken is not a sufficient ground for dismissal. Adams *v.* Law, 16 How. (U. S.) 144, 14 L. ed. 880.

17. *Illinois.*— Lochnitt *v.* Stockon, 31 Ill. App. 217. See also Callaghan *v.* Myers, 89 Ill. 566.

Indiana.— Miller *v.* Arnold, 65 Ind. 488.

New York.— Gardner *v.* Gardner, 5 Paige (N. Y.) 170.

Pennsylvania.— Bonner *v.* Campbell, 48 Pa. St. 286.

Texas.— Miller *v.* Sullivan, 89 Tex. 480, 35 S. W. 362.

See 2 Cent. Dig. tit. "Appeal and Error," § 1871.

18. Thorp *v.* Thorp, 40 Ill. 113.

See *infra*, XIV.

b. Unauthorized Appeals. An appeal, taken in the name of a party without such party's knowledge or consent, may, on motion, be dismissed as to him.[19]

6. Amendments — a. In General. Defects in appellate proceedings, such defects arising from the non-joinder or misjoinder of parties, are usually amendable in the appellate court.[20]

Against consent of co-parties.— Where one of several plaintiffs in error moves to withdraw, without the consent of the others, the motion will be entered, and the cause proceed as between remaining plaintiffs and the opposite party. Hyde *v.* Tracy, 2 Day (Conn.) 491.

See 2 Cent. Dig. tit. "Appeal and Error," § 1871.

19. McIntyre *v.* Sholty, 139 Ill. 171, 29 N. E. 43; Harding *v.* Durand, 36 Ill. App. 238; Miller *v.* Arnold, 65 Ind. 488; Ikerd *v.* Borland, 35 La. Ann. 337; Watson *v.* Watson, 4 Rand. (Va.) 611. See also Robinson *v.* Robinson, 20 S. C. 567.

An appeal, taken contrary to his client's order, by an attorney who has been discharged, will be dismissed on motion of the client. Ikerd *v.* Borland, 35 La. Ann. 337.

Appeal in name of administrator.— In McIntyre *v.* Sholty, 139 Ill. 171, 29 N. E. 43, it was held that, under Ill. Rev. Stat. c. 3, § 123, providing that an appeal lies from a judgment of the county court in favor of a person who is aggrieved, where a judgment was recovered against an administrator for a trespass by his intestate, a writ of error, sued out in the administrator's name without his knowledge, should be dismissed on motion by him.

Where the preponderance of the testimony is that a party did authorize an appeal, a motion to strike the name of said party from the record as an appellant, on the ground that he never authorized the appeal, will be refused. Robinson *v.* Robinson, 20 S. C. 567.

See 2 Cent. Dig. tit. "Appeal and Error," § 1872.

20. *Alabama.*— Harper *v.* Bibb, 45 Ala. 670; Garlick *v.* Dunn, 42 Ala. 404.

Florida.— Continental Nat. Bldg., etc., Assoc. *v.* Miller, 41 Fla. 418, 26 So. 725; Nash *v.* Haycraft, 34 Fla. 449, 16 So. 324.

Georgia.— McCain *v.* Sublive, 109 Ga. 547, 34 S. E. 1013; Bennett *v.* Georgia Trust Co., 106 Ga. 578, 32 S. E. 625; Steele Lumber Co. *v.* Laurens Lumber Co., 98 Ga. 329, 24 S. E. 755. *Compare* Arnold *v.* Wells, 6 Ga. 380.

Illinois.—Peadro *v.* People, 57 Ill. App. 45.

Kentucky.—Callaghan *v.* Carr, 3 Litt. (Ky.) 153.

Nebraska.— Andres *v.* Kridler, 42 Nebr. 784, 60 N. W. 1014.

New Jersey.— Holcombe *v.* Holcombe, 29 N. J. Eq. 375.

New Mexico.— Neher *v.* Armijo, 9 N. M. 325, 54 Pac. 236.

North Carolina.—N. C. Code (1883), § 965.

Pennsylvania.— Hill *v.* West, 1 Binn. (Pa.) 486.

Texas.— Morrison *v.* Lewis, 13 Tex. 64.

Washington.—Garrison *v.* Cheeney, 1 Wash. Terr. 489.

Wyoming.— Seibel *v.* Bath, 5 Wyo. 409, 40 Pac. 756.

United States.— U. S. *v.* Schoverling, 146 U. S. 76, 13 S. Ct. 24, 36 L. ed. 893; Inland, etc., Coasting Co. *v.* Tolson, 136 U. S. 572, 10 S. Ct. 1063, 34 L. ed. 539; Adams *v.* Johnson, 107 U. S. 251, 2 S. Ct. 246, 27 L. ed. 386; Moore *v.* Simonds, 100 U. S. 145, 25 L. ed. 590.

See 2 Cent. Dig. tit. "Appeal and Error," § 1875 *et seq.*

A discretionary power.— See Pearson *v.* Yewdall, 95 U. S. 294, 24 L. ed. 436.

After appeal.— When a judgment is amended *nunc pro tunc*, after an appeal has been taken, by adding another defendant, the amendment will be considered as relating back for the purpose of bringing up the entire case with the new party, but not so as to defeat the appeal for want of proper parties, or from the misdescription of the judgment in the appeal bond. Farmer *v.* Wilson, 33 Ala. 446.

An appeal prosecuted against a firm instead of against the individual partners is defective, but may be cured by amendment. U. S. *v.* Schoverling, 146 U. S. 76, 13 S. Ct. 24, 36 L. ed. 893; Estes *v.* Trabue, 128 U. S. 225, 9 S. Ct. 58, 32 L. ed. 437. See also Moore *v.* Simonds, 100 U. S. 145, 24 L. ed. 590.

Consent.— In some jurisdictions an amendment by the addition of a new party cannot be had without the consent of such party. Carey *v.* Rice, 2 Ga. 408; Andres *v.* Kridler, 42 Nebr. 784, 60 N. W. 1014; Seibel *v.* Bath, 5 Wyo. 409, 40 Pac. 756.

Joint judgments.— Where, to a joint judgment against several defendants, two of such defendants, without joining the others or without a severance, sue out a writ of error, a motion for leave to amend by joining the other defendants, or by a severance, will be denied. Mason *v.* U. S., 136 U. S. 581, 10 S. Ct. 1062, 34 L. ed. 545.

A mistake, made in respect to the name of one of the parties to an appeal, may be amended. Scheel *v.* Eidman, 77 Ill. 301. See also Kingsley *v.* Schmicker, (Tex. Civ. App. 1900) 60 S. W. 331.

Parol evidence to rectify defect.— An appeal by one of two defendants cannot be made the appeal of both by parol evidence that it was intended to be such, unless the error be chargeable to the default of the officer who took the appeal. Sterrett *v.* Ramsay, 2 Watts (Pa.) 91.

Parties added by supplemental bill.—Where new parties are made by a supplemental bill, a writ of error sued out in the names of the

b. After Expiration of Time to Appeal. Depending, as they do, upon the interpretation of diverse statutes, the decisions are not uniform as to the power of amendment, with regard to parties, after the expiration of the statutory limitation as to the time within which appeals may be taken.[21]

c. Loss of Interest in Subject-Matter. An appeal or writ of error taken in the name of a party after he has, by assignment, or otherwise, lost interest in the subject-matter of litigation, cannot be amended in the appellate court by the substitution of the person upon whom such party's interest has devolved.[22]

d. Mode of Amendment. The usual procedure for remedying a defect of party caused by non-joinder is to issue a summons, citing the party to appear and join, or to submit to an order of severance.[23]

7. Waiver of Objections — a. In General. If a petition for appeal or writ of error is not objected to by appellee, respondent, or defendant in error for want of necessary parties, the appeal or writ may be decided on its merits as to such non-objecting party, though all the proper parties are not before the court.[24]

parties to the original bill alone is amendable under the statute. Toulmin *v.* Hamilton, 7 Ala. 362.

Persons interested in sustaining the decree or judgment below cannot, on motion of a dissatisfied suitor, be made appellants or plaintiffs in error by amendment to the petition or bill of exceptions. Craig *v.* Webb, 70 Ga. 188. See also Knox *v.* McCalla, 70 Ga. 725. In such a case, the interest of the party being adverse, he should be made an appellee or defendant in error. Price *v.* Lathrop, 66 Ga. 247.

Persons not necessary to the jurisdiction of the appellate court will not be made parties by amendment. McCalop *v.* Fluker, 12 La. Ann. 345.

Striking out the name of the party and inserting that of another in a writ of error will not be allowed in Georgia. Arnold *v.* Wells, 6 Ga. 380.

21. **In Kentucky** it is held that it is too late. Smith *v.* Craft, (Ky. 1900) 58 S. W. 500. To like effect see National Bank *v.* Newheart, 41 Fla. 470, 27 So. 297; Bridge *v.* Main St. Hotel Co., (Kan. 1900) 61 Pac. 754.

In Nebraska it is held that defendants against whom a joint judgment has been rendered, but who have not been made parties to the petition in error, may, within the statutory time, be made defendants in error in order to obviate the defect of parties. Andres *v.* Kridler, 42 Nebr. 784, 60 N. W. 1014.

In New York it is too late. Patterson *v.* Hamilton, 26 Hun (N. Y.) 665. See also Wait *v.* Van Allen, 22 N. Y. 319; Humphrey *v.* Chamberlain, 11 N. Y. 274; Cotes *v.* Carroll, 28 How. Pr. (N. Y.) 436. But see Cox *v.* Schermerhorn, 12 Hun (N. Y.) 411; Crittenden *v.* Adams, 5 How. Pr. (N. Y.) 310.

In Ohio parties omitted by mistake may be joined in error, though the time for filing a petition in error has elapsed. Secor *v.* Witter, 39 Ohio St. 218; Bradford *v.* Andrews, 20 Ohio St. 208, 5 Am. Rep. 645 [*distinguishing*, *disapproving*, and *doubting* Smetters *v.* Rainey, 14 Ohio St. 287]. But see Loewenstein *v.* Rheinstrom, 10 Ohio Dec. 587.

22. Weiler *v.* Long, 13 Pa. Co. Ct. 632, 3 Pa. Dist. 218.

Discharge of personal representative.— Where an appeal or writ of error is taken in the name of an executor or administrator after he has been discharged as such, the appellate court has no power to substitute another party to the action, and a motion to that purpose will be overruled. McCormick Harvesting Mach. Co. *v.* Snedigar, 3 S. D. 625, 54 N. W. 814. And see Taylor *v.* Savage, 1 How. (U. S.) 282, 11 L. ed. 132, in which it was held that where an executor is party to a decree in equity, and he is removed before an appeal has been taken by the appellant and an administrator *de bonis non* is appointed, the irregularity of such appeal cannot be cured in the appellate court unless the administrator voluntarily appears.

23. Nash *v.* Haycraft, 34 Fla. 449, 16 So. 324; Steele Lumber Co. *v.* Laurens Lumber Co., 98 Ga. 329, 24 S. E. 755; Carey *v.* Giles, 10 Ga. 1; Holcombe *v.* Holcombe, 29 N. J. Eq. 375.

24. Campbell *v.* Arcenaux, 3 La. Ann. 558; Toop *v.* New York, 13 N. Y. Suppl. 280, 36 N. Y. St. 724; Gilchrist *v.* Rea, 9 Paige (N. Y.) 66; Cairnes *v.* Knight, 17 Ohio St. 68; Howard *v.* Levering, 8 Ohio Cir. Ct. 614; Huebschman *v.* Cotzhausen, (Wis. 1900) 82 N. W. 720. But see Atkins *v.* Nordyke Marmon Co., 60 Kan. 354, 56 Pac. 573, in which it was held that defects of parties go to the jurisdiction of the court, and consequently cannot be waived.

See 2 Cent. Dig. tit. "Appeal and Error," § 1873.

Ohio Rev. Stat. (1892), § 5062, which provides that a defect of parties is a ground of demurrer, and § 5064, which provides that, where no objection is taken upon that ground, the same is waived, have been held to apply to proceedings in error. Howard *v.* Levering, 8 Ohio Cir. Ct. 614.

Waiver by stipulation.— In Toop *v.* New York, 13 N. Y. Suppl. 280, 36 N. Y. St. 724, sureties for performance of a contract for work brought suit, alleging that the work had been abandoned by the contractor and performed by them, with the consent of the other party to the contract, and recovered judgment against the latter for the compensa-

b. Failure to Object in Time.[25] Objection that proper and necessary parties have not been joined in an appeal or writ of error, or that there has been a misjoinder of parties, will be deemed to be waived where the appellee, respondent, or defendant in error fails to make objection in due season.[26]

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

A. Time for Taking and Perfecting — 1. In General — a. Rule Stated — (1) *Generally.* The time within which a proceeding to review the action of a lower court must be prayed, taken, and perfected is regulated by statute,[27] and

tion agreed on. On appeal from such judgment it was held that an objection that plaintiffs had not shown an assignment to them of the contract was obviated by an oral stipulation by counsel on the argument that the court should dispose of the appeal as though plaintiffs were properly assignees of the contract, and that the pleadings should be amended to show an allegation and admission of such assignment, the appellate court having power to allow such amendment.

25. See 2 Cent. Dig. tit. "Appeal and Error," § 1874.

26. After appearance and joinder in error it is too late for defendant to object that an administrator has been improperly made a party plaintiff in a writ of error. Booker *v.* Hunt, 1 Port. (Ala.) 26; Olson *v.* Sheffield, 90 Ill. App. 198. But see Garside *v.* Wolf, 135 Ind. 42, 34 N. E. 810, in which it was held that the failure of plaintiff to join, on his appeal, certain defendants who were necessary appellees, is not waived by a joinder in error. And see Dunns *v.* Jones, 20 N. C. 154, in which it was held that where, in assumpsit against two, they plead separately, and the jury assesses damages against both jointly, and one appeals to the superior court, and plaintiff obtains an order to take a deposition, and the case is continued to the next term, it will, at that term, be dismissed on motion of plaintiff. *Contra, Ex p.* Moore, 64 N. C. 90.

After submission.— It is too late to make objection to the non-joinder or misjoinder of parties after the cause has been submitted. Coffey *v.* Norwood, 81 Ala. 512, 8 So. 199; Carter *v.* Thompson, 41 Ala. 375; Higbee *v.* Rodeman, 129 Ind. 244, 28 N. E. 442; Munson *v.* Blake, 101 Ind. 78; Bates-Smith Invest. Co. *v.* Scott, 56 Nebr. 475, 76 N. W. 1063; Curtin *v.* Atkinson, 36 Nebr. 110, 54 N. W. 131; Consaul *v.* Sheldon, 35 Nebr. 247, 52 N. W. 1104; Wangerien *v.* Aspell, 47 Ohio St. 250, 24 N. E. 405.

Upon argument.— An objection that an appeal was taken by interveners without joining as appellants the defendants to the original bill, and without a summons and severance, cannot be suggested for the first time in argument. Louisville Mfg. Co. *v.* Brown, 101 Ala. 273, 13 So. 15. See also Venner *v.* Sun L. Ins. Co., 17 Can. Supreme Ct. 394.

Objection, on account of misjoinder of parties in the lower court, cannot be originally made in the appellate court. Chappell *v.* Robertson, 2 Rob. (Va.) 590.

In Louisiana, the want of proper parties for a final decree may be brought to the notice of the court at any time. Marcy *v.* Citizens' Mut. Ins. Co., 21 La. Ann. 429; Belleville Iron Works Co. *v.* Its Creditors, 16 La. Ann. 77.

United States.— The objection that a writ of error from a judgment against two jointly was sued out by only one of them, without a proper severance, can be taken at any time before judgment is rendered thereon. Ayres *v.* Polsdorfer, 105 Fed. 737.

27. Legislative power to prescribe and amend.— It has been expressly decided that the legislature has the power to prescribe and change the time within which proceedings for review must be taken. Smythe *v.* Boswell, 117 Ind. 365, 20 N. E. 263; The Schooner Marinda *v.* Dowlin, 4 Ohio St. 500; Gaskins *v.* Com., 1 Call (Va.) 194.

As to prospective or retrospective effect of statutes amending or repealing statutes prescribing the time for taking appeals or suing out writs of error see the following cases:

Alabama.—Page *v.* Matthews, 40 Ala. 547; Lewis *v.* Lindsay, 33 Ala. 304 [*overruling* Green *v.* Maclin, 29 Ala. 695].

California.— Melde *v.* Reynolds, 120 Cal. 234, 52 Pac. 491.

Colorado.—Hewitt *v.* Colorado Springs Co., 5 Colo. 184; Willoughby *v.* George, 5 Colo. 80.

Florida.— Sammis *v.* Bennett, 32 Fla. 458, 14 So. 90, 22 L. R. A. 48.

Illinois.— McClure *v.* Walker, 103 Ill. 544.

Indiana.— Evansville, etc., R. Co. *v.* Barbee, 74 Ind. 169; Lindley *v.* Darnall, 24 Ind. App. 399, 56 N. E. 861.

Kentucky.— Saunders *v.* Moore, 14 Bush (Ky.) 97; Moss *v.* Hall, 1 Ky. L. Rep. 280.

Minnesota.— Kerlinger *v.* Barnes, 14 Minn. 526.

Nebraska.— Roesink *v.* Barnett, 8 Nebr. 146.

New York.— New York *v.* Schermerhorn, 1 N. Y. 423; Bailey *v.* Kincaid, 57 Hun (N. Y.) 516, 19 N. Y. Civ. Proc. 232, 11 N. Y. Suppl. 294, 33 N. Y. St. 110.

Ohio.— Canaan Tp. *v.* Board of Infirmary Directors, 46 Ohio St. 694, 23 N. E. 492; Wade *v.* Kimberley, 5 Ohio Cir. Ct. 33.

Pennsylvania.— Shelly *v.* Dampman, 174 Pa. St. 495, 34 Atl. 124 [*affirming* 1 Pa. Super. Ct. 115, 38 Wkly. Notes Cas. (Pa.) 312].

Tennessee.— Trim *v.* McPherson, 7 Coldw. (Tenn.) 15.

the proceeding must be taken and perfected within the prescribed statutory time.[28]

Texas.— Wright *v.* Hardie, 88 Tex. 653, 32 S. W. 885; Story *v.* Runkle, 32 Tex. 398; Compton *v.* Ashley, (Tex. Civ. App. 1895) 28 S. W. 924.

Virginia.—Yarborough *v.* Deshazo, 7 Gratt. (Va.) 374.

Wisconsin.— Sydnor *v.* Palmer, 32 Wis. 406; Smith *v.* Packard, 12 Wis. 371.

See 2 Cent. Dig. tit. "Appeal and Error," § 1882.

See also *supra*, I, C, 2, g.

28. *Alabama.*— Buford *v.* Ward, 108 Ala. 307, 19 So. 357; Kimbrell *v.* Rogers, 90 Ala. 339, 7 So. 241.

Arizona.— Fleury *v.* Jackson, 1 Ariz. 361, 25 Pac. 669.

Arkansas.—Johnson *v.* Godden, (Ark. 1892) 18 S. W. 125; Joyner *v.* Hall, 36 Ark. 513.

California.— Matter of Devincenzi, 131 Cal. 452, 63 Pac. 723; Bartlett *v.* Mackey, 130 Cal. 181, 62 Pac. 482.

Colorado.— Simonton *v.* Rohm, 9 Colo. 402, 12 Pac. 424; Fischer *v.* Hanna, 8 Colo. App. 471, 47 Pac. 303.

Connecticut.— Halliday *v.* Collins Co., (Conn. 1900) 47 Atl. 321; Russell *v.* Monson, 33 Conn. 506.

District of Columbia.— National Cable Co. *v.* Washington, etc., R. Co., 8 App. Cas. (D. C.) 478.

Florida.— Jacksonville, etc., R., etc., Co. *v.* Broughton, 38 Fla. 139, 20 So. 829; Hall *v.* Penny, 13 Fla. 593.

Georgia.— Gress Lumber Co. *v.* Coody, 99 Ga. 775, 27 S. E. 169; Pergason *v.* Etcherson, 91 Ga. 785, 18 S. E. 29.

Idaho.— Balfour *v.* Eves, (Ida. 1895) 42 Pac. 508.

Illinois.— Balance *v.* Frisby, 2 Ill. 595; Lawyers' Co-Operative Pub. Co. *v.* Chicago Law Book Co., 90 Ill. App. 425.

Indiana.— Baker *v.* Martin, (Ind. 1901) 59 N. E. 174; Rogers *v.* State, (Ind. App. 1901) 59 N. E. 334.

Iowa.— Young *v.* Rann, 111 Iowa 253, 82 N. W. 785; Lesure Lumber Co. *v.* Mutual F. Ins. Co., 101 Iowa 514, 70 N. W. 761.

Kansas.— Atchison, etc., R. Co. *v.* Dougan, 39 Kan. 181, 17 Pac. 811; Kauter *v.* Entz, 8 Kan. App. 788, 61 Pac. 818.

Kentucky.— Elizabethtown, etc., R. Co. *v.* Catlettsburg Water Co., (Ky. 1901) 61 S. W. 47; Boyle *v.* Stivers, (Ky. 1900) 58 S. W. 691.

Louisiana.— New Orleans *v.* Crescent City R. Co., 41 La. Ann. 904, 6 So. 719; Charles *v.* Board of Liquidation, 37 La. Ann. 176.

Maine.— Carleton *v.* Lewis, 67 Me. 76.

Maryland.— Hoppe *v.* Byers, 60 Md. 381; Powhatan Steamboat Co. *v.* Potomac Steamboat Co., 36 Md. 238.

Massachusetts.—Emmons *v.* Alvord, (Mass. 1901) 59 N. E. 126; Elwell *v.* Dizer, 1 Allen (Mass.) 484.

Michigan.— Carney *v.* Baldwin, 95 Mich. 442, 54 N. W. 1081; Moore *v.* Ellis, 18 Mich. 77.

Mississippi.—Wilson *v.* Pugh, 61 Miss. 449; Briscoe *v.* Planters' Bank, 3 Sm. & M. (Miss.) 423.

Missouri.— Crutsinger *v.* Missouri Pac. R. Co., 82 Mo. 64; Sater *v.* Hunt, 75 Mo. App. 468.

Montana.—Ramsey *v.* Burns, 24 Mont. 234, 61 Pac. 129; Welcome *v.* Howell, 20 Mont. 42, 49 Pac. 393.

Nebraska.— Clark *v.* McDowell, 58 Nebr. 593, 79 N. W. 158; Smith *v.* Silver, 58 Nebr. 429, 78 N. W. 725.

Nevada.— Reinhardt *v.* Company D, First Brigade, 23 Nev. 369, 47 Pac. 979; Weinrich *v.* Porteus, 12 Nev. 102.

New Hampshire.— Rowell *v.* Conner, 57 N. H. 323; Holt *v.* Smart, 46 N. H. 9.

New Jersey.— Hillyer *v.* Schenck, 15 N. J. Eq. 398; Newark Plank-Road, etc., Co. *v.* Elmer, 9 N. J. Eq. 754.

New York.—Porter *v.* International Bridge Co., 163 N. Y. 79, 57 N. E. 174; Voisin *v.* Commercial Mut. Ins. Co., 123 N. Y. 120, 25 N. E. 325, 33 N. Y. St. 160, 9 L. R. A. 612 [*affirming* 56 Hun (N. Y.) 215, 9 N. Y. Suppl. 267]; Lane *v.* Wheeler, 101 N. Y. 17, 3 N. E. 796; Burch *v.* Newbury, 10 N. Y. 374; New York *v.* Schermerhorn, 1 N. Y. 423; McCall *v.* Moschowitz, 14 Daly (N. Y.) 16; Whitman *v.* Johnson, 10 Misc. (N. Y.) 730, 31 N. Y. Suppl. 1009, 65 N. Y. St. 103; King *v.* Platt, 2 Abb. Dec. (N. Y.) 527, 3 Abb. Pr. N. S. (N. Y.) 174; Mason *v.* Jones, Code Rep. N. S. (N. Y.) 335; Deming *v.* Post, 1 Code Rep. (N. Y.) 121; Muir *v.* Demaree, 9 Wend. (N. Y.) 449; Halsey *v.* Van Amringe, 4 Paige (N. Y.) 279.

North Carolina.— Simmons *v.* Allison, 119 N. C. 556, 26 S. E. 171; Russell *v.* Hearne, 113 N. C. 361, 18 S. E. 711; Tucker *v.* Inter-States L. Assoc., 112 N. C. 796, 17 S. E. 532; Applewhite *v.* Fort, 85 N. C. 596.

North Dakota.— Keogh *v.* Snow, (N. D. 1900) 83 N. W. 864; Stierlen *v.* Stierlen, 8 N. D. 297, 78 N. W. 990.

Ohio.— Layer *v.* Schaber, 57 Ohio St. 234, 48 N. E. 939; Mannix *v.* Purcell, 46 Ohio St. 102, 19 N. E. 572, 15 Am. St. Rep. 562, 2 L. R. A. 753; Cowie *v.* Meyers, 10 Ohio Dec. 91; Snell *v.* Cincinnati St. R. Co., 16 Ohio Cir. Ct. 633, 700, 9 Ohio Cir. Dec. 264.

Oklahoma.— Herring *v.* Wiggins, 7 Okla. 312, 54 Pac. 483.

Oregon.— Joshua Hendy Mach. Works *v.* Portland Sav. Bank, 24 Oreg. 60, 32 Pac. 1036.

Pennsylvania.— Barlott *v.* Forney, 187 Pa. St. 301, 41 Atl. 47; Pottsville Bank *v.* Cake, 12 Pa. Super. Ct. 61; Lingerfield *v.* George, 10 Phila. (Pa.) 80, 30 Leg. Int. (Pa.) 321; Jones' Appeal, 11 Wkly. Notes Cas. (Pa.) 554.

South Carolina.— Weatherly *v.* Jackson, 3 Rich. (S. C.) 228.

South Dakota.— Granger *v.* Roll, 6 S. D. 611, 62 N. W. 970; Mouser *v.* Palmer, 2 S. D. 466, 50 N. W. 967.

Tennessee.— Chester *v.* Foster, 90 Tenn. 515, 16 S. W. 615; Smith *v.* Sprout, (Tenn.

(II) *Persons Under Disabilities*—(A) *In General.* It is usually provided that statutes limiting the time for taking appeals shall not run against persons under certain legal disabilities.[29]

(B) *Persons Excepted*—(1) Infants, Married Women, and Lunatics. The persons ordinarily excepted are infants,[30] married women,[31] and persons *non compos mentis*.[32]

Ch. 1900) 58 S. W. 376; Gamble *v.* Branch, (Tenn. Ch. 1898) 52 S. W. 897.

Texas.— Peabody *v.* Marks, 25 Tex. 19; State *v.* Kroner, 2 Tex. 492; Western Union Tel. Co. *v.* Bedell, (Tex. Civ. App. 1900) 57 S. W. 706.

Utah.— Snow *v.* Rich, (Utah 1900) 61 Pac. 336; Ryan, etc., Cattle Co. *v.* Murdock, 8 Utah 497, 33 Pac. 136.

Vermont.— West Derby *v.* Newport Cemetery Assoc., 69 Vt. 166, 37 Atl. 239; Robinson *v.* Robinson, 32 Vt. 738.

Virginia.— Jordan *v.* Cunningham, 85 Va. 418, 7 S. E. 540; Frazier *v.* Frazier, 77 Va. 775; White *v.* Jones, 4 Call (Va.) 253, 2 Am. Dec. 564.

Washington.—Hibbard *v.* Delanty, 20 Wash. 539, 56 Pac. 34; Seattle, etc., R. Co. *v.* Simpson, 19 Wash. 628, 54 Pac. 29.

West Virginia.— Shumate *v.* Crockett, 43 W. Va. 491, 27 S. E. 240.

Wisconsin.— Milwaukee Electric R., etc., Co. *v.* Bradley, 108 Wis. 467, 84 N. W. 870; Jarvis *v.* Hamilton, 37 Wis. 87.

Wyoming.— Kuhn *v.* McKay, 6 Wyo. 466, 46 Pac. 853.

United States.— U. S. *v.* Pena, 175 U. S. 500, 20 S. Ct. 165, 44 L. ed. 251; Small *v.* Northern Pac. R. Co., 134 U. S. 514, 10 S. Ct. 614, 33 L. ed. 1006; Logan *v.* Goodwin, 101 Fed. 654, 41 C. C. A. 573; Noonan *v.* Chester Park Athletic Club, 93 Fed. 576, 35 C. C. A. 457.

England.— White *v.* Witt, 5 Ch. D. 589, 46 L. J. Ch. 560, 37 L. T. Rep. N. S. 110, 25 Wkly. Rep. 435; Cummins *v.* Herron, 4 Ch. D. 787, 25 Wkly. Rep. 325, 46 L. J. Ch. 423, 36 L. T. Rep. N. S. 41; Trail *v.* Jackson, 4 Ch. D. 7, 46 L. J. Ch. 16, 25 Wkly. Rep. 36.

Canada.— Currier *v.* Crosby, 16 N. Brunsw. 610; Séminairé de Québec *v.* Vinet, 6 L. C. Jur. 138.

See 2 Cent. Dig. tit. "Appeal and Error," § 1877 *et seq.*

In Quebec, the rule limiting the period of appeal to the privy council, though usually adhered to, is not imperative. The party complaining of delay should not himself be guilty of delay. If he has been he has no claim to be heard. The appeal may be allowed to proceed on sufficient cause shown. St. Louis *v.* St. Louis, 1 Moore P. C. 143. See also Allan *v.* Pratt, 32 L. C. Jur. 57, 3 Q. B. 322; Merchants' Bank *v.* Whitfield, 27 L. C. Jur. 183.

Not properly statutes of limitations.— Statutes limiting the time for taking an appeal are not technically statutes of limitations, and hence temporary suspensions of the operation of state statutes of limitations during the civil war were held not to apply to statutes limiting the time within which an appeal might be taken. Trim *v.* McPherson, 7 Coldw. (Tenn.) 15; Hart *v.* Mills, 38 Tex. 513; Pace *v.* Hollaman, 31 Tex. 158; Walker *v.* Taul, 1 Tex. App. Civ. Cas. § 31; Rogers *v.* Strother, 27 Gratt. (Va.) 417.

29. Hawkins *v.* Hawkins, 28 Ind. 66; Hinde *v.* Whitney, 31 Ohio St. 53; Caldwell *v.* Hodsden, 1 Lea (Tenn.) 305. See also Shuman *v.* Hurd, 79 Wis. 654, 48 N. W. 672. But the Texas act of Sept. 1, 1892, requires writs of error to be prosecuted within twelve months after rendition of judgment, without excepting any class of person. Perry *v.* Warner, (Tex. Civ. App. 1897) 40 S. W. 170.

See 2 Cent. Dig. tit. "Appeal and Error," § 1905 *et seq.*

Necessity of showing disability.— Where a party alleges that he is entitled to commence a proceeding in error after the lapse of the statutory time, by reason of some legal disability recognized by the statute, the facts which bring such party within the excepted class must be averred in the petition in error. Piatt *v.* Sinton, 35 Ohio St. 282.

30. *Connecticut.*— Davidson, a Minor, 1 Root (Conn.) 275.

Indiana.— Vordermark *v.* Wilkinson, 147 Ind. 56, 46 N. E. 336.

Kentucky.— Moss *v.* Hall, 79 Ky. 40, 3 Ky. L. Rep. 89, 1 Ky. L. Rep. 314.

Louisiana.— Préjean *v.* Robin, 14 La. Ann. 788; Dufau *v.* Deflechier, 3 La. 304.

Massachusetts.— Eager *v.* Com., 4 Mass. 182.

Ohio.— Arrowsmith *v.* Gleason, 1 Ohio Cir. Ct. 345.

Tennessee.— Ridgely *v.* Bennett, 13 Lea (Tenn.) 206.

Texas.— McAnear *v.* Epperson, 54 Tex. 220, 38 Am. Rep. 625; Miers *v.* Betterton, 18 Tex. Civ. App. 430, 45 S. W. 430.

See 2 Cent. Dig. tit. "Appeal and Error," § 1911.

A minor heir, on arriving at his majority, cannot by appeal obtain the reversal of a judgment rendered against the succession of his father, and which the executor of that succession allowed to become final by not appealing. West *v.* Davis, 34 La. Ann. 357.

31. Bertrand *v.* Taylor, 87 Ill. 235; Fenn *v.* Early, 113 Pa. St. 264, 6 Atl. 58; Cordray *v.* Galveston, (Tex. Civ. App. 1894) 26 S. W. 245 (prior to the act of Sept. 12, 1892).

In Connecticut, the statute limiting appeals from probate courts to eighteen months having no saving clause for *femes covert*, the latter must appeal within that time. Merrils *v.* Adams, Kirby (Conn.) 247.

In Missouri, married women are not excepted. Davenport *v.* Hannibal, 120 Mo. 150, 25 S. W. 364.

32. Anderson *v.* Layton, 3 Bush (Ky.) 87; Finney *v.* Speed, 71 Miss. 32, 14 So. 465; Witte *v.* Gilbert, 10 Nebr. 539, 7 N. W. 288.

(2) Non-Residents. While some statutes limiting writs of error to a certain period do not make any exception where the party is out of the state or beyond seas,[33] in others an exception is made in favor of persons absent from the state.[34]

(3) Prisoners. In some jurisdictions the time for appealing has been extended in favor of persons undergoing imprisonment.[35]

(c) *Effect of Disability of One or More Parties.* In some jurisdictions it is held that where the interest of appellants is joint, if one or more be barred by lapse of time, all are barred, though some be under disability;[36] while in other jurisdictions a contrary view obtains;[37] and under some statutes, where the statute of limitations has run against one or more appellants, the appeal will be dismissed as to them, and determined as to those against whom the statute has not run.[38]

(III) *Effect of Becoming Party After Judgment.* The time within which an appeal must be taken is not extended in favor of one who becomes a party to the action after the rendition or entry of the judgment or order appealed from.[39]

(IV) *Effect of Death of Party.* Unless expressly provided otherwise by statute, the death of either party to an appeal does not suspend the running of the time in which the appeal must be brought.[40]

(V) *Effect of Dismissal of First Appeal.* Under statutes providing that, when an appeal has been dismissed, another appeal may be taken, it has been generally decided that the second appeal must be taken within the statutory period.[41]

33. Stevenson *v.* Westfall, 18 Ill. 209.

34. In Louisiana, persons absent from the state may appeal within two years instead of one, as in the case of other persons. Samory *v.* Montgomery, 19 La. Ann. 333; Lambert *v.* Conrad, 18 La. Ann. 145; Scott *v.* Rusk, 2 La. Ann. 266; Kræutler *v.* U. S. Bank, 12 Rob. (La.) 456, 11 Rob. (La.) 213.

Personal representative of non-resident.— The two years granted to non-residents for the purpose of appealing from a judgment rendered under La. Code Prac. art. 593, is not affected by the death of an unsuccessful non-resident; but such right is transmitted to his legal representatives, even though his succession is administered in the state by a resident administrator. Martin *v.* Hoggatt, 37 La. Ann. 340.

35. Wyatt *v.* Morris, 2 W. Va. 575; McDonald *v.* Hovey, 110 U. S. 619, 4 S. Ct. 142, 28 L. ed. 269.

36. State *v.* Layton, 3 Harr. (Del.) 348; Moore *v.* Capps, 9 Ill. 315; Farlee *v.* Rodes, 11 Bush (Ky.) 365; Helm *v.* Bentley, 1 Metc. (Ky.) 510; Riney *v.* Riney, 1 B. Mon. (Ky.) 69; May *v.* Marshall, 2 Litt. (Ky.) 147 [*distinguishing* Kennedy *v.* Duncan, Hard. (Ky.) 365, decided under the act of 1796]; Griffing *v.* Bowmar, 3 Rob. (La.) 112; Field *v.* Mathison, 3 Rob. (La.) 38.

See 2 Cent. Dig. tit. "Appeal and Error," § 1906.

37. Peer *v.* Cookerow, 14 N. J. Eq. 361; Wilkins *v.* Philips, 3 Ohio 49, 17 Am. Dec. 579; Harvey *v.* Carroll, 72 Tex. 63, 10 S. W. 334; Cordray *v.* Galveston, (Tex. Civ. App. 1894) 26 S. W. 245; Priest *v.* Hamilton, 2 Tyler (Vt.) 44.

38. Vordermark *v.* Wilkinson, 147 Ind. 56, 46 N. E. 336; Hawkins *v.* Hawkins, 28 Ind. 66 [*distinguishing* Hottle *v.* Kindle, 8 Blackf. (Ind.) 295; Shannon *v.* Dunn, 8 Blackf. (Ind.) 182]; McEndree *v.* McEndree, 12 Ind. 97; Fine *v.* Freeman, 83 Tex. 529, 17 S. W. 783, 18 S. W. 963.

39. Thomas *v.* Dumas, 30 Ala. 83; Boykin *v.* Kernochan, 24 Ala. 697; Binford *v.* Binford, 22 Ala. 682; McKinnon *v.* Wolfenden, 78 Wis. 237, 47 N. W. 436.

40. *Alabama.*— Richardson *v.* Williams, 5 Port. (Ala.) 515.

California.— Williams *v.* Long, 130 Cal. 58, 62 Pac. 264.

Indiana.— Wright *v.* Manns, 111 Ind. 422, 12 N. E. 160; Heller *v.* Clark, 103 Ind. 591, 3 N. E. 844.

Kentucky.— Reeves *v.* Davis, 6 Ky. L. Rep. 288.

Maryland.— Hopper *v.* Jones, 64 Md. 578, 4 Atl. 273.

New York.— Brown *v.* New York City, 9 Hun (N. Y.) 587.

Virginia.— Pace *v.* Ficklin, 76 Va. 292.

Wisconsin.— Sambs *v.* Stein, 53 Wis. 569, 11 N. W. 53.

See 2 Cent. Dig. tit. "Appeal and Error," § 1907.

In Oregon, under Hill's Code, § 38, providing that, on the death of the party, the court may, within a year, allow the suit to be continued by such party's personal representatives or successors in interest, this period is not to be considered as any part of the time limited for taking an appeal. McBride *v.* Northern Pac. R. Co., 19 Oreg. 64, 23 Pac. 814; Dick *v.* Kendall, 6 Oreg. 166.

41. *Arkansas.*— State Bank *v.* Morris, 13 Ark. 291.

California.— Dooling *v.* Moore, 20 Cal. 141.

Colorado.—Hewitt *v.* Colorado Springs Co., 5 Colo. 184.

Indiana.— Vordermark *v.* Wilkinson, 147 Ind. 56, 46 N. E. 336.

Louisiana.— Griffing *v.* Bowmar, 3 Rob. (La.) 112.

(VI) *Effect of Motion for New Trial or Rehearing.* In some jurisdictions, if a motion or petition for rehearing or new trial is made or presented in season [42] and entertained by the court, the time limited for an appeal or writ of error does not begin to run until such motion or petition is disposed of, the judgment or decree not taking final effect for the purposes of the appeal or writ of error until then; [43] while in others the time is not extended by making such application.[44]

(VII) *Effect of Motion to Vacate.* The pendency of a motion to vacate a judgment or order does not ordinarily relieve from the statutory requirement to appeal within the prescribed time; [45] and when the statutory period has elapsed

West Virginia.— Middleton *v.* Selby, 19 W. Va. 167.

But *compare* Ross *v.* Willet, 54 Ohio St. 150, 42 N. E. 697; *Ex p.* Roach, (N. Brunsw.) Hil. T. 1872.

As to right to bring successive appeals see *supra*, I, F.

42. Motion made after statutory time for appeal elapsed.— When the right to appeal has been lost by the expiration of the statutory time before petition or motion made for a new trial is filed, the right to appeal cannot be revived by the filing of such petition. Carpenter *v.* Brown, 50 Iowa 451.

43. *Alabama.*— Florence Cotton, etc., Co. *v.* Field, 104 Ala. 471, 16 So. 538.

District of Columbia.— Walter *v.* Baltimore, etc., R. Co., 6 App. Cas. (D. C.) 20; Meloy *v.* Central Nat. Bank, 6 Mackey (D. C.) 444.

Indiana.— Atkinson *v.* Williams, 151 Ind. 431, 51 N. E. 721; Colchen *v.* Ninde, 120 Ind. 88, 22 N. E. 94; Moon *v.* Cline, 11 Ind. App. 460, 39 N. E. 432.

Iowa.— Kendall *v.* Lucas County, 26 Iowa 395.

Kentucky.— Northwestern Mut. L. Ins. Co. *v.* Barbour, 96 Ky. 128, 16 Ky. L. Rep. 315, 28 S. W. 156; Louisville *v.* Muldoon, 19 Ky. L. Rep. 1386, 43 S. W. 867; Cincinnati, etc., R. Co. *v.* Reasor, 6 Ky. L. Rep. 509.

Louisiana.— Gilmore's Succession, 12 La. Ann. 562.

Nebraska.— Sharp *v.* Brown, 34 Nebr. 406, 51 N. W. 1030 [*overruling* Hollenbeck *v.* Tarkington, 14 Nebr. 430, 16 N. W. 472 (*followed* in Phenix Ins. Co. *v.* Swantkowski, 31 Nebr. 245, 47 N. W. 917)]. But see Smith *v.* Silver, 58 Nebr. 429, 78 N. W. 725 [*distinguishing* Sharp *v.* Brown, 34 Nebr. 406, 51 N. W. 1030], holding that the filing of a motion for new trial will not extend the time for prosecuting an appeal from a decree in equity.

New Mexico.— Pearce *v.* Strickler, 9 N. M. 46, 49 Pac. 727.

Utah.— Snow *v.* Rich, (Utah 1900) 61 Pac. 336; Stoll *v.* Daly Min. Co., 19 Utah 271, 57 Pac. 295.

United States.— Northern Pac. R. Co. *v.* Holmes, 155 U. S. 137, 15 S. Ct. 28, 39 L. ed. 99; Aspen Min., etc., Co. *v.* Billings, 150 U. S. 31, 14 S. Ct. 4, 37 L. ed. 986; *In re* Worcester County, 102 Fed. 808, 42 C. C. A. 637. See also Marden *v.* Campbell Printing-Press, etc., Co., 67 Fed. 809, 15 C. C. A. 26, where a petition for a rehearing was not filed within the time prescribed.

See 2 Cent. Dig. tit. "Appeal and Error," § 1895.

44. *California.*— Houser, etc., Mfg. Co. *v.* Hargrove, 129 Cal. 90, 61 Pac. 660; Henry *v.* Merquire, 111 Cal. 1, 43 Pac. 387.

Colorado.— Freas *v.* Townsend, 1 Colo. 86; Slattery *v.* Robinson, 7 Colo. App. 22, 42 Pac. 179. See also Burchinell *v.* Bennett, 10 Colo. App. 150, 50 Pac. 206.

Illinois.— Vickers *v.* Tyndall, 168 Ill. 616, 48 N. E. 214; Kirkwood *v.* Steele, 168 Ill. 177, 49 N. E. 193; Goldsbrough *v.* Gable, 39 Ill. App. 278.

Michigan.— Hill *v.* Hill, 114 Mich. 599, 72 N. W. 597.

Missouri.—Ham *v.* St. Louis Public Schools, 34 Mo. 181. See also Phillippi *v.* McLean, 5 Mo. App. 587.

Montana.— Griswold *v.* Ryan, 2 Mont. 47.

Ohio.— Dowty *v.* Pepple, 58 Ohio St. 395, 50 N. E. 923; Brown *v.* Ohio, etc., Coal Co., 48 Ohio St. 542, 28 N. E. 669; Selig *v.* Akron Hydraulic Pressed Brick Co., 19 Ohio Cir. Ct. 633, 10 Ohio Cir. Dec. 535.

Tennessee.— Patterson *v.* Greenville First Nat. Bank, 101 Tenn. 511, 48 S. W. 225.

Texas.— Cooper *v.* Yoakum, 91 Tex. 391, 43 S. W. 871; Chambers *v.* Hodges, 23 Tex. 104.

See 2 Cent. Dig. tit. "Appeal and Error," § 1895.

Where there has been no stay of proceedings pending a motion for rehearing on a decree distributing the proceeds of a sale of an assignee for the benefit of creditors, an appeal taken more than six months after the date of the original decree will be quashed. *In re* Frazier, 188 Pa. St. 415, 41 Atl. 528.

Where no motion for new trial is necessary, as where a case is tried on an agreed statement of facts, the filing of such a motion does not extend the time beyond the three days from the judgment in which to make and serve the case or apply for extension of time. Atkins *v.* Nordyke-Marmon Co., 60 Kan. 354, 56 Pac. 533; Doorley *v.* Buford, 5 Okla. 594, 49 Pac. 936.

Appeal from state court to supreme court of United States.— In Magraw *v.* McGlynn, 32 Cal. 257, it was held that an appeal from the supreme court of California to the supreme court of the United States was taken within ten days "after rendering the judgment" within the meaning of these terms, as used in the judiciary act of 1789 [1 U. S. Stat. at L. p. 85], if the writ of error was sued out and lodged with the clerk, and the proper security given, within ten days from the time a petition for a rehearing was denied.

45. *California.*— McCourtney *v.* Fortune, 42 Cal. 387.

without an appeal having been taken, the right to appeal cannot be restored by a motion to vacate the judgment or order, and an appeal from the refusal of such motion.[46] Where, however, a judgment is void, the person affected by it has the right, upon motion, to have it stricken from the record, and an appeal from an order refusing such motion will lie although the statutory period has expired.[47]

(VIII) *Effect of Vacating or Suspending Judgment.* When the appeal or order is itself vacated[48] or suspended, there is nothing from which an appeal would lie, and the operation of the statute of limitations is suspended;[49] but an order staying execution on a judgment does not, it seems, enlarge the time for appealing.[50]

b. Computation of Time — (I) *In General.* The time within which an appeal is required to be taken is computed by excluding the first day (the day on which the judgment was rendered or entered)[51] and by including the last day (the day on

Colorado.— Dusing *v.* Nelson, 6 Colo. 39.

Illinois.— Quinn Chapel *v.* Pease, 66 Ill. App. 552.

Michigan.— Buckley *v.* Sutton, 38 Mich. 1.

Missouri.— Smith *v.* Smith, 48 Mo. App. 612.

New York.— Renouil *v.* Harris, 2 Sandf. (N. Y.) 641; Bishop *v.* Empire Transp. Co., 37 N. Y. Super. Ct. 17.

North Dakota.— Travelers' Ins. Co. *v.* Mayer, 2 N. D. 234, 50 N. W. 706; Travelers' Ins. Co. *v.* Weber, 2 N. D. 239, 50 N. W. 703.

Pennsylvania.—Miller's Estate, 159 Pa. St. 575, 34 Wkly. Notes Cas. (Pa.) 93, 28 Atl. 443.

Compare St. Clair *v.* Conlon, 12 App. Cas. (D. C.) 161.

See 2 Cent. Dig. tit. "Appeal and Error," § 1894.

46. *California.*— Thompson *v.* Lynch, 43 Cal. 482.

Florida.— Fitzpatrick *v.* Turner, 14 Fla. 382.

Iowa.—Russell *v.* Red Oak First Nat. Bank, 65 Iowa 242, 21 N. W. 585.

North Carolina.— Badger *v.* Daniel, 82 N. C. 468.

Wisconsin.— Van Steenwyck *v.* Miller, 18 Wis. 320.

See also Black *v.* Pollock, 2 Penr. & W. (Pa.) 489.

47. Clarion, etc., R. Co. *v.* Hamilton, 127 Pa. St. 1, 17 Atl. 732. See also Farmers', etc., Bank *v.* Babcock Hardware Co., 59 Kan. 779, 56 Pac. 1123; Herman *v.* Martin, 21 Ky. L. Rep. 1396, 55 S. W. 429.

48. Where the order vacating the judgment is a nullity, the statute begins to run from the rendition or entry of the judgment vacated. Zimmermann *v.* Bloch, 12 Misc. (N. Y.) 158, 32 N. Y. Suppl. 1073, 66 N. Y. St. 358. See also Jenkins *v.* Corwin, 55 Ind. 21.

49. Herbert *v.* Rowles, 30 Md. 271; Bennett *v.* Bennett, 5 Gill (Md.) 463; Luck *v.* Hopkins, 92 Tex. 426, 49 S. W. 360. See also Bowers *v.* McNutt, 5 Blackf. (Ind.) 231; Keystone Iron Works Co. *v.* Douglas Sugar Co., 55 Kan. 195, 40 Pac. 273; Fargo First Nat. Bank *v.* Briggs, 34 Minn. 266, 26 N. W. 6.

Where two judgments are rendered in the same case, and the last judgment is appealed from and decided to be a nullity, the right of appeal from the first judgment is suspended until the decision takes place, and an appeal may be taken within a year from that period, although more than a year has elapsed since signing the judgment appealed from. Flint *v.* Cuny, 7 La. 379, 26 Am. Dec. 505.

50. Hamill *v.* Clear Creek County Bank, 7 Colo. App. 472, 43 Pac. 903; Renouil *v.* Harris, 2 Code Rep. (N. Y.) 71; Hardin *v.* Watson, 85 Tenn. 593, 4 S. W. 37. See also Robinson *v.* Hudson River R. Co., 1 Hilt. (N. Y.) 144.

51. *Alabama.*— Field *v.* Gamble, 47 Ala. 443; Cawlfield *v.* Brown, 45 Ala. 552.

Indiana.— Wright *v.* Manns, 111 Ind. 422, 12 N. E. 160; Lange *v.* Lammier, (Ind. 1887) 12 N. E. 160 [*overruling* 11 N. E. 33]; Hursh *v.* Hursh, 99 Ind. 500.

Iowa.— Ritchey *v.* Fisher, 85 Iowa 560, 52 N. W. 505; Carleton *v.* Byington, 16 Iowa 588.

Kansas.— Smith County *v.* Labore, 37 Kan. 480, 15 Pac. 577.

Maryland.— Calvert *v.* Williams, 34 Md. 672.

Nebraska.— Chapman *v.* Allen, 33 Nebr. 129, 49 N. W. 926; Glore *v.* Hare, 4 Nebr. 131.

New York.— Young *v.* Whitcomb, 46 Barb. (N. Y.) 615; Gallt *v.* Finch, 24 How. Pr. (N. Y.) 193; *Ex p.* Dean, 2 Cow. (N. Y.) 605, 14 Am. Dec. 521.

North Carolina.— Turrentine *v.* Richmond, etc., R. Co., 92 N. C. 642.

Pennsylvania.—Ege's Appeal, 2 Watts (Pa.) 283; Thomas *v.* Premium Loan Assoc., 3 Phila. (Pa.) 425, 16 Leg. Int. (Pa.) 174.

Tennessee.—Carson *v.* Love, 8 Yerg. (Tenn.) 214.

Texas.— Ramirez *v.* McClane, 50 Tex. 598; Lubbock *v.* Cook, 49 Tex. 96.

Wisconsin.—Bennett *v.* Keehn, 67 Wis. 154, 29 N. W. 207, 30 N. W. 112.

United States.— Smith *v.* Gale, 137 U. S. 577, 11 S. Ct. 185, 34 L. ed. 792; Credit Co. *v.* Arkansas Cent. R. Co., 128 U. S. 258, 9 S. Ct. 107, 32 L. ed. 448.

Compare Chiles *v.* Smith, 13 B. Mon. (Ky.) 460 [*overruling* Smith *v.* Cassity, 9 B. Mon. (Ky.) 192, 48 Am. Dec. 420]; Frankfort *v.* Farmers Bank, 20 Ky. L. Rep. 1635, 49 S. W. 811 [*reversing* 20 Ky. L. Rep. 889, 47 S. W. 872]; Greer *v.* Spencer, 3 Ky. L. Rep. 469.

See 2 Cent. Dig. tit. "Appeal and Error," § 1914.

which the appeal was taken).[52] Sunday is not counted if it is the last day,[53] but a legal holiday is not excluded.[54] Where it is provided that an appeal is to be taken within a month or a certain number of months, calendar, and not lunar, months are meant,[55] and calendar months are to be computed by reckoning from a given day to a day of a corresponding number, where there is one.[56] Upon the substitution of a new term of limitation for taking an appeal or writ of error, the time which elapsed under the former law will be counted in the ratio that it bears to the whole period, and the time of the new term will be computed upon the basis of the ratio that the unexpired term under the old law bears to the whole term.[57]

(II) *Commencement of Period of Limitations*—(A) *From Final Judgment, Decree, or Order*—(1) In General. Statutes of limitation, prescribing the time for taking appeals and suing out writs of error, begin to run only from the rendition or entry of a final judgment, decree, or order, in the absence of a statute providing for an appeal from an interlocutory order.[58]

52. *Alabama.*— Walker *v.* Walker, 42 Ala. 489.

Indiana.— Faure *v.* U. S. Express Co., 23 Ind. 48.

Iowa.— Ritchey *v.* Fisher, 85 Iowa 560, 52 N. W. 505; Carleton *v.* Byington, 16 Iowa 588.

Kansas.— Smith County *v.* Labore, 37 Kan. 48, 15 Pac. 577.

Nebraska.— Chapman *v.* Allen, 33 Nebr. 129, 49 N. W. 926.

53. Ritchey *v.* Fisher, 85 Iowa 560, 52 N. W. 505; Diesing *v.* Reilly, 77 Mo. App. 450; Lucia *v.* Omel, 46 N. Y. App. Div. 200, 61 N. Y. Suppl. 659; Clark's Code Civ. Proc. N. C. (1900), § 596; West *v.* West, (R. I. 1898) 46 Atl. 44. But see Drake *v.* Andrews, 2 Mich. 203.

54. St. Clair *v.* Conlon, 12 App. Cas. (D. C.) 161; Diesing *v.* Reilly, 77 Mo. App. 450. *Compare* Lucia *v.* Omel, 46 N. Y. App. Div. 200, 61 N. Y. Suppl. 659, in which it was held that where the day on which the limit for appeal would ordinarily have expired, and the days following were made days of general thanksgiving and public holidays, and the day following such holidays was Sunday, the limit for appeal did not expire until the Monday following.

55. Avery *v.* Pixley, 4 Mass. 460; Hunt *v.* Holden, 2 Mass. 168.

56. Parkhill *v.* Brighton, 61 Iowa 103, 15 N. W. 853.

57. Odum *v.* Garner, 86 Tex. 374, 25 S. W. 18.

In North Carolina, if the time for appeal is changed, a notice of appeal given under the new statutory term is sufficient, though judgment was taken before the enactment. Walker *v.* Scott, 104 N. C. 481, 10 S. E. 523.

58. *Alabama.*— Alexander *v.* Bates, (Ala. 1900) 28 So. 415; Martin *v.* Kelly, 113 Ala. 577, 21 So. 337.

Arkansas.— Smith *v.* Yell, 4 Ark. 293.

California.— Ferris *v.* Baker, 127 Cal. 520, 59 Pac. 937; Doyle *v.* Republic L. Ins. Co., 125 Cal. 15, 57 Pac. 667.

Connecticut.— Finch *v.* Ives, 24 Conn. 387.

Georgia.— Southern R. Co. *v.* Glenn, 98 Ga. 309, 36 S. E. 395; Fouché *v.* Harison, 78 Ga. 359, 3 S. E. 330.

Illinois.— Sale *v.* Fike, 54 Ill. 292; Avery *v.* Babcock, 35 Ill. 175.

Iowa.—Meredith *v.* Peterson, 108 Iowa 551, 79 N. W. 351.

Kansas.— Blackwood *v.* Shaffer, 44 Kan. 273, 24 Pac. 423.

Kentucky.— Gentry *v.* Walker, 93 Ky. 405, 14 Ky. L. Rep. 351, 20 S. W. 291.

Louisiana.— Abrams *v.* Jay, 16 La. Ann. 373.

Maryland.— Davis *v.* Gemmell, 73 Md. 530, 21 Atl. 712.

Massachusetts.— See Smett *v.* Sullivan, 7 Mass. 342.

Michigan.— Teller *v.* Willis, 12 Mich. 384.

Minnesota.— Billison *v.* Lardner, 67 Minn. 35, 69 N. W. 477.

Missouri.— Chouteau *v.* Nuckols, 33 Mo. 148.

New Mexico.— U. S. *v.* Gwyn, 4 N. M. 635, 42 Pac. 167.

New York.— Lee *v.* Tillotson, 4 Hill (N. Y.) 27.

Ohio.— Hinde *v.* Whitney, 31 Ohio St. 53.

Oregon.— Watkins *v.* Mason, 11 Oreg. 72, 4 Pac. 524.

Texas.— Martin *v.* Crow, 28 Tex. 613.

Virginia.— Home Bldg., etc., Co. *v.* London, 98 Va. 152, 35 S. E. 362.

Washington.— Leary *v.* Territory, 3 Wash. Terr. 13, 13 Pac. 665.

West Virginia.— Rader *v.* Adamson, 37 W. Va. 582, 16 S. E. 808.

United States.— Coe *v.* East. etc., R. Co., 85 Fed. 489, 29 C. C. A. 292.

Compare Carter *v.* Davidson, 73 Iowa 45, 34 N. W. 603; Camblos *v.* Butterfield, 15 Abb. Pr. N. S. (N. Y.) 197; Simpson *v.* Downs, 5 Rich. Eq. (S. C.) 421, in the last of which cases it is decided that, where there is a final decree as to any one of the parties or any distinct branch of litigation, so that nothing remains to be adjudged as to that party or that branch of the litigation, the appeal must be taken within the prescribed time after the rendition of such decree, or the right of appeal will be lost.

See 2 Cent. Dig. tit. "Appeal and Error," § 1889 *et seq.*

Effect of bill of review, see Wethered *v.* Elliott, 45 W. Va. 436, 32 S. E. 209; Kanawha

(2) When Amended or Modifed. The general rule as to the running of the statute of limitations holds good when a judgment is altered or modified in particulars not changing its character;[59] but where the modification is in some material matter, the statute begins to run from the time of the modification.[60]

(B) *From Rendition or Entry*[61] *of Judgment, Decree, or Order* — (1) In General. In some jurisdictions, the period of limitation begins to run from the rendition of an appealable judgment or order;[62] in others it does not begin to run until an appealable judgment or order is duly entered[63] of record as well as

Valley Bank *v.* Wilson, 35 W. Va. 36, 13 S. E. 58; Middleton *v.* Selby, 19 W. Va. 167.

59. *Alabama.*— Alabama Coal, etc., Co. *v.* State, 54 Ala. 36.

California.— Savings, etc., Soc. *v.* Horton, 63 Cal. 310.

Nevada.— Burbank *v.* Rivers, 20 Nev. 159, 18 Pac. 753.

New York.— Hubbard *v.* Copcutt, 9 Abb. Pr. N. S. (N. Y.) 289.

Washington.— Agassiz *v.* Kelleher, 11 Wash. 88, 39 Pac. 228.

Wisconsin.— Leadbetter *v.* Laird, 45 Wis. 522.

Wyoming.— Snyder *v.* James, 2 Wyo. 252.

See 2 Cent. Dig. tit. "Appeal and Error," § 1891.

As retaxation of costs does not alter the judgment as originally entered, it does not operate to extend the time in which an appeal may be taken from such judgment. Hewitt *v.* City Mills, 136 N. Y. 211, 32 N. E. 768, 49 N. Y. St. 335; Wilson *v.* Palmer, 75 N. Y. 250.

60. Johnson *v.* Foreman, 24 Ind. App. 93, 56 N. E. 254; Weeks *v.* Coe, 36 N. Y. App. Div. 339, 55 N. Y. Suppl. 263; Kubin *v.* Miller, 61 N. Y. Suppl. 1121; Sass *v.* Hirschfeld, 23 Tex. Civ. App. 1, 56 S. W. 602.

Modification upon motion for new trial is in effect the rendition of a new judgment, and a party desiring to have it reviewed may appeal at any time within one year after its modification. Mann *v.* Haley, 45 Cal. 63.

61. **"Rendition" and "entry" distinguished.**—"The judgment is a judicial act of the court, the entry is the ministerial act of the clerk. The judgment is as final when pronounced by the court as when it is entered and recorded by the clerk, as required by statute. If the record discloses that the decision of the court finally disposed of the action, and nothing further was to be done by it to complete that disposition, that surely was a final judgment from which an appeal would lie, whether it were perfected by entry in the judgment-book and docket, or not. It is the act of the court which renders the judgment final, and not that of the clerk, whose only office in this respect is to put in form and record what the court has previously declared." California State Tel. Co. *v.* Patterson, 1 Nev. 150, 155.

62. *Arkansas.*— Cleburne County *v.* Morton, (Ark. 1900) 60 S. W. 307.

Indiana.—Mayer *v.* Haggerty, 138 Ind. 628, 38 N. E. 42; Long *v.* Emery, 49 Ind. 200; Reading *v.* Brown, 19 Ind. App. 90, 49 N. E. 41.

Nevada.— California State Tel. Co. *v.* Patterson, 1 Nev. 150.

Ohio.— Lafferty *v.* Shinn, 38 Ohio St. 46; West *v.* Meddock, 16 Ohio St. 417.

Texas.— Waterhouse *v.* Love, 23 Tex. 559 (writ of error). *Compare* Johnson *v.* Smith, 14 Tex. 412 (appeal).

Washington.— Hays *v.* Dennis, 11 Wash. 360, 39 Pac. 658.

See 2 Cent. Dig. tit. "Appeal and Error," § 1897.

Appeal for insufficiency of evidence.— In a few states it is expressly provided by statute that an appeal, on the ground that the verdict on which the judgment is based is not supported by the evidence, must be taken within sixty days after the rendition of the judgment. Coonan *v.* Loewenthal, 129 Cal. 197, 61 Pac. 940; Wise *v.* Ballou, 129 Cal. 45, 61 Pac. 574; Brady *v.* Linehan, (Ida. 1898) 51 Pac. 761; Young *v.* Tiner, (Ida. 1894) 38 Pac. 697; Gilliam *v.* Black, 16 Mont. 217, 40 Pac. 303; Bacon *v.* Thornton, 16 Utah 138, 51 Pac. 153; Bear River Valley Orchard Co. *v.* Hanley, 15 Utah 506, 50 Pac. 611.

See 2 Cent. Dig. tit. "Appeal and Error," § 1888.

Such statutes do not apply to an exception taken to an order dismissing the complaint below (Clifford *v.* Allman, 84 Cal. 528, 24 Pac. 292); where the evidence is examined for the purpose of determining errors of law presented by the record — as the refusal of a nonsuit and the giving of instructions (Gilliam *v.* Black, 16 Mont. 217, 40 Pac. 303); or to an appeal from an order overruling a motion for a new trial based upon the ground that the evidence did not support the judgment (Needham *v.* Salt Lake City, 7 Utah 319, 26 Pac. 920).

63. **An irregularity in the entry** of a judgment, of which entry due notice is given, does not prevent the running of the time for appealing. New York City Baptist Mission Soc. *v.* Tabernacle Baptist Church, 9 N. Y. App. Div. 527, 41 N. Y. Suppl. 720.

In Louisiana, the judgment or order must be signed before the statute begins to run. Le Blanc *v.* Lemaire, 52 La. Ann. 1635, 28 So. 105; State *v.* Wharton, 25 La. Ann. 2; Scott *v.* Goodrich, 24 La. Ann. 259; Planters' Consol. Assoc. *v.* Mason, 24 La. Ann. 518; Derbigny *v.* Trepagnier, 12 La. Ann. 756; Chartier *v.* Police Jury, 9 La. Ann. 42; Mechanics, etc., Bank *v.* Walton, 7 Rob. (La.) 451; Whittemore *v.* Watts, 4 Rob. (La.) 47; Lazarre *v.* Snow, 1 Rob. (La.) 60; Tissott *v.* Bowles, 18 La. 30; Cooley *v.* Seymour, 9 La. 274. See also Dorsey *v.* Hills, 4 La. Ann. 106; De St. Avid *v.* Pichot, 3 La. Ann. 6. But where an appeal is taken at the same term at which the judgment is signed, but before the judgment is actually perfected by the

rendered on the principle that not until there is an actual entry of judgment is the record evidence of a final disposition of the cause.[64]

(2) Actual Rendition or Entry. Whether the statute begins to run from the time of rendition or entry of judgment, it is the time of actual rendition or entry which determines the commencement of the period of limitation, and the judgment having been once actually rendered or entered, the statute runs despite the action of the court or the agreement of the parties.[65]

(c) *From End of Term.* Under some statutes, the time for taking an appeal commences to run from the last day of the term at which the judgment was rendered.[66]

signature of the judge, it is not such a fault on the part of appellant as to occasion the dismissal of the appeal. McGregor *v.* Barker, 12 La. Ann. 289. And it seems that it is usual in the country districts to apply for an appeal before the judgment is signed, the appeal being considered as taken *nunc pro tunc.* State *v.* Balize, 38 La. Ann. 542; Mouton *v.* Broussard, 25 La. Ann. 497; State *v.* McKeown, 12 La. Ann. 596.

64. *California.*— Matter of Scott, 124 Cal. 671, 57 Pac. 654; Matter of Sheid, 122 Cal. 528, 55 Pac. 328. *Compare* Wetherbee *v.* Dunn, 36 Cal. 249; Genella *v.* Relyea, 32 Cal. 159; Gray *v.* Palmer, 28 Cal. 416 — all decided under section 336 of the practice act.

Connecticut.— Vincent *v.* McNamara, 70 Conn. 332, 39 Atl. 444.

Maine.— Cram *v.* Gilman, 83 Me. 193, 32 Atl. 106; Gilpatrick *v.* Glidden, 82 Me. 201, 19 Atl. 166.

Michigan.—McCahill *v.* Detroit City R. Co., 96 Mich. 156, 55 N. W. 668; Newbould *v.* Stewart, 15 Mich. 155. See also Teller *v.* Willis, 12 Mich. 384.

Minnesota.— Exley *v.* Berryhill, 36 Minn. 117, 30 N. W. 436; Humphrey *v.* Havens, 9 Minn. 318 [*overruling* Haines *v.* Paxton, 5 Minn. 442; Furlong *v.* Griffin, 3 Minn. 207].

Montana.— See Work *v.* Northern Pac. R. Co., 11 Mont. 513, 29 Pac. 280.

Nebraska.— Hornick *v.* Maguire, 47 Nebr. 826, 66 N. W. 867; Bickel *v.* Dutcher, 35 Nebr. 761, 53 N. W. 663 [*overruling* Horn *v.* Miller, 20 Nebr. 98, 29 N. W. 260]. *Compare* Scarborough *v.* Myrick, 47 Nebr. 794, 66 N. W. 867 (proceeding in error).

New Jersey.— Mount *v.* Slack, 39 N. J. Eq. 230; Young *v.* Young, 32 N. J. Eq. 275.

New York.— Daniels *v.* Southard, 36 N. Y. App. Div. 540, 55 N. Y. Suppl. 692; Star F. Ins. Co. *v.* Godet, 34 N. Y. Super. Ct. 359; Smith *v.* Dodds, 3 E. D. Smith (N. Y.) 215; Keller *v.* Straus, 34 Misc. (N. Y.) 194, 68 N. Y. Suppl. 777; Maas *v.* Ellis, 12 N. Y. Civ. Proc. 323; Vernon *v.* Palmer, 67 How. Pr. (N. Y.) 18; Marshall *v.* Francisco, 10 How. Pr. (N. Y.) 147; Wells *v.* Danforth, 7 How. Pr. (N. Y.) 197; Bentley *v.* Jones, 4 How. Pr. (N. Y.) 335; Woollen Mfg. Co. *v.* Townsend, Code Rep. N. S. (N. Y.) 415; Nicholson *v.* Dunham, 1 Code Rep. (N. Y.) 119; Robertson *v.* McGeoch, 11 Paige (N. Y.) 640; North American Coal Co. *v.* Dyett, 4 Paige (N. Y.) 273; Banks *v.* People, 7 Albany L. J. 41. *Compare* Farmers' L. & T. Co. *v.* Carroll, 2 N. Y. 566 (decided before enactment of the code); Lee *v.* Tillotson, 4 Hill (N. Y.) 27; Fleet *v.* Youngs, 11 Wend. (N. Y.) 522.

North Dakota.— Oliver *v.* Wilson, 8 N. D. 590, 80 N. W. 757, 73 Am. St. Rep. 784.

Oregon.— Lee *v.* Imbrie, 13 Oreg. 510, 11 Pac. 270.

South Dakota.— Mettel *v.* Gales, 12 S. D. 632, 82 N. W. 181; Neeley *v.* Roberts, 11 S. D. 634, 80 N. W. 130.

Virginia.— Tatum *v.* Snidow, 2 Hen. & M. (Va.) 542.

Washington.— Wadhams *v.* Page, 6 Wash. 103, 32 Pac. 1068.

Wisconsin.— Milwaukee County *v.* Pabst, 64 Wis. 244, 25 N. W. 11 (holding that costs must be taxed and inserted); Fehring *v.* Swineford, 33 Wis. 550; Blodget *v.* Hatfield, 5 Wis. 77.

United States.— Radford *v.* Folsom, 131 U. S. 392, 9 S. Ct. 792, 33 L. ed. 203; Polleys *v.* Black River Imp. Co., 113 U. S. 81, 5 S. Ct. 369, 28 L. ed. 938; Marks *v.* Northern Pac. R. Co., 76 Fed. 941, 44 U. S. App. 714, 22 C. C. A. 630.

England.— 2 Tidd Pr. 1064.

Canada.— Brookfield *v.* St. Andrews, etc., R. Co., 9 N. Brunsw. 496; Frost *v.* Nichols, 8 N. Brunsw. 297.

See 2 Cent. Dig. tit. "Appeal and Error," § 1897.

In England, the period within which the appeal may be taken is calculated from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal. Swindell *v.* Birmingham Syndicate, 3 Ch. D. 127, 45 L. J. Ch. 756, 24 Wkly. Rep. 911, 35 L. T. Rep. N. S. 111.

65. *Alabama.*— Pearson *v.* Darrington, 21 Ala. 169. See also Andrews *v.* Branch Bank, 10 Ala. 375.

California.— Coon *v.* Grand Lodge, etc., 76 Cal. 354, 18 Pac. 384; Noce *v.* Daveggio, (Cal. 1884) 4 Pac. 495; Matter of Fifteenth Ave. Extension, 54 Cal. 179.

Colorado.— Globe Smelting, etc., Co. *v.* Spann, 6 Colo. App. 146, 40 Pac. 198.

Illinois.— Owens *v.* Crossett, 104 Ill. 468.

Indiana.— Anderson *v.* Mitchell, 58 Ind. 592.

Iowa.— Carter *v.* Sherman, 63 Iowa 689, 16 N. W. 707.

Kansas.— Brown *v.* Clark, 31 Kan. 521, 3 Pac. 415.

United States.— Providence Rubber Co. *v.* Goodyear, 6 Wall. (U. S.) 153, 18 L. ed. 762.

66. Ansley *v.* Barlow, 103 Ga. 107, 29 S. E. 596 [*distinguishing* Black *v.* Peters, 64 Ga.

(D) *From Service of Notice and Copy of Judgment or Order*—(1) IN GENERAL. Under other statutes, in order to limit the time within which an appeal may be taken, the party cast by a judgment or order must be served with notice of the rendition or entry thereof, and a copy of the judgment or order is also sometimes required to be served.[67]

(2) FORM OF NOTICE AND COPY. As a rule written notice is necessary,[68] and in New York, in order effectually to limit the time for appealing, the notice must be indorsed with both the name of the attorney and his office address,[69]

628]. See also Stephens *v.* Bernays, 119 Mo. 143, 24 S. W. 46.

In North Carolina the statutory time within which an appeal can be taken begins to run from the actual adjournment of the term at which the judgment is rendered. Davison *v.* West Oxford Land Co., 120 N. C. 259, 26 S. E. 782; Turrentine *v.* Richmond, etc., R. Co., 92 N. C. 642; Clark's Code Civ. Proc. N. C. (1900), § 549.

In Virginia it is held that the limitation runs from the actual date of the decree, and not from the beginning or the end of the term at which it was rendered. Buford *v.* North Roanoke Land Co., 94 Va. 616, 27 S. E. 509.

67. *Louisiana.*— Francis *v.* Martin, 28 La. Ann. 403; Hoffman *v.* Howell, 27 La. Ann. 304.

Michigan.— See Richardson *v.* Yawkey, 9 Mich. 139.

New York.— Fairchild *v.* Edson, 144 N. Y. 645, 39 N. E. 493, 64 N. Y. St. 866 [*affirming* 81 Hun (N. Y.) 80, 30 N. Y. Suppl. 615, 62 N. Y. St. 548]; Lane *v.* Wheeler, 101 N. Y. 17, 3 N. E. 796; McGruer *v.* Abbott, 47 N. Y. App. Div. 191, 62 N. Y. Suppl. 123; Weeks *v.* Coe, 36 N. Y. App. Div. 339, 55 N. Y. Suppl. 263; New Rochelle Gas, etc., Co. *v.* Van Benschoten, 47 N. Y. App. Div. 477, 62 N. Y. Suppl. 398; Matter of Armstrong, 57 Hun (N. Y.) 587, 10 N. Y. Suppl. 899, 32 N. Y. St. 441 [*reversing* 9 N. Y. Suppl. 443]; Mohr *v.* Dorschel, 49 Hun (N. Y.) 607, 2 N. Y. Suppl. 33, 16 N. Y. St. 766; Levien *v.* Webb, 30 Misc. (N. Y.) 742, 63 N. Y. Suppl. 155; Dawson *v.* Parsons, 16 Misc. (N. Y.) 190, 38 N. Y. Suppl. 1000, 74 N. Y. St. 810; Kerner *v.* Steck, 9 N. Y. Suppl. 303, 18 N. Y. Civ. Proc. 286, 30 N. Y. St. 223; Baker *v.* Hatfield, 3 Civ. Proc. 303, 29 Hun (N. Y.) 670; Smith *v.* Evans, 1 Abb. N. Cas. (N. Y.) 396; Fry *v.* Bennett, 16 How. Pr. (N. Y.) 402; Dorlon *v.* Lewis, 7 How. Pr. (N. Y.) 132; Duel *v.* Fisher, 2 How. Pr. (N. Y.) 38; Mason *v.* Jones, Code Rep. N. S. (N. Y.) 335; Bentley *v.* Jones, 3 Code Rep. (N. Y.) 37, 4 How. Pr. (N. Y.) 335; Mucklethwaite *v.* Weiser, 1 Code Rep. (N. Y.) 61; People *v.* Ten Eyck, 18 Wend. (N. Y.) 553; Jenkins *v.* Wild, 14 Wend. (N. Y.) 539; Tyler *v.* Simmons, 6 Paige (N. Y.) 127; Studwell *v.* Palmer, 5 Paige (N. Y.) 57; Eldridge *v.* Howell, 4 Paige (N. Y.) 457; Childs *v.* Geraghty, 8 N. Y. Leg. Obs. 172.

South Dakota.— Brooks *v.* Bigelow, 9 S. D. 179, 68 N. W. 286.

Washington.— National Christian Assoc. *v.* Simpson, 21 Wash. 16, 56 Pac. 844.

Wisconsin.— Jarvis *v.* Hamilton, 37 Wis. 87; Couldren *v.* Caughey, 29 Wis. 317.

See 2 Cent. Dig. tit. "Appeal and Error," § 1900.

In Louisiana the party cast is entitled to notice of judgment, except where he has been cited personally, and filed an answer, or where he has appeared and filed an answer. State *v.* Judge, 37 La. Ann. 118; Webb *v.* Keller, 35 La. Ann. 930; Verges *v.* Gonzales, 33 La. Ann. 410.

In Michigan, when a decree is entered in vacation, notice must be given to the opposite party, under Mich. Comp. Laws, §§ 4967, 4968, and the period within which an appeal must be taken runs from the date of such notice. McClung *v.* McClung, 39 Mich. 55.

In North Carolina the statutory time for appealing is from notice of a judgment taken out of term, and from adjournment of the court when it is taken in term. Clark's Code Civ. Proc. N. C. (1900), § 549.

In South Carolina the appellant or his counsel must have ten days' written notice of an order, decree, or judgment granted at chambers. Appleby *v.* South Carolina, etc., R. Co., 58 S. C. 33, 36 S. E. 109; Alexander *v.* Alexander, 16 S. C. 126. See also Maner *v.* Wilson, 16 S. C. 469; Lake *v.* Moore, 12 S. C. 563.

Effect of amendment of judgment.— If, after notice to limit the time of appeal has been given, the judgment is amended in a material particular, a new notice is necessary in order to limit the time for appealing. Smith *v.* Evans, 1 Abb. N. Cas. (N. Y.) 396. See also Brown *v.* Hardie, 5 Rob. (N. Y.) 678.

68. Fry *v.* Bennett, 7 Abb. Pr. (N. Y.) 352, 16 How. Pr. (N. Y.) 402; Rankin *v.* Pine, 4 Abb. Pr. (N. Y.) 309; Gay *v.* Gay, 10 Paige (N. Y.) 369; People *v.* Spalding, 9 Paige (N. Y.) 607; Lake *v.* Moore, 12 S. C. 563; Corwith *v.* Illinois State Bank, 18 Wis. 560, 86 Am. Dec. 793; Rosenkrans *v.* Kline, 42 Wis. 558; Couldren *v.* Caughey, 29 Wis. 317. *Compare* Farley *v.* Farley, 7 Paige (N. Y.) 40 [*decided* under 2 N. Y. Rev. Stat. 605, § 79]; North American Coal Co. *v.* Dyett, 4 Paige (N. Y.) 273.

Parol notice is sufficient in Pennsylvania. Dawson's Appeal, 15 Pa. St. 480.

69. Fortsmann *v.* Shulting, 107 N. Y. 644, 14 N. E. 190; Kelly *v.* Sheehan, 76 N. Y. 325; Langdon *v.* Evans, 29 Hun (N. Y.) 652; Yorks *v.* Peck, 17 How. Pr. (N. Y.) 192. See also People *v.* Keator, 101 N. Y. 610, 3 N. E. 903.

Sufficient notice.— A paper bearing an indorsement of the title of a cause, and a statement that it is a copy of a certified order affirming an order of reference, to which order

and must state the clerk's office in which the judgment is entered.[70] It is unnecessary that the copy of the judgment which is served upon appellant should be certified where it appears that the judgment itself was signed by the proper clerk.[71]

(3) Time for Giving Notice. Where the judgment or order must be entered before an appeal can be taken, a notice given before the entry of the judgment or order is ineffectual to limit the time for appealing,[72] and such notice can only be given when the amount of the judgment, including costs as well as damages, has been finally adjusted and determined by the proper officer.[73]

(4) Sufficiency of Service. One who seeks, by the service of notice, or papers of any description, to restrict or limit the time in which an appeal may be taken, will be held to strict and technical exactness of practice.[74] Service is complete when the notice is mailed to the adverse party's attorneys, properly addressed, whether it is received by such attorneys or not.[75]

(5) Waiver of Service. The necessity for notice may be waived if appellant takes steps to appeal without waiting for notice to be given.[76]

2. Extension of Time — a. By Courts — (1) *Appellate Courts.* The general

is subscribed the name of the attorney for respondent, with the number of his office, and it is addressed to and served on the attorney for appellant, and which, on its face, bears the certificate of the clerk of common pleas that the paper is an extract from the minutes of the court, and that it is a copy of an order made at the general term of the court, is such written notice of a judgment as will limit the time of appeal. Devlin *v.* New York, 62 How. Pr. (N. Y.) 166.

70. Matter of New York Cent., etc., R. Co., 60 N. Y. 112; Valton *v.* National Loan Fund L. Assur. Soc., 19 How. Pr. (N. Y.) 515. See also Livingston *v.* New York Electric R. Co., 21 N. Y. Civ. Proc. 210, 15 N. Y. Suppl. 191, 60 Hun (N. Y.) 473, 39 N. Y. St. 535.

71. Levien *v.* Webb, 30 Misc. (N. Y.) 742, 63 N. Y. Suppl. 155 [*distinguishing* Livingston *v.* New York El. R. Co., 21 N. Y. Civ. Proc. 210, 60 Hun (N. Y.) 473, 15 N. Y. Suppl. 191, 39 N. Y. St. 535; Good *v.* Daland, 119 N. Y. 153, 23 N. E. 474, 28 N. Y. St. 935, in which cases an objection to the copy of the judgment was sustained because the copy did not show that the judgment as entered had been properly signed by the clerk].

72. Turpin *v.* His Creditors, 9 Mart. (La.) 517; Matter of New York Cent., etc., R. Co., 60 N. Y. 112; Sherman *v.* Postley, 45 Barb. (N. Y.) 348; Leavy *v.* Roberts, 8 Abb. Pr. (N. Y.) 310; Gallt *v.* Finch, 24 How. Pr. (N. Y.) 193; Studwell *v.* Palmer, 5 Paige (N. Y.) 57; Eldridge *v.* Howell, 4 Paige (N. Y.) 457.

73. Thurber *v.* Chambers, 60 N. Y. 29; De Mott *v.* Kendrick, 63 Hun (N. Y.) 112, 17 N. Y. Suppl. 630, 43 N. Y. St. 858; Beinhauer *v.* Gleason, 44 Hun (N. Y.) 556; Champion *v.* Plymouth Cong. Soc., 42 Barb. (N. Y.) 441; Bonesteel *v.* Bonesteel, 30 Wis. 151.

74. Richardson *v.* Rogers, 37 Minn. 461, 35 N. W. 270; Good *v.* Daland, 119 N. Y. 153, 23 N. E. 474, 28 N. Y. St. 935; Matter of New York Cent., etc., R. Co., 60 N. Y. 112; Weeks *v.* Coe, 36 N. Y. App. Div. 339, 55 N. Y. Suppl. 263; Pickersgill *v.* Read, 7 Hun (N. Y.) 636; Champion *v.* Plymouth Cong. Soc., 42 Barb. (N. Y.) 441; Keogh *v.* Snow, (N. D. 1900) 83 N. W. 864; McKenzie *v.* Bismarck Water Co., 6 N. D. 361, 71 N. W. 608; Corwith *v.* Illinois State Bank, 18 Wis. 560, 86 Am. Dec. 793.

Notice and copy both necessary.— The service of a copy of an order for judgment, without notice of the entry of the original, is not sufficient to limit the time in which to appeal (Kubin *v.* Miller, 61 N. Y. Suppl. 1121), and a notice of judgment is not a copy of the judgment within the meaning of N. Y. Code Civ. Proc. § 1351, so as to limit the time of appeal from the date of the service thereof (Rollins *v.* Wood, 16 Hun (N. Y.) 586).

Service upon attorney.— Service of notice, not upon the person who formally appeared as attorney for defendant, but upon a firm of attorneys who had nearly the exclusive management of the case, and who gave an admission in the name of the attorney of record (Chase *v.* Bibbins, 71 N. Y. 592), or upon an attorney occupying an office with defendant's attorney and at the time in charge of such office (Crook *v.* Crook, 14 Daly (N. Y.) 298, 12 N. Y. St. 663), is sufficient. Service upon the attorney who had appeared for all defendants limits the time to appeal, not only as against plaintiff, but also as to an appeal by one defendant against his co-defendant. Morrison *v.* Morrison, 16 Hun (N. Y.) 507.

75. Miller *v.* Shall, 67 Barb. (N. Y.) 446.

76. People *v.* Center, 9 Pac. Coast L. J. 765; Bowers *v.* Watts, 40 S. C. 547, 18 S. E. 888; Braely *v.* Marks, 13 Wash. 224, 43 Pac. 27; McQuesten *v.* Morrill, 12 Wash. 335, 41 Pac. 56.

Waiver of defective service.—A written extension of time to serve a case will be considered as a waiver of a defective service. Staats *v.* Garrett, 21 N. Y. Wkly. Dig. 39. And a written admission signed by appellant's attorney of "due and timely service of a copy of the within judgment and notice of entry," estops appellant from alleging irregularity in the service or contents of the notice. Mohr *v.* Dorschel, 15 N. Y. Civ. Proc. R. 22, 49 Hun (N. Y.) 607, 2 N. Y. Suppl. 33, 16 N. Y. St. 766.

rule is that the time prescribed by statute for appealing or suing out a writ of error cannot be extended by the appellate court.[77]

(II) *Lower Courts.* In the absence of provision to the contrary,[78] the court from which an appeal is taken or a writ of error sued out is without power to extend the statutory time.[79]

77. *California.*— Dooling *v.* Moore, 20 Cal. 141.

Kansas.— Morrell *v.* Massa, 1 Kan. 224.

Louisiana.— See Beaird *v.* Russ, 34 La. Ann. 315.

Minnesota.— Burns *v.* Phinney, 53 Minn. 431, 55 N. W. 540.

Mississippi.—Butler *v.* Craig, 27 Miss. 628, 61 Am. Dec. 527.

Missouri.—Randolph *v.* Mauck, 78 Mo. 468.

Nebraska.— Fitzgerald *v.* Brandt, 36 Nebr. 683, 54 N. W. 992.

New York.— People *v.* Eldridge, 7 How. Pr. (N. Y.) 108; Enos *v.* Thomas, 5 How. Pr. (N. Y.) 361.

Wisconsin.— Herrick *v.* Racine Warehouse, etc., Co., 43 Wis. 93; Van Steenwyck *v.* Miller, 18 Wis. 320.

United States.— Threadgill *v.* Platt, 71 Fed. 1.

But in Henry *v.* Kline, 13 Ky. L. Rep. 239, it was held that, although an appeal granted by the lower court had not been dismissed, the clerk of the appellate court had the right to grant an appeal if appellant, because of his failure to file the transcript in time, had lost his right to prosecute the appeal granted by the lower court. And see Climie *v.* Odell, 20 Mich. 12, to the effect that, in cases where the Michigan practice act has conferred upon the appellate court power, upon cause shown, to authorize an appeal, the statutory time for taking an appeal may be extended.

See 2 Cent. Dig. tit. "Appeal and Error," § 1921.

78. Under Mills' Anno. Stat. Colo. (1891), § 1086, the county court may at any time within the prescribed period, upon good cause shown, extend the time for appealing (Grove *v.* Foutch, 6 Colo. App. 357, 40 Pac. 852); but notice must first be given to the appellee, or notice waived (Van Duzer *v.* Caskie, 13 Colo. App. 229, 56 Pac. 986).

In Quebec, the court of king's bench has discretionary power to allow an appeal to the supreme court after the delay mentioned in the statute has expired (Caverhill *v.* Robillard, 21 L. C. Jur. 74, 7 Rev. Leg. 575); but the court will refuse leave to appeal in such cases unless it is shown that special circumstances have retarded the appeal (Massue *v.* Corporation de St. Aime, 3 Q. B. 319).

79. *Florida.*— Whitaker *v.* Sparkman, 30 Fla. 347, 11 So. 542.

Illinois.—McGowan *v.* Duff, 41 Ill. App. 57.

Kentucky.— Marcum *v.* Sewell, 4 Ky. L. Rep. 898; Broseke *v.* Carton, 3 Ky. L. Rep. 687.

Louisiana.— New Orleans *v.* Adams, 28 La. Ann. 15; State *v.* Judge, 11 La. Ann. 728.

Massachusetts.—Atty.-Gen. *v.* Barbour, 121 Mass. 568; Gardner *v.* Dudley, 12 Gray (Mass.) 430.

Minnesota.— Burns *v.* Phinney, 53 Minn. 431, 55 N. W. 540. See also Carli *v.* Jackman, 9 Minn. 249.

New York.— Wait *v.* Van Allen, 22 N. Y. 319; Humphrey *v.* Chamberlain, 11 N. Y. 274; De Freest *v.* Troy, 34 Hun (N. Y.) 580; Lavelle *v.* Skelly, 24 Hun (N. Y.) 642; Whitney *v.* Townsend, 7 Hun (N. Y.) 233; Sherwood *v.* Pratt, 11 Abb. Pr. N. S. (N. Y.) 115; Fry *v.* Bennett, 7 Abb. Pr. (N. Y.) 352, 16 How. Pr. (N. Y.) 385; De la Figaniere *v.* Jackson, 2 Abb. Pr. (N. Y.) 286, 4 E. D. Smith (N. Y.) 477; Salls *v.* Butler, 27 How. Pr. (N. Y.) 133 [*reviewing* and *disapproving* Toll *v.* Thomas, 18 How. Pr. (N. Y.) 324; Haase *v.* New York Cent. R. Co., 14 How. Pr. (N. Y.) 430; Crittenden *v.* Adams, 5 How. Pr. (N. Y.) 310; Traver *v.* Silvernail, 2 Code Rep. (N. Y.) 96]; Lindsley *v.* Almy, Code Rep. N. S. (N. Y.) 139; Westcott *v.* Platt, 1 Code Rep. (N. Y.) 100; Renouil *v.* Harris, 2 Sandf. (N. Y.) 641, 646, 2 Code Rep. (N. Y.) 71; Moot *v.* Parkhurst, 2 Hill (N. Y.) 372.

North Carolina.— Pipkin *v.* McArtan, 122 N. C. 194, 29 S. E. 334.

Pennsylvania.—Schrenkeisen *v.* Kishbaugh, 162 Pa. St. 45, 29 Atl. 284.

Utah.— Brough *v.* Mighell, 6 Utah 317, 23 Pac. 673.

United States.— Judson *v.* Courier Co., 25 Fed. 705; Benjamin *v.* Hart, 4 Ben. (U. S.) 454, 3 Fed. Cas. No. 1,302; Walsh *v.* U. S., 23 Ct. Cl. 1. See also Credit Co. *v.* Arkansas Cent. R. Co., 128 U. S. 258, 9 S. Ct. 107, 32 L. ed. 448.

See 2 Cent. Dig. tit. "Appeal and Error," § 1922.

Vacating an order or judgment.— The lower court cannot vacate an order or judgment, and cause it to be entered as of a more recent date, or refile and thereby extend the time for taking an appeal. Weed *v.* Lyon, Walk. (Mich.) 77; Mount *v.* Van Ness, 34 N. J. Eq. 523; Humphrey *v.* Chamberlain, 11 N. Y. 274; Whitney *v.* Townsend, 7 Hun (N. Y.) 233; Cotes *v.* Smith, 29 How. Pr. (N. Y.) 326; Monroe Bank *v.* Widner, 11 Paige (N. Y.) 529, 43 Am. Dec. 768; Townsend *v.* Townsend, 2 Paige (N. Y.) 413. *Compare* Church *v.* Rhodes, 6 How. Pr. (N. Y.) 281.

"The extension of time for settling a bill of exceptions has nothing to do with taking an appeal further than the making of a record of matters *in pais* for the appellate court to act on; it has no effect to extend the time prescribed by statute for appealing." Jackson *v.* Haisly, 27 Fla. 205, 214, 9 So. 648.

In Colorado it is provided by statute [Laws (1893), p. 80] that whenever the supreme court or court of appeals shall dismiss an appeal for lack of jurisdiction to entertain the same — as where the appeal has not

b. Because of Delay Occasioned by Court or Official. If delay in taking an appeal or suing out a writ of error is caused by the acts or omissions of the court or some official thereof when the concurrence of the court or of such official is necessary,[80] the appeal may be taken or the writ of error sued out after the expiration of the prescribed time.[81]

c. Because of Delay Occasioned by Fraud, Accident, or Mistake. In some jurisdictions a party desiring to appeal or sue out a writ of error will be relieved from the operation of the statute of limitations when the delay has been occasioned by fraud, accident, mistake, or some other cause beyond his control, and when he himself has been without laches.[82]

been brought within the statutory time, and it appears that the court would have had jurisdiction if the action had come up on a writ of error — the court shall order the clerk to enter the action as pending on writ of error, and thereby all the proceedings shall be such as if the action had originally been brought to the court on writ of error. Colorado Springs Live Stock Co. *v.* Godding, 20 Colo. 71, 36 Pac. 884.

80. Act not required by law.— Where the failure to perfect an appeal within the time limited by law is due to the failure of some officer to perform an act not required of him by law, the right to appeal is destroyed. Van Sant *v.* Francisco, 55 Nebr. 650, 75 N. W. 1086. See also Warner *v.* Texas, etc., R. Co., 54 Fed. 920, 2 U. S. App. 647, 4 C. C. A. 670.

81. *Florida.*— Knight *v.* Towles, 32 Fla. 473, 14 So. 91.

Georgia.— Stamps *v.* Hardigree, 100 Ga. 160, 23 S. E. 41.

Iowa.— Burns *v.* Keas, 20 Iowa 16.

Kansas.— Atchison County *v.* Sullivan, 6 Kan. App. 100, 49 Pac. 677.

Louisiana.—Jacobs' Succession, 5 Rob. (La.) 270. See also Le Blanc *v.* Lemaire, 52 La. Ann. 1635, 28 So. 105.

Michigan.— Cameron *v.* Calkins, 43 Mich. 191, 5 N. W. 292 (sickness of official stenographer).

Nebraska.— Dobson *v.* Dobson, 7 Nebr. 296.

New Jersey.— Mount *v.* Van Ness, 34 N. J. Eq. 523.

New York.— Clapp *v.* Graves, 9 Abb. Pr. (N. Y.) 20; Juliand *v.* Grant, 34 How. Pr. (N. Y.) 132 (death of referee). See also Halsey *v.* Van Amringe, 4 Paige (N. Y.) 279.

Pennsylvania.— Huyner *v.* Miller, 192 Pa. St. 365, 43 Atl. 976.

Virginia.— Pugh *v.* Jones, 6 Leigh (Va.) 299.

United States.— U. S. *v.* Adams, 6 Wall. (U. S.) 101, 18 L. ed. 792.

See also U. S. *v.* Pena, 175 U. S. 500, 20 S. Ct. 165, 44 L. ed. 251.

Failure of clerk to make out transcript.— Failure to appeal in time is not cured by the fact that it arose from the neglect of the clerk to make out the transcript in time. Redway *v.* Chapman, 48 Mo. 218.

No appellate court.— The fact that no appellate court existed would not prevent the limitation of the right of appeal from running. It might be otherwise if there had been no judge in the court below to grant an appeal. Hall *v.* Beggs, 17 La. Ann. 238.

Office of judge closed.— The fact that the judge of a county court habitually closed his office at half after three o'clock P. M. and went to his home constitutes no legal excuse for failure to enter an appeal from a judgment rendered in that court within the time prescribed by law, where it affirmatively appears that on each of the days within which the appeal could have been entered the judge was in his office until the hour named. Reliable Jobbing House *v.* Goldstein, 110 Ga. 265, 34 S. E. 279.

82. *Florida.*—Underwood *v.* Underwood, 12 Fla. 432 (constitutional change of time and place of holding supreme court).

Georgia.— Dougherty *v.* Fogle, 48 Ga. 615.

Illinois.— Excelsior Electric Co. *v.* Chicago Waifs' Mission, 41 Ill. App. 111.

Indiana.— Smythe *v.* Boswell, 117 Ind. 365, 20 N. E. 263.

Louisiana.— Emerson *v.* Lozano, 1 Mart. (La.) 265.

Maine.—Chase *v.* Bates, 81 Me. 182, 16 Atl. 542.

Massachusetts.— Bergen *v.* Jones, 4 Metc. (Mass.) 371; Stebbins *v.* Palmer, 1 Pick. (Mass.) 71, 11 Am. Dec. 146.

Michigan.— Jerome *v.* Wayne Cir. Judge, 117 Mich. 19, 75 N. W. 143.

New Jersey.— See Dansen *v.* Johnson, 13 N. J. L. 264.

New York.— Jellinghaus *v.* New York Ins. Co., 5 Bosw. (N. Y.) 678; Dutchess County Bank *v.* Ibbotson, 1 How. Pr. (N. Y.) 60; Manhattan Co. *v.* Osgood, 1 Cow. (N. Y.) 65.

North Carolina.— Reade *v.* Hamlin, 62 N. C. 128; Clark's Code Civ. Proc. N. C. (1900), pp. 722, 723.

Pennsylvania.—Holazasz *v.* Osman, 9 Kulp (Pa.) 450; Debert *v.* Smith, 7 Kulp (Pa.) 307.

South Carolina.— Crosswell *v.* Connecticut Indemnity Assoc., 49 S. C. 374, 27 S. E. 388; Willoughby *v.* North Eastern R. Co., 49 S. C. 372, 27 S. E. 273. See also Scurry *v.* Coleman, 14 S. C. 166.

Tennessee.— Craddick *v.* Pritchett, Peck (Tenn.) 21.

Texas.— Wright *v.* Haley, 34 Tex. 48.

Wisconsin.— Oakley *v.* Davidson, 103 Wis. 98, 79 N. W. 27.

Canada.— Lewis *v.* Talbot-St. Gravel Road Co., 10 Ont. Pr. 15; Gilbert *v.* Jarvis, 2 Ch. Chamb. (U. C.) 259; Clark *v.* Reg., 3 Exch. Ct. Rep. 1; Braun *v.* Davis, 9 Manitoba 539. See also Duff *v.* Barrett, 3 Ch. Chamb. (U. C.) 318; Butler *v.* Church, 3 Ch. Chamb. (U. C.)

d. Because of Delay Occasioned by Negligence of Counsel. An appellant cannot defeat the plea that the statute of limitations has run against his appeal by showing that the failure to perfect the appeal in time was due to the neglect of his counsel.[83]

e. By Waiver — (1) *Express.* In some jurisdictions the time may be extended by agreement of the parties,[84] if such agreement is in writing or is not denied,[85] while in others such agreements are held to be invalid.[86]

91; Bullen *v.* Renwick, 1 Ch. Chamb. (U. C.) 204; McRae *v.* Corbett, 6 Manitoba 536.

See 2 Cent. Dig. tit. "Appeal and Error," § 1931.

In Maryland, under the statute of 1826, c. 200, an appeal may be taken after the time prescribed by statute when it is alleged on oath that the judgment or order appealed from was obtained by fraud or mistake. United Lines Tel. Co. *v.* Stevens, 67 Md. 156, 8 Atl. 908; Johnson *v.* Robertson, 31 Md. 476; Contee *v.* Pratt, 9 Md. 67; Oliver *v.* Palmer, 11 Gill & J. (Md.) 137.

In Michigan, under Comp. Laws, c. 117, § 190, providing that the circuit court may authorize the taking of an appeal after the expiration of the five days fixed by section 184, "when the party making the appeal has been prevented from taking the same by circumstances not under his control," the circuit court has not a general discretion to allow appeals when it would be merely equitable to do so. Draper *v.* Tooker, 16 Mich. 74, 75.

Advice of counsel.— The fact that defendant was erroneously informed by his counsel that a judgment against him for unlawful detainer would not affect his right to certain produce grown on the premises is no reason for granting an appeal after the expiration of the statutory time. Ruffner *v.* Love, 24 W. Va. 181.

Sickness of appellant.— An application to file an appeal *nunc pro tunc*, upon the sole ground that appellant was prevented from filing it by an attack of cholera morbus, should be sustained by some proof that he has a defense on the merits. Friedman *v.* Smith, 7 Kulp (Pa.) 504. See also Hibbs *v.* Stines, 8 Phila. (Pa.) 236.

Certiorari when appeal lost.— In North Carolina, where a party is deprived of the right of appeal without his laches, he is entitled to a certiorari as a substitute for an appeal; but the writ of certiorari, as a substitute for an appeal lost, will be granted only when the petitioner shows that he has been diligent and there has been no laches on his part in respect to his appeal, and, further, that his failure to take and perfect the same was occasioned by some act or misleading representation on the part of the opposing party or some other person or cause in some way connected with it, and not within his control. Graves *v.* Hines, 106 N. C. 323, 11 S. E. 362; Williamson *v.* Boykin, 99 N. C. 238, 5 S. E. 378; Greenville *v.* Old Dominion Steamship Co., 98 N. C. 163, 3 S. E. 505; Parker *v.* Wilmington, etc., R. Co., 84 N. C. 118; Andrews *v.* Whisnant, 83 N. C. 446; Skinner *v.* Maxwell, 67 N. C. 257. See also Hygienic Plate Ice Mfg. Co. *v.* Raleigh, etc., Air Line R. Co., 125 N. C. 17, 34 S. E. 100.

83. Cunningham *v.* Cunningham, 20 Ky. L. Rep. 1537, 49 S. W. 794.

Certiorari granted.— In North Carolina, however, a writ of certiorari was granted as a substitute for an appeal where the petitioner had lost his right of appeal by neglect of his counsel to make up and serve his case on appeal in time, when it appeared that all of his counsel were insolvent, and unable to respond in damages for their negligence. Hygienic Plate Ice Mfg. Co. *v.* Raleigh, etc., Air Line R. Co., 125 N. C. 17, 34 S. E. 100.

84. Bagley *v.* Jennings, 58 Hun (N. Y.) 56, 19 N. Y. Civ. Proc. 199, 11 N. Y. Suppl. 386, 33 N. Y. St. 355; Jacobs *v.* Morange, 1 Daly (N. Y.) 523; Pipkin *v.* McArtan, 122 N. C. 194, 29 S. E. 334; Morrison *v.* Craven, 120 N. C. 327, 26 S. E. 940; Hemphill *v.* Morrison, 112 N. C. 756, 17 S. E. 535; Sondley *v.* Asheville, 112 N. C. 694, 17 S. E. 534; Holmes *v.* Holmes, 84 N. C. 833; Rouse *v.* Quinn, 75 N. C. 354; Adams *v.* Reeves, 74 N. C. 106; Wade *v.* Newbern, 72 N. C. 498; Goodwin *v.* Fox, 120 U. S. 775, 7 S. Ct. 779, 30 L. ed. 815.

Time for serving case extended.— Where a notice of appeal was not served within the time fixed by law, either on the clerk or the attorney, a stipulation extending the time to serve a proposed case, etc., is not a waiver of the right to insist that no appeal has been taken, where it appears that the attorney, at the time of granting the extension, refused to receive a notice of appeal, on the express ground that the time in which to serve it had expired. Durant *v.* Abendroth, 8 N. Y. Civ. Proc. 87, 53 N. Y. Super. Ct. 15. Nor does acceptance of service after time limited waive the right to insist that service was not in time. Watkins *v.* Raleigh, etc., Air Line R. Co., 116 N. C. 961, 21 S. E. 409.

85. Where an agreement between the parties or their counsel is alleged and not denied, it will be recognized by the court (Adams *v.* Reeves, 74 N. C. 106); but where the agreement is denied, it must either appear by a proper entry in the record or must be reduced to writing (Smith *v.* Smith, 119 N. C. 311, 25 S. E. 877; Rosenthal *v.* Roberson, 114 N. C. 594, 19 S. E. 667; Hemphill *v.* Morrison, 112 N. C. 756, 17 S. E. 535; Sondley *v.* Asheville, 112 N. C. 694, 17 S. E. 534; Rouse *v.* Quinn, 75 N. C. 354; Wade *v.* Newbern, 72 N. C. 498).

86. *Colorado.*— Grove *v.* Foutch, 6 Colo. App. 357, 40 Pac. 852.

Idaho.— Penny *v.* Nez Perces County, (Ida. 1895) 43 Pac. 570.

(11) *Implied.* In some cases it has been held that appellee, by his acts or conduct, may waive his right to object that the appeal has not been taken within the proper time.[87]

3. Effect of Failure to Proceed in Time — a. In General. When an appeal is not taken or a writ of error sued out within the prescribed time, it will be dismissed unless there is an express statutory provision to the contrary, or unless appellant or plaintiff in error can show some excuse which the court will deem a sufficient reason for relieving such party from the consequences of his failure to comply with the law.[88]

Indiana.— Flory *v.* Wilson, 83 Ind. 391. See also Louisville, etc., R. Co. *v.* Boland, 70 Ind. 595.

Kansas.— Hartzell *v.* Nagee, 60 Kan. 646, 57 Pac. 502; Strong *v.* Kansas City First Nat. Bank, 6 Kan. App. 753, 50 Pac. 952.

Louisiana.— Untereiner *v.* Miller, 29 La. Ann. 435. See also Higgins *v.* Haley, 28 La. Ann. 216; State *v.* Judge, 27 La. Ann. 697.

Massachusetts.—Atty.-Gen. *v.* Barbour, 121 Mass. 568.

Missouri.—Randolph *v.* Mauck, 78 Mo. 468.

Nebraska.— Tootle *v.* Shirey, 52 Nebr. 674, 72 N. W. 1045. See also Clark *v.* Morgan, 21 Nebr. 673, 33 N. W. 245.

Ohio.— King *v.* Penn, 43 Ohio St. 57, 1 N. E. 84.

Rhode Island.— Kenyon *v.* West Greenwich Probate Ct., 17 R. I. 652, 24 Atl. 149 [*distinguishing* State *v.* Dexter, 10 R. I. 341].

Washington.— Cogswell *v.* Hogan, 1 Wash. 4, 23 Pac. 835; Stark *v.* Jenkins, 1 Wash. Terr. 421.

Wisconsin.— Hall *v.* Gilman, 90 Wis. 455, 63 N. W. 1044; Herrick *v.* Racine Warehouse, etc., Co., 43 Wis. 93.

United States.— Stevens *v.* Clark, 62 Fed. 321, 18 U. S. App. 584, 10 C. C. A. 379.

See 2 Cent. Dig. tit. "Appeal and Error," § 1923.

An anticipated or expected agreement with counsel for the adverse party, concerning the contents of a transcript of the record on appeal, is not an excuse for not taking an appeal in time. Ewell *v.* Taylor, 45 Md. 573.

87. Haley *v.* Elliott, 20 Colo. 199, 37 Pac. 27; Orcutt's Appeal, 61 Conn. 378, 24 Atl. 276; Planchet's Succession, 29 La. Ann. 520.

A general appearance by respondent in the appellate court, and noticing the appeal for argument, are positive acts of submission to that court, and amount to a waiver of the right to have the appeal dismissed on the ground that it was not made in time. Pearson *v.* Lovejoy, 53 Barb. (N. Y.) 407. See also Lloyd *v.* Reynolds, 26 Nebr. 63, 41 N. W. 1072; Bazzo *v.* Wallace, 16 Nebr. 290, 20 N. W. 315 [*distinguished* in Omaha L. & T. Co. *v.* Ayer, 38 Nebr. 891, 57 N. W. 567].

No waiver by failure to return papers.— Where notice of appeal was served after the time had expired, which notice was immediately returned by respondent's attorney, with an indorsement stating that it was so returned because the appeal was not brought within the time prescribed, the omission to return the printed copies of the return served upon him was not a waiver of the objection to the appeal. Marsh *v.* Pierce, 110 N. Y. 639, 17 N. E. 729, 17 N. Y. St. 91.

No waiver by objection to bond.— The fact that appellee's counsel was present in the lower court when the appeal bond was filed, and made objection to its wording, cannot be regarded as a waiver of the right to have the appeal dismissed as not having been prayed for in proper time. James *v.* Dexter, 112 Ill. 489.

88. *Alabama.*— Leinkauff *v.* Tuskaloosa Sale, etc., Co., 105 Ala. 328, 16 So. 891; Gardner *v.* Ingram, 82 Ala. 339, 2 So. 879.

Arizona.— Fleury *v.* Jackson, 1 Ariz. 361, 25 Pac. 669.

Arkansas.—Johnson *v.* Godden, (Ark. 1892) 18 S. W. 125; Ferguson *v.* Doxey, 33 Ark. 663.

California.—Fitzgerald *v.* Fitzgerald, (Cal. 1894) 36 Pac. 947; Burr *v.* Navarro Mill Co., (Cal. 1894) 35 Pac. 990.

Colorado.— Dusing *v.* Nelson, 6 Colo. 39; Freas *v.* Townsend, 1 Colo. 86; Slattery *v.* Robinson, 7 Colo. App. 22, 42 Pac. 179.

Connecticut.—Allin *v.* Cook, 1 Root (Conn.) 54.

Florida.— Hull *v.* Westcott, 17 Fla. 280.

Georgia.— Perry *v.* Higgs, 6 Ga. 43. But see Fouché *v.* Harison, 78 Ga. 359, 3 S. E. 330, to the effect that it is no cause for dismissing a writ of error that it comes too late for some of the errors assigned, but such tardiness is cause only for declining to consider the errors which are over age.

Idaho.— Penny *v.* Nez Perces County, (Ida. 1895) 43 Pac. 570; Balfour *v.* Eves, (Ida. 1895) 42 Pac. 508.

Illinois.— James *v.* Dexter, 112 Ill. 489; Fleet *v.* Gilbert, 66 Ill. App. 678.

Indiana.— Holloran *v.* Midland R. Co., 129 Ind. 274, 28 N. E. 549; Smythe *v.* Boswell, 117 Ind. 365, 20 N. E. 263.

Iowa.— Young *v.* Rann, 111 Iowa 253, 82 N. W. 785; Dickerman *v.* Lubiens, 70 Iowa 345, 30 N. W. 610.

Kansas.— Byington *v.* Quinton, 45 Kan. 188, 25 Pac. 565; Struber *v.* Rohlfs, 36 Kan. 202, 12 Pac. 830; Marietta *v.* Standard Oil Co., 9 Kan. App. 887, 57 Pac. 47. See also Butcher *v.* Auld, 3 Kan. 217.

Kentucky.— American Acc. Co. *v.* Reigert, 92 Ky. 142, 13 Ky. L. Rep. 442, 17 S. W. 280; Dugan *v.* Massey, 6 Bush (Ky.) 81.

Louisiana.— Mutual Loan, etc., Assoc. *v.* First African Baptist Church, 48 La. Ann. 1458, 21 So. 24; Untereiner *v.* Miller, 29 La. Ann. 435.

Maine.— Webster *v.* Androscoggin County, 64 Me. 436.

b. Necessity for Plea or Motion. According to the English practice, which has been followed in some cases in this country,[89] defendant in error must avail himself of the defense of the statute of limitations by plea, and cannot take advantage of it by motion; nor can the court judicially take notice of it, as the limitation of time is not an objection to the jurisdiction of the court.[90] The general rule, however, now seems to be that the proper method of making use of this defense, either in the case of a writ of error or of an appeal, is by motion;[91] and in jurisdictions where the failure to take an appeal within the prescribed time is regarded as jurisdictional, it seems that neither plea nor motion is necessary; but that, when such failure appears upon the face of the record, the appellate court will of its own motion dismiss the appeal.[92]

Maryland.—Riley *v.* New York, etc., R. Co., 90 Md. 53, 44 Atl. 994; Hopper *v.* Jones, 64 Md. 578, 4 Atl. 273.

Massachusetts.—Atty.-Gen. *v.* Barbour, 121 Mass. 568.

Michigan.— Carney *v.* Baldwin, 95 Mich. 442, 54 N. W. 1081; Borden *v.* Peoria M. & F. Ins. Co., 14 Mich. 232.

Missouri.— State *v.* Keuchler, 83 Mo. 193; Gill *v.* Scruggs, 79 Mo. 187; Giesing *v.* Schowengerdt, 24 Mo. App. 554.

Montana.— Richter *v.* Eagle L. Assoc., 24 Mont. 346, 61 Pac. 878; Gallagher *v.* Cornelius, 23 Mont. 27, 57 Pac. 447.

Nebraska.— Renard *v.* Thomas, 50 Nebr. 398, 69 N. W. 932; Omaha L. & T. Co. *v.* Ayer, 38 Nebr. 891, 57 N. W. 567.

New York.— Witherhead *v.* Allen, 28 Barb. (N. Y.) 661; Hubbard *v.* Copcutt, 9 Abb. Pr. N. S. (N. Y.) 289; Haight *v.* Rodgers, 1 How. Pr. (N. Y.) 155; Hogan *v.* Brophy, 2 Code Rep. (N. Y.) 77; Bay *v.* Van Rensselaer, 1 Paige (N. Y.) 423.

North Carolina.— Tucker *v.* Inter-States L. Assoc., 112 N. C. 796, 17 S. E. 532; Brantley *v.* Jordan, 90 N. C. 25.

Ohio.— King *v.* Penn, 43 Ohio St. 57, 1 N. E. 84; Sibley *v.* Condensed Lubricating Oil Co., 12 Cinc. L. Bul. 308.

Oklahoma.—Vandervoort *v.* Pawnee County, 8 Okla. 227, 57 Pac. 167; Hoffman *v.* Pawnee County, 8 Okla. 225, 57 Pac. 167.

Pennsylvania.—Weil *v.* Frauenthal, 103 Pa. St. 317; Pennsylvania Cent. Ins. Co. *v.* Gaus, 91 Pa. St. 103. See also Camp *v.* Welles, 11 Pa. St. 206.

South Carolina.— Foot *v.* Williams, 18 S. C. 601.

Tennessee.—Dale *v.* Heffner, 4 Baxt. (Tenn.) 217.

Texas.— Schleicher *v.* Runge, 90 Tex. 456, 39 S. W. 279; Stoner *v.* Spencer, 32 Tex. 653.

Utah.— The Blyth, etc., Co. *v.* Swenson, 15 Utah 345, 49 Pac. 1027.

Vermont.— Gove *v.* Dyke, 14 Vt. 561.

Virginia.— Thompson *v.* Carpenter, 88 Va. 702, 14 S. E. 181.

Washington.— Murphy *v.* Ross, 2 Wash. 327, 26 Pac. 222.

West Virginia.— Grinnan *v.* Edwards, 5 W. Va. 111.

Wisconsin.— Munk *v.* Anderson, 94 Wis. 27, 68 N. W. 407.

United States.— Whitsitt *v.* Union Depot, etc., R. Co., 122 U. S. 363, 7 S. Ct. 1248, 30 L. ed. 1150; Condon *v.* Central L. & T. Co., 73 Fed. 907, 36 U. S. App. 579, 20 C. C. A. 110.

See 2 Cent. Dig. tit. "Appeal and Error," § 1926.

89. Allin *v.* Cook, 1 Root (Conn.) 54; Eager *v.* Com., 4 Mass. 182; Acker *v.* Ledyard, 1 Den. (N. Y.) 677; Fleet *v.* Youngs, 11 Wend. (N. Y.) 522.

Must be pleaded in appellate court.— In one jurisdiction it has been held that the defense is not available unless pleaded in the appellate court. Hendricks *v.* Pugh, 57 Miss. 157.

90. Higgs *v.* Evans, 2 Str. 837; Street *v.* Hopkinson, Hardw. 345. See also Brooks *v.* Norris, 11 How. (U. S.) 204, 13 L. ed. 665.

91. *California.*—Fairchild *v.* Daten, 38 Cal. 286.

Colorado.— Haley *v.* Elliott, 20 Colo. 199, 37 Pac. 27 (writ of error).

Connecticut.— Orcutt's Appeal, 61 Conn. 378, 24 Atl. 276.

Florida.— Crippen *v.* Livingston, 12 Fla. 638.

Indiana.— Day *v.* Huntington, 78 Ind. 280; Buntin *v.* Hooper, 59 Ind. 589.

Kansas.— Morell *v.* Massa, 1 Kan. 224.

Michigan.— Teller *v.* Willis, 12 Mich. 268.

Montana.— Nelson *v.* Donovan, 14 Mont. 78, 35 Pac. 227.

Nebraska.—Patterson *v.* Woodland, 28 Nebr. 250, 44 N. W. 112.

Ohio.— Cleveland, etc., R. Co. *v.* Wick, 35 Ohio St. 247.

Texas.— Shelley *v.* Southwick, 31 Tex. 125; Williams *v.* Craig, 10 Tex. 437.

Wisconsin.— Telford *v.* Ashland, 100 Wis. 238, 75 N. W. 1006.

United States.— Brooks *v.* Norris, 11 How. (U. S.) 204, 13 L. ed. 665.

92. *Colorado.*— Haley *v.* Elliott, 20 Colo. 199, 37 Pac. 27; Slattery *v.* Robinson, 7 Colo. App. 22, 42 Pac. 179.

Illinois.— Marder *v.* Campbell Printing Press, etc., Co., 76 Ill. App. 431.

Louisiana.— Untereiner *v.* Miller, 29 La. Ann. 435.

Massachusetts.—Atty.-Gen. *v.* Barbour, 121 Mass. 568.

Montana.—Gallagher *v.* Cornelius, 23 Mont. 27, 57 Pac. 447.

Texas.— Schleicher *v.* Runge, 90 Tex. 456, 39 S. W. 279.

United States.— See Edmonson *v.* Bloomshire, 7 Wall. (U. S.) 306, 19 L. ed. 91.

4. Premature Appeal — a. What Constitutes. An appeal taken before the rendition and, in some jurisdictions, before the entry of an appealable judgment or order is premature.[93]

b. Effect of. An appeal which has been taken prematurely will be dismissed.[94]

5. What Constitutes Taking and Perfecting. An appeal is considered as taken in some jurisdictions when the appeal papers are filed in the court in which the decree or order appealed from was entered;[95] in other jurisdictions when such papers are filed in the office of the clerk of the appellate court.[96] When a petition in error has been filed and a summons issued within the time limited for the commencement of proceedings in error, it seems that the proceeding is commenced in proper time, though the service of the summons is not made until after the expiration of the period prescribed for commencing a proceeding in error.[97]

93. *Arkansas.*— Cleburne County *v.* Morton, (Ark. 1900) 60 S. W. 307; Little River County *v.* Joyner, 57 Ark. 185, 20 S. W. 1082.

Indiana.— James *v.* Lake Erie, etc., R. Co., 144 Ind. 630, 43 N. E. 876; Anderson *v.* Mitchell, 58 Ind. 592.

Nevada.— California State Tel. Co. *v.* Patterson, 1 Nev. 150.

North Carolina.— Piedmont Mfg. Co. *v.* Buxton, 105 N. C. 74, 11 S. E. 264; Clark's Code Civ. Proc. N. C. (1900), pp. 741, 742.

Ohio.— Wilson *v.* Holeman, 2 Ohio 253.

South Carolina.—Wallace *v.* Columbia, etc., R. Co., 36 S. C. 599, 15 S. E. 452.

Washington.— Hays *v.* Dennis, 11 Wash. 360, 39 Pac. 658.

United States.— Fairbanks *v.* Amoskeag Nat. Bank, 32 Fed. 572; Brown *v.* Evans, 8 Sawy. (U. S.) 502, 18 Fed. 56.

See 2 Cent. Dig. tit. "Appeal and Error," § 1877; and *supra*, VII, A, 1, b, (II).

Appeal on day of entry not premature.— In Tyrrell *v.* Baldwin, 72 Cal. 192, 13 Pac. 475, it was held that where the notice of appeal was served on the seventh day of December and filed on the eighth day of December, being the same day as that on which the judgment was entered, the appeal was not premature. See also Schroder *v.* Schmidt, 71 Cal. 399, 12 Pac. 302; Blydenburgh *v.* Cotheal, 4 N. Y. 418, 5 How. Pr. (N. Y.) 200.

94. Inman *v.* Estes, 104 Ga. 645, 30 S. E. 800; D. M. V. Live Stock Ins. Co. *v.* Henderson, 38 Iowa 446; Goode *v.* Rogers, 126 N. C. 62, 35 S. E. 185; and see *supra*, note 92.

Estoppel.— Since the supreme court has no jurisdiction to entertain a premature appeal, an appellee cannot be estopped by his acts to raise this objection. Matter of Pearson, 119 Cal. 27, 50 Pac. 929.

95. Mehaffey *v.* Fink, 13 Pa. Super. Ct. 534; Farrar *v.* Churchhill, 135 U. S. 609, 10 S. Ct. 771, 34 L. ed. 246; Credit Co. *v.* Arkansas Cent. R. Co., 128 U. S. 258, 9 S. Ct. 107; 32 L. ed. 448; Scarborough *v.* Pargoud, 108 U. S. 567, 2 S. Ct. 877, 27 L. ed. 824; U. S. *v.* Adams, 6 Wall. (U. S.) 101, 18 L. ed. 792; Brooks *v.* Norris, 11 How. (U. S.) 204, 13 L. ed. 665; *In re* Goodman, 101 Fed. 920, 42 C. C. A. 85; U. S. *v.* Baxter, 51 Fed. 624, 10 U. S. App. 241, 2 C. C. A. 410; Threadgill *v.* Platt, 71 Fed. 1; Platt *v.* Preston, 19 Blatchf. (U. S.) 312, 8 Fed. 182.

96. Lange *v.* Lammier, (Ind. 1887) 12 N. E. 160, 11 N. E. 33; Johnson *v.* Stephenson, 104 Ind. 368, 4 N. E. 46; Harshman *v.* Armstrong, 43 Ind. 126; Jones *v.* Finnell, 8 Bush (Ky.) 25; Hansen *v.* Kinney, (Nebr. 1895) 63 N. W. 926.

Both the filing and serving of a notice are essential to the taking of an appeal in some jurisdictions. Tyrell *v.* Baldwin, 72 Cal. 192, 13 Pac. 475; Lowell *v.* Lowell, 55 Cal. 316; Baldwin *v.* Tuttle, 23 Iowa 66.

When appeal is prayed or a petition therefor filed, and the undertaking filed within the prescribed time, the appeal is properly taken, although it is not allowed (Cummings *v.* Hugh, 2 Vt. 578); or the citations served on the appellees until after the expiration of the statutory time (Crunk *v.* Crunk, 23 Tex. 604).

In Florida, the day on which a writ of error is filed, as well as that on which it is issued or bears test, must be within the time limited by law wherein such writs may be brought. Crippen *v.* Livingston, 12 Fla. 638.

In Iowa, the time of suing out a writ of error is determined by the date of its service upon the clerk to whom it is directed. Wright *v.* Hughes, 2 Greene (Iowa) 142.

In Louisiana, it has been decided that if appellant obtains the judge's order for an appeal during the time allowed for appealing, the citation may be served afterward. Baldwin *v.* Martin, 1 Mart. N. S. (La.) 519.

In Maryland, an appeal is not properly taken by a mere verbal application for an order of appeal which is not entered of record until after the expiration of the statutory period. Gaines *v.* Lamkin, 82 Md. 129, 33 Atl. 459; Humphreys *v.* Slemons, 78 Md. 606, 28 Atl. 1101; Miller *v.* Murray, 71 Md. 61, 17 Atl. 939.

In New Jersey, under the statute regulating appeals from the court of chancery, it is sufficient if the notice of appeal be filed within the statutory time. The petition may be filed later in the court above. Barton *v.* Long, 45 N. J. Eq. 160, 16 Atl. 683.

In Texas, an appeal from a county court to a district court is perfected when notice of the appeal is given in the county court and duly entered. Kahn *v.* Israelson, 62 Tex. 221.

In Ontario, the meaning of "appealing" is giving notice to the adversary of the intention to appeal by serving him with notice of appeal. Reg. *v.* McGauley, 12 Ont. Pr. 259.

97. *Illinois.*— Burnapp *v.* Wight, 14 Ill. 303.

Indiana.— Evans *v.* Galloway, 20 Ind. 479.

B. Allowance of Appeal or Writ of Error — 1. Necessity — a. Appeals. Under some statutes, the appellant must obtain an order allowing him to appeal;[98] while, under other statutes, an appeal may be taken as a matter of right, and such allowance is unnecessary.[99]

Kansas.— Barber Asphalt Paving Co. *v.* Botsford, 50 Kan. 331, 31 Pac. 1106; St. Louis, etc., Co. *v.* Rierson, 38 Kan. 359, 16 Pac. 443.

Missouri.— Buelterman *v.* Meyer, 132 Mo. 474, 34 S. W. 67.

Nebraska.— Rogers *v.* Redick, 10 Nebr. 332, 6 N. W. 413; Bemis *v.* Rogers, 8 Nebr. 149.

Ohio.— McDonald *v.* Ketchum, 53 Ohio St. 519, 42 N. E. 322. See also Burke *v.* Taylor, 45 Ohio St. 444, 15 N. E. 471; Moore *v.* Chittenden, 39 Ohio St. 563.

98. *Arkansas.*— Berry *v.* Singer, 9 Ark. 128; Woolford *v.* Harrington, 2 Ark. 85. See also Adams *v.* Hepman, 27 Ark. 156; Johnson *v.* Hodges, 24 Ark. 597.

Illinois.— Lagow *v.* Robeson, 69 Ill. App. 176; Mississippi Valley Manufacturers' Mut. Ins. Co. *v.* Bermond, 39 Ill. App. 267; Chester *v.* Wilson, 15 Ill. App. 239.

Louisiana.— Bechnel *v.* New Orleans, etc., R. Co., 28 La. Ann. 522; Burton *v.* Sheriff, 9 La. Ann. 158.

Michigan.— Matter of Dickinson, 2 Mich. 337.

Missouri.— State *v.* Griggs, 48 Mo. 557.

New York.— Smith *v.* White, 23 N. Y. 572; Thompson *v.* Kearney, 14 Daly (N. Y.) 436, 14 N. Y. St. 686; Weil *v.* Kempf, 12 N. Y. Civ. Proc. 379. See also Masters *v.* Bailey, 1 How. Pr. (N. Y.) 42.

Pennsylvania.— Haslage's Appeal, 37 Pa. St. 440.

South Carolina.— Pell *v.* Ball, 1 Rich. Eq. (S. C.) 419.

Tennessee.— Harrison *v.* Farnsworth, 1 Heisk. (Tenn.) 751; Cowan *v.* Hatcher, (Tenn. Ch. 1898) 48 S. W. 328. See also Wooten *v.* Daniel, 16 Lea (Tenn.) 156.

Washington.—Steamboat Zephyr *v.* Brown, 2 Wash. Terr. 44, 3 Pac. 186; Puget Sound Agricultural Co. *v.* Pierce County, 1 Wash. Terr. 76.

United States.— Tuskaloosa Northern R. Co. *v.* Gude, 141 U. S. 244, 11 S. Ct. 1004, 35 L. ed. 742; Barrell *v.* The Propeller Mohawk, 3 Wall. (U. S.) 424, 18 L. ed. 168; The Oriental, 2 Flipp. (U. S.) 37, 18 Fed. Cas. No. 10,570; U. S. *v.* Haynes, 2 McLean (U. S.) 155, 26 Fed. Cas. No. 15,335.

See 2 Cent. Dig. tit. "Appeal and Error," § 1932 *et seq.*

Allowing receiver to appeal.—See Farlow *v.* Kelley, 131 U. S. cci, appendix, 26 L. ed. 427.

Consent order.— Where an appeal is taken on due notice, a consent order declaring that subsequent proceedings may be had without prejudice, and that the case, on reaching the supreme court, shall stand to be heard on its merits, entitles appellant to a hearing though no further steps are taken to perfect the appeal in reference to such proceedings. McCrady *v.* Jones, 36 S. C. 136, 15 S. E. 430.

Leave upon terms.— Where a court has discretion, in granting leave of appeal, to impose such terms as it thinks just, it is not a proper exercise of such discretion, in view of the supposed merits of the case, which on an application for leave to appeal are not properly before it, to impose, as a condition of leave, the giving of security for payment of the sum awarded by the judgment which the applicant seeks to impeach. Johnson *v.* Voight, 65 L. J. P. C. 87, 75 L. T. Rep. N. S. 57.

In Arkansas, under the Arkansas act of Dec. 14, 1875, regulating appeals from the court of common pleas to the circuit court, an appeal must be granted by the court as a matter of right, upon motion. Ferguson *v.* Doxey, 33 Ark. 663.

In Pennsylvania, unless it clearly appears from the record that the case comes within one of the exceptions named in the seventh section of the act creating superior courts, there must be an allowance of the appeal by the court below. *In re* Melon St., 182 Pa. St. 397, 38 Atl. 482, 41 Wkly. Notes Cas. (Pa.) 153, 38 L. R. A. 275.

In Tennessee, it is within the discretion of the chancellor to allow an appeal from an order overruling a demurrer. Sigler *v.* Vaugh, 11 Lea (Tenn.) 131; Crawford *v.* Ætna L. Ins. Co., 12 Heisk. (Tenn.) 154; Northman *v.* Insurance Co.'s, 1 Tenn. Ch. 324.

99. Moore *v.* Randolph, 52 Ala. 530; Thompson *v.* McKim, 6 Harr. & J. (Md.) 302; Nesbit *v.* Rodewald, 43 Miss. 304.

Appeals from interlocutory orders.— Under the Illinois statute, when an appeal is taken from an interlocutory order, no order of the court allowing an appeal is necessary. Neil *v.* Oldach, 86 Ill. App. 354; Iroquois Furnace Co. *v.* Kimbark, 85 Ill. App. 399; Eichenbaum *v.* Levee, 78 Ill. App. 610; Hartzell *v.* Warren, 77 Ill. App. 274; Commerce Vault *v.* Hurd, 73 Ill. App. 107; Sidway *v.* American Mortg. Co., 67 Ill. App. 24.

Appeals from probate court.—See Boynton *v.* Dyer, 18 Pick. (Mass.) 1; Bazzo *v.* Wallace, 16 Nebr. 293, 20 N. W. 314.

Under Ky. Civ. Code, § 876, providing that an appeal for the removing of a judgment to the court of appeals for review shall be granted as a matter of right, either by the court rendering the judgment during the term at which it was rendered, or by the clerk of the court of appeals on application, it was held that, where no appeal is granted by the court below, the appeal is properly taken by application to the clerk of the court of appeals by filing the record with him. Jones *v.* Finnell, 8 Bush (Ky.) 25.

Under the North Carolina practice, an appeal may be taken without the sanction of a judge if the parties can make up the case on appeal by agreement, and without such judge's intervention. But whether they can perfect an appeal, not only without the sanction, but in

b. Writs of Error. It is not necessary that a writ of error should be allowed by a judge.[1]

2. By Whom Allowed. The allowance must be obtained from the court, judge, or clerk of the court designated by the statute under which the appeal is taken.[2] Thus, to give the supreme court of the United States jurisdiction of a

spite of the prohibition, of the judge, *quære?* Skinner *v.* Maxwell, 67 N. C. 257.

United States statute.— The right of appeal from the circuit court to the supreme court in the class of cases enumerated in the judiciary act of March 3, 1891, § 5, is an absolute right, and the circuit courts have no authority either to allow or disallow such an appeal, or to determine whether any particular case is one in which an appeal lies. Pullman's Palace-Car Co. *v.* Central Transp. Co., 71 Fed. 809.

1. It is a writ of right and the proper officer is bound to issue it, of course, on the application of the party. The filing of the writ with the clerk of the court to which it is directed, and his entering the receipt of it, is a sufficient allowance.

Alabama.— Hodges *v.* State, 8 Ala. 55.

Florida.—Orlando First Nat. Bank *v.* King, 36 Fla. 25, 18 So. 1.

Massachusetts.— Pembroke *v.* Abington, 2 Mass. 142.

New Jersey.— Anonymous, 16 N. J. L. 271.

New York.— Thompson *v.* Valarino, 3 Den. (N. Y.) 179; Van Antwerp *v.* Newman, 4 Cow. (N. Y.) 82, 15 Am. Dec. 340.

Ohio.— Bundy *v.* Ophir Iron Co., 35 Ohio St. 80; Shepler *v.* Dewey, 1 Ohio St. 331.

Texas.— Miller *v.* Cunningham, 1 Tex. App. Civ. Cas. § 958.

See 2 Cent. Dig. tit. "Appeal and Error," § 1933 *et seq.*

Court which issues the writ of error is to decide upon the propriety of it. The court to which it issues cannot examine into the question. State *v.* Farlee, 1 N. J. L. 96.

United States supreme court practice:— In Wilmington *v.* Ricaud, 90 Fed. 212, 213, 32 C. C. A. 578, it is said: "While it is the practice (and one which should never be departed from) to present a petition to the court when a review is desired, asking for a writ of error or an appeal, as the one or other is the appropriate remedy, such petition and the order thereon are neither of them absolutely necessary. When the case comes up, the writ of error gives the court jurisdiction." See also *Ex p.* Ralston, 119 U. S. 613, 7 S. Ct. 317, 30 L. ed. 506; *Ex p.* Barksdale, 112 U. S. 177, 5 S. Ct. 421, 28 L. ed. 691; Davidson *v.* Lanier, 4 Wall. (U. S.) 447, 18 L. ed. 377. Where a writ of error was issued by the clerk of a circuit court without the filing of any petition therefor, or the allowance thereof by a judge, but the judge subsequently, and within the time limited, signed a bill of exceptions and a citation, it was held that this was sufficient to give jurisdiction to the appellate court. Louisville Trust Co. *v.* Stockton, 72 Fed. 1, 18 C. C. A. 408. *Compare* Yeaton *v.* Lenox, 7 Pet. (U. S.) 220, 8 L. ed. 664, in which it is said that the judicial act directs that a writ of error must be allowed by a judge, and that a citation should be returned with the record.

When an application for the writ is refused on the merits of the case presented by it, or dismissed because it does not show the jurisdiction of the appellate court, such action is final, unless a motion for rehearing is filed within the proper time. Riordan *v.* Gulf, etc., R. Co., 86 Tex. 233, 24 S. W. 393.

Where one of two applications for writs of error in the same case is granted by the supreme court, the other will be granted as a matter of course. Houston, etc., R. Co. *v.* McFadden, 91 Tex. 194, 40 S. W. 216, 42 S. W. 593.

2. *Alabama.*— Griffin *v.* Huntsville Branch Bank, 9 Ala. 201.

Colorado.— Daniels *v.* Miller, 8 Colo. 542, 9 Pac. 18.

Illinois.— Town *v.* Howieson, 175 Ill. 85, 51 N. E. 712.

Kentucky.— Trimble *v.* Lewis, 14 Ky. L. Rep. 527; Mudd *v.* Mullican, 11 Ky. L. Rep. 417, 12 S. W. 263, 385.

Louisiana.— Edwards' Succession, 34 La. Ann. 216; Perkins *v.* Nettles, 17 La. 253.

Missouri.— Jefferson City Sav. Assoc. *v.* Monison, 42 Mo. 515.

New York.— Third Ave. R. Co. *v.* Ebling, 100 N. Y. 98, 2 N. E. 878; Sprague *v.* Western Union Tel. Co., 64 N. Y. 658; Curtin *v.* Metropolitan St. R. Co., 27 N. Y. Civ. Proc. 97, 22 Misc. (N. Y.) 586, 49 N. Y. Suppl. 668; Richmond County *v.* Van Clief, 16 Abb. Pr. N. S. (N. Y.) 97.

South Carolina.— Pell *v.* Ball, 1 Rich. Eq. (S. C.) 419.

Tennessee.— Burton *v.* Woods, 16 Lea (Tenn.) 260.

Virginia.— Tomlinson *v.* Dilliard, 3 Hen. & M. (Va.) 199.

Washington.— Steamboat Zephyr *v.* Brown, 2 Wash. Terr. 44, 3 Pac. 186; Puget Sound Agricultural Co. *v.* Pierce County, 1 Wash. Terr. 76.

United States.— U. S. *v.* Pena, 175 U. S. 500, 20 S. Ct. 165, 44 L. ed. 251; Richards *v.* Mackall, 113 U. S. 539, 5 S. Ct. 535, 28 L. ed. 1132; Sage *v.* Central R. Co., 96 U. S. 712, 24 L. ed. 641; Rodd *v.* Heartt, 17 Wall. (U. S.) 354, 21 L. ed. 627.

Canada.— Thomas *v.* Ray, 14 Nova Scotia 135.

See 2 Cent. Dig. tit. "Appeal and Error," § 1936 *et seq.*

Allowance by clerk.— Statutes do not generally empower the clerk of the court to allow appeals. Montville St. R. Co. *v.* New London Northern R. Co., 68 Conn. 418, 36 Atl. 811; Jeune *v.* Jeffrien, 3 La. 53; Johnson *v.* Jones, 51 Miss. 860; Holiman *v.* Dibrell, 51 Miss. 96; and 2 Cent. Dig. tit. "Ap-

writ of error to review a judgment of a state court, it should appear from the record that the writ has been allowed either by the chief justice or presiding justice of the state court, or a justice of the United States supreme court.[3]

3. Application — a. Necessity. The necessity for a prayer, petition, application, affidavit, or certificate as a basis for the allowance of an appeal or writ of error is dependent upon the statutory enactments and the rules of court of the several jurisdictions.[4]

peal and Error," § 1939. In Kentucky, however, it is provided by statute [Civ. Code, § 734] that an appeal shall be granted as a matter of right by the clerk of the court of appeals after the expiration of the term at which the judgment sought to be reviewed was rendered. Schmidt *v.* Mitchell, 95 Ky. 342, 15 Ky. L. Rep. 768, 25 S. W. 278. There must be some act on the part of the clerk showing that he has granted the appeal, such as an indorsement upon the transcript or copy of judgment to that effect, or the issue of a summons. The act of filing the copy of the judgment does not constitute an appeal. Young *v.* Moss, 4 Ky. L. Rep. 449.

Alternating judges.— Where the judges of two districts are required by law to sit alternately in each district, an appeal may be granted by one from a judgment rendered by the other. Perkins *v.* Nettles, 17 La. 253.

In vacation or at chambers.— Whether or not an appeal can be granted in vacation or at chambers depends upon the provision of the statute under which the appeal is prayed. Nesbit *v.* Rodewald, 43 Miss. 304; Stebbins *v.* Niles, 13 Sm. & M. (Miss.) 307; State *v.* Hirzel, 137 Mo. 435, 37 S. W. 921, 38 S. W. 961; Amis *v.* Koger, 7 Leigh (Va.) 221; William and Mary College *v.* Hodgson, 2 Hen. & M. (Va.) 557; Foote *v.* Silsby, 1 Blatchf. (U. S.) 542, 9 Fed. Cas. No. 4,917; and 2 Cent. Dig. tit. "Appeal and Error," § 1937.

Judge of court of land claims.— An appeal may be allowed by an associate justice of the court of private land claims. U. S. *v.* Pena, 175 U. S. 500, 20 S. Ct. 165, 44 L. ed. 251.

United States district judge.— Though a district judge has no vote in the circuit court on an appeal from his decision, he may allow an appeal from a decision rendered by him while holding the circuit court. Rodd *v.* Heartt, 17 Wall. (U. S.) 354, 21 L. ed. 627.

3. *Re* Robertson, 156 U. S. 183, 15 S. Ct. 324, 39 L. ed. 389; Northwestern Union Packet Co. *v.* Home Ins. Co., 12 Wall. (U. S.) 588, 20 L. ed. 463; Gleason *v.* Florida, 9 Wall. (U. S.) 779, 19 L. ed. 730.

When a state court is composed of a chief justice and associates, a writ of error to the federal supreme court can be allowed only by the chief justice of the state court or by one of the justices of the federal supreme court. A writ allowed by an associate justice of the state court will be dismissed. Butler *v.* Gage, 138 U. S. 52, 11 S. Ct. 235, 34 L. ed. 869; Bartemeyer *v.* Iowa, 14 Wall. (U. S.) 26, 20 L. ed. 792.

4. **Affidavit.**— See the following cases:

Arkansas.—Hanna *v.* Pitman, 25 Ark. 275; Crow *v.* Hardage, 24 Ark. 282.

Indiana.— Robinson *v.* Vanderburg County, 37 Ind. 333.

Iowa.— Keeline *v.* Council Bluffs, 62 Iowa 450, 17 N. W. 668.

Kansas.—McClun *v.* Glasgow, 55 Kan. 182, 40 Pac. 329; Spangler *v.* Robinson, 20 Kan. 682.

Kentucky.— Canaday *v.* Hopkins, 7 Bush (Ky.) 108.

Missouri.—State *v.* Ball, 27 Mo. 324; Townsend *v.* Finley, 3 Mo. 288.

Montana.—McMullen *v.* Armstrong, 1 Mont. 486.

New Jersey.— See Robbins *v.* Bonnel, 16 N. J. L. 234.

New Mexico.— Texas, etc., R. Co. *v.* Saxton, 3 N. M. 282, 6 Pac. 206; Matter of Watts, 1 N. M. 541.

New York.— Knickerbacker *v.* Brintnall, 2 Barb. Ch. (N. Y.) 71.

Pennsylvania.—McConnel *v.* Morton, 11 Pa. St. 398; Dawson *v.* Ryan, 4 Watts & S. (Pa.) 403; Heckert's Appeal, 13 Serg. & R. (Pa.) 48; Hanover Borough Alley, 4 Pa. Dist. 160. See also Pottsville *v.* Curry, 32 Pa. St. 443.

United States.— Janes *v.* Buzzard, Hempst. (U. S.) 259, 13 Fed. Cas. No. 7,206*b*.

Canada.— Abell *v.* Craig, 12 Manitoba 81; *Ex p.* McQuarrie, 24 N. Brunsw. 287.

Merely omitting to indorse affidavit for appeal as filed will not prejudice the appellant, where the clerk notices the filing of it of record. State *v.* Ritter, 9 Ark. 244. See also Bensley *v.* Haeberle, 20 Mo. App. 648; King *v.* Penn, 43 Ohio St. 57, 1 N. E. 84.

See 2 Cent. Dig. tit. "Appeal and Error," § 1941 *et seq.*

Certificate (Thompson *v.* Campbell, 52 Ala. 583; Churchill *v.* Mallison, 2 Hilt. (N. Y.) 70; Barrow *v.* Baker, 3 N. C. 2; Gallagher *v.* Kean, 3 Yeates (Pa.) 321), by whom granted (Ingraham *v.* Wheeler, 1 How. Pr. (N. Y.) 65; Thompson *v.* Smith, 1 Den. (N. Y.) 638; Anonymous, 7 Hill (N. Y.) 170), as well as time for obtaining same (Butterfield *v.* Radde, 38 N. Y. Super. Ct. 44; Clark *v.* McClaughry, 22 Wend. (N. Y.) 627; Colvin *v.* Jacksonville, 158 U. S. 456, 15 S. Ct. 866, 39 L. ed. 1053).

Claim of appeal unnecessary.— See Covell *v.* Mosely, 15 Mich. 514; Warner *v.* Whittaker, 5 Mich. 241; Emerson *v.* Atwater, 5 Mich. 34.

Formal application or demand.—See Sykes *v.* Lafferry, 26 Ark. 414; Casey *v.* Peebles, 13 Nebr. 7, 12 N. W. 840; Cleary *v.* Kendall, 53 N. J. L. 130, 20 Atl. 747; Claypool *v.* Norcross, 37 N. J. Eq. 261. In Lincoln *v.* Bishop, 13 Ohio 249, it was held that an application for a writ of error, made to the supreme court in term-time, must be made in court, and its allowance entered on the minutes. An application to the supreme court of the United States while in session for a writ of error will

b. By Whom Made.[5] Parties jointly interested in a judgment by which they are aggrieved may join in the motion for appeal.[6] An affidavit for appeal may be made by one of several appellants,[7] or by the appellant's agent.[8]

c. Form and Contents — (1) *In General.* Prayers, petitions, applications, affidavits, and certificates for appeals and writs of error should, as to form and contents, conform to the statutes and rules of court.[9] In the absence of special enactments or rules as to these matters, the sufficiency of the prayer, petition, affidavit, certificate, or application, as to form and contents, is a question for determination in each particular case, though, as hereinafter stated, certain matters are usually required to be stated.[10]

not be entertained except when a justice of the court, upon consideration of the record, deems it proper, under the special circumstances, to indorse on the record the request that counsel be allowed to proceed in that way. *Ex p.* Ingalls, 139 U. S. 548, 11 S. Ct. 652, 35 L. ed. 266.

Petition.— See the following cases:

Florida.— Hull *v.* Westcott, 17 Fla. 280.

Kansas.— Schuster *v.* Gray, (Kan. App. 1900) 61 Pac. 819.

Louisiana.— Jacob *v.* Preston, 31 La. Ann. 514; Dorsey *v.* Hills, 4 La. Ann. 106; De St. Avid *v.* Pichot, 3 La. Ann. 6; Prudhomme *v.* Edens, 6 Rob. (La.) 64.

Mississippi.— Ricard *v.* Smith, 37 Miss. 644.

Nebraska.—Cary *v.* Kearney Nat. Bank, 59 Nebr. 169, 80 N. W. 484; Baacke *v.* Dredla, 57 Nebr. 92, 77 N. W. 341; Bazzo *v.* Wallace, 16 Nebr. 290, 20 N. W. 315.

New York.—Matter of Sayre, 53 Hun (N. Y.) 632, 7 N. Y. Suppl. 954, 25 N. Y. St. 1039, 51 Hun (N. Y.) 636, 3 N. Y. Suppl. 388, 20 N. Y. St. 682; Woodcock *v.* Bennet, 20 Johns. (N. Y.) 501.

Pennsylvania.— Boyle's Retail Liquor License, 190 Pa. St. 577, 42 Atl. 1025, 45 L. R. A. 399.

Rhode Island.— Lodge *v.* O'Toole, 20 R. I. 300, 38 Atl. 980.

United States.— Springfield Safe-Deposit, etc., Co. *v.* Attica, 85 Fed. 387, 56 U. S. App. 330, 29 C. C. A. 214.

See 2 Cent. Dig. tit. "Appeal and Error," § 1941 *et seq.*

Prayer (Caldwell *v.* Baldwin, 43 Ala. 617; Adams *v.* Hepman, 27 Ark. 156; Ehlert *v.* Security Deposit Co., 72 Ill. App. 59; Berry *v.* Berry, 22 Ind. 275; Staley *v.* Dorset, 11 Ind. 367), made in open court (New Orleans *v.* Seixas, 35 La. Ann. 36; Planchet's Succession, 29 La. Ann. 520; Untereiner *v.* Miller, 29 La. Ann. 435; Prudhomme *v.* Edens, 6 Rob. (La.) 64; Parker *v.* Willis, 27 Miss. 766).

When there are a number of distinct judgments in a number of distinct cases, which are not only several and separate, but which are wholly disconnected, though each of them involves the same question, there must be as many applications for writs of error as there are judgments. A single application is insufficient. Cameron *v.* State, 87 Tex. 246, 28 S. W. 272.

5. **A party sued by a wrong name** may, on appeal, make the necessary affidavit in his right name, and, if required, must prove his identity. Tomlin *v.* Morris, 16 N. J. L. 179.

6. Schlieder *v.* Martinez, 38 La. Ann. 847.

7. Van Campen *v.* Ribble, 17 N. J. 433; Bensell *v.* Boyd, 2 Miles (Pa.) 296.

But an affidavit signed in the name of a partnership by one of the partners is insufficient. Gaddis *v.* Durashy, 13 N. J. L. 324.

8. Ober *v.* Pratte, 1 Mo. 8; Ring *v.* Charles Vogel Paint, etc., Co., 46 Mo. App. 374. See also Duffie *v.* Black, 1 Pa. St. 388. *Compare* Whitehill *v.* Bank, 1 Watts (Pa.) 396; Bryan *v.* McCulloch, 1 Penr. & W. (Pa.) 421.

Agent of corporation.— In the case of a writ of error sued out by a corporation the affidavit required by law may be made by an agent of the corporation, even though he is not expressly authorized so to do. Academy of Fine Art *v.* Power, 14 Pa. St. 442. See also New Brunswick Steamboat, etc., Transp. Co. *v.* Baldwin, 14 N. J. L. 440.

9. **Prescribed form and contents.**— See Town *v.* Wilson, 7 Ark. 386; McJenkin *v.* State Bank, 7 Ark. 232; Tomlin *v.* Morris, 16 N. J. L. 179; Hitsman *v.* Garrard, 16 N. J. L. 124; Pennsylvania Coal Co. *v.* Flynn, 9 Kulp (Pa.) 269; San Antonio, etc., R. Co. *v.* Choate, 90 Tex. 81, 35 S. W. 472; Willis *v.* Moore, 89 Tex. 19, 32 S. W. 1038; and see also 2 Cent. Dig. tit. "Appeal and Error," § 1943 *et seq.*

Forms of applications for an allowance of an appeal may be found set out in whole, in part, or in substance in Archer *v.* Hart, 5 Fla. 234; Copp *v.* Copp, 20 N. H. 284; Shields *v.* Coleman, 157 U. S. 168, 15 S. Ct. 570, 39 L. ed. 660; Sage *v.* Central R. Co., 93 U. S. 412, 23 L. ed. 933; U. S. *v.* Adams, 6 Wall. (U. S.) 101, 18 L. ed. 792.

10. *Arkansas.*— Katz *v.* Goldman, 64 Ark. 395, 42 S. W. 901; Hempstead County *v.* Howard County, 51 Ark. 344, 11 S. W. 478.

Indiana.— Wilson *v.* Bennett, 132 Ind. 210, 31 N. E. 184.

Kentucky.—Arthurs *v.* Harlan, 78 Ky. 138.

Louisiana.— Spencer *v.* McDonogh, 11 La. Ann. 420.

Massachusetts.— Avery *v.* Pixley, 4 Mass. 460.

New Hampshire.— Eastman *v.* Barnes, 62 N. H. 630; Clark *v.* Robinson, 37 N. H. 579.

New Jersey.— Thompson *v.* Wright, 14 N. J. L. 38.

New York.— Chatterton *v.* Chatterton, 34 N. Y. App. Div. 245, 54 N. Y. Suppl. 515, 32

(II) *AVERMENT AS TO APPLICANT'S INTEREST.* In some jurisdictions it is necessary that the application should allege that the applicant has an interest in the judgment or order appealed from, and such interest should be set forth.[11]

(III) *DESCRIPTION OF JUDGMENT.* The petition for a writ of error must describe the judgment with sufficient accuracy to notify defendant in error, with reasonable certainty, what judgment it is proposed to review.[12]

(IV) *DESIGNATION OF PARTIES.* The rule has been laid down that the petition for appeal should name the persons who are intended to be made respondents.[13]

N. Y. App. Div. 633, 53 N. Y. Suppl. 329; Banks *v.* Taylor, 10 Abb. Pr. (N. Y.) 199; Sherman *v.* Wells, 14 How. Pr. (N. Y.) 522.

Texas.— St. Louis, etc., R. Co. *v.* Batsell, 86 Tex. 192, 24 S. W. 504; Bauman *v.* Jaffray, 86 Tex. 617, 26 S. W. 394; Tolle *v.* Correth, 31 Tex. 362, 98 Am. Dec. 540.

Vermont.—Rutherford *v.* Allen, 62 Vt. 260, 19 Atl. 714; Barnard *v.* Barnard, 16 Vt. 223.

United States.— U. S. *v.* Adams, 6 Wall. (U. S.) 101, 18 L. ed. 792.

See also 2 Cent. Dig. tit. "Appeal and Error," § 1943 *et seq.*

Prayer or demand in writing.— See State *v.* Cooper, 20 Fla. 547; Claypool *v.* Norcross, 36 N. J. Eq. 524; Hillyer *v.* Schenck, 15 N. J. Eq. 398.

To whom addressed.— In Texas, a petition for a writ of error may be addressed either to the clerk of the district court or to the supreme court. Johnson *v.* McCutchings, 43 Tex. 553; Miller *v.* Cunningham, 1 Tex. App. Civ. Cas. § 958.

11. Dickerson's Appeal, 55 Conn. 223, 10 Atl. 194, 15 Atl. 99; Norton's Appeal, 46 Conn. 527; Alexander *v.* McCordsville, etc., Gravel Road Co., 44 Ind. 436; Shirley *v.* Healds, 34 N. H. 407; Cochrane *v.* Day, 27 Tex. 385; Thomas *v.* Jones, 10 Tex. 52; and see also 2 Cent. Dig. tit. "Appeal and Error," § 1950.

12. *Kansas.*— Higgins *v.* Higgins, 7 Kan. App. 811, 52 Pac. 906; Ketner *v.* Dillingham, 6 Kan. App. 921, 50 Pac. 1098.

Louisiana.—Surget *v.* Stanton, 10 La. Ann. 318; Martin *v.* Rutherford, 6 Mart. N. S. (La.) 281.

Michigan.— See also Hanaw *v.* Bailey, 83 Mich. 24, 46 N. W. 1039, 9 L. R. A. 801.

Texas.— Hammond *v.* Mays, 45 Tex. 486; Jordan *v.* Terry, 33 Tex. 680; Tolle *v.* Correth, 31 Tex. 362, 98 Am. Dec. 540.

Washington.— Carr *v.* King County, 1 Wash. Terr. 418.

West Virginia.— Beard *v.* Arbuckle, 13 W. Va. 732.

See 2 Cent. Dig. tit. "Appeal and Error," § 1945.

Description in citation.— It has been held that, though the petition be deficient in describing the judgment, if it be described accurately in the citation this is sufficient. Hillebrant *v.* Brewer, 5 Tex. 566.

Two decrees.— Under Ala. Civ. Code. § 454, providing that a certificate of appeal shall specify particularly the decree appealed from, a certificate of appeal in a cause where there are two decrees, from either of which an appeal will lie, should specify from which decree the appeal is taken. Decatur Land Co. *v.* Cook, (Ala. 1900) 27 So. 559.

Under the rules of the federal circuit court of appeals, it has been decided that a petition for a writ of error is intended merely to ask for a writ of error in general terms, and need not specifically mention each order or judgment complained of; but it is enough if such orders and judgment are excepted to, and assigned for error in the assignments of error. Tefft *v.* Stern, 74 Fed. 755, 43 U. S. App. 442, 21 C. C. A. 73.

13. Brown *v.* Evans, 34 Barb. (N. Y.) 594; Valentine *v.* Valentine, 2 Barb. Ch. (N. Y.) 430; Van Slyke *v.* Schmeck, 10 Paige (N. Y.) 301; Chaffee *v.* Baptist Missionary Convention, 10 Paige (N. Y.) 85, 40 Am. Dec. 225; Hawley *v.* Donnelly, 8 Paige (N. Y.) 415; Kellett *v.* Rathbun, 4 Paige (N. Y.) 102. *Compare In re* Beam, 8 Kan. App. 835, 57 Pac. 854; and see also 2 Cent. Dig. tit. "Appeal and Error," § 1944.

"And others."—In Buckingham *v.* Commercial Bank, 21 Ohio St. 131, it was held that where plaintiff in a petition in error named as defendant thereto only one of several parties defendant, with the words "and others" added, but filed with his petition a transcript of the record below, and referred to it as such in his petition, the petition in error was sufficient, and would be regarded as a proceeding against all the parties appearing by the record to be united in interest with the defendant named.

In Louisiana, it has been decided that a petition for appeal need not even state the names of the appellees, but simply pray that they be cited (Townsend's Succession, 36 La. Ann. 447; Vredenburg *v.* Behan, 32 La. Ann. 561; Boutté *v.* Boutté, 30 La. Ann. 177); and it is not always necessary that the petition should contain an express prayer that the appellee be cited (Townsend's Succession, 36 La. Ann. 447; Barton *v.* Kavanaugh, 12 La. Ann. 332; Ludeling *v.* Frellsen, 4 La. Ann. 534).

In Texas, it has been decided that it is not necessary that the names of all the parties be stated in the petition, but only that a citation should issue to them. Coe *v.* Nash, 91 Tex. 113, 41 S. W. 473. *Compare* Weems *v.* Watson, 91 Tex. 35, 40 S. W. 722.

The surety on an injunction bond need not, under the Louisiana practice, be specially mentioned in the motion for an appeal. He is considered as a party cited before the appellate court without such mention. Lavedan *v.* Trinchard, 35 La. Ann. 540; Matta *v.*

(v) *Errors Should Be Specifically Assigned.* In the affidavit or petition on which the application for the review of the judgment or order complained of is based, the errors complained of should be specifically assigned.[14]

(vi) *Signature and Verification.* In most jurisdictions, it seems the application must be signed and sworn to.[15]

d. Amendment or Waiver. A petition which is defective may, generally, be amended.[16] But it may be so fatally defective that no amendment will be

Gayle, 10 La. Ann. 347; Mitchell *v.* Lay, 4 La. Ann. 514.

Residence of defendant in error.—In Texas, it has been held that a petition for a writ of error is fatally defective if it fails to state the residence of the defendant in error, or that his residence is unknown. Cassells *v.* Kinney, 39 Tex. 431; Covitt *v.* Anderson, 34 Tex. 262; Daugherty *v.* Cartwright, 31 Tex. 284; Roberts *v.* Sollibellus, 10 Tex. 352; Wheeler *v.* State, 8 Tex. 228. But if it be stated in the original writ that plaintiff is a non-resident that fact need not be alleged in a petition for a writ of error. Mills *v.* Howard, 12 Tex. 9.

14. *Kansas.*— Brown *v.* Rhodes, 1 Kan. 359; Lawton *v.* Eagle, (Kan. App. 1900) 61 Pac. 868.

Kentucky.— Amann *v.* Wern, 4 Ky. L. Rep. 731; Curtice *v.* Driver, 4 Ky. L. Rep. 624.

Louisiana.— Cooley *v.* Cooley, 38 La. Ann. 195; Dolliole *v.* Azenia, 3 La. 359.

Maryland.— Hearn *v.* Gould, 51 Md. 319.

Massachusetts.— Pembroke *v.* Abington, 2 Mass. 142.

Nebraska.— James *v.* Higginbotham, (Nebr. 1900) 82 N. W. 625; Schlageck *v.* Widhalm, 59 Nebr. 541, 81 N. W. 448.

New Hampshire.—Holt *v.* Smart, 46 N. H. 9.

New York.— Cromwell *v.* Clement, 89 Hun (N. Y.) 603, 34 N. Y. Suppl. 998, 69 N. Y. St. 111.

Oklahoma.—Woods County *v.* Okley, 8 Okla. 502, 58 Pac. 651; Beall *v.* Mutual L. Ins. Co., 7 Okla. 285, 54 Pac. 474.

Pennsylvania.— Wilson *v.* Keller, 195 Pa. St. 98, 45 Atl. 682.

Tennessee.— Vance *v.* McNabb Coal, etc., Co., (Tenn. Ch. 1897) 48 S. W. 235.

Texas.—San Antonio, etc., R. Co. *v.* Choate, 90 Tex. 81, 35 S. W. 472; Hilliard *v.* White, 88 Tex. 591, 32 S. W. 525.

Vermont.—Barnard *v.* Barnard, 16 Vt. 223.

Virginia.— Orr *v.* Pennington, 93 Va. 268, 24 S. E. 928.

Wyoming.—Hogan *v.* Peterson, 8 Wyo. 549, 59 Pac. 162.

See 2 Cent. Dig. tit. "Appeal and Error," § 1960 *et seq.*

Allegation outside of record.— Allegations which go beyond the record in the case cannot be considered. Cooley *v.* Cooley, (Tenn. Ch. 1896) 37 S. W. 1028.

Argumentative assignment.— So much of the assignment of error as is argumentative is improper. Hodo *v.* Mexican Nat. R. Co., 88 Tex. 523, 32 S. W. 511.

Waiver.—Where the overruling of a motion to strike out matter from a pleading as alternative and hypothetical is not assigned as error in the notice of appeal, the objection is waived. Emison *v.* Owyhee Ditch Co., 37 Oreg. 577, 62 Pac. 13.

15. Crenshaw *v.* Taylor, 70 Iowa 386, 30 N. W. 647; Evans *v.* Jones, 7 Cinc. L. Bul. 345; Treichler *v.* Bower, 1 Woodw. (Pa.) 219; Kidder *v.* Fay, 60 Wis. 218, 18 N. W. 839; and see also 2 Cent. Dig. tit. "Appeal and Error," § 1946.

In Nebraska, verification is unnecessary. Newlove *v.* Woodward, 9 Nebr. 502, 4 N. W. 237.

In Pennsylvania, the oath, in taking an appeal from an assessment of railroad damages, need not be made before the prothonotary of the court, but may be made before, and attested by, any magistrate in that state authorized to administer oaths. Delong *v.* Allentown R. Co., 1 Woodw. (Pa.) 191.

Misplaced signature.— An affidavit for appeal is not invalidated by the fact that the signature of the deponent was, through a mistake, placed below the jurat instead of being in its proper place. Launius *v.* Cole, 51 Mo. 147.

Omission of appellant's attorney to sign the petition for an appeal is not such a fault of appellant as will justify the dismissal of the appeal. Erwin *v.* Commercial, etc., Bank, 12 Rob. (La.) 227.

16. *Florida.*— Weston *v.* Moody, 29 Fla. 169, 10 So. 612.

Kansas.—Leavenworth, etc., R. Co. *v.* Whitaker, 42 Kan. 634, 22 Pac. 733.

Louisiana.— See Hearing *v.* Mound City L. Ins. Co., 29 La. Ann. 832.

Michigan.— Matter of Flint, etc., R. Co., 105 Mich. 289, 63 N. W. 303.

Nebraska.— Robinson *v.* Kilpatrick-Koch Dry Goods Co., 50 Nebr. 795, 70 N. W. 378; Spencer *v.* Thistle, 13 Nebr. 201, 13 N. W. 208.

New Hampshire.— Patrick *v.* Cowles, 45 N. H. 553.

New York.— Van Slyke *v.* Schmeck, 10 Paige (N. Y.) 301.

Texas.— Homes *v.* Henrietta, 91 Tex. 318, 42 S. W. 1052; Western Union Tel. Co. *v.* Smith, 88 Tex. 9, 28 S. W. 931, 30 S. W. 549.

See 2 Cent. Dig. tit. "Appeal and Error," § 1956.

An amendment which sets forth an entirely new allegation of error will not be allowed after the lapse of time limited for bringing a petition in error. Cogshall *v.* Spurry, 47 Kan. 448, 28 Pac. 154.

Manner of amendment.—Where an amendment is to be made by striking out or adding an allegation to a petition, it cannot be done by mutilating or altering the files. The party amending should either file a new petition or answer, or file a statement of the amendment,

allowed.[17] A defect in an appeal because there is no affidavit,[18] or a defective affidavit,[19] or an insufficient petition, may be waived when no objection is made, or when objection is not made in apt time.[20]

e. Papers Accompanying.[21] In some jurisdictions, a transcript of the record must be filed along with the petition in error.[22]

4. Notice of Application. Whether appellee or defendant in error is entitled to a notice of the application for the allowance of an appeal or writ of error depends upon the provisions of the particular statute under which the appeal or writ of error is sought to be obtained.[23]

5. Order Granting Application[24] **— a. Describing Judgment.** The order

and designate by reference where the new matter is to be inserted, or what is to be considered as stricken out. Hill *v.* Road Dist. No. 6, 10 Ohio St. 621.

17. Nowland *v.* Horace, 8 Kan. App. 722, 54 Pac. 919; Proper *v.* Luce, 3 Penr. & W. (Pa.) 65. See also Bondurant *v.* Watson, 103 U. S. 278, 26 L. ed. 447.

18. James *v.* Dyer, 31 Ark. 489; Heckert's Appeal, 13 Serg. & R. (Pa.) 104.

19. Proper *v.* Luce, 3 Penr. & W. (Pa.) 65.

20. Orr *v.* Pennington, 93 Va. 268, 24 S. E. 928; and see also 2 Cent. Dig. tit. "Appeal and Error," § 1958.

Reference to annexed papers.— It has been held that an insufficient affidavit for appeal may be sustained by its reference and annexation to other papers in the cause. Blair *v.* Stewart, 18 N. J. L. 123.

21. **In Texas,** the law requires applications for writs of error from the court of civil appeals to the supreme court to be accompanied by a certified copy of the conclusions of law and fact filed in the cause by the former court (Burnett *v.* Powell, 86 Tex. 382, 24 S. W. 788, 25 S. W. 17; Texas, etc., R. Co. *v.* Wilson, 85 Tex. 507, 22 S. W. 300, 385 [see also International, etc., R. Co. *v.* Douglass, 87 Tex. 297, 28 S. W. 271]); and in this state it has also been held that an opinion, written and filed on rehearing in the court of civil appeals after the original opinion, should, when necessary to a proper understanding of the questions involved, be made a part of the record on application for a writ of error to the supreme court (Gulf, etc., R. Co. *v.* Kizziah, (Tex. 1893) 22 S. W. 300).

22. Garneau *v.* Omaha Printing Co., 42 Nebr. 847, 61 N. W. 100; Cain *v.* Cocke, 1 Lea (Tenn.) 288. See 2 Cent. Dig. tit. "Appeal and Error," § 1952.

23. See 2 Cent. Dig. tit. "Appeal and Error," § 1954.

In Kentucky, it has been decided that the statute requiring notice of application for writs or error coram vobis did not apply to a case where the object of the writ was to contest the validity of a judgment, but referred exclusively to proceedings for relief against faulty replevin and forthcoming bonds or faulty executions. Breckinbridge *v.* Coleman, 7 B. Mon. (Ky.) 331.

In New Jersey, it has been held that an application for an order to require the appellee to answer the appeal, and even the order itself, may be made without notice to the appellee. Wyckoff *v.* Hulse, 28 N. J. Eq. 429.

In Ohio, it was decided that where a party desired to appeal from the court of common pleas to the supreme court, he must enter notice on the records of the court during the term of the judgment, and that if he omitted the entry, and merely declared in court his intention to appeal, this would not authorize the court at a subsequent term to order an entry *nunc pro tunc.* Bradford *v.* Watts, Wright (Ohio) 495.

In Tennessee, it has been held that a writ of error is in the nature of a new suit, and may be obtained as of right by any person entitled to it without his giving notice of application therefor. Mowry *v.* Davenport, 6 Lea (Tenn.) 80; Caldwell *v.* Hodsden, 1 Lea (Tenn.) 305; Spurgin *v.* Spurgin, 3 Head (Tenn.) 22.

In Washington, it was decided that, under a statute of that state, an appeal taken at chambers, without a notice of application for the allowance of the appeal, would be dismissed. Parker *v.* D'Acres, 3 Wash. Terr. 12, 13 Pac. 903.

24. **Forms of orders allowing an appeal** may be found in Indiana, etc., R. Co. *v.* Sampson, 132 Ill. 527, 24 N. E. 609; Shields *v.* Coleman, 157 U. S. 168, 15 S. Ct. 570, 39 L. ed. 660; Fleitas *v.* Richardson, 147 U. S. 538, 13 S. Ct. 429, 37 L. ed. 272; Radford *v.* Folsom, 123 U. S. 725, 8 S. Ct. 334, 31 L. ed. 292; Dodge *v.* Knowles, 114 U. S. 436, 5 S. Ct. 1108, 29 L. ed. 296.

Form of order allowing writ of error is set out in Butler *v.* Gage, 138 U. S. 52, 11 S. Ct. 235, 34 L. ed. 869.

An ordinary order indorsed on a writ of error, staying proceedings on the judgment and exception for the purpose of removing the cause by writ of error, is not sufficient. A proper allowance of the writ should be indorsed. Wilbur *v.* Ramsey, 1 How. Pr. (N. Y.) 10. See also Meyers *v.* Meyers, 98 Mo. 262, 11 S. W. 617.

Two orders.— In Louisiana an order for a suspensive appeal and devolutive appeal may be granted by the judge separately or both in one order. Funke *v.* McVay, 21 La. Ann. 192.

Time for making or entering order.— See Louisville *v.* Muldon, 19 Ky. L. Rep. 1386, 43 S. W. 867; Irving *v.* Dunscomb, 2 Wend. (N. Y.) 205; Latham *v.* U. S., 131 U. S. xcvii, appendix, 19 L. ed. 452.

Entry of order nunc pro tunc.— See Dykes *v.* Cockrell, 6 La. Ann. 707; Clapp *v.* Graves, 2 Hilt. (N. Y.) 317; Nicholson *v.* Chicago, 5 Biss. (U. S.) 89, 18 Fed. Cas. No. 10,248.

must clearly state from what judgment the party desires to prosecute his appeal.[25]

b. Designating Appellate Court. While the order should designate the court to which the appeal is taken or the writ of error returnable, a failure in this particular does not always invalidate the order.[26]

c. Designating Parties. It is not always necessary to describe by name every party who may take advantage of an order allowing an appeal.[27] Nor need the order name individually all of the appellees.[28]

d. Designating Return-Term. In some jurisdictions it is the duty of the trial judge to fix the time and place to which the appeal is returnable;[29] and if the order of appeal does not name the time and place of return,[30] or, if an erroneous time or place is designated,[31] it is a fault which is not attributable to appellant.[32]

e. Fixing Amount of Bond. In some jurisdictions the order must prescribe the amount of the appeal bond.[33]

25. Hunt *v.* Curry, 37 Ark. 100; Day *v.* Callow, 39 Cal. 593; Matter of Dayries, 19 La. Ann. 73.

But inaccuracies in an order describing a judgment appealed from will not invalidate the appeal if the description contains statements sufficient to identify the judgment referred to. People's Brewing Co. *v.* Bœbinger, 40 La. Ann. 277, 4 So. 82.

26. Thus, where the order omits to designate the court to which the appeal is allowed, and by law it can go to a certain court only, the appellant may follow the law, file his record in that court, and have his appeal heard there. Illinois Cent. R. Co. *v.* Highway Com'rs, 61 Ill. App. 203 [*disapproving* Mississippi Valley Manufacturers Mut. Ins. Co. *v.* Bermond, 39 Ill. App. 267]. See also Friend *v.* Graham, 10 La. 438.

It is merely a clerical error, which will not affect the right of appeal, for the lower court to grant an appeal to the supreme court when there is no such appellate tribunal in the jurisdiction. Stone *v.* Cromie, 87 Ky. 173, 10 Ky. L. Rep. 19, 7 S. W. 920.

Such oversight may be cured by the recital of the bond on appeal and by other proceedings. New Iberia Telephone Exch. *v.* Cumberland Tel., etc., Co., 51 La. Ann. 1022, 25 So. 975.

27. Carne *v.* Peacock, 114 Ill. 347, 2 N. E. 165, wherein it was held that where so many persons were interested that it was impracticable to enter a separate order allowing an appeal as to each, a general order permitting all parties desiring to appeal to do so, without naming the several parties, was sufficient.

28. Richardson *v.* Green, 130 U. S. 104, 9 S. Ct. 443, 32 L. ed. 872, holding this to be the rule where the names of all the appellees are given in the appeal bond.

Name of counsel.— Where there is counsel of record, an order of court, purporting to be granted on motion of the counsel of the party, is legal and binding, because it is presumed to refer to the counsel of record, and it is unnecessary to name him: but when a party has no counsel of record, and applies by counsel for an order which could only be granted on petition or motion, it must appear by the record who is the counsel undertaking to represent the party, in order that there may be some responsibility growing out of the act of the court in granting the order. Shields *v.* Matheison, 9 La. Ann. 487.

29. Laicher *v.* New Orleans, etc., R. Co., 28 La. Ann. 320.

30. Laicher *v.* New Orleans, etc., R. Co., 28 La. Ann. 320.

In Louisiana, by statute, the trial judge has the legal discretion to fix a different return-day from that named by law if more time be required to prepare the record for appeal. Calloway's Succession, 49 La. Ann. 968, 22 So. 225; Bartoli *v.* Huguenard, 39 La. Ann. 411, 2 So. 196, 6 So. 30; Brabazon *v.* New Orleans, 28 La. Ann. 64. See also Williams *v.* Close, 14 La. Ann. 737, and La. Laws (1870, extra session), No. 45, § 4. But under La. Code Prac. art. 883, it seems that the time allowed for the return-day could not be extended by the court from which the appeal was taken, but only by the supreme court. Harbour *v.* Brickel, 10 Rob. (La.) 419; Hempkin *v.* Averett, 12 La. 482; Ginn *v.* Clack, 12 La. 480; Laville *v.* Rightor, 11 La. 198; Hart *v.* Fisk, 10 La. 481; and see also State *v.* Judge, 9 La. Ann. 14. In Bridge *v.* Merle, 7 La. 446, it was held that the judge *a quo* could not, by a second order, extend the return-day on the ground that the first day fixed was not a judicial day.

31. Watkins Banking Co. *v.* Louisiana Lumber Co., 47 La. Ann. 581, 17 So. 143; State *v.* Balize, 38 La. Ann. 542; Claffe *v.* Heyner, 31 La. Ann. 594; State *v.* Brown, 29 La. Ann. 861; Cramer *v.* Brown, 26 La. Ann. 272; Brou *v.* Becnel, 20 La. Ann. 254; Trimble *v.* Brichta, 10 La. Ann. 778; Rains *v.* Kemp, 4 La. 318. See also Miller *v.* Speight, 61 Ga. 460, wherein it was held that a writ of error, returnable by law to the August term, will not be dismissed for a misdescription of the term in the order granting the appeal when the misdescription consists in writing July term instead of August term, there being no July term.

32. Hence, the appeal will not be dismissed on account thereof unless the error is the result of a suggestion of appellant which is adopted by the judge. State *v.* Stephens, 38 La. Ann. 928; State *v.* Balize, 38 La. Ann. 542; State *v.* Jumel, 35 La. Ann. 980; Wooton *v.* Le Blanc, 32 La. Ann. 692; Citizens' Bank *v.* Ruty, 26 La. Ann. 747.

33. Wolfley *v.* Lebanon Min. Co., 3 Colo. 64; Lowenstein *v.* Fudickar, 43 La. Ann. 886,

f. Prescribing Conditions. Conditions other than those prescribed by statute should not be imposed in an order allowing an appeal.[34]

g. Signature of Judge. In Louisiana, the omission of the judge to sign the order is immaterial;[35] but the rule seems to be otherwise in Kentucky.[36]

h. Amendment. A defective order allowing an appeal may be amended.[37]

i. Revocation — (I) *Right to Revoke.* It seems that a court has the power, during the term, at the request of appellant, to set aside the order of allowance, and thus vacate the appeal which has been granted in appellant's favor.[38] The court cannot, however, vacate an order allowing an appeal after the expiration of the term at which such order was made.[39]

(II) *Effect of Revocation.* When, in a proper case, the allowance of an appeal has been revoked, the appeal itself will be dismissed.[40]

6. Order Refusing Application. The refusal to grant an application for a writ of error, it seems, is in effect an affirmance of the correctness of the decision of the court below.[41]

9 So. 742; Keller's Succession, 39 La. Ann. 579, 2 So. 553. See also McGuirk *v.* Marchand, 45 La. Ann. 732, 13 So. 161; and 2 Cent. Dig. tit. "Appeal and Error," § 1978.

34. Sanitary Dist. *v.* Cook, 51 Ill. App. 424; State *v.* Engleman, 45 Mo. 27; and see also 2 Cent. Dig. tit. "Appeal and Error," § 1980.

Directions for the insertion into the transcript of records filed in evidence have been held to render an order irregular. State *v.* Kruttschnitt, 44 La. Ann. 567, 10 So. 887.

35. Austin *v.* Scovill, 34 La. Ann. 484; Theriot *v.* Michel, 28 La. Ann. 107.

36. Kanatzar *v.* Kanatzar, 4 Ky. L. Rep. 448, wherein it was held that an appeal will be stricken from the docket where it appears that the judge of the lower court did not sign the order. See also, generally, Orders.

37. National City Bank *v.* New York Gold Exch. Bank, 97 N. Y. 645; Health Department *v.* Trinity Church, 10 Misc. (N. Y.) 738, 32 N. Y. Suppl. 120, 65 N. Y. St. 215; Brown *v.* Brown, 66 Vt. 76, 28 Atl. 666.

Amendment can be made at a subsequent term only from some minute or memorial paper from which it can be determined what the order really was. Town *v.* Howieson, 175 Ill. 85, 51 N. E. 712.

Reference to petition to supply defects.— When an order of appeal is made on the back or at the foot of a petition for appeal, the deficiencies in the order may be supplied by reference to the petition. Friend *v.* Graham, 10 La. 438.

38. Campbell *v.* Garven, 5 Ark. 485; Oberkoetter *v.* Luebbering, 4 Mo. App. 481; Phillips *v.* Ordway, 101 U. S. 745, 25 L. ed. 1040; *Ex p.* Roberts, 15 Wall. (U. S.) 384, 21 L. ed. 131 [*overruling* Nutt *v.* U. S., 8 Ct. Cl. 185]; and see also 2 Cent. Dig. tit. "Appeal and Error," § 1940.

After acceptance of the bond on appeal and docketing of the cause in the United States supreme court, the federal circuit court has no power to vacate the allowance of an appeal, though the term at which the appeal was allowed has not adjourned. Keyser *v.* Farr, 105 U. S. 265, 26 L. ed. 1025.

In Louisiana, it has been held that, the moment a sufficient appeal bond is signed and citation issued, the jurisdiction of the appellate court attaches, and the lower court is incompetent to disturb the order granting the appeal. State *v.* Judge, 21 La. Ann. 152; State *v.* Judge, 21 La. Ann. 43; Potier *v.* Harman, 1 Rob. (La.) 527; Alling *v.* Beamis, 15 La. 385. See also State *v.* Judge, 39 La. Ann. 774, 2 So. 390; State *v.* Judge, 36 La. Ann. 192.

Second appeal during pendency of the first. — When an appeal has been granted and is still pending, the court below has no jurisdiction to grant a second appeal from the same judgment. Pomeroy's Succession, 22 La. Ann. 518.

The court may vacate an order allowing an appeal when the order was made upon an erroneous appearance of counsel or under a mistake of fact (*Ex p.* Roberts, 15 Wall. (U. S.) 384, 21 L. ed. 131; Farmers' L. & T. Co. *v.* McClure, 78 Fed. 211, 24 C. C. A. 66, 49 U. S. App. 46); or where the court to which appeal was granted has no jurisdiction (Engelman *v.* Coco, 42 La. Ann. 923, 8 So. 610). So it has been held that where the appellate court has improperly granted a writ of error, that court will quash the same. Gaskins *v.* Com., 1 Call (Va.) 194.

39. Springer *v.* Merchants Nat. Bank, 67 Ill. App. 317; Anderson *v.* Anderson, 2 Call (Va.) 198. See also McGarrahan *v.* New Idria Min. Co., 49 Cal. 331; Rector *v.* Lipscomb, 141 U. S. 557, 12 S. Ct. 83, 35 L. ed. 857; and see also 2 Cent. Dig. tit. "Appeal and Error," § 1940.

Time for objecting to allowance.— Objections to the legality of the allowance of an appeal should be made on the occasion of the allowance. Graves *v.* Sheldon, 2 D. Chipm. (Vt.) 71, 15 Am. Dec. 653.

40. Weiser *v.* Blaese, 34 La. Ann. 833; Sthele *v.* Millspaugh, 33 La. Ann. 194; McKim *v.* Manwaring, 5 Hill (N. Y.) 296; and see also 2 Cent. Dig. tit. "Appeal and Error," § 1940.

41. Brackenridge *v.* Cobb, 85 Tex. 448, 21 S. W. 1034.

In Nebraska, it has been held that the dismissal of a petition in error from an appel-

7. Proof of Allowance. Any particular formality by which the allowance is made to appear is not material.[42]

8. Questions Presented Upon the Application — a. Grounds for Granting or Denying[43] — (I) *Conflict of Decisions.* A writ of error will sometimes be granted on the ground that the decision which it is sought to have reviewed is in conflict with other decisions previously made upon the same question in the same jurisdiction.[44]

(II) *Fraud and Laches of Applicant.* It is within the discretion of the court to grant or deny the application of one who has been guilty of bad faith and laches.[45]

(III) *Importance of Interests Involved.*[46] In New York, leave to appeal to the court of appeals or to the appellate division should be granted when there is a question of the construction of public statutes; where the case is one of public importance or involves large interests, or is of importance to others besides the litigants; or where a number of cases depend on the decisions.[47]

late court, without an examination of the merits of the assignments, operates as an affirmance of the judgment sought to be reviewed. Bell *v.* Walker, 54 Nebr. 222, 74 N. W. 617; Dunterman *v.* Storey, 40 Nebr. 447, 58 N. W. 949; and see also 2 Cent. Dig. tit. "Appeal and Error," § 1957; and *infra*, XIV.

42. Steamboat Zephyr *v.* Brown, 2 Wash. Terr. 44, 3 Pac. 186; Washington, etc., R. Co. *v.* Bradley, 7 Wall. (U. S.) 575, 19 L. ed. 274; Hudgins *v.* Kemp, 18 How. (U. S.) 530, 15 L. ed. 514; U. S. *v.* Haynes, 2 McLean (U. S.) 155, 26 Fed. Cas. No. 15,335.

An agreement of parties in the appellate court to the fact of an allowance is sufficient evidence of the allowance. The New England, 3 Sumn. (U. S.) 495, 18 Fed. Cas. No. 10,151.

Security taken and citation signed by judge, see Brandies *v.* Cochrane, 105 U. S. 262, 26 L. ed. 989.

43. See *infra*, VII, B, 8, a, (I)–(III).

44. Sheaff *v.* Williams, 59 Ohio St. 559, 53 N. E. 50; Terrell *v.* McCown, 87 Tex. 470, 29 S. W. 467.

See 2 Cent. Dig. tit. "Appeal and Error," § 1964.

45. Downer *v.* Howard, 47 Wis. 476, 3 N. W. 1.

46. In the District of Columbia, from an interlocutory order, a discretionary appeal will not be allowed, unless a strong case is made out showing to the court of appeals the necessity of an immediate readjudication. U. S. Electric Lighting Co. *v.* Ross, 9 App. Cas. (D. C.) 558; National Cable Co. *v.* Washington, etc., R. Co., 8 App. Cas. (D. C.) 478; Thompson *v.* Conroy, 8 App. Cas. (D. C.) 145; Morris *v.* Washington, etc., R. Co., 6 App. Cas. (D. C.) 513.

47. Atlantic, etc., Tel. Co. *v.* Barnes, 39 N. Y. Super. Ct. 357; Butterfield *v.* Radde, 38 N. Y. Super. Ct. 44; Lynch *v.* Sauer, 16 Misc. (N. Y.) 362, 38 N. Y. Suppl. 1, 25 N. Y. Civ. Proc. 286, 74 N. Y. St. 369; Blake *v.* Voight, 12 N. Y. Suppl. 213, 35 N. Y. St. 37; Taylor *v.* Arnoux, 15 N. Y. St. 383; and see also 2 Cent. Dig. tit. "Appeal and Error," § 1963.

N. Y. Code Civ. Proc. § 191, subd. 2, provides for an appeal from a unanimous decision of the appellate division in certain cases when the appellate division certifies that, in its opinion, a question of law is involved which ought to be reviewed by the court of appeals. Young *v.* Fox, 155 N. Y. 615, 50 N. E. 279. See also *supra*, V, B, 4, m.

New question.— In Mundt *v.* Glokner, 26 N. Y. App. Div. 123, 50 N. Y. Suppl. 190, it was held that, where the question presented upon the appeal was novel and of first impression, leave should be granted to appeal to the court of appeals.

Where the subject-matter involved is trifling in amount, or where the principle involved is not of sufficient importance to justify the application, leave to appeal should not be granted. Roeber *v.* New Yorker Staats Zeitung, 2 N. Y. App. Div. 163, 37 N. Y. Suppl. 719, 73 N. Y. St. 393; Myers *v.* Rosenback, 14 Misc. (N. Y.) 638, 36 N. Y. Suppl. 7, 70 N. Y. St. 766; Josuez *v.* Murphy, 6 Daly (N. Y.) 404; Annan *v.* Ritchie, 6 Daly (N. Y.) 331; Lynch *v.* Sauer, 16 Misc. (N. Y.) 362, 38 N. Y. Suppl. 1, 25 N. Y. Civ. Proc. 286, 74 N. Y. St. 369; Riche *v.* Martin, 2 Misc. (N. Y.) 64, 20 N. Y. Suppl. 872, 49 N. Y. St. 921; Kent *v.* Sibley, 7 N. Y. Suppl. 801, 28 N. Y. St. 183; Ahren *v.* National Steamship Co., 11 Abb. Pr. N. S. (N. Y.) 356; and see also 2 Cent. Dig. tit. "Appeal and Error," § 1966.

Counsel's want of preparation.—In Drucker *v.* Patterson, 2 Hilt. (N. Y.) 135, it was held that an affidavit, from which it appeared that on the first hearing of the case the counsel for appellant was not duly prepared to argue the case, and therefore entertained the belief that the court did not fully understand the question involved in the case, did not show any grounds for allowing an appeal.

Question previously decided.— An appeal or writ of error will not be granted in order to have a question passed upon which has already been settled by a previous decision in another case. Flaherty *v.* Greenman, 7 Daly (N. Y.) 481; Ward *v.* Edesheimer, 18 N. Y. Suppl. 139, 45 N. Y. St. 283; Sire *v.* Rumboldt, 16 N. Y. Suppl. 956, 41 N. Y. St. 954; Deutsche *v.* Reilly, 19 Alb. L. J. 162; Holt *v.* Maverick, 86 Tex. 457, 25 S. W. 607. See also Palmer *v.* Moeller, 2 Hilt. (N. Y.) 421, 19 How. Pr. (N. Y.) 322; Saril *v.* Payne, 4 N. Y.

b. Merits of Controversy. Generally, the merits of the controversy between the parties will not be determined or fully investigated on a petition for an appeal or writ of error.[48]

9. Writ of Mandamus to Compel Allowance. Upon the refusal of an inferior court to grant an appeal to a party entitled thereto, the appellate court will issue a mandamus directing the allowance of the appeal.[49] But a mandamus will not issue when the party has another adequate remedy.[50]

C. Costs and Fees — 1. In General. Some statutes regulating appellate practice provide that the costs which have accrued must be paid before the appeal is perfected.[51]

Suppl. 897, 24 N. Y. St. 486. *Compare* State *v.* Whitaker, 45 La. Ann. 1299, 14 So. 66; and see also 2 Cent. Dig. tit. "Appeal and Error," § 1965.

Remitting excess of judgment.— On a motion for leave to file a petition in error, defendant in error will be permitted to remit, on the record of the court below, any excess that may be found in the judgment, and when such *remittitur* is properly entered the motion will be overruled. Averill Coal, etc., Co. *v.* Verner, 22 Ohio St. 372.

Substantial justice done.—Where the court has a discretionary power as to the allowance of an appeal it will refuse the appeal when substantial justice has been done, though some irregularities may be attributable to the prevailing party. The Sloop Chester *v.* The Brig Experiment, 2 Dall. (U. S.) 41, 1 L. ed. 280.

48. Matthews *v.* Fogg, 35 N. H. 289; Lamb *v.* Lane, 4 Ohio St. 167, in which last case it was also held, however, that where the questions involved are of unusual gravity and a decision of them at an early day is highly desirable, the appellate court will consider them fully upon a mere motion for leave to file a petition. *Compare* Dodge *v.* Stickney, 62 N. H. 330, construing N. H. Gen. Laws, c. 207, § 9.

49. *Arkansas.*— Pettigrew *v.* Washington County, 43 Ark. 33; Beebe *v.* Lockert, 6 Ark. 422.

Kentucky.— Schmidt *v.* Mitchell, 95 Ky. 342, 15 Ky. L. Rep. 768, 25 S. W. 278; Kelly *v.* Toney, 95 Ky. 338, 15 Ky. L. Rep. 718, 25 S. W. 264; Louisville Industrial Reform School *v.* Louisville, 88 Ky. 584, 11 Ky. L. Rep. 109, 11 S. W. 603.

Louisiana.— State *v.* Houston, 36 La. Ann. 210; State *v.* Currie, 35 La. Ann. 887; State *v.* Judge, 31 La. Ann. 850; State *v.* Parish Judge, 29 La. Ann. 809; State *v.* Judge, 28 La. Ann. 900; State *v.* Judge, 24 La. Ann. 596; State *v.* Judge, 23 La. Ann. 768; State *v.* Judge, 18 La. Ann. 628; State *v.* Judge, 17 La. Ann. 186; State *v.* Judge, 12 Rob. (La.) 320; Little *v.* Consolidated Assoc. Com'rs, 2 La. Ann. 731; State *v.* Probate Judge, 12 Rob. (La.) 315; Gravier *v.* Caraby, 8 La. 202.

Missouri.—Patton *v.* Williams, 74 Mo. App. 451; State *v.* Lewis, 71 Mo. 170; Hall *v.* Audrain County, 27 Mo. 329.

Tennessee.— King *v.* Hampton, 3 Hayw. (Tenn.) 59.

See, generally, Mandamus.

Mandamus does not lie to compel the granting of an appeal in a case which, on the face of the papers, is unappealable (State *v.* Burthe, 39 La. Ann. 341, 1 So. 656); or to compel a district judge to rescind an order granting an appeal (State *v.* Judge, 14 La. Ann. 60).

Under N. C. Code (1883), §§ 252, 253, upon the refusal of the clerk to prepare a statement of the case, as required by Clark's Code Civ. Proc. N. C. (1900), § 254, on appeal from his decision to the superior court, the court in term, or a judge at chambers, may direct him to do so by a simple order. Farmers Nat. Bank *v.* Burns, 107 N. C. 465, 12 S. E. 252.

50. Byrne *v.* Harbison, 1 Mo. 225; Sabine *v.* Rounds, 50 Vt. 74. See also *infra*, XIV.

51. *Florida.*— Wheeler, etc., Mfg. Co. *v.* Johns, 37 Fla. 262, 20 So. 236, as to payment of all accrued costs. But see Jackson *v.* Haisly, 27 Fla. 205, 9 So. 648; Smith *v.* Curtis, 19 Fla. 786, to the effect that the rule does not apply to cases in equity. And *compare* also Florida Orange Hedge Fence Co. *v.* Branham, 27 Fla. 526, 8 So. 841; McIver *v.* Marshall, 24 Fla. 42, 4 So. 563.

Georgia.— Perkins *v.* Rowland, 69 Ga. 661. See also Brewer *v.* Brewer, 6 Ga. 587; Nisbet *v.* Lawson, 1 Ga. 275; Doe *v.* Peeples, 1 Ga. 1, to the effect that plaintiff in error should pay all costs accrued, but that a failure to do so will not deprive the appellate court of jurisdiction to hear the cause. The clerk may waive the payment of costs by receiving an appeal without demanding the costs or tendering a cost-bill. Lynier *v.* Jackson, 20 Ga. 773; Crawford *v.* Cate, 20 Ga. 69; Short *v.* Cohen, 11 Ga. 39.

Kentucky.—Gore *v.* Pettit, 2 B. Mon. (Ky.) 25, as to payment of jury-fee.

Missouri.—Hardison *v.* Steamboat Cumberland Valley, 13 Mo. 226, as to payment of jury-fee.

New York.— Weehawken Wharf Co. *v.* Knickerbocker Coal Co., 25 Misc. (N. Y.) 309, 54 N. Y. Suppl. 566 (construing N. Y. Code Civ. Proc. § 779, as to payment of costs of motion); Schwartz *v.* Schendel, 23 Misc. (N. Y.) 473, 51 N. Y. Suppl. 395; Szerlip *v.* Bair, 20 Misc. (N. Y.) 588, 46 N. Y. Suppl. 461 (construing N. Y. Laws (1896), c. 748, and N. Y. Code Civ. Proc. § 3047).

Pennsylvania.— The payment of the taxed costs is a condition precedent, and is indispensable to an appeal from an award of arbitrators. Peterson *v.* Pennsylvania R. Co.,

2. For Transcript. In some jurisdictions, the fees of the clerk for making out, certifying, and transmitting the transcript must be prepaid or secured, or the appeal will not be properly perfected;[52] while in other jurisdictions the clerk must perform these duties without prepayment or security.[53]

3. In Appellate Court. It is sometimes provided by statute or rule of court that the fees of the clerk of the appellate court shall be paid or secured in advance, or within a certain time, fixed by the statute or the rule.[54]

195 Pa. St. 494, 46 Atl. 112; Carr *v.* McGovern, 66 Pa. St. 457; Williams *v.* Hazlep, 14 Pa. St. 157.

In the absence of statutory authority it has been decided that a court cannot by a rule require parties appealing from its judgments to pay all accrued costs prior to the perfecting of their appeals. People *v.* Quinn, 12 Colo. 473, 21 Pac. 488.

Manner of payment.— Only actual payment is required, and an appeal will not be dismissed for a mere technical default, but only for a substantial failure of payment. Schrenkeisen *v.* Kishbaugh, 162 Pa. St. 45, 29 Atl. 284. Thus, payment by a check which is itself actually paid within the twenty days prescribed by statute is a valid payment. Rice *v.* Constein, 89 Pa. St. 477. See also Burns *v.* Smith, 180 Pa. St. 606, 37 Atl. 105, holding that an appeal should not be stricken off for non-payment of costs within the prescribed twenty days, where appellant's check, given to the prothonotary sixteen days before expiration of the time, was good, and known to the prothonotary to be so, and was accepted by him in payment without objection, but was not presented for payment or deposited for collection. The fact that the prothonotary receives payment of costs on appeal in the shape of a draft, which, on the same day, without his indorsement or provision for recourse to him, was cashed by a bank, is not a ground for dismissing the appeal. Delong *v.* Allentown R. Co., 1 Woodw. (Pa.) 191 [*distinguishing* Ellison *v.* Buckley, 42 Pa. St. 281, where appellant paid only a part of the costs, and gave the deputy of the prothonotary a note for the balance, which note was not paid off until the day when a rule was taken to strike off the appeal].

Municipal corporations are not bound to pay costs before taking an appeal. Swartz *v.* Middletown School Dist., 21 Pa. Co. Ct. 175.

Where two appeals have been taken in the same cause, the first of which appeals was dismissed, the second one will be stayed until the costs of the first are paid. Dresser *v.* Brooks, 1 Abb. Dec. (N. Y.) 555.

52. *Idaho.*— Potter *v.* Talkington, (Ida. 1897) 49 Pac. 14, stating rule in this state prior to the act of March 12, 1897.

Iowa.— Peterson *v.* Hays, 85 Iowa 14, 51 N. W. 1143; Loomis *v.* McKenzie, 57 Iowa 77, 8 N. W. 779, 10 N. W. 298.

Kentucky.—In this state the question seems to be undecided. See Houston *v.* Ducker, 86 Ky. 123, 9 Ky. L. Rep. 421, 5 S. W. 382; Duncan *v.* Baker, 13 Bush (Ky.) 514; Bates *v.* Foree, 4 Bush (Ky.) 430.

Louisiana.—State *v.* Rousseau, 28 La. Ann. 579, construing La. Acts (1872), No. 24, § 2. Prior to the enactment of this statute, decisions upon this question were not always harmonious. See State *v.* Sixth Dist. Ct. Clerk, 23 La. Ann. 762; State *v.* Second Dist. Ct. Clerk, 22 La. Ann. 585; State *v.* Seventh Dist. Ct. Clerk, 22 La. Ann. 563; State *v.* Phelps, 6 Rob. (La.) 308.

Michigan.— Boardman *v.* Taylor, 16 Mich. 62.

New York.— Chambers *v.* Appleton, 47 N. Y. Super. Ct. 524; Gardner *v.* Brown, 5 How. Pr. (N. Y.) 351; Aldrich *v.* Ketchum, 12 N. Y. Leg. Obs. 319.

North Carolina.— Brown *v.* House, 119 N. C. 622, 26 S. E. 160; Bailey *v.* Brown, 105 N. C. 127, 10 S. E. 1054; Andrews *v.* Whisnant, 83 N. C. 446. Under Clark's Code Civ. Proc. N. C. (1900), § 551, it seems that leave to appeal *in forma pauperis*, except in criminal cases, does not excuse appellant from paying the costs of transcript. State *v.* Deyton, 119 N. C. 880, 26 S. E. 159; Sanders *v.* Thompson, 114 N. C. 282, 19 S. E. 225; State *v.* Nash, 109 N. C. 822, 13 S. E. 733; Bailey *v.* Brown, 105 N. C. 127, 10 S. E. 1054; Martin *v.* Chasteen, 75 N. C. 96.

Time of payment.— In Iowa, it has been held that payment of the fees of the clerk of the court for a transcript need not be made within the time allowed for the service of notice of appeal. Slone *v.* Berlin, 88 Iowa 205, 55 N. W. 341; Bruner *v.* Wade, 85 Iowa 666, 52 N. W. 558.

Waiver of prepayment.— In Varnum *v.* Winslow, 106 Iowa 287, 76 N. W. 708, it was held that when the clerk accepts service of a notice of appeal containing an admission that the costs of the transcript have been paid or secured, he waives his right to prepayment or security.

53. Parker *v.* McGaha, 13 Ala. 344; Bowie *v.* Maryland Agricultural College, 27 Md. 268.

In Tennessee, it has been decided that it is the duty of the clerk to make out, certify, and transmit the transcript without the prepayment of his fees. But when the clerk has performed this duty, and the transcript has been lost, he will not be compelled to prepare another without compensation. Western Union Tel. Co. *v.* Ordway, 8 Lea (Tenn.) 558.

Writ of error.— In Arkansas and Texas, it has been decided that the clerk has no right to withhold the transcript of a writ of error until his fees for making it out are paid or secured. Thorn *v.* Glendenin, 12 Ark. 60; Davis *v.* Carter, 18 Tex. 400; ——— *v.* Costley, 7 Tex. 460.

54. *California.*— Boyd *v.* Burrel, 60 Cal. 280.

Colorado.— Busby *v.* Camp, 16 Colo. 38, 26 Pac. 326.

D. Bonds and Undertakings — 1. Necessity — a. In General. At common law, it seems, no appeal bond is necessary.[55]

b. Statutory Requirements — (1) *In General.* By statute, however, in most jurisdictions, the filing of a bond is an essential step in perfecting an appeal.[5]

Florida.— Johnson *v.* Polk County, 23 Fla. 58, 1 So. 334; Robinson *v.* Roberts, 16 Fla. 156.

Iowa.— Scott *v.* Lasell, 71 Iowa 180, 32 N. W. 322; Cole *v.* Laub, 35 Iowa 590.

Louisiana.— State *v.* Heuchert, 42 La. Ann. 270, 7 So. 329; Champomier *v.* Washington, 2 La. Ann. 722.

Massachusetts.— Burlingame *v.* Bartlett, 161 Mass. 593, 37 N. E. 748.

Oregon.—Therkelsen *v.* Therkelsen, 35 Oreg. 75, 54 Pac. 885, 57 Pac. 373.

Utah.— Van Wagonen *v.* Barben, 9 Utah 481, 35 Pac. 497; Legg *v.* Larson, 7 Utah 110, 25 Pac. 731.

Washington.—Griffith *v.* Maxwell, 22 Wash. 634, 61 Pac. 708, wherein it was held that when appellant had failed to transmit the docket-fee with the transcript, so that the case was not docketed for the first term, the court might dismiss the appeal, or direct compensation to be paid to appellee for the delay.

United States.— Selma, etc., R. Co. *v.* Louisiana Nat. Bank, 94 U. S. 253, 24 L. ed. 32; Owings *v.* Tiernan, 10 Pet. (U. S.) 447, 9 L. ed. 489.

Fee for printing record.— Upon an appeal to the supreme court of the United States, if the record is printed under the supervision of the clerk, he may require the payment of the fee, chargeable under supreme court Rule 24, before the printing is done. If the parties themselves furnish the printed copies, the fee must be paid, if demanded by the clerk, in time to enable him to make the necessary examination and be ready to deliver the copies to the parties or their counsel and to the court when needed for any purpose in the progress of the cause. Bean *v.* Patterson, 110 U. S. 401, 4 S. Ct. 23, 28 L. ed. 190.

Fee for prothonotary.— In Konigmacher *v.* Kimmel, 1 Penr. & W. (Pa.) 207, 21 Am. Dec. 374, it was held that, in the case of an appeal from a decree of the circuit court, the prothonotary could not demand his fee before entering it.

55. Ringgold's Case, 1 Bland (Md.) 5 [*citing* 2 Tidd Pr. 1074] wherein it is said: "The right of appeal seems to have been conceded to the citizen by the common law in all civil cases, without check or control of any kind whatever."

"The giving of bond with sureties is not essential, in all cases, as part of an appeal, but only in those cases in which it is required by statute, or by the order of the court allowing the appeal in cases where the court possesses power to prescribe such terms." Peoria County *v.* Harvey, 18 Ill. 364, 370.

As to waiver of bond see *infra*, VII, D, 11, a, (1).

For supersedeas and stay bonds see *infra*, VIII.

56. *Arizona.*—Sutherland *v.* Putnam, (Ariz. 1890) 24 Pac. 320.

California.— Meyer *v.* San Diego, 130 Cal. 60, 62 Pac. 211; Scott *v.* Glenn, 98 Cal. 168, 32 Pac. 983; Von Schmidt *v.* Widber, (Cal. 1893) 32 Pac. 531.

Colorado.— Clelland *v.* Tanner, 8 Colo. 252, 7 Pac. 9. See also Pollock *v.* People, 1 Colo. 83.

Florida.— Finnegan *v.* Fernandina, 14 Fla. 72.

Illinois.— Traders Safe, etc., Co. *v.* Calow, 77 Ill. App. 146; John F. Alles Plumbing Co. *v.* Alles, 67 Ill. App. 252.

Kentucky.—Wickliffe *v.* Clay, 1 Dana (Ky.) 585. See also Clinton *v.* Phillips, 7 T. B. Mon. (Ky.) 117.

Louisiana.— Davis *v.* Curtis, 3 Mart. N. S. (La.) 142; Dubreuil *v.* Dubreuil, 5 Mart. (La.) 81.

Maine.— Moore *v.* Phillips, 94 Me. 421, 47 Atl. 913.

Massachusetts.— Santon *v.* Ballard, 133 Mass. 464, relating to appeals from certain courts, holding that bond cannot be dispensed with by consent of parties.

Montana.— Washoe Copper Co. *v.* Hickey, 23 Mont. 319, 58 Pac. 866.

Nebraska.— Hier *v.* Anheuser-Busch Brewing Assoc., 52 Nebr. 144, 71 N. W. 1005; School Dist. No. 6 *v.* Traver, 43 Nebr. 524, 61 N. W. 720.

Nevada.— Marx *v.* Lewis, 24 Nev. 306, 53 Pac. 600; Gaudette *v.* Glissan, 11 Nev. 184.

New Hampshire.— Clark *v.* Courser, 30 N. H. 454.

New York.— Architectural Iron Works *v.* Brooklyn, 85 N. Y. 652; Raymond *v.* Richmond, 76 N. Y. 106; Cowdin *v.* Teal, 67 N. Y. 581; Jones *v.* Decker, 14 Abb. Pr. (N. Y.) 391; Spotts *v.* Dumesnil, 12 Abb. Pr. N. S. (N. Y.) 117; Sheldon *v.* Barnard, 3 How. Pr. (N. Y.) 423; Langley *v.* Warner, 3 How. Pr. (N. Y.) 363, 1 N. Y. 606. *Compare* Parsons *v.* Suydam, 4 Abb. Pr. (N. Y.) 134.

North Carolina.—Harshaw *v.* McDowell, 89 N. C. 181: Smith *v.* Reeves, 85 N. C. 594; Clark's Code Civ. Proc. N. C. (1900), § 552.

Ohio.— Hubbard *v.* Topliff, 60 Ohio St. 382, 54 N. E. 367.

Pennsylvania.— Com. *v.* Judges, 10 Pa. St. 37; Chew's Case, 8 Watts & S. (Pa.) 375; Page *v.* J. C. McNaughton Co., 2 Pa. Super. Ct. 519; Moody's Appeal, 1 Pennyp. (Pa.) 287.

South Dakota.— McConnell *v.* Spicker, 13 S. D. 406, 83 N. W. 435; Sutton *v.* Consolidated Apex Min. Co., 12 S. D. 576, 82 N. W. 188.

Tennessee.— Davis *v.* Hansard, 9 Humphr. (Tenn.) 173. See also Ing *v.* Davey, 2 Lea (Tenn.) 276.

Texas.— Smithwick *v.* Kelly, 79 Tex. 564, 15 S. W. 486; Lyell *v.* Guadalupe County, 28 Tex. 57. *Compare* Hansborough *v.* Towns, 1 Tex. 58.

Utah.— Crismon *v.* Bingham Canyon, etc.,

In some states, however, an appeal bond is not required in order to give the appel-

R. Co., 3 Utah 249, 2 Pac. 208. *Compare* Winters *v.* Hughes, 3 Utah 438, 24 Pac. 907.

Virginia.— See Thomson *v.* Evans, 6 Munf. (Va.) 397; Braxton *v.* Morris, 1 Wash. (Va.) 380.

Washington.— Van Dusen *v.* Kelleher, 20 Wash. 716, 56 Pac. 35; Hibbard *v.* Delanty, 20 Wash. 539, 56 Pac. 34; Smithson *v.* Woodin, 13 Wash. 709, 43 Pac. 638. *Compare* Fox *v.* Utter, 6 Wash. 299, 33 Pac. 354.

Wisconsin.— Eureka P. Steam Heating Co. *v.* Sloteman, 67 Wis. 118, 30 N. W. 241.

Wyoming.— Horton *v.* Peacock, 1 Wyo. 39.

See 2 Cent. Dig. tit. "Appeal and Error," § 2001 *et seq.*

Alabama.— Bond is unnecessary where appeal is not intended to act as a supersedeas; a simple acknowledgment in writing by the sureties is sufficient to secure the costs. Marshall *v.* Croom, 50 Ala. 479; Williams *v.* McConico, 27 Ala. 572; Riddle *v.* Hanna, 25 Ala. 484; Spencer *v.* Thompson, 24 Ala. 512.

Arkansas — Appeal from probate court.— Under the Arkansas act of Jan. 4, 1849, no bond for costs is required on appeals from probate to circuit courts. Sullivan *v.* Deadman, 14 Ark. 49; Ross *v.* Davis, 13 Ark. 293; Biscoe *v.* Maddin, 12 Ark. 765 [*overruling* Morrow *v.* Walker, 10 Ark. 569].

Connecticut.—Probate appeals, for the want of a bond are voidable only, and not void. Orcutt's Appeal, 61 Conn. 378, 24 Atl. 276; Bailey *v.* Woodworth, 9 Conn. 388.

Florida — Chancery appeals.— A chancery appeal may be perfected without giving bond and security, or paying the costs of the suit as required in suits at law. Williams *v.* Hilton, 25 Fla. 608, 6 So. 452; Smith *v.* Curtis, 19 Fla. 786; Bauknight *v.* Sloan, 17 Fla. 281; Kilbee *v.* Myrick, 12 Fla. 416.

Indiana — Term appeals.— "The filing of a bond is an essential step in perfecting a term appeal, and where a bond is not filed within the time limited by the order granting the appeal, the appeal must be upon notice. This doctrine has been asserted in many unreported decisions, made upon motions, and is declared in Holloran *v.* Midland R. Co., 129 Ind. 274, 28 N. E. 549; Webber *v.* Brieger, 1 Colo. App. 92, 27 Pac. 871; Goodwin *v.* Fox, 120 U. S. 775, 7 S. Ct. 779, 30 L. ed. 815. In Jones *v.* Droneberger, 23 Ind. 74, and in Ham *v.* Greve, 41 Ind. 531, there are intimations of a contrary doctrine, but there was no authoritative decision upon the question. The failure to file a bond does not, however, prevent an appeal upon notice. As held in Burt *v.* Hoettinger, 28 Ind. 214, a bond is not always essential to an appeal; but, as held in Holloran *v.* Midland R. Co., 129 Ind. 274, 28 N. E. 549, where there is no bond, notice is required. A bond is, we may add, not essential to the appeal, although it is necessary to obtain a supersedeas, where notice is given." *Ex p.* Sweeney, 131 Ind. 81, 30 N. E. 884. See also Sturgis *v.* Rogers, 26 Ind. 1; John V. Farwell Co. *v.* Newman, 17 Ind. App. 649, 47 N. E. 234. Where no appeal was prayed and no bond given in the court below, a cause cannot be properly appealed — as from an interlocutory order — under the second specification of Ind. Rev. Stat. p. 162, § 376. Berry *v.* Berry, 22 Ind. 275; Staley *v.* Dorset, 11 Ind. 367.

Mississippi — Decree overruling demurrer. — The provisions of Miss. Code (1871), §§ 1251, 1252, 1257, requiring appeal bonds, do not embrace appeals from a decree overruling a demurrer. Byrd *v.* Clarke, 52 Miss. 623; Philips *v.* Hines, 33 Miss. 163; Gay *v.* Edwards, 30 Miss. 218.

Missouri — Appeals in attachment suits.— Defendant may appeal from an adverse judgment in an attachment suit without giving a bond. His failure to give a bond deprives him of the right to a supersedeas. Paddock-Hawley Iron Co. *v.* Graham, 48 Mo. App. 638; Crawford *v.* Greenleaf, 48 Mo. App. 590.

New York — City court appeals.— Under N. Y. Code Civ. Proc. §§ 1340, 1341, as amended by N. Y. Laws (1895), c. 946, security is not necessary on an appeal from a judgment of the general term of the city court of New York set for the hearing at the appellate term. Quigg *v.* International Shirt, etc., Co., 16 Misc. (N. Y.) 39, 37 N. Y. Suppl. 916, 73 N. Y. St. 44. But see Carling *v.* Purcell, 3 Misc. (N. Y.) 55, 22 N. Y. Suppl. 558, 51 N. Y. St. 835, to the effect that, under former statutory conditions, security to perfect an appeal from a judgment of the city court to the court of common pleas was held to be essential. And *compare* Schnitzer *v.* Willner, 5 Misc. (N. Y.) 418, 25 N. Y. Suppl. 960 [*distinguishing* Lane *v.* Humbert, 16 Daly (N. Y.) 186, 9 N. Y. Suppl. 744, 31 N. Y. St. 277; Carling *v.* Purcell, 3 Misc. (N. Y.) 55, 22 N. Y. Suppl. 558, 51 N. Y. St. 835, on the ground that in these cases the appeal was from a judgment, and not an order], where it was held that, under N. Y. Code Civ. Proc. § 1343, no security was required to appeal to the court of common pleas from an order made by the general term of the city court of New York.

New York.— On appeals from orders made upon special motions, as distinguished from judgments, no security is required. Beach *v.* Southworth, 6 Barb. (N. Y.) 173.

Statutes are constitutional which require the giving of an appeal bond. Hier *v.* Anheuser-Busch Brewing Assoc., 52 Nebr. 144, 71 N. W. 1005.

United States supreme court practice.— Although, upon an appeal to the supreme court of the United States, a bond should be filed, its omission affects only the regularity of the proceedings. The taking of security is not jurisdictional in its character. If, through mistake or accident, no bond or a defective bond has been filed, that court will not dismiss the appeal, but will permit a bond to be given there. Brown *v.* McConnell, 124 U. S. 489, 8 S. Ct. 559, 31 L. ed. 495; Union Ins. Co. *v.* Smith, 124 U. S. 405, 8 S. Ct. 534, 31 L. ed. 497; Edmonson *v.* Bloomshire, 7 Wall. (U. S.) 306, 19 L. ed. 91; Seymour *v.* Freer,

late court jurisdiction.[57] And, as a general rule, no bond is required for the prosecution of a writ of error.[58]

(II) *Where There Are Several Judgments or Orders*— (A) *In General.* Statutes requiring undertakings on appeal generally contemplate a separate appeal bond for each judgment or order appealed from.[59] In some cases, however, a single bond may support an appeal from more than one judgment or order.[60]

5 Wall. (U. S.) 822, 18 L. ed. 564 [*distinguishing* The Dos Hermanos, 10 Wheat. (U. S.) 306, 6 L. ed. 328]; *Ex p.* Milwaukee, etc., R. Co., 5 Wall. (U. S.) 188, 18 L. ed. 676; Anson *v.* Blue Ridge R. Co., 23 How. (U. S.) 1, 16 L. ed. 517. *Compare* Boyce *v.* Grundy, 6 Pet. (U. S.) 777, 8 L. ed. 579; Veitch *v.* Farmers' Bank, 6 Pet. (U. S.) 777, 8 L. ed. 578.

57. Failure to give bond simply denies the complaining party a supersedeas to the judgment below. Where no bond is given the opposite party is at liberty to proceed to enforce his rights below, by execution or otherwise, subject, of course, to the chances of a reversal. Perkins *v.* Rowland, 69 Ga. 661; Nisbet *v.* Lawson, 1 Ga. 275; Doe *v.* Peeples, 1 Ga. 1; Biddison *v.* Mosely, 57 Md. 89; Price *v.* Thomas, 4 Md. 514; State *v.* Adams, 9 Mo. App. 464. See also Childress *v.* Foster, 2 Ark. 123; Hill *v.* Hudspeth, 22 Ga. 621; McKim *v.* Thompson, 1 Bland (Md.) 150; Ringgold's Case, 1 Bland (Md.) 5; Blanchard *v.* Wolff, 1 Mo. App. 520; Byrne *v.* Thompson, 1 Mo. 443; and *infra*, VIII, H, 1; VIII, L. Under Howell's Anno. Stat. Mich. § 6738, as amended by Mich. Acts (1899), p. 380, a bond on an appeal is not required except where a stay of proceedings is sought. Daeschke *v.* Schellenberg, (Mich. 1900) 82 N. W. 665. Prior to this enactment a bond was necessary. Covell *v.* Mosely, 15 Mich. 514. See also Atty.-Gen. *v.* Hane, 50 Mich. 447.

58. *Arkansas.*— Dillard *v.* Noel, 2 Ark. 123.

Florida.— Wheeler, etc., Mfg. Co. *v.* Johns, 37 Fla. 262, 20 So. 236. See also Florida Orange Hedge Fence Co. *v.* Branham, 27 Fla. 526, 8 So. 841; Weiskoph *v.* Dibble, 18 Fla. 22. *Compare* Union Bank *v.* McBride, 2 Fla. 7.

Mississippi.— Winters *v.* Claitor, 54 Miss. 341; Swann *v.* Horne, 54 Miss. 337; Tombigbee R. Co. *v.* Bell, 4 Sm. & M. (Miss.) 685. See also Baskin *v.* May, 9 Sm. & M. (Miss.) 373; Stephens *v.* Hood, 9 Sm. & M. (Miss.) 75.

New Hampshire.— Rochester *v.* Roberts, 25 N. H. 495; Tracy *v.* Perry, 5 N. H. 172.

Ohio.— Barker *v.* Cory, 15 Ohio 9.

But, under the Texas statute, where a petition for a writ of error is filed, but there is no writ-of-error bond for costs, nor affidavit of inability to give such bond, the writ of error will, on motion, be dismissed. Indianola R. Co. *v.* Fryer, 56 Tex. 609; Waterhouse *v.* Love, 23 Tex. 559. *Compare* San Roman *v.* De la Serna, 40 Tex. 306 [*overruling* Dawson *v.* Hardy, 33 Tex. 198]; Horton *v.* Bodine, 19 Tex. 280; Turner *v.* Hamilton, 6 Tex. 250 — to the effect that, under the statutes of 1846 and 1858, no bond expressly for costs was necessary when there was a supersedeas bond.

In several jurisdictions, a non-resident must give a cost bond on suing out a writ of error. Edgar Gold, etc., Min. Co. *v.* Taylor, 10 Colo. 110, 14 Pac. 113; Filley *v.* Cody, 3 Colo. 221; Talpey *v.* Doane, 2 Colo. 298; Roberts *v.* Fahs, 32 Ill. 474; Smith *v.* Robinson, 11 Ill. 119; Hickman *v.* Haines, 10 Ill. 20; Ripley *v.* Morris, 7 Ill. 381.

59. *California.*— Sharon *v.* Sharon, 68 Cal. 326, 9 Pac. 187; People *v.* Center, 61 Cal. 191. See also Biagi *v.* Howes, 63 Cal. 384.

Florida.— Moseley *v.* Shepherd, 1 Fla. 155, where there were several appellants and two separate and distinct rules taken.

Louisiana.—Clairteaux's Succession, 35 La. Ann. 1178.

North Carolina.— But see Pretzfelder *v.* Merchants' Ins. Co., 116 N. C. 491, 21 S. E. 302.

Rhode Island.— Harris *v.* Harris, 2 R. I. 538, where there were also several appellants.

Texas.— Chambers *v.* Fiske, 9 Tex. 261.

Wisconsin.— Sweet *v.* Mitchell, 17 Wis. 125; Chamberlain *v.* Sage, 14 Wis. 193; White *v.* Appleton, 14 Wis. 190. See also Montgomery *v.* American Cent. Ins. Co., 106 Wis. 543, 82 N. W. 532, where there were also several appellants.

Non-appealable order appealed from.— In Schermerhorn *v.* Anderson, 1 N. Y. 430, 2 Code Rep. (N. Y.) 2, it was held that when an appeal was taken from two orders, one of which was not appealable, and the undertaking was insufficient for a double appeal, the court might allow appellant to amend, by striking out all reference to the non-appealable order, upon paying costs of the appeal from the non-appealable order, and that the bond would then be sufficient to support the appeal from the appealable order.

Penalty covering several appeals.— "Where several distinct decisions and orders have been made by the court below, in the same suit, and between the same parties, it is sometimes permitted to the party who considers himself aggrieved by such decisions to embrace them all in the same notice of appeal. But where the proceeding is in the nature of a separate and distinct appeal from each order, as in this case, the appellant must either execute a separate appeal bond upon the appeal from each order, or he must give one bond upon the appeal with a penalty sufficiently large to cover the appeals from both orders, and with a condition which is broad enough to embrace the damages and costs of both." Skidmore *v.* Davies, 10 Paige (N. Y.) 316, 318. To the same effect is Tyler *v.* Simmons, 6 Paige (N. Y.) 127.

60. As where there is an appeal from several orders, all of which relate to the same question, the several orders being treated as

(B) *Two Appeals and One Bond.* In some jurisdictions an appeal from a judgment and certain particular orders, or from two or more particular orders, will be supported by one bond.[61]

c. Exemptions — (I) *In General.* Certain parties are exempted by statute from the necessity of giving appeal bonds.[62] But such parties must show affirmatively to the court their right to this exemption.[63]

a single order (Edgecomb *v.* His Creditors, 19 Nev. 149, 7 Pac. 533); where several questions, tending to one conclusion, in the same case, having been consolidated by consent of the parties to the case, are passed on in several separate decrees rendered simultaneously (People's Brewing Co. *v.* Bœbinger, 40 La. Ann. 277, 4 So. 82; Geddes' Succession, 36 La. Ann. 963; Clark's Succession, 30 La. Ann. 801); where two orders are made and entered in a cause on the same date, one of which orders substantially embraces the other, and defendant appeals from both orders (Gregory *v.* Dodge, 3 Paige (N. Y.) 90); or when two judgments in one suit are given against the plaintiff in favor of different defendants, but there is only one judgment record (Smith *v.* Lynes, 2 N. Y. 569, 4 How. Pr. (N. Y.) 209).

61. In California and Montana, it is a well-settled rule of practice that one bond is sufficient in the instance of an appeal from a judgment and an order denying a new trial. Granger *v.* Robinson, 114 Cal. 631, 46 Pac. 604; Williams *v.* Dennison, 86 Cal. 430, 25 Pac. 244; Sharon *v.* Sharon, 68 Cal. 326, 9 Pac. 187; Nolan *v.* Montana Cent. R. Co., 24 Mont. 327, 61 Pac. 880; Ramsey *v.* Burns, 24 Mont. 234, 61 Pac. 129; Coleman *v.* Perry, 24 Mont. 237, 61 Pac. 129. In all other cases where an appeal is taken from two or more orders, or from a judgment and an order, an undertaking for each appeal must be given. Centerville, etc., Irrigation Ditch Co. *v.* Bachtold, 109 Cal. 111, 41 Pac. 813. Where the undertaking is executed between the time of entering the judgment and the filing of a motion for a new trial, and is designed to cover the appeal from both, the instrument is divisible, and the fact that it is invalid for want of consideration as to the appeal from the order does not affect its validity as to the appeal from the judgment. Clarke *v.* Mohr, 125 Cal. 540, 58 Pac. 176.

In Idaho, under Ida. Rev. Stat. § 4809, see Kelly *v.* Leachman, (Ida. 1897) 51 Pac. 407; Vane *v.* Towle, (Ida. 1897) 50 Pac. 1004; Sebree *v.* Smith, 2 Ida. 327, 16 Pac. 477 — applying the rule generally.

In Wisconsin, an exception is made in cases where a review of an intermediate order is allowed upon appeal from a final judgment. Sweet *v.* Mitchell, 17 Wis. 125.

Extent and limits of rule.— Where such undertaking refers to the judgment alone, or to only one of the orders appealed from, the court will have jurisdiction only of the matter referred to in the undertaking.

California.—Dodge *v.* Kimple, 121 Cal. 580, 54 Pac. 94; Pignaz *v.* Burnett, 121 Cal. 292, 53 Pac. 633; Rhoads *v.* Gray, (Cal. 1897) 48 Pac. 971.

Idaho.— Young *v.* Tiner, (Ida. 1894) 38 Pac. 697; Sebree *v.* Smith, 2 Ida. 327, 16 Pac. 477; McCoy *v.* Oldham, 1 Ida. 465.

Illinois.—Campbell *v.* Jacobson, 44 Ill. App. 238.

Louisiana.— Boutté *v.* Boutté, 30 La. Ann. 177.

Montana.— Hurley *v.* O'Neill, 24 Mont. 293 61 Pac. 658.

If the undertaking has no special reference to either matter appealed from, but is conditioned generally upon "such appeal" or "said appeals," all the appeals will be dismissed, upon the ground that, by reason of its ambiguity, it cannot be determined for which appeal the bond was given. Matter of Heydenfeldt, 119 Cal. 346, 51 Pac. 543; Centerville, etc., Irrigation Ditch Co. *v.* Bachtold, 109 Cal. 111, 41 Pac. 813; Field *v.* Andrada, (Cal. 1894) 37 Pac. 180; McCormick *v.* Belvin, 96 Cal. 182, 31 Pac. 16; Wallace *v.* McKinley, (Ida. 1898) 53 Pac. 104; Kelly *v.* Leachman, (Ida. 1897) 51 Pac. 407; Weil *v.* Sutter, (Ida. 1896) 44 Pac. 555; Schiller *v.* Small, (Ida. 1895) 40 Pac. 53; Richter *v.* Eagle L. Assoc., 24 Mont. 346, 61 Pac. 878; Washoe P. Copper Co. *v.* Hickey, 23 Mont. 319, 58 Pac. 866; Murphy *v.* Northern Pac. R. Co., 22 Mont. 577, 57 Pac. 278; Creek *v.* Bozeman Water Works Co., 22 Mont. 327, 56 Pac. 362.

In Montana, a distinction has been made, in the case of an appeal from a judgment and an order refusing a new trial, between a bond conditioned that appellant will pay all costs and damages "on the appeal, or such appeal, or a dismissal thereof," and "on such appeals or a dismissal thereof," a bond conditioned in the first manner being held sufficient (Nolan *v.* Montana Cent. R. Co., 24 Mont. 327, 61 Pac. 880; Ramsey *v.* Burns, 24 Mont. 234, 61 Pac. 129; Watkins *v.* Morris, 14 Mont. 354, 36 Pac. 452); and one conditioned in the other manner being held insufficient on the ground that the sureties assume no liability thereby unless both appeals should be decided against appellant, or should be dismissed (Coleman *v.* Perry, 24 Mont. 237, 61 Pac. 129; Baker *v.* Butte City Water Co., 24 Mont. 113, 60 Pac. 817). This distinction is discussed in a late case and affirmed — not because it is right in principle, but because of the reluctance of the court to disturb the practice as settled in the first case deciding the question. Ramsey *v.* Burns, 24 Mont. 234, 61 Pac. 129 [*following* Watkins *v.* Morris, 14 Mont. 354, 36 Pac. 452].

62. See *infra*, VII, D, 1, c, (II) *et seq.*; and 2 Cent. Dig. tit. "Appeal and Error," § 2005 *et seq.*

63. Pugh *v.* Ottenkirk, 3 Watts & S. (Pa.) 170; Weeden *v.* Martin, 2 Tex. App. Civ. Cas. § 197; Guest *v.* Phillips, 34 Tex. 176.

(II) *Assignees and Trustees.* Trustees and assignees are among the parties sometimes exempted.[64]

(III) *Guardians and Wards.* Under some statutes[65] guardians are sometimes allowed to appeal without giving bonds when the appeals are taken in the interest of the wards.[66] No security is required of a ward appealing from an order appointing a guardian for him, or refusing to remove one previously appointed.[67]

(IV) *Municipal Corporations.* Statutes have been enacted in some states providing that an appeal bond shall not be required of a municipal corporation.[68]

64. *California.*— Scheerer *v.* Edgar, 67 Cal. 377, 7 Pac. 760.

Georgia.— Sawyer *v.* Cheney, 59 Ga. 368.

Kentucky.— Paducah Hotel Co. *v.* Long, 92 Ky. 278, 13 Ky. L. Rep. 531, 17 S. W. 853, construing Ky. Civ. Code, § 619, to the effect that every insolvent assignee may be required to give an appeal bond.

Ohio.— Kennedy *v.* Thompson, 3 Ohio Cir. Ct. 446, 2 Ohio Cir. Dec. 254; Biddle *v.* Phipps, 2 Ohio Cir. Ct. 61 (holding that the trustee must give bond unless the appeal is in the interest of the trust); Biddle *v.* Phipps, 2 Ohio Cir. Ct. 61, 1 Ohio Cir. Dec. 363. *Compare* Collins *v.* Millen, 57 Ohio St. 289, 48 N. E. 1097.

Utah.— Crismon *v.* Bingham Canyon, etc., R. Co., 3 Utah 249, 2 Pac. 208, holding, however, that, under a statute providing that a collector of taxes shall be responsible for the taxes collected by him, and sue for them in his own right, he is not a trustee as to the taxes not yet collected by him, and in a suit for them he must give an appeal bond.

County treasurer.— In Hubbard *v.* Topliff, 60 Ohio St. 382, 54 N. E. 367, it was decided that a county treasurer was not a party in a trust capacity within the meaning of the statute providing that such party might appeal without giving a bond. To the same effect are State *v.* Delaware County, 15 Ohio Cir. Ct. 40, 8 Ohio Dec. 244; State *v.* Smiley, 14 Ohio Cir. Ct. 660, 8 Ohio Cir. Dec. 117. And *compare* Scheerer *v.* Edgar, 67 Cal. 377, 7 Pac. 760.

The bond of a trustee in bankruptcy is not sufficient to exempt the trustee from giving an appeal bond under Ohio Rev. Stat. § 5228, providing that a party in any trust capacity who has given bond in the state shall not be required to give any bond and security to perfect an appeal. Kuhn *v.* Haley, 20 Ohio Cir. Ct. 286, 11 Ohio Cir. Dec. 105.

65. **Under other statutes** an appeal bond must be filed. Potter *v.* Todd, 73 Mo. 101. See also Hudgins *v.* Leggett, 84 Tex. 207, 19 S. W. 387 (construing Tex. Rev. Stat. arts. 1408, 2201, 2202); Lumpkin *v.* Smyth, 57 Tex. 489; Watson *v.* Guest, 41 Tex. 559 (construing Paschal's Dig. Tex. art. 1503).

66. Hubbard *v.* Topliff, 60 Ohio St. 382, 54 N. E. 367; Tompkins *v.* Page, 70 Wis. 249, 35 N. W. 563; Stinson *v.* Leary, 69 Wis. 269, 34 N. W. 63; and see also 2 Cent. Dig. tit. "Appeal and Error," § 2007.

Guardians ad litem come within this rule under Tex. Rev. Stat. (1895), art. 1048. Tutt *v.* Morgan, 18 Tex. Civ. App. 627, 42 S. W. 578, 46 S. W. 122.

Limits of rule.— A bond must be filed by a guardian when a personal obligation is imposed upon him by the judgment appealed from (Hunter *v.* Thurmon, 25 Miss. 463); or where he appeals from an order for his removal (Morrow *v.* Walker, 10 Ark. 569).

67. *Maine.*— Witham, Appellant, 85 Me. 360, 27 Atl. 252.

Massachusetts.— McDonald *v.* Morton, 1 Mass. 543.

Missouri.— State *v.* Ball, 27 Mo. 324.

New Hampshire.— Wadleigh *v.* Eaton, 59 N. H. 574.

Rhode Island.— Atwood *v.* Warwick Probate Ct., 17 R. I. 537, 23 Atl. 99.

A ward who has become of age must file a bond. Curtiss *v.* Morrison, 93 Me. 245, 44 Atl. 892.

68. *California.*— Meyer *v.* San Diego, 130 Cal. 60, 62 Pac. 211.

Illinois.— Holmes *v.* Mattoon, 111 Ill. 27, 53 Am. Rep. 602. *Compare* Warren *v.* Wright, 3 Ill. App. 420.

Louisiana.— State *v.* New Orleans, 34 La. Ann. 467; State *v.* Brown, 29 La. Ann. 53.

Pennsylvania.—King *v.* Penn Dist., 1 Phila. (Pa.) 402, 9 Leg. Int. (Pa.) 140.

Texas.— Vernon *v.* Montgomery, (Tex. Civ. App. 1895) 33 S. W. 606; Victoria *v.* Jessel, 7 Tex. Civ. App. 520, 27 S. W. 159.

Washington.— Elma *v.* Carney, 4 Wash. 418, 30 Pac. 732.

Wisconsin.— Miller *v.* Jacobs, 70 Wis. 122, 35 N. W. 324.

A township drainage district has been held to be a municipal corporation within the meaning of such a statutory provision. Havana Tp. Drainage Dist. No. 1 *v.* Kelsey, 120 Ill. 482, 11 N. E. 256; Union Drainage Dist. Com'rs *v.* Highway Com'rs, 87 Ill. App. 93.

Counties are sometimes exempted by statute from giving appeal bonds. Maricopa County *v.* Osborn, (Ariz. 1895) 40 Pac. 313; Maricopa County *v.* Rosson, (Ariz. 1895) 40 Pac. 314; Lamberson *v.* Jefferds, 116 Cal. 492, 48 Pac. 485; Warden *v.* Mendocino County, 32 Cal. 655; People *v.* Marin County, 10 Cal. 344. See also Davis *v.* Hansard, 9 Humphr. (Tenn.) 173; and *compare* Freestone County *v.* Bragg, 28 Tex. 91. But a county officer is not exempted from filing an undertaking on appeal by virtue of the provision of Cal. Code Civ. Proc. § 1058. Von Schmidt *v.* Widber, (Cal. 1893) 32 Pac. 532. *Compare* Lamberson *v.* Jefferds, 116 Cal. 492, 48 Pac. 485.

Validity and effect of such statutes.— Such statutes are constitutional. Holmes *v.* Mattoon, 111 Ill. 27, 53 Am. Rep. 602; Kathman *v.* New Orleans, 11 La. Ann. 145; McClay *v.*

(v) *Personal Representatives.* As a general rule, a bond need not be given by an executor or an administrator prosecuting an appeal or writ of error in the interest of the estate.[69] But when an executor or administrator appeals in his own behalf from a judgment affecting him personally, he undoubtedly must give bond in like manner as any other person appealing from a judgment by which he considers himself personally aggrieved.[70]

Lincoln, 32 Nebr. 412, 49 N. W. 282. Such exemptions, being in derogation of general law, cannot be extended to other parties even though the latter be officers of such corporation (State *v.* Brown, 29 La. Ann. 53; State *v.* Mount, 21 La. Ann. 177); except where the suit against the ministerial officers of a municipal corporation is to all intents and purposes against the corporation (State *v.* New Orleans, 34 La. Ann. 467).

69. *Arkansas.*— Johnson *v.* Duval, 27 Ark. 599.

California.— Matter of McDermott, 127 Cal. 450, 59 Pac. 783; *Ex p.* Orford, 102 Cal. 656, 36 Pac. 928; Kirsch *v.* Derby, 93 Cal. 573, 29 Pac. 218. See also Matter of Sherrett, 80 Cal. 62, 22 Pac. 85.

Georgia.— Sawyer *v.* Cheney, 59 Ga. 368; Irving *v.* Melton, 27 Ga. 330.

Indiana.— Ruch *v.* Biery, 110 Ind. 444, 11 N. E. 312; Davis *v.* Huston, 84 Ind. 272; Case *v.* Nelson, 22 Ind. App. 22, 52 N. E. 176.

Michigan.— Winter *v.* Winter, 90 Mich. 197, 51 N. W. 363.

Mississippi.— Hunter *v.* Thurmon, 25 Miss. 463; Scott *v.* Searles, 1 Sm. & M. (Miss.) 590.

Missouri.— Bruening *v.* Oberschelp, 42 Mo. 276.

New Hampshire.— Prescott *v.* Farmer, 59 N. H. 90.

Ohio.— Hubbard *v.* Topliff, 60 Ohio St. 382, 54 N. E. 367; Ulery *v.* Ulery, Wright (Ohio) 631. A statute exempting administrators and executors who have given bonds to the state from giving appeal bonds does not apply to an administrator or executor who has not given such a bond. Dennison *v.* Talmage, 29 Ohio St. 433; Roberts *v.* Wheeler, Wright (Ohio) 697. A non-resident executor who has not given a bond within the state is not entitled to appeal without giving an appeal bond. Work *v.* Massie, 6 Ohio 503.

Pennsylvania.— Maule *v.* Shaffer, 2 Pa. St. 404; Pugh *v.* Ostenkirk, 3 Watts & S. (Pa.) 170.

Texas.— Daniel *v.* Mason, 90 Tex. 162, 37 S. W. 1061; Erwin *v.* Erwin, (Tex. Civ. App. 1901) 61 S. W. 159; Anglin *v.* Barlow, (Tex. Civ. App. 1898) 45 S. W. 827; Tutt *v.* Morgan, 18 Tex. Civ. App. 627, 42 S. W. 578, 46 S. W. 122; Huddleston *v.* Kempner, (Tex. Civ. App. 1894) 28 S. W. 236.

Utah.— But see Wells *v.* Kelly, 11 Utah 421, 40 Pac. 705 [*distinguishing* Uebel *v.* Maltese, 2 Utah 430], holding that, notwithstanding supreme court Rule 24, an administrator must give an appeal bond on appeal from the probate to the district court where the sureties on his official bond had been discharged, at their own instance, before appeal taken.

Virginia.— McCauley *v.* Griffin, 4 Gratt. (Va.) 9 (holding that, where an executor had been allowed to qualify without bond, as directed by the testator, he need not give an appeal bond on an appeal for the protection of the estate); Linney *v.* Holliday, 3 Rand. (Va.) 1.

Wisconsin.—But *compare In re* Somervaill, 104 Wis. 72, 80 N. W. 65, holding that an appellant from an order refusing probate to a will must file an appeal bond although he is named as executor in the will, as he does not become an executor until he has been confirmed in his office by the court.

United States.—Deneale *v.* Young, 2 Cranch C. C. (U. S.) 200, 7 Fed. Cas. No. 3,785.

Canada.—In Ontario a personal representative must give a bond. *Re* Parker, 16 Ont. Pr. 392.

See 2 Cent. Dig. tit. "Appeal and Error," § 2006.

Bond by co-defendants.—In Sadler *v.* Green, 1 Hen. & M. (Va.) 26, it was decided that, when an appeal is taken jointly by the executor and legatees, the latter having possession of the property in dispute, they must file an appeal bond; and in Duggan *v.* Noell, 30 Tex. 451, it was decided that where a decedent's widow intervened and appealed in a suit against the administrator, she must give an appeal bond, although the administrator had also appealed. In Emerick *v.* Armstrong, 1 Ohio 513, however, it was decided that an executor or administrator could perfect an appeal — not only for himself, but for his co-defendants — in all cases where the interest was joint, without giving a bond.

One who is appointed temporary administrator under the Texas statute is not required to give bond on appeal. Anglin *v.* Barlow, (Tex. Civ. App. 1898) 45 S. W. 827.

Rule applied.— Where a judgment is obtained by a person as an individual against himself as administrator, he need not file a bond upon taking an appeal. Jones *v.* Jones, 91 Ind. 378. And where a person is interested in a suit both as an individual and in his representative capacity, upon taking an appeal he need file no bond except in respect to his individual interest. Shearman *v.* Christian, 1 Rand. (Va.) 393; Dunton *v.* Robins, 2 Munf. (Va.) 341.

70. *Georgia.*—Hickman *v.* Hickman, 74 Ga. 401; McCay *v.* Devers, 9 Ga. 184.

Indiana.— Case *v.* Nelson, 22 Ind. App. 22, 52 N. E. 176.

Iowa.— Matter of Pierson, 13 Iowa 449.

Mississippi.— Hudson *v.* Gray, 58 Miss. 589; Campbell *v.* Doyle, 57 Miss. 292; Holiman *v.* Dibrell, 51 Miss. 96; Hunter *v.* Thurmon, 25 Miss. 463.

(VI) *States.* The general rule is that a state has a right to appeal in a suit for its own interest without giving bond.[71]

d. Deposit of Money in Lieu of Bond. Unless it is expressly authorized by statute,[72] depositing money in court does not meet the requirements of a statute providing for an undertaking on appeal.[73]

e. Appeals in Forma Pauperis — (I) *In General.* The fact of poverty does not of itself relieve an appellant of the necessity of giving an appeal bond;[74]

Ohio.— Taylor *v.* McCullom, 5 Cinc. L. Bul. 414.

Pennsylvania.— Lundy's Estate, 3 C. Pl. Rep. (Pa.) 139.

Texas.— McTaylor *v.* State, 39 Tex. 298; Guest *v.* Guest, 48 Tex. 210; Hicks *v.* Oliver, (Tex. Civ. App. 1894) 26 S. W. 641.

Virginia.—Erskine *v.* Henry, 6 Leigh (Va.) 378; Porter *v.* Arnold, 3 Rand. (Va.) 479. In Pugh *v.* Jones, 6 Leigh (Va.) 299, it was decided that where a judgment was entered against an executor personally instead of in his representative capacity, although the judgment was plainly erroneous the executor must file a bond before being allowed to appeal.

So, when an executor or administrator appeals from a decision removing him as personal representative, he must file a bond. Matter of Danielson, 88 Cal. 480, 26 Pac. 505; Coutlet *v.* Atchison, etc., R. Co., 59 Kan. 772, 52 Pac. 68; Mallory *v.* Burlington, etc., R. Co., 53 Kan. 557, 36 Pac. 1059; Cluff's Estate, 11 N. Y. Civ. Proc. 338; Guest *v.* Guest, 48 Tex. 210. *Compare* Uebel *v.* Maltese, 2 Utah 430.

71. People *v.* Clingan, 5 Cal. 389; State *v.* Rushing, 17 Fla. 223; State *v.* Cannon, 45 La. Ann. 1231, 14 So. 130; Greiner *v.* Prendergast, 2 Rob. (La.) 235; State *v.* Coahoma County, 64 Miss. 358, 1 So. 501; and see also 2 Cent. Dig. tit. "Appeal and Error," §§ 2008, 2009.

But where a private party, as relator, brings suit in the name of the attorney-general, an effective appeal cannot be taken without the giving of an undertaking. State *v.* Milwaukee, 102 Wis. 509, 78 N. W. 756.

State revenue agent.— In Adams *v.* Kuhn, 72 Miss. 276, 16 So. 598, it was held that under Miss. Acts (1892), § 4194, a state revenue agent might appeal, without giving a bond, in an action brought to recover back taxes; and, under the Louisiana statute, a state tax-collector need not give bond. Merchants' Mut. Ins. Co. *v.* Board of Assessors, 40 La. Ann. 371, 3 So. 891. See also Smith *v.* New Orleans, 43 La. Ann. 726, 9 So. 773.

Where United States appeals.— No bond for the prosecution of a suit or to answer in damages or costs is required on writs of error or appeal issuing from, or brought to, the United States supreme court by direction of the controller of the currency, in suits by or against insolvent national banks or the receivers thereof. Pacific Nat. Bank *v.* Mixter, 114 U. S. 463, 5 S. Ct. 944, 29 L. ed. 221; Robinson *v.* Southern Nat. Bank, 94 Fed. 22. See also Platt *v.* Adriance, 90 Fed. 772; and State *v.* U. S., 8 Blackf. (Ind.) 252.

72. *California.*— Wiebold *v.* Rauer, 95 Cal. 418, 30 Pac. 558; Stratton *v.* Graham, 68 Cal. 168, 8 Pac. 710.

Georgia.— See Hill *v.* Hudspeth, 22 Ga. 621.

Louisiana.— Sauer *v.* Union Oil Co., 43 La. Ann. 699, 9 So. 566 (municipal bonds sufficient); Lanata *v.* Bayhi, 31 La. Ann. 229.

Massachusetts.—Maley *v.* Moshier, 160 Mass. 415, 36 N. E. 64.

Nevada.— Alt *v.* California Fig Syrup Co., 18 Nev. 423, 4 Pac. 743 (certificate of deposit sufficient).

New Jersey.— Clark *v.* Haines, 4 N. J. Eq. 136.

New York.—Lane *v.* Humbert, 18 N. Y. Civ. Proc. 377, 16 Daly (N. Y.) 186, 9 N. Y. Suppl. 744, 31 N. Y. St. 277; McIntyre *v.* Strong, 63 How. Pr. (N. Y.) 405, 2 Civ. Proc. 36, 48 N. Y. Super. Ct. 299.

North Carolina.—Eshon *v.* Chowan County, 95 N. C. 75 (note payable to appellant and secured by mortgage on realty insufficient; but *quære* as to note and mortgage executed by appellant). See Clark's Code Civ. Proc. N. C. (1900), § 552.

73. Gordon *v.* Camp, 2 Fla. 23; Beckwith *v.* Kansas City, etc., R. Co., 28 Kan. 484; Alvord *v.* Mallory, 10 Ky. L. Rep. 80; and see also 2 Cent. Dig. tit. "Appeal and Error," § 2071.

74. *Georgia.*—Fite *v.* Black, 85 Ga. 413, 11 S. E. 782.

Missouri.— Green *v.* Castello, 35 Mo. App. 127.

New York.—Butler *v.* Jarvis, 117 N. Y. 115, 22 N. E. 561, 26 N. Y. St. 841.

Texas.— Halloran *v.* Texas, etc., R. Co., 40 Tex. 465.

United States.— The Presto, 93 Fed. 522, 35 C. C. A. 394.

Canada.— In Legault *v.* Legault, 2 L. C. L. Jur. 10, it was held that in Quebec appeals cannot be brought *in forma pauperis* to the court of queen's bench. See also Derome *v.* Robitaille, 4 Leg. N. 99; Loyseau *v.* Charbonneau, 3 Leg. N. 308; Trust *v.* Quintal, 3 Leg. N. 397; Canadian Bank of Commerce *v.* Brown, 19 L. C. Jur. 110; Prevost *v.* Rogers, Q. B. June, 1878.

Statutes authorizing persons to sue in forma pauperis have been held, in some jurisdictions, not to extend to writs of error or appeal, but only to suits or actions prosecuted in courts of original jurisdiction. Ostrander *v.* Harper, 14 How. Pr. (N. Y.) 16; McDonald *v.* New York City Sav. Bank, 2 How. Pr. (N. Y.) 35; Moore *v.* Cooley, 2 Hill (N. Y.) 412 (construing 2 N. Y. Rev. Stat. (25th ed.) p. 362, § 1); Hoagland *v.* Hoagland, 18 Utah 304, 54 Pac. 978 (construing Utah Rev. Stat. (1898), §§ 1016–1020, 3303).

but there must be express statutory authority for an appeal *in forma pauperis*.[75]

(II) *Persons Entitled.* The statutory right to appeal *in forma pauperis* upon making the requisite affidavit ordinarily extends to all persons entitled to appeal from a judgment or decree.[76] But it has been held that neither a non-resident,[77] an administrator of an insolvent estate,[78] a guardian *ad litem*,[79] a next friend,[80] an infant,[81] nor a married woman suing by next friend,[82] can take advantage of a general statute providing for pauper appeals.

The United States statute of July 20, 1892, providing that any citizen entitled to bring suit in a federal court "may commence and prosecute to conclusion" such suit without prepaying fees or costs or giving security therefor, has been held in some circuits to embrace the right to appeal without bond. Columb *v.* Webster Mfg. Co., 76 Fed. 198; Fuller *v.* Montague, 53 Fed. 206. See also Brinkley *v.* Louisville, etc., R. Co., 95 Fed. 345; Wickelman *v.* A. B. Dick Co., 85 Fed. 851, 57 U. S. App. 196, 29 C. C. A. 436, in which the decision of the question is left open. In other circuits it has been held otherwise. *Ex p.* Harlow, 3 App. Cas. (D. C.) 203; McGrane *v.* McCann, 2 App. Cas. (D. C.) 221; The Presto, 93 Fed. 522, 35 C. C. A. 394.

The old English statutes of 2 Hen. VII, c. 12, and 23 Hen. VIII, c. 15, providing for the prosecution of civil cases by indigent persons, did not apply to, or contemplate, the prosecution of appeals or writs of error to an appellate court *in forma pauperis*. Anonymous, 1 Mod. 268. See also *Ex p.* Harlow, 3 App. Cas. (D. C.) 203; Bolton *v.* Gardner, 3 Paige (N. Y.) 273.

75. In many jurisdictions statutes have been enacted expressly providing for an appeal without paying costs and fees or giving an undertaking, when the person desiring the appeal shall have taken the prescribed oath of inability.

Alabama.— *Ex p.* Tower Mfg. Co., 103 Ala. 415, 15 So. 836; Guy *v.* Lee, 80 Ala. 346.

Georgia.— Fite *v.* Black, 85 Ga. 413, 11 S. E. 782; Savannah *v.* Brown, 64 Ga. 229.

Indiana.— Falkenburgh *v.* Jones, 5 Ind. 296.

North Carolina.— An appeal is allowed without bond, if party is unable by reason of poverty, to give security or to make deposit; but there is no stay of execution, and appellant must pay his own costs. Speller *v.* Speller, 119 N. C. 356, 26 S. E. 160; Clark's Code Civ. Proc. N. C. (1900), pp. 789, 790, and cases cited.

Tennessee.— Cox *v.* Patton, 11 Lea (Tenn.) 545; Lynn *v.* Tellico Mfg. Co., 8 Lea (Tenn.) 29.

Texas.— Demonet *v.* Jones, (Tex. Civ. App. 1897) 42 S. W. 1033. But *compare* Halloran *v.* Texas, etc., R. Co., 40 Tex. 465; Prestige *v.* Prestige, 25 Tex. 585.

Applicable to writs of error.—In Tennessee and Texas, it has been decided that the right to proceed *in forma pauperis* applies to writs of error as well as appeals. Campbell *v.* Boulton, 3 Baxt. (Tenn.) 354; Herd *v.* Dew, 9 Humphr. (Tenn.) 364; Brumley *v.* Hayworth, 3 Yerg. (Tenn.) 420; Rodgers *v.* Alexander, 35 Tex. 116.

The clerk has no power to accept the pauper oath in lieu of the bond, where the appeal is granted on condition that the party give bond "as required by law." Henly *v.* Claiborne, 1 Lea (Tenn.) 224.

Under Tenn. Code, § 3192, a plaintiff appealing from a judgment in an action of false imprisonment, malicious prosecution, or slander cannot prosecute the appeal *in forma pauperis*. Hendrickson *v.* Cartright, 99 Tenn. 364, 41 S. W. 1053; Cox *v.* Patton, 11 Lea (Tenn.) 545. But a defendant appealing in such action may do so without giving a bond. Heatherly *v.* Bridges, 1 Heisk. (Tenn.) 220.

When the surety on an appeal bond becomes insolvent the appellant may save his appeal by an affidavit that he is advised and believes that he has a good cause of appeal, and that, owing to poverty, he is unable to give other good security as required by law. Sample *v.* Cary, 19 Ga. 573; Burkhalter *v.* Bullock, 18 Ga. 371.

76. Andrews *v.* Page, 2 Heisk. (Tenn.) 634. See *supra*, IV; and 2 Cent. Dig. tit. "Appeal and Error," § 2073.

A municipal corporation may enter an appeal *in forma pauperis* through its chief executive officer. Savannah *v.* Brown, 64 Ga. 229.

77. Christian *v.* Gouge, 58 How. Pr. (N. Y.) 445, holding that the statute was intended solely for the benefit of residents of the state.

78. McCoy *v.* Broderick, 3 Sneed (Tenn.) 202, wherein it was held that, since a statute authorizing suits *in forma pauperis* confers a personal privilege, an administrator cannot take an appeal *in forma pauperis* on an affidavit merely that the estate is insolvent.

79. Musgrove *v.* Lusk, 5 Baxt. (Tenn.) 684.

80. Brooks *v.* Workman, 10 Heisk. (Tenn.) 430.

81. Sharer *v.* Gill, 6 Lea (Tenn.) 495.

82. Sharer *v.* Gill, 6 Lea (Tenn.) 495, holding that, when the suit of a married woman is required to be brought by her next friend, she cannot take an appeal in the suit under the pauper oath.

Under the Alabama statute, it has been decided that a married woman may appeal *in forma pauperis* from a judgment or decree which, by force of its own terms, subjects her statutory or other separate estate to sale; but that she cannot appeal in such mode from a personal judgment against her for the recovery of money. *Ex p.* Towle Mfg. Co., 103 Ala. 415, 15 So. 836; Guy *v.* Lee, 80 Ala. 346; Cahalan *v.* Monroe, 65 Ala. 254; Coleman *v.*

(III) *The Affidavit*—(A) *In General.* The affidavit upon an appeal *in forma pauperis* must, as to form and contents, comply substantially with the requirements of the statute authorizing such affidavit.[83]

(B) *By Whom Made.* The affidavit must be made by the party dissatisfied with the judgment.[84]

(C) *Time and Place of Making and Filing.* The statutory requirements as to the time and place of filing the affidavit, and as to the officer before whom it is to be made, must be complied with.[85]

(D) *Truth of Affidavit.* While, in Georgia, the affidavit is not traversible,[86] the filing of the affidavit constitutes only *prima facie* proof of inability.[87]

2. Parties — a. Obligors —(I) *In General.* The bond or undertaking on appeal must be given by the person praying the appeal, and obtaining the order therefor.[88]

Smith, 52 Ala. 259; Marshall *v.* Croom, 50 Ala. 479.

83. Josey *v.* Sheorn, 106 Ga. 204, 32 S. E. 118; Flanagan *v.* Scott, 102 Ga. 399, 31 S. E. 23; Cheshire *v.* Williams, 101 Ga. 814, 29 S. E. 191; State *v.* Bramble, 121 N. C. 603, 28 S. E. 269; Huskey *v.* Lanning, 8 Baxt. (Tenn.) 187; Creamer *v.* Ford, 1 Heisk. (Tenn.) 307; Stewart *v.* Heidenheimer, 55 Tex. 644; Wooldridge *v.* Roller, 52 Tex. 447; Ewell *v.* Anderson, 49 Tex. 697; and see also 2 Cent. Dig. tit. "Appeal and Error," § 2074.

Description of judgment.— The appeal will be dismissed where the affidavit fails to describe the judgment appealed from. McShirley *v.* Hoard, (Tex. Civ. App. 1898) 46 S. W. 373; Dixon *v.* Southern Bldg., etc., Assoc., (Tex. Civ. App. 1894) 28 S. W. 58; Perry *v.* Scott, 68 Tex. 208, 7 S. W. 384; Vestal *v.* Reese, (Tex. Civ. App. 1894) 28 S. W. 54.

Amendment of affidavit.— In Tennessee, it has been decided that the affidavit, if defective or untrue, may be amended or supplied, as in the case of an insufficient bond. Morris *v.* Smith, 11 Humphr. (Tenn.) 133. But, under the Georgia statute, the affidavit is not amendable unless it is shown that an omission therein occurred through accident or mistake. Truitt *v.* Shumate, 107 Ga. 235, 33 S. E. 48; Josey *v.* Sheorn, 106 Ga. 204, 32 S. E. 118; Mize *v.* Brewer, 99 Ga. 322, 25 S. E. 700.

84. Lester *v.* Haynes, 80 Ga. 120, 5 S. E. 250; Fuller *v.* Montague, 53 Fed. 206.

Agent or attorney.— It has been decided that the affidavit can be made neither by the attorney of the appellant (Elder *v.* Whitehead, 25 Ga. 262), nor by a person acting as agent for appellant, where it does not appear that such person was authorized by any warrant of attorney to execute it (Lester *v.* Haynes, 80 Ga. 120, 5 S. E. 250).

Where a husband and wife are joint parties, the former only need take the oath prescribed by statute for appeal *in forma pauperis.* McPhatridge *v.* Gregg, 4 Coldw. (Tenn.) 324.

Where there are several appellants an affidavit made by one only of them is insufficient. Taylor *v.* New England Mortg. Security Co., 95 Ga. 571, 20 S. E. 636; Grills *v.* Hill, 2 Sneed (Tenn.) 710.

85. Sasser *v.* Adkins, 108 Ga. 228, 33 S. E. 881; Graves *v.* Warner, 26 Ga. 620; Russell *v.* Hearne, 113 N. C. 361, 18 S. E. 711; Stell *v.* Barham, 86 N. C. 727; Davis *v.* Wilson, 85 Tenn. 383, 5 S. W. 285; State *v.* Gannaway, 16 Lea (Tenn.) 124; Harvey *v.* Cummings, 62 Tex. 186; Hearne *v.* Prendergast, 61 Tex. 627; Stewart *v.* Heidenheimer, 55 Tex. 644; Lambert *v.* Western Union Tel. Co., 19 Tex. Civ. App. 415, 47 S. W. 476, 45 S. W. 1034; Thompson *v.* Hawkins, (Tex. Civ. App. 1896) 38 S. W. 236; and see also 2 Cent. Dig. tit. "Appeal and Error," § 2075.

A substantial compliance, however, is, it seems, sufficient. State *v.* Gannaway, 16 Lea (Tenn.) 124; Thompson *v.* Hawkins, (Tex. Civ. App. 1896) 38 S. W. 236. Thus, an appeal, without an appeal bond being given, will not be dismissed because the proof of the appellant's inability to give such bond was taken before the trial judge at a term subsequent to that in which the judgment was rendered. Ostrom *v.* Arnold, (Tex. Civ. App. 1900) 58 S. W. 630; Cox *v.* Hightowell, 19 Tex. Civ. App. 536, 47 S. W. 1048.

86. Hines *v.* Rosser, 27 Ga. 85.

87. Affidavit, when filed under the Texas statute, is subject to contest as to its truth. Newton *v.* Leal, (Tex. Civ. App. 1900) 56 S. W. 209; Thompson *v.* Hawkins, (Tex. Civ. App. 1896) 38 S. W. 236; Brock *v.* Abercrombie, 3 Tex. Civ. App. 342, 24 S. W. 667.

In other jurisdictions it has been held that the duties of the officers designated by statute to take affidavits are merely ministerial, and if appellants make the affidavits it is not within their power to refuse the appeals, even though they may believe the affidavit to be false. Walsh *v.* Ford, 8 Kulp (Pa.) 220; Morris *v.* Smith, 11 Humphr. (Tenn.) 133; and see also 2 Cent. Dig. tit. "Appeal and Error," § 2076.

88. *Illinois.*— Tedricks *v.* Wells, 152 Ill. 214, 38 N. E. 625; Propeller Niagara *v.* Martin, 42 Ill. 106; Fay *v.* Seator, 88 Ill. App. 419. See also Howe *v.* Forman, 68 Ill. App. 398.

Louisiana.—Penny's Succession, 14 La. Ann. 194.

Michigan.—Matter of Dickinson, 2 Mich. 337.

Mississippi.— Hardaway *v.* Biles, 1 Sm. & M. (Miss.) 657.

New York.— *Ex p.* Lassell, 8 Cow. (N. Y.) 119.

(11) *Several Appellants.* An appeal bond for costs need not be signed by all of several appellants, although all must join in the appeal. It is sufficient if the bond appears to be executed on behalf of all.[89] It has been held, however,

Rhode Island.—Townsend *v.* Hazard, 9 R. I. 254.

Texas.— Morris *v.* Morgan, (Tex. Civ. App. 1898) 46 S. W. 667.

See 2 Cent. Dig. tit. "Appeal and Error," § 2017 *et seq.*

Bond executed by stranger is not the bond of appellant, and is not sufficient. Propeller Niagara *v.* Martin, 42 Ill. 106; Leach *v.* Drake, 16 Pick. (Mass.) 203; Matter of Dickinson, 2 Mich. 337; Hardaway *v.* Biles, 1 Sm. & M. (Miss.) 657; *Ex p.* Brooks, 7 Cow. (N. Y.) 428; Townsend *v.* Hazard, 9 R. I. 254.

Additional appellee.— When appellant files a supplemental petition, for the purpose of having one of the appellees cited who had been omitted in the original petition of appeal, no additional bond need be furnished. Borde *v.* Erskine, 33 La. Ann. 873, 29 La. Ann. 822.

An intervener is a separate independent party to a suit, and must himself give a bond. State *v.* New Orleans, 27 La. Ann. 469.

Appeal by one of several judgment defendants.— When a judgment has been obtained against several persons, and only one of them appeals, only the person appealing need execute the appeal bond. People *v.* Judges, 1 Wend. (N. Y.) 90.

Bond executed by a minor, against whom a judgment has been rendered, and by a substantial freeholder, is sufficient although the minor's guardian *ad litem* did not join in the bond. Andruss *v.* Stewart, 10 N. J. L. 160.

Bond of one in an official capacity, by and through whom a suit is brought by an organization styling itself a corporation, is a bond furnished by appellant, and fulfils the requirements of the law. St. Patrick's Church *v.* Consumers' Ice Co., 44 La. Ann. 1021, 11 So. 682.

On appeal taken by a board of county commissioners, the appeal bond must be executed in the name of the board, and not by the members individually. Boulder County *v.* King, (Colo. 1887) 13 Pac. 539.

Married women.— Under an Alabama statute, if a married woman appeals from a judgment in an action at law against herself and husband, it has been held that she may execute an appeal bond in her own name, without joining her husband. Childress *v.* Taylor, 33 Ala. 185. And the same is true in Louisiana, except it seems that the husband must authorize the wife to sign the appeal bond (De Gruy *v.* Aiken, 43 La. Ann. 798, 9 So. 747; Barnabé *v.* Snaer, 16 La. Ann. 84; Nolasco *v.* Lurty, 13 La. Ann. 100); and such authority will be inferred where the action is against both husband and wife and they appear and defend it. Hill *v.* Tippett, 10 La. Ann. 554. See also Barnabé *v.* Snaer, 16 La. Ann. 84. An appeal will be dismissed, however, where the real appellant is a married woman, and the bond is signed only by her husband, who is not interested in the suit. Day *v.* Gordon, 9 La. Ann. 183; Allen *v.* Landreth, 7 La. Ann. 650; Wood *v.* Wall, 5 La. Ann. 179.

Subsequent appellants joining in an appeal after original notice under Wash. Acts (1893) p. 121, § 5, must file an appeal bond in addition to that filed by the parties first appealing. Stans *v.* Baitey, 9 Wash. 115, 37 Pac. 316.

Where an action is brought by a nominal plaintiff for the use of another, the appeal bond, it seems, may be executed by the real, instead of the nominal, party (McBarnett *v.* Breed, 6 Ala. 476; *Ex p.* Lassell, 8 Cow. (N. Y.) 119); still, it has been held that the beneficial plaintiff cannot perfect the appeal by filing a bond in his own name, when the appeal is prayed for by the nominal plaintiff, and allowed to him (Tedrick *v.* Wells, 152 Ill. 214, 38 N. E. 625; Gates *v.* Thede, 91 Ill. App. 603. See also Propeller Niagara *v.* Martin, 42 Ill. 106).

When a personal representative appeals as such, a bond given by him as an individual will not suffice (Thibodeaux *v.* Thibodeaux, 45 La. Ann. 1126, 13 So. 805; Love *v.* Francis, 63 Mich. 181, 29 N. W. 843, 6 Am. St. Rep. 290 [but see *supra*, VII, D, 1, c, (v)]); and when the judgment is against defendant both personally and in a representative character, an appeal bond, given in a representative capacity exclusively, will not support the appeal (Crawford *v.* Alexander, 14 La. Ann. 708). See also Beardsley *v.* Hill, 61 Ill. 354, as to the manner of signing bond by administrator.

Where appeal was prayed by two defendants from decree against only one of them, an appeal bond executed by he party against whom the decree was rendered is not invalid because it was also executed by him in the name of the other party without the latter's authority. Willenborg *v.* Murphy, 40 Ill. 46.

Who are obligors or sureties, and who are principals, need not appear on the face of the bond. Cullen *v.* Lee, 50 Ala. 494.

89. *Alabama.*— Deslonde *v.* Carter, 28 Ala. 541; Crump *v.* Wallace, 27 Ala. 277.

Indiana.— Hinkle *v.* Holmes, 85 Ind. 405; Railsback *v.* Greve, 58 Ind. 72.

Louisiana.— Lafrance *v.* Martin, 17 La. Ann. 77.

Michigan.— Warner *v.* Whittaker, 5 Mich. 241.

Mississippi.— Hudson *v.* Gray, 58 Miss. 589; Thompson *v.* Toomer, 50 Miss. 394.

United States.— Scruggs *v.* Memphis, etc., R. Co., 131 U. S. cciv, appendix, 26 L. ed. 741; Brockett *v.* Brockett, 2 How. (U. S.) 238, 11 L. ed. 251.

Where cases have been consolidated, parties dissatisfied with the judgment rendered may join in one appeal bond. Schlieder *v.* Martinez, 38 La. Ann. 847; Pasley *v.* McConnell, 38 La. Ann. 470.

that, where an appeal is allowed jointly to several parties, all these parties must join in the execution of the bond.[90]

b. Obligees[91] — (i) *In General.* Unless otherwise provided by statute, the bond or undertaking on appeal or writ of error should run in favor of the party or parties whose interest is adverse to that of the party or parties appealing.[92]

90. Hileman *v.* Beale, 115 Ill. 355, 5 N. E. 108; Blood *v.* Harvey, 81 Ill. App. 187; Robeson *v.* Lagow, 73 Ill. App. 665. But see Campbell *v.* Equitable Securities Co., 12 Colo. App. 544, 56 Pac. 88; Weeks *v.* Sego, 9 Ga. 199 — to the effect that the bond might avail the party signing and executing it.

Bond executed by one appellant, and reciting an appeal by him alone where several defendants pray an appeal jointly, is irregular and the appeal will be dismissed. Andre *v.* Jones, 1 Colo. 489.

Judgment in solido.— Where a judgment has been rendered against two defendants *in solido,* and only one defendant is mentioned in the bond, the appeal will be dismissed. Cotton *v.* Stirling, 19 La. Ann. 137. But on appeal from such a judgment, if all defendants join as principals in the appeal bond and bind themselves to satisfy whatever judgment shall be rendered against them, it is not necessary that the bond shall expressly stipulate a solidary liability. De Gruy *v.* Aiken, 43 La. Ann. 798, 9 So. 747.

91. See 2 Cent. Dig. tit. "Appeal and Error," § 2011 *et seq.*; and cases cited *infra,* notes 92, 93.

92. *Alabama.*— Cooper *v.* Maclin, 25 Ala. 298, holding that the bond should be made payable to infant appellee, not to his next friend.

Illinois.— Nashville *v.* Weiser, 54 Ill. 245; First Presb. Church *v.* Lafayette, 42 Ind. 115.

Louisiana.— Knox *v.* Duplantier, 20 La. Ann. 328; Twichell *v.* Avegno, 19 La. Ann. 294.

Missouri.— Price *v.* Halsed, 3 Mo. 461.

New York.— *Ex p.* Hawks, 7 Cow. (N. Y.) 492; Kellinger *v.* Roe, 7 Paige (N. Y.) 362; Black's Estate, Tuck. Surr. (N. Y.) 339; Patullo's Goods, Tuck. Surr. (N. Y.) 106.

Pennsylvania.— Boal's Appeal, 2 Rawle, (Pa.) 37.

Texas.— Greenwade *v.* Smith, 57 Tex. 195 (holding that upon appeal by an intervener, the bond should run to both plaintiff and defendant); Kosminsky *v.* Hamburger, 20 Tex. Civ. App. 291, 48 S. W. 1107; Hamblen *v.* Tuck, (Tex. Civ. App. 1898) 45 S. W. 175; Smith *v.* Parks, 55 Tex. 82.

Washington.— Seattle Trust Co. *v.* Pitner, 17 Wash. 365, 49 Pac. 505, holding that a garnishee is not the adverse party on appeal in the principal action.

Wisconsin.— Fehland's Estate, 49 Wis. 349, 5 N. W. 813; Mullins' Appeal, 40 Wis. 154 (to the effect that a special administrator, appointed before probate of a will, is the "adverse party" to whom the bond on appeal from an order admitting the will to probate should run; and that this is certainly so where the special administrator is also the proponent of the will and the executor named in it); Nelson *v.* Clongland, 15 Wis. 392 (holding that on an appeal from an order denying the probate of a will, the heir at law of the decedent is the party adversely interested).

United States.— Davenport *v.* Fletcher, 16 How. (U. S.) 142, 14 L. ed. 879.

Municipality.— On appeal from an assessment of a municipal corporation the bond should be executed to the city, or to the people of the state for the use of the city. Nashville *v.* Weiser, 54 Ill. 245; Griffin *v.* Belleville, 50 Ill. 422. But see First Presb. Church *v.* Lafayette, 42 Ind. 115, wherein it was held that on appeal from a precept issued to enforce the collection of an assessment for the improvement of a street, the appeal bond should be payable to the contractor who did the work, and for whose benefit the precept was issued, and not to the city.

Name of defendant unnecessary.— Under the Texas statutes an appeal bond, payable to the defendant, without naming him, is valid. Masterson *v.* Young, (Tex. Civ. App. 1899) 48 S. W. 1109.

Original party dead.— A bond payable to the original party to the suit, which party has died and whose representatives are parties to the proceeding, and not payable to any of the substituted parties to the suit, is a nullity, and does not confer jurisdiction. Smith *v.* Parks, 55 Tex. 82; Johnson *v.* Robeson, 27 Tex. 526; Dial *v.* Rector, 12 Tex. 99. See also Futch *v.* Palmer, 11 Tex. Civ. App. 191, 32 S. W. 566.

State or United States.— Unless the statute so directs an appeal bond, made payable to a state or the United States in an action or proceeding in which the state or United States has no interest, is insufficient. U. S. *v.* Draper, 19 D. C. 85; Price *v.* Halsed, 3 Mo. 461; Patullo's Goods, Tuck. Surr. (N. Y.) 106; Dorsey *v.* Raleigh, etc., R. Co., 91 N. C. 201; White *v.* Moerlidge, 7 Ohio Cir. Ct. 348. An appeal bond, given in the alternative to the state or to a relator, is good. Spalding *v.* People, 2 How. (U. S.) 66, 11 L. ed. 181. In proceeding to contest an election, an appeal bond may be made payable to the state instead of to the adverse party. Corey *v.* Lugar, 62 Ind. 60.

Strangers.— If the bond on appeal runs in favor of one not a party to the judgment, such bond is insufficient. Howard *v.* Malsch, 52 Tex. 60; Davenport *v.* Fletcher, 16 How. (U. S.) 142, 14 L. ed. 879.

Unnecessary obligees.— It cannot affect the validity of an appeal bond that other parties besides the one in whose favor the decree appealed from was rendered are named in it as obligees. Hill *v.* Chicago, etc., R. Co. 129 U. S. 170, 9 S. Ct. 269, 32 L. ed. 651.

When payable to clerk of court.— It is

(II) *Several Parties Interested.* And when there are several parties interested in having the judgment remain undisturbed, all of such parties must be made obligees.[93]

c. Sureties — (I) *Necessity and Number.* It is usual for statutes to require an appeal bond, with a surety or sureties.[94] Such statutory requirements must be

sometimes provided by statute that the undertaking shall be made payable to the clerk of the court or judge of probate. Bailey *v.* Woodworth, 9 Conn. 388; Nugent *v.* McCaffrey, 33 La. Ann. 271; Eschert *v.* Harrison, 29 La. Ann. 860; Alexander *v.* Smith, 4 Sm. & M. (Miss.) 258; Harper *v.* Archer, 4 Sm. & M. (Miss.) 99, 43 Am. Dec. 472. But in Louisiana the name of the clerk need not be mentioned in the bond. Gaudet *v.* Dumoulin, 49 La. Ann. 984, 22 So. 622; Schlieder *v.* Martinez, 38 La. Ann. 847. In the absence of any name as obligee of the bond, the court will supply it by considering the bond as payable to the person whom the law designates — namely, the clerk. Nugent *v.* McCaffrey, 33 La. Ann. 271 [*distinguishing* Marks *v.* Herman, 21 La. Ann. 756, in which the bond was made payable to the plaintiffs]. An appeal bond payable to the clerk and to the appellees is good. Ogier *v.* Marchand, 22 La. Ann. 133; Nelson *v.* Scott, 21 La. Ann. 203.

Georgia statute.— Ga. Civ. Code, § 4466, provides that, in all cases in the court of ordinary, the party desiring to appeal shall give "bond and security to the ordinary for such further costs as may accrue by reason of such appeal." It was held that this section does not require that the bond shall be made payable to the ordinary, but that the proper obligee is the appellee. Sims *v.* Walton, 111 Ga. 866, 36 S. E. 966. See also Hogg *v.* Mobley, 8 Ga. 256.

93. Brown *v.* Levins, 6 Port. (Ala.) 414; Weigel's Succession, 21 La. Ann. 149; Rice *v.* Levy, 20 La. Ann. 348; Welge *v.* Jackson, (Tex. Civ. App. 1895) 32 S. W. 371; Bauer *v.* Adkins, (Tex. Civ. App. 1895) 28 S. W. 1009; Grant *v.* Collins, 5 Tex. Civ. App. 45, 23 S. W. 994. See 2 Cent. Dig. tit. "Appeal and Error," § 2013 *et seq.* But see *supra*, note 92, to the effect that under the present practice in Louisiana the clerk of court is the proper obligee.

Co-defendants of appellant should be made obligees in the appeal bond. Snow *v.* Eastham, (Tex. Civ. App. 1898), 46 S. W. 866.

Joint or separate bonds.—"Where two or more persons have a common interest in resisting the reversal of the decree, or the modification which is sought for by the appellant, a joint bond to all of those respondents is a sufficient compliance with the statute and the rule of the court relative to appeals. It is not necessary, in such a case, for the appellant and his sureties to execute separate appeal bonds to each of the respondents. But where there are several respondents having entirely distinct and conflicting interests in relation to the object sought for by the appeal, separate appeal bonds should be given, to make the appeal valid and effectual in reference to such adverse parties respectively." Thompson *v.* Ellsworth, 1 Barb. Ch. (N. Y.) 624. See also Bickham *v.* Hutchinson, 50 La. Ann. 765, 23 So. 902.

Parties against whom action dismissed.— An appeal bond must be made payable to all parties interested adversely to appellant, and where an action is dismissed as to some of the defendants, and judgment is had therein for the others, the defendants against whom the action is dismissed must be made obligees in the bond. Terry *v.* Cutler, (Tex. Civ. App. 1893) 21 S. W. 726.

Parties not appearing.— Where a suit is dismissed as to one defendant, and judgment rendered against the other three defendants, only two of whom appeal, it is proper to make the appeal bond payable not only to the plaintiffs, but also to the two defendants who do not appeal. Stafford *v.* Blum, 7 Tex. Civ. App. 283, 27 S. W. 12.

Under the term "and others," parties to an action not expressly named may be considered as included among the obligees in the bond. Conery *v.* Webb, 12 La. Ann. 282; Lebeau *v.* Trudeau, 10 La. Ann. 164; Bacchus *v.* Moreau, 4 La. Ann. 313; Smith *v.* Montreil, 26 Mo. 578.

94. *Alabama.*— Cooper *v.* Maclin, 25 Ala. 298.

Connecticut.— Ripley *v.* Merchants' Nat. Bank, 41 Conn. 187.

Georgia.— Benson *v.* Shines, 107 Ga. 406, 33 S. E. 439; Gordon *v.* Robertson, 26 Ga. 410.

Indiana.— Harris *v.* Millege, 151 Ind. 70, 51 N. E. 102; McVey *v.* Heavenridge, 30 Ind. 100.

Maine.— Bartlett, Appellant, 82 Me. 210, 19 Atl. 170.

Maryland.— Harris *v.* Regester, 70 Md. 109, 16 Atl. 386.

Massachusetts.— Henderson *v.* Benson, 141 Mass. 218, 5 N. E. 314.

Michigan.— Beebe *v.* Young, 13 Mich. 221.

Mississippi.— Hudson *v.* Gray, 58 Miss. 591; Baskin *v.* May, 9 Sm. & M. (Miss.) 373.

New York.— Van Wezel *v.* Van Wezel, 3 Paige (N. Y.) 38.

North Carolina.— Syme *v.* Badger, 91 N. C. 272; Gibson *v.* Lynch, 5 N. C. 495; Clark's Code Civ. Proc. N. C. (1900), § 552.

Ohio.— Roberts *v.* Wheeler, Wright (Ohio) 697.

Texas.— Pevito *v.* Rodgers, 52 Tex. 581; Hooper *v.* Brinson, 10 Tex. 296.

Washington.— Smith *v.* Beard, 21 Wash. 204, 57 Pac. 796.

Canada.— Fiola *v.* Hamel, 4 Quebec 52.

See 2 Cent. Dig. tit. "Appeal and Error," § 2022 *et seq.*

Additional surety.— In Bergen *v.* Stewart, 28 How. Pr. (N. Y.) 6, it was held that the court had a right to require an additional surety before directing an entry to be made by the clerk on the docket of a judgment "secured by appeal."

strictly complied with. Thus, where a bond with sureties or securities is required, a single surety will not suffice.[95]

(II) *Competency*—(A) *Appellants.*[96] The general rule is that an appellant is not a competent surety on an appeal bond.[97]

Bond without surety.— In Martin *v.* Dennie, 16 Pick. (Mass.) 202, it was held that where a statute required that a bond should be given, such bond to be approved by the judge of probate, but was silent on the subject of sureties, a bond so approved, although not signed by a surety, was sufficient.

Limitation of liability.— In Bastable *v.* Denegre, 22 La. Ann. 124, it was held that, under a statute requiring bond with surety, several persons might sign as sureties, each surety limiting his liability to an amount less than the bond required, provided that together they became bound for the amount of the bond. To the same effect see Guturrez *v.* Croner, 29 La. Ann. 827; State *v.* Judge, 21 La. Ann. 730; State *v.* Judge, 21 La. Ann. 443; New Orleans Ins. Co. *v.* E. D. Albro Co., 112 U. S. 506, 5 St. Ct. 289, 28 L. ed. 809.

95. *Maine.*— Bartlett, Appellant, 82 Me. 210, 19 Atl. 170.

Maryland.—Harris *v.* Regester, 70 Md. 109, 16 Atl. 386.

Michigan.— Beebe *v.* Young, 13 Mich. 221.

Mississippi.—Hudson *v.* Gray, 58 Miss. 591; Baskin *v.* May, 9 Sm. & M. (Miss.) 373.

New York.— Van Wezel *v.* Van Wezel, 3 Paige (N. Y.) 38.

North Carolina.— Gibson *v.* Lynch, 5 N. C. 495; Jones *v.* Sykes, 5 N. C. 281.

Texas.— Pevito *v.* Rodgers, 52 Tex. 581; Hooper *v.* Brinson, 10 Tex. 296.

Compare Riley *v.* Mitchell, 38 Minn. 9, 35 N. W. 472 (in which it is said that such a non-compliance is only an irregularity, which may be waived by appellee or as to which the bond may be amended by leave of court); and also Dane *v.* Dane, 67 N. H. 552, 39 Atl. 433 (in which it was held that a bond with one sufficient surety is a compliance with N. H. Pub. Stat. c. 200, § 3, which requires appellant from a decree of a judgment of probate to give bond "with sufficient surety" to prosecute his appeal).

Bond given by fidelity company.— It has been decided that N. Y. Laws (1881), c. 486, permitting a fidelity company to become surety upon bonds, does not repeal N. Y. Code Civ. Proc. § 1334, requiring two sureties upon an appeal bond. Nichols *v.* MacLean, 98 N. Y. 458 [*overruling* Hurd *v.* Hannibal, etc., R. Co., 67 How. Pr. (N. Y.) 516, 33 Hun (N. Y.) 189].

96. See *infra*, VII, D, 2 c, (II), (A)–(F); and 2 Cent. Dig. tit. "Appeal and Error," § 2023 *et seq.*

A bond executed by an Indian as surety is valid in Quebec if it is established by affidavit that he is in possession, as proprietor, according to the customary Indian law, of certain real estate, situated and lying within the tract of land appropriated to the uses of the tribe to which he belongs. Nianentsiasa *v.* Akwirente, 3 L. C. Jur. 316.

97. *Connecticut.*—Ripley *v.* Merchants' Nat. Bank, 41 Conn. 187.

Georgia.— Benson *v.* Shines, 107 Ga. 406, 33 S. E. 439; Gordon *v.* Robertson, 26 Ga. 410.

Indiana.— McVey *v.* Heavenridge, 30 Ind. 100.

Mississippi.—Hudson *v.* Gray, 58 Miss. 591.

New York.— Nichols *v.* MacLean, 98 N. Y. 458; Morss *v.* Hasbrouck, 10 Abb. N. Cas. (N. Y.) 407, 63 How. Pr. (N. Y.) 84.

Texas.— Labadie *v.* Dean, 47 Tex. 90.

Washington.— Smith *v.* Beard, 21 Wash. 204, 57 Pac. 796.

See 2 Cent. Dig. tit. "Appeal and Error," § 2024.

Agent.— A person who has no interest in the case, and is a party thereto only in his capacity as agent for appellant, is a competent surety. Montan *v.* Whitley, 12 La. Ann. 175.

Appellants in consolidated action.— Where a proposed highway affects the respective lands of several persons, and each of such persons brings an action for damages, each may file an appeal bond, with plaintiffs in the other actions as sureties, and, after the consolidation of such cases in the circuit court, the appeal will not be dismissed because the appeal bond is not signed by any one other than the other plaintiffs. Leffel *v.* Oberchain, 90 Ind. 50 [*distinguishing* Scotten *v.* Divelbiss, 46 Ind. 301; McVey *v.* Heavenridge, 30 Ind. 100].

Co-defendant and competent sureties.— Where there were three sureties in an appeal bond, one of whom was a co-defendant with appellants in the court below, the court refused to dismiss the appeal on that ground, but said that the receiving of a co-defendant as a surety was highly objectionable, as it may be possible that his sufficiency, and not that of the actual sureties, was the real ground of approval. Hollis *v.* Border, 10 Tex. 277.

Executors cannot be received, in their private capacity, as sureties on an appeal taken from a judgment given against them in their representative character. State *v.* Judge, 2 Rob. (La.) 449; Lafon *v.* Lafon, 2 Mart. N. S. (La.) 571.

Party not appealing.— In Thompson *v.* Valarino, 3 Den. (N. Y.) 179, it was held that where one of several defendants prosecutes a writ of error alone, the other defendants were competent sureties for the plaintiff in error. See also Syme *v.* Badger, 91 N. C. 272, holding that an objection that the undertaking was not signed by any surety, but only by the parties to the record, could not be sustained where it appeared from the record that the judgment appealed from did not affect the party signing as surety. But in Croft *v.* Bailey, 1 Lea (Tenn.) 369, it was decided that, upon writ of error by two of three par-

(B) *Attorneys and Court Officers.* Under the rules of the court in some jurisdictions, an appeal bond signed by an attorney [98] or officer of the court, as surety, will be defective.[99]

(C) *Corporations.* The offer of a corporation to become surety on an appeal bond should not be accepted if there is any doubt as to the power of the corporation to act in that capacity.[1]

(D) *Non-Residents.* As a general rule non-residents cannot become sureties.[2]

(E) *Partnership.* It has been decided that an appeal bond signed with a partnership name as surety is not sufficient.[3]

(F) *Sureties on Other Bonds.* Upon the question whether one who has previously signed some bond, made necessary in the action or proceeding prior to the appeal, is a competent surety upon the appeal bond the decisions are not harmonious.[4]

ties to the judgment below, the other judgment debtor, alone on the bond, would not meet the requirements of the statute. To the same effect see Labadie *v.* Dean, 47 Tex. 90.

Under the Louisiana practice of requiring appeal bonds to be made payable to the clerk and constituting all parties appellees who are not appellants, a necessary party, either appellee or appellant, is not competent to sign an appeal bond as surety. Barrow *v.* Clack, 45 La. Ann. 478, 12 So. 631 [*reviewing* and *distinguishing* French *v.* Davidson, 32 La. Ann. 718; State *v.* Judge, 27 La. Ann. 234; and other cases]. *Compare*, however, Shiff *v.* Wilson, 3 Mart. N. S. (La.) 91; Riley *v.* Riley, 27 La. Ann. 248, for limitations of this rule.

98. *Florida.*— Nash *v.* Haycraft, 34 Fla. 449, 16 So. 324.

Minnesota.—Schuek *v.* Hagar, 24 Minn. 339.

New York.—Craig *v.* Scott, 1 Wend. (N. Y.) 35. *Compare* Studwell *v.* Palmer, 5 Paige (N. Y.) 57.

Ohio.— Hays *v.* Rush, 5 Cinc. L. Bul. 328.

Pennsylvania.— See Wise *v.* Pennsylvania Hard-Vein Slate Co., 3 Pa. Dist. 564.

Canada.— Lamelin *v.* Larue, 10 L. C. Rep. 190; Beckitt *v.* Wragg, 1 Ch. Chamb. (U. C.) 5. *Compare* Fournier *v.* Cannon, 6 Quebec 228.

See 2 Cent. Dig. tit. "Appeal and Error," § 2025.

In Nebraska, under Nebr. Comp. Stat. c. 10, § 14, an attorney is not a proper surety; yet if he executes the undertaking as surety, and it is approved by the proper officer, it is a valid obligation. Chase *v.* Omaha, etc., L. & T. Co., 56 Nebr. 358, 76 N. W. 896. See also Luce *v.* Foster, 42 Nebr. 818, 60 N. W. 1027; Tessier *v.* Crowley, 17 Nebr. 207, 22 N. W. 422.

In North Carolina, by rule of court, bail or sureties on prosecution, or appeal, or other bond in the action are disabled to appear as counsel in such proceeding. Clark's Code Civ. Proc. N. C. (1900), pp. 951, 953.

Limits and exceptions to rule.— It has been decided that such a rule does not apply to an attorney who has relinquished the practice of the law for a number of years, and has engaged in other business. Stringham *v.* Stewart, 8 N. Y. Civ. Proc. 420. And, in Texas, it seems that an appeal bond is not bad because one of the sureties is an attorney in the case. Morgan *v.* Richardson, (Tex. Civ. App. 1894) 25 S. W. 171; Kohn *v.* Washer, 69 Tex. 67, 6 S. W. 551, 5 Am. St. Rep. 28.

99. It seems that, where it is the duty of the clerk of the court to approve the appeal bond, such clerk cannot become a surety thereto. Jourdan *v.* Chandler, 37 Tex. 55. But where the clerk does not approve the bond, it seems that, in the absence of a rule of court forbidding it, he may become surety. Walker *v.* Simon, 21 La. Ann. 669; Russell *v.* Sprigg, 10 La. 421.

1. Black *v.* Black, 53 Fed. 985.

See also McGean *v.* MacKellar, 67 How. Pr. (N. Y.) 273, to the effect that, when a corporation is offered as a surety, it is the duty of the officer required to pass upon the bond in each particular case to exercise his discretion as to whether the actual state of the corporation's business justifies the approval of the undertaking.

2. Snedicor *v.* Barnett, 9 Ala. 434; State *v.* Judge, 30 La. Ann. 582; State *v.* Judge, 29 La. Ann. 776; Van Wezel *v.* Van Wezel, 3 Paige (N. Y.) 38; Ulrich *v.* Farrington Mfg. Co., 69 Wis. 213, 34 N. W. 89; Smith *v.* Chicago, etc., R. Co., 19 Wis. 89. See also 2 Cent. Dig. tit. "Appeal and Error," § 2028.

Residence in the county, however, may not be necessary. Bushong *v.* Graham, 4 Ohio Cir. Ct. 138, 2 Ohio Cir. Dec. 464; Moodie *v.* Ashland Bank, 1 Wkly. Notes Cas. (Pa.) 324.

Under N. Y. Code Civ. Proc. §§ 812, 1326, "householder" includes one who is engaged in the milling business, and who rents and occupies a mill within the state, and owns the machinery in such mill. Delamater *v.* Byrne, 59 How. Pr. (N. Y.) 71.

3. Buchard *v.* Cavins, 77 Tex. 365, 14 S. W. 388 [*overruling* Boney *v.* Waterhouse, 35 Tex. 178]; Frees *v.* Baker, (Tex. 1887) 6 S. W. 563. See also Donnelly *v.* Elser, 69 Tex. 282, 6 S. W. 563; and *compare* Allen *v.* Cary, 32 La. Ann. 1125; and see also 2 Cent. Dig. tit. "Appeal and Error," § 2026.

4. Thus, it has been decided that sureties on a bond given merely to secure the costs of a suit (Sampson *v.* Solinsky, 75 Tex. 663, 13 S. W. 67; Long *v.* Kruger, 4 Tex. Civ. App. 145, 23 S. W. 242); sureties upon a replevin or forthcoming bond (Trammell *v.* Trammell, 15 Tex. 291; Cobb *v.* Morris, 2 Tex. App. Civ. Cas. § 668; Lee *v.* Lord, 75 Wis. 35, 43 N. W.

(III) *SUFFICIENCY*—(A) *In General.* The object of an appeal bond is to protect the party in whose interest such bond is required, and he has a right to require with such sureties a bond which shall be clearly sufficient for this purpose.[5] If the proffered surety has sufficient tangible property susceptible of seizure at the time of signing the bond to answer for the amount of the obligation assumed by him, this is all that is required. He need not be the owner of real estate.[6]

(B) *Who Must Determine.* The question as to the solvency and ability of the sureties on an appeal bond is one that the trial court must determine.[7]

(IV) *JUSTIFICATION*—(A) *When Necessary*—(1) UPON SIGNING. The statutory enactments of some states require that the surety shall justify at the time when he signs the bond,[8] and it has generally been decided that such provisions

799, 44 N. W. 771; Bonesteel *v.* Orvis, 20 Wis. 646) may become sureties on an appeal bond.

But it has also been held that a surety on a supersedeas bond who is also a party to the judgment appealed from (Davis *v.* McCampbell, 37 Ala. 609); a surety on a bond given to dissolve a garnishment, when a judgment was obtained against him below (Eufaula Home Ins. Co. *v.* Plant, 36 Ga. 623); or a surety on an injunction bond, when judgment has been rendered against such surety as well as against appellant (Daniels *v.* Larendon, 49 Tex. 216 [*quære* in Sampson *v.* Solinsky, 75 Tex. 663, 13 S. W. 67; and see *infra*, this note, for the Louisiana rule]), is not a competent surety upon the appeal bond.

See 2 Cent. Dig. tit. "Appeal and Error," § 2027.

In Louisiana, a surety on an injunction bond is incompetent to act as a surety on a bond for an appeal from a judgment dissolving the injunction and for damages against the principal and surety *in solido,* such surety being a necessary party to the appeal. Barrow *v.* Clack, 45 La. Ann. 478, 12 So. 631; Bowman *v.* Kaufman, 30 La. Ann. 1021; Bauer *v.* Lochte, 30 La. Ann. 685; Dumas *v.* Mary, 29 La. Ann. 808; Cimeo *v.* Danerwheim, 18 La. Ann. 659. *Compare* Pasley *v.* McConnell, 39 La. Ann. 1097, 3 So. 484, 485; Moussier *v.* Gustine, 25 La. Ann. 36. But see Mehnert *v.* Dietrich, 36 La. Ann. 390; Verret *v.* Bonvillain, 32 La. Ann. 29, for limitations of this rule.

5. State *v.* Rightor, 36 La. Ann. 711; Lafon *v.* Lafon, 2 Mart. N. S. (La.) 511; Barnum *v.* Raborg, 2 Md. Ch. 516; Kirby *v.* Collins, 5 Wash. 682, 32 Pac. 769. See also 2 Cent. Dig. tit. "Appeal and Error," § 2029 *et seq.*

Burden of proof.—In attacking the sufficiency of an appeal bond, a mere *prima facie* showing on the part of appellee will cast the burden of showing the responsibility of sureties upon appellant. Kirby *v.* Collins, 5 Wash. 682, 32 Pac. 769. See also State *v.* Judge, 35 La. Ann. 737.

6. State *v.* Rightor, 36 La. Ann. 711 [*overruling* State *v.* Judge, 28 La. Ann. 884]; State *v.* Judge, 23 La. Ann. 279; Moodie *v.* Ashland Bank, 1 Wkly. Notes Cas. (Pa.) 324.

But in Quebec, if there is only one surety such surety must justify on real estate. Fiola *v.* Hamel, 4 Quebec 52; Dawson *v.* Defosses, 1 Quebec 121; Marshall *v.* Coffing, 7 Rev. Leg. 575.

A person against whom the sheriff holds two executions, to satisfy which executions the sheriff cannot find property, is not a sufficient surety on an appeal bond. Squier *v.* Stockton, 5 La. Ann. 741.

Mortgaged property.—Where a surety was approved because of his representation that certain land was freed from encumbrance, but it was afterward discovered that the property had been secretly mortgaged, the approval may be vacated. Kaufman *v.* Hirsch, 9 Wkly. Notes Cas. (Pa.) 347. An appeal bond is insufficient if the surety has not sworn that the immovables which he has mortgaged belong to him. Stuart *v.* Scott, 1 L. C. Rep. 218, 2 R. J. R. Q. 467.

Property out of the state.—Where the evidence showed that the existing liabilities of a surety on an appeal bond exceeded his assets in the state, but he testified that he had in another state property worth a sum much larger than all his liabilities, it was held that he was a good surety. State *v.* Judge, 27 La. Ann. 685; State *v.* Judge, 27 La. Ann. 662.

Security, on appeal, on real estate, the title-deed to which is not registered, is insufficient. Prince *v.* Morin, 18 L. C. Jur. 208.

7. *Indiana.*—Midland R. Co. *v.* Wilcox, 111 Ind. 561, 12 N. E. 513.

Louisiana.—De Gruy *v.* Aiken, 43 La. Ann. 798, 9 So. 747; State *v.* Judge, 30 La. Ann. 1014.

Michigan.—Moore *v.* Olin, 6 Mich. 328.

New York.—Delamater *v.* Byrne, 59 How. Pr. (N. Y.) 71, 57 How. Pr. (N. Y.) 170.

Pennsylvania.—Snyder *v.* Zimmerman, 1 Penr. & W. (Pa.) 293.

Tennessee.—Stewart *v.* Wilcox, 1 Lea (Tenn.) 81.

If there is any reasonable doubt of the ability of the party offering to act as surety to adequately secure the appellee, such surety should be rejected. Kirby *v.* Collins, 5 Wash. 682, 32 Pac. 769; Black *v.* Black, 53 Fed. 985.

8. McDonald *v.* Ellis, (Ariz. 1894) 36 Pac. 37; Witt *v.* Long, 93 N. C. 388; State *v.* Wagner, 91 N. C. 521; Hyatt *v.* Lewis, 20 Wash. 303, 55 Pac. 217; Glover *v.* Cove, 16 Wash. 323, 47 Pac. 737; Johnston *v.* Northwestern Live Stock Ins. Co., 107 Wis. 337, 83 N. W. 641; and see 2 Cent. Dig. tit. "Appeal and Error," § 2031 *et seq.*

Justification must be made by the surety himself.—The affidavit of another as to the pecuniary reputation of the surety will not answer the demands of the law. Morphew *v.* Tatem, 89 N. C. 183.

are mandatory and that the appeal, to be valid, must be perfected in accordance with their requirements.[9]

(2) Upon Exception — (a) In General. In some states a surety need not justify until appellee excepts to him as such surety.[10]

(b) Notice of Exception. Appellant must be duly notified of the exception to the sureties offered by him.[11]

(c) Time of Exception. The exception to sureties must be taken within the time provided by statute.[12]

(B) *Time of Justification.* The time within which sureties who are excepted to must appear and justify is generally regulated by statute;[13] and it has been decided that the time so fixed cannot be shortened[14] or extended.[15]

(c) *Notice of Justification.* Appellee must have notice of the time of justification, as he has a right to be present and question the sureties.[16]

9. Northern Counties Invest. Trust Co. *v.* Hender, 12 Wash. 559, 41 Pac. 913 [*distinguishing* Warburton *v.* Ralph, 9 Wash. 537, 38 Pac. 140; McEachern *v.* Brackett, 8 Wash. 652, 40 Am. St. Rep. 922, 36 Pac. 690].

In Kansas, however, a statute of this kind has been construed to be merely directory. St. Louis, etc., R. Co. *v.* Wilder, 17 Kan. 239.

10. Swasey *v.* Adair, 83 Cal. 136, 23 Pac. 284; Hill *v.* Finnigan, 54 Cal. 311; Schacht *v.* Odell, 52 Cal. 447; Kelsey *v.* Campbell, 14 Abb. Pr. (N. Y.) 368; Chamberlain *v.* Dempsey, 13 Abb. Pr. (N. Y.) 421; Moody *v.* Baker, 5 Cow. (N. Y.) 413; Holcomb *v.* Teal, 4 Oreg. 352 (holding that while the justification need only be made after exception to the sufficiency of the sureties, the statutory affidavit as to the qualifications of the sureties must be filed contemporaneously with the filing of the undertaking; and to the same effect see State *v.* McKinmore, 8 Oreg. 207; Pencinse *v.* Burton, 9 Oreg. 178; Alberson *v.* Mahaffey, 6 Oreg. 412); Dunn *v.* National Bank, 11 S. D. 305, 77 N. W. 111; Hazeltine *v.* Browne, 9 S. D. 351, 69 N. W. 579.

See 2 Cent. Dig. tit. "Appeal and Error," § 2031 *et seq.*

It is not the practice of the high court of chancery of Maryland to require the sureties in an appeal bond, when excepted to, to justify in order to ascertain their sufficiency, in analogy to the practice at law in the case of bail. Ringgold's Case, 1 Bland (Md.) 5; Barnum *v.* Raborg, 2 Md. Ch. 516.

Surety companies.— When a surety company guarantees an undertaking on appeal, the officers of such company may be examined as to its assets as a basis for the discretion of the judge in approving or disapproving the security. When excepted to, such company must justify as in the case of any other surety. Hurd *v.* Hannibal, etc., R. Co., 6 N. Y. Civ. Proc. 386; McGean *v.* MacKellar, 6 N. Y. Civ. Proc. 169, 67 How. Pr. (N. Y.) 273.

The effect of failure to justify.— In New York it has been decided that if the sureties proffered on an undertaking on appeal fail to justify when excepted to by the appellee, the appeal becomes a nullity (Kelsey *v.* Campbell, 14 Abb. Pr. (N. Y.) 368; Chamberlain *v.* Dempsey, 13 Abb. Pr. (N. Y.) 421); but in California it has been decided that such failure does not justify a dismissal of the appeal, but only affects the stay of execution (Swasey *v.* Adair, 83 Cal. 136, 23 Pac. 284; Wittram *v.* Crommelin, 72 Cal. 89, 13 Pac. 160; Gooby *v.* Hanson, (Cal. 1886) 11 Pac. 489; Hill *v.* Finnigan, 54 Cal. 311; Schacht *v.* Odell, 52 Cal. 447).

When appellant files a new undertaking in the supreme court, such new undertaking being approved by one of the justices, respondent cannot require the sureties in the substituted undertaking to justify. Stevenson *v.* Steinberg, 32 Cal. 373.

11. Rouch *v.* Van Hagen, 17 Cal. 121; Davelin *v.* Post Falls Woolen-Mills Co., (Ida. 1896) 44 Pac. 554; Liddy *v.* Long Island City, 102 N. Y. 726, 7 N. E. 904; Jackson *v.* Wiseburn, 5 Wend. (N. Y.) 136; Hazeltine *v.* Browne, 9 S. D. 351, 69 N. W. 579.

Notice of exception must be "to the sureties" and not "to the undertaking." Young *v.* Colby, 2 Code Rep. (N. Y.) 68.

Notice to appellant's attorney was held to be sufficient under an act allowing the giving of such notice to an agent of appellant. Cummings *v.* Forsman, 6 Pa. St. 194.

12. Blake *v.* Lyon, etc., Mfg. Co., 75 N. Y. 611; Webster *v.* Stevens, 5 Duer (N. Y.) 682, 3 Abb. Pr. (N. Y.) 227; Culliford *v.* Gadd, 2 Misc. (N. Y.) 574, 22 N. Y. Suppl. 539, 51 N. Y. St. 609; Hays *v.* Armstrong, 7 Ohio 247; Lewis *v.* Lewis, 4 Oreg. 209.

13. Davelin *v.* Post Falls Woolen-Mills Co., (Ida. 1896) 44 Pac. 554; Hees *v.* Snell, 8 How. Pr. (N. Y.) 185; Campbell *v.* Gregg, Brightly (Pa.) 440; and 2 Cent. Dig. tit. "Appeal and Error," § 2033.

Irregular justification.— Sureties who have justified in time, but have done so irregularly, may be allowed to justify anew even if the time for justification is past. Kelly *v.* Moody, 7 Hill (N. Y.) 156.

On application for extension of the time for justification of bail on appeal, the merits of the case will not be considered. Bradley *v.* Hall, 1 Cal. 199.

14. Chemin *v.* East Portland, 19 Oreg. 512, 24 Pac. 1038.

15. Roush *v.* Van Hagen, 17 Cal. 121; Jackson *v.* Wiseburn, 5 Wend. (N. Y.) 136.

16. Stark *v.* Barrett, 15 Cal. 361; Davelin *v.* Post Falls Woolen-Mills Co., (Ida. 1896) 44 Pac. 554; Dresser *v.* Brooks, 5 How. Pr.

(D) *Manner of Justifying.* In justifying, the sureties must comply with the statutory requirements as to the method of justification.[17]

(E) *Must Justify in What Amount.* The amount in which a surety must justify is provided for by statute in most of the states, and is usually fixed at double the amount of the bond.[18]

3. AMOUNT — a. In General. The bond or undertaking must be for the amount required by statute or fixed by the court when the court is empowered to name the penalty, and varies in the several states, and in amount in different actions and proceedings.[19] The forum in which to try

(N. Y.) 75; Cook *v.* Albina, 20 Oreg. 190, 25 Pac. 386. *Compare* Barnett *v.* Pardow, 10 Wend. (N. Y.) 615; and see 2 Cent. Dig. tit. "Appeal and Error," § 2034.

Day named in notice.— Security in appeal cannot be legally given, in the absence of the opposite party, on a day different to that stated in the notice. Charbonneau *v.* Davis, 20 L. C. Jur. 167. But an appeal will not be dismissed merely because the security was put in one day sooner than that stated in the notice served on respondent if no objections be made to the sureties themselves. Canada Invest., etc., Co. *v.* Hudon, 25 L. C. Jur. 227.

Hour named in notice.— In Lower *v.* Knox, 10 Cal. 480, appellant gave notice that the justification would take place on a certain day between the hours of ten A. M. and five P. M. It was held that it was proper for the clerk to refuse to take the justification until the hour last-named.

17. Boyce *v.* Superior Ct., 110 Cal. 401, 42 Pac. 892 (before proper officer); Tevis *v.* O'Connell, 21 Cal. 512 (proper place for justification); Roush *v.* Van Hagen, 18 Cal. 668; Barnett *v.* Pardow, 10 Wend. (N. Y.) 615 (by affidavit); Bonnell *v.* Esterly, 30 Wis. 549 (venue for justification); Hobson *v.* Johnson, 4 Biss. (U. S.) 505, 12 Fed. Cas. No. 6,553 (insufficiency of affidavit alone); Hatch *v.* Coddington, 5 Blatchf. (U. S.) 523, 11 Fed. Cas. No. 6,205 (by affidavit).

18. *California.*— Mokelumne Hill Canal, etc., Co. *v.* Woodbury, 10 Cal. 185.

New York.— Hill *v.* Burke, 62 N. Y. 111; Newton *v.* Harris, Code Rep. N. S. (N. Y.) 191; Rich *v.* Beekman, 2 Code Rep. (N. Y.) 63; Eldridge *v.* Howell, 4 Paige (N. Y.) 457.

North Carolina.—Bailey *v.* Rutjes, 91 N. C. 420; McCanless *v.* Reynolds, 91 N. C. 244; Turner *v.* Quinn, 91 N. C. 92; Lytle *v.* Lytle, 90 N. C. 647; Hemphill *v.* Blackwelder, 90 N. C. 14; McMillan *v.* Nye, 90 N. C. 11; Harshaw *v.* McDowell, 89 N. C. 181.

Ohio.— Winkler *v.* State, 20 Ohio Cir. Ct. 360, 11 Ohio Cir. Dec. 123; Orr *v.* Orr, 5 Cinc. L. Bul. 711.

Oregon.— Holcomb *v.* Teal, 4 Oreg. 352.

South Dakota.— Tolerton, etc., Co. *v.* Casperson, 7 S. D. 206, 63 N. W. 908.

Justifying in an amount more than twice the amount specified in the undertaking does not affect the validity of such undertaking. Hill *v.* Burke, 62 N. Y. 111; *Ex p.* Eastabrooks, 5 Cow. (N. Y.) 27.

Stating that surety is worth double the amount specified in the bond, without stating that such amount is over and above his liabilities and homestead and other exemptions allowed by law, is a sufficient justification under Clark's Code Civ. Proc. N. C. (1900), § 560; Witt *v.* Long, 93 N. C. 388. The justification of two sureties to the effect that each is worth the amount of the bond is not sufficient, the statute requiring the justification of one surety in double the amount of the bond. Anthony *v.* Carter, 91 N. C. 229.

19. *Alabama.*— Briarfield Iron Works Co. *v.* Foster, 54 Ala. 622; Barnett *v.* State, 34 Ala. 260.

Arizona.—Johnston *v.* Letson, (Ariz. 1892) 29 Pac. 893; Crowley *v.* Reilley, (Ariz. 1891) 29 Pac. 14.

California.— Gardiner *v.* California Guarantee Invest. Co., 129 Cal. 528, 62 Pac. 110.

Colorado.— Standley *v.* Hendrie, etc., Mfg. Co., 25 Colo. 376, 55 Pac. 723.

Florida.— Scott *v.* Milton, 26 Fla. 52, 7 So. 32; Montgomery *v.* Knox, 22 Fla. 575.

Georgia.— King *v.* Cook, T. U. P. Charlt. (Ga.) 286, 4 Am. Dec. 715.

Illinois.— Ennor *v.* Galena, etc., R. Co., 104 Ill. 103; McCall *v.* Moss, 100 Ill. 461. See Hurd's Rev. Stat. Ill. (1899), c. 110, § 68.

Indiana.— Shannon *v.* Spencer, 1 Blackf. (Ind.) 120; Merchants' etc., Sav. Bank *v.* Fraze, (Ind. App. 1893) 34 N. E. 749.

Louisiana.— Ray *v.* Shehee, 34 La. Ann. 1106; Rawle *v.* Feltus, 33 La. Ann. 421.

Maryland.— Ringgold's Case, 1 Bland (Md.) 5.

Michigan.— Richardson *v.* Richardson, 82 Mich. 305, 46 N. W. 670; Michie *v.* Ellair, 60 Mich. 73, 26 N. W. 837.

Minnesota.—See Minn. Stat. (1894), § 6141.

Mississippi.— Swann *v.* Horne, 54 Miss. 337.

Missouri.— State *v.* Klein, 137 Mo. 673, 39 S. W. 272; Reed *v.* Leffingwell, 30 Mo. 543.

New York.— Jesup *v.* Carnegie, 45 N. Y. Super. Ct. 310; Coithe *v.* Crane, 1 Barb. Ch. (N. Y.) 21; and see N. Y. Code Civ. Proc. § 1326.

North Carolina.— Hemphill *v.* Blackwelder, 90 N. C. 14; McCanless *v.* Reynolds, 90 N. C. 648. Clark's Code Civ. Proc. N. C. (1900), § 552, requires appellant to execute an appeal bond, and in such sum as may be ordered by the court, not to exceed the sum of two hundred and fifty dollars. This is in addition to the bond to stay execution required by section 554. McCanless *v.* Reynolds, 91 N. C. 244; Harshaw *v.* McDowell, 89 N. C. 181; Bledsoe *v.* Nixon, 69 N. C. 81.

the question of the sufficiency of the penalty of an appeal bond, in a case

Ohio.— Branch *v.* Dick, 14 Ohio St. 551; Oliver *v.* Pray, 4 Ohio 175, 19 Am. Dec. 595, 5 Ohio 326.

Oregon.— The undertaking must not be limited in amount, and must provide for the payment of all damages, costs, and disbursements which may be awarded against appellant. State *v.* McKinmore, 8 Oreg. 207.

Pennsylvania.—Quick *v.* Miller, 103 Pa. St. 67; Churchman *v.* Parke, 2 Pa. St. 406.

Tennessee.— Ing *v.* Davey, 2 Lea (Tenn.) 276; Staub *v.* Williams, 1 Lea (Tenn.) 36; Mason *v.* Anderson, 12 Heisk. (Tenn.) 38 (for damages and costs only on appeal from judgment on open account); State *v.* Wright, 5 Heisk. (Tenn.) 612 (for costs only on appeal for usurpation of office); Davis *v.* Jackson, (Tenn. Ch. 1897) 39 S. W. 1067.

Texas.— Scott *v.* Allen, 1 Tex. 508; Hamblen *v.* Tuck, (Tex. Civ. App. 1898) 45 S. W. 175; Cowen *v.* Bloomberg, 15 Tex. Civ. App. 364, 39 S. W. 947.

Washington.— Sumner *v.* Rogers, 21 Wash. 361, 58 Pac. 214; Pierce *v.* Willeby, 20 Wash. 129, 54 Pac. 999; Kirby *v.* Collins, 5 Wash. 682, 32 Pac. 769.

Wisconsin.— Eureka Steam Heating Co. *v.* Sloteman, 67 Wis. 118, 30 N. W. 241; Ætna L. Ins. Co. *v.* McCormick, 20 Wis. 265.

United States.—Swan *v.* Hill, 155 U. S. 394, 15 S. Ct. 178, 39 L. ed. 197; Wheeling Bridge, etc., R. Co. *v.* Cochran, 68 Fed. 141, 25 U. S. App. 306, 15 C. C. A. 321.

Canada.— Taylor *v.* Gavin, 18 Nova Scotia 296; Brooke *v.* Dallimore, 20 L. C. Jur. 176, holding security for costs alone sufficient in case of appeal from a judgment ordering appellant to render an account.

See 2 Cent. Dig. tit. "Appeal and Error," § 2036 *et seq.*

In England.—Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the court of appeals. Costa Rica *v.* Erlanger, 3 Ch. D. 62; Hastings *v.* Ivall, L. R. 9 Ch. 758, 43 L. J. Ch. 728, 22 Wkly. Rep. 783, 31 L. T. Rep. N. S. 262. See also Grant *v.* Banque Franco-Egyptienne, 2 C. P. D. 430, 26 Wkly. Rep. 68; Judd *v.* Green, 4 Ch. D. 784, 46 L. J. Ch. 257, 35 L. T. Rep. N. S. 873, 25 Wkly. Rep. 293.

Failure of judge to fix amount.— When the amount of the bond for an appeal, such appeal being taken by motion in open court, is not fixed by the judge, the appeal is defective and the amount of the bond cannot subsequently be fixed and the appeal perfected by an order rendered at chambers on the petition of appellant. Fournet *v.* Van Wickle, 33 La. Ann. 1108.

Judgments for specific sums of money.— As to the amount of the bond when the judgment is for a specific sum of money see:

Indiana.— Shannon *v.* Spencer, 1 Blackf. (Ind.) 120.

Maryland.— Ringgold's Case, 1 Bland (Md.) 5.

Michigan.— Richardson *v.* Richardson, 82 Mich. 305, 46 N. W. 670; Michie *v.* Ellair, 60 Mich. 73, 26 N. W. 837.

New York.— Coithe *v.* Crane, 1 Barb. Ch. (N. Y.) 21.

Ohio.— *In re* Winterfeldt, 2 Ohio Dec. 473; Pray *v.* Oliver, 5 Ohio 326, 4 Ohio 175, 19 Am. Dec. 595; White *v.* Moerlidge, 7 Ohio Cir. Ct. 348.

Tennessee.— Watkins *v.* Clifton Hill Land Co., 91 Tenn. 683, 20 S. W. 246; Wilson *v.* Edwards, 5 Coldw. (Tenn.) 238.

Personal representatives.—As to the amount of the appeal bond to be given by a personal representative see the following cases:

Georgia.— Hobbs *v.* Cody, 45 Ga. 478.

Iowa.— Matter of Pierson, 13 Iowa 449.

Louisiana.— Frye's Succession, 32 La. Ann. 1308.

New York.— Mills *v.* Forbes, 12 How. Pr. (N. Y.) 466.

Tennessee.— Goine *v.* Henderson, 5 Yerg. (Tenn.) 197; Patterson *v.* Gordon, 3 Tenn. Ch. 18.

See 2 Cent. Dig. tit. "Appeal and Error," § 2040.

Real actions.— As to the amount of the bond in actions concerning real property see the following cases: State *v.* Meacham, 6 Ohio Cir. Ct. 31; Watkins *v.* Clifton Hill Land Co., 91 Tenn. 683, 20 S. W. 246; Rogers *v.* Newman, 5 Lea (Tenn.) 255; Staub *v.* Williams, 1 Lea (Tenn.) 36; Kinsey *v.* Stanton, 6 Baxt. (Tenn.) 92; McCoy *v.* Jones, 9 Tex. 363; and see 2 Cent. Dig. tit. "Appeal and Error," § 2041.

Right to decrease or increase amount.— If, in fixing the amount, the judge has been misled, he probably may modify the order fixing the amount, and require an additional undertaking (Eureka Steam Heating Co. *v.* Sloteman, 67 Wis. 118, 30 N. W. 241; Holbrook *v.* Holbrook, 32 La. Ann. 13); and before an appeal is completed he may reduce the amount of the bond (Immanuel Presb. Church *v.* Riedy, 104 La. 314, 29 So. 149). So, it has been held that the amount of the bond given to secure costs may be increased by the court because of the length of the record. Boswell *v.* Kilborn, 13 Moore (Quebec) 476, 7 L. C. Jur. 150.

Specific amount.— It has been held that if no penalty is inserted in an appeal bond the appeal must be dismissed. Henry *v.* Gamble, Minor (Ala.) 6. See also Warner *v.* Howard, 121 Mass. 82. In Eschert *v.* Harrison, 29 La. Ann. 860, it is said that a failure to set forth specifically the amount is not ground to dismiss the appeal, it being presumed that the bond was given for the amount prescribed in the order of the court granting the appeal. See also Stille *v.* Beauchamp, 13 La. Ann. 604; Mason *v.* Fuller, 12 La. Ann. 68. And under Tex. Rev. Stat. art. 2201, requiring an appellant to file a bond payable to the judge and "conditioned to prosecute his appeal," but not requiring it to be given in any sum, the bond is not void because given for a stated amount, and the appeal on which

appealed in term, is the court which is called upon to receive and approve the bond.[20]

b. In Excess of Amount Required. The execution of an undertaking in a sum which exceeds that fixed by the statute or the court does not affect the validity of the undertaking.[21]

c. Supersedeas Instead of Appeal Bond. A bond, although conditioned as supersedeas bonds usually are, if in the amount prescribed by the statute or the court, is sufficient as an appeal bond.[22] An undertaking for appeal, and also to secure a stay of execution, may be effectual for the appeal although insufficient for supersedeas.[23]

4. Conditions. An appeal bond must contain the conditions required by the statute or the order of court for the security of the rights of the appellee.[24] If,

it is given should not for that reason be dismissed. Howard *v.* Russell, 75 Tex. 171, 12 S. W. 525; Hicks *v.* Oliver, 71 Tex. 776, 10 S. W. 97.

20. Midland R. Co. *v.* Wilcox, 111 Ind. 561, 12 N. E. 513.

21. Zoller *v.* McDonald, 23 Cal. 136; Levesque *v.* Anderson, 6 Mart. N. S. (La.) 293; Stapleton *v.* Pease, 2 Mont. 508; *Ex p.* Eastabrooks, 5 Cow. (N. Y.) 27; Coil *v.* Davis, Wright (Ohio) 164; Johnson *v.* Noonan, 16 Wis. 687. See 2 Cent. Dig. tit. "Appeal and Error," § 2037. It has been held, however, that a bond executed in an amount in excess of the statute is defective and possibly void. Sutherland *v.* Putnam, (Ariz. 1890) 24 Pac. 320; Janes *v.* Langham, 29 Tex. 413.

22. McCollum *v.* McCollum, 33 Ala. 711; Minden Bank *v.* Lake Bisteneau Lumber Co., 47 La. Ann. 1432, 17 So. 832; Anderson *v.* Bigelow, 16 Wash. 198, 47 Pac. 426; State *v.* Seavey, 7 Wash. 562, 35 Pac. 389. See also *infra*, VIII.

23. Dobbins *v.* Dollarhide, 15 Cal. 374; Cruger *v.* Douglass, 8 Barb. (N. Y.) 81, 2 Code Rep. (N. Y.) 123; Zapp *v.* Michaelis, 56 Tex. 395. See also Reid *v.* Norfolk City R. Co., (Va. 1894) 21 S. E. 27.

In Louisiana, if, by order of court, a suspensive appeal has been allowed upon appellant furnishing a bond in an amount fixed by the court, which amount is not sufficient for a suspensive appeal, and the bond has been furnished in that amount, it will not be dismissed because it cannot be maintained as a suspensive appeal. Though not good as a suspensive, it stands good as a devolutive, appeal. Weil *v.* Schwartz, 51 La. Ann. 1547, 26 So. 475; Stempel *v.* Fulton, 51 La. Ann. 468, 25 So. 270; Morgan's Louisiana, etc., R., etc., Co. *v.* Pecot, 50 La. Ann. 737, 23 So. 948; Michenor *v.* Reinach, 49 La. Ann. 360, 21 So. 552. See also McCarthy *v.* McCarthy, 44 La. Ann. 146, 11 So. 77. But unless given in the sum fixed by the court the bond will not support either a suspensive or devolutive appeal. Keenan *v.* Whitehead, 15 La. Ann. 333; McCall's Succession, 19 La. Ann. 507. *Compare* Nichols *v.* Marshall, 10 La. 110. And where no order fixing the amount is found in the record, the mere fact that appellant has attempted to give a suspensive appeal bond, but failed as to the amount required, does not give appellant a right to a devolutive appeal. Woodville *v.* Klasing, 51 La. Ann. 1057, 25 So. 635; Dwight *v.* Barrow, 25 La. Ann. 424.

24. *Alabama.*— Henson *v.* Preslor, 27 Ala. 643.

Arizona.— Johnston *v.* Letson, (Ariz. 1892) 29 Pac. 893.

Arkansas.— Ballard *v.* Noaks, 1 Ark. 133.

California.— Carter *v.* Butt Creek Gold Min., etc., Co. 131 Cal. 350, 63 Pac. 667; Duncan *v.* Times-Mirror Co., 109 Cal. 602, 42 Pac. 147.

Delaware.— Miller *v.* Holding, 5 Houst. (Del.) 494.

Georgia.— Seymore *v.* Howard, 15 Ga. 110.

Illinois.— Terre Haute, etc., R. Co. *v.* Peoria, etc., R. Co., 61 Ill. App. 405.

Kentucky.— Talbot *v.* Morton, 15 Litt. (Ky.) 326.

Louisiana.— Prudhomme *v.* Williams, 45 La. Ann. 484, 12 So. 628; Calhoun's Succession, 35 La. Ann. 363.

Maine.— French *v.* Snell, 37 Me. 100; Owen *v.* Daniels, 21 Me. 180. See also Merrick *v.* Farwell, 33 Me. 253.

Massachusetts.— Harrington *v.* Brown, 7 Pick. (Mass.) 232.

Mississippi.— Swann *v.* Horne, 54 Miss. 337; Warren *v.* African Baptist Church, 50 Miss. 223.

Montana.— Nolan *v.* Montana Cent. R. Co., 24 Mont. 327, 61 Pac. 880; Coleman *v.* Perry, 24 Mont. 237, 61 Pac. 129.

New York.— Langley *v.* Warner, 1 Code Rep. (N. Y.) 111, 3 How. Pr. (N. Y.) 363, 1 N. Y. 606; Drexel *v.* St. Amant, 47 Hun (N. Y.) 520; Hollister *v.* McNeill, 31 Hun (N. Y.) 629; Morss *v.* Hasbrouck, 10 Abb. N. Cas. (N. Y.) 407, 63 How. Pr. (N. Y.) 84, 201.

North Carolina.— Oakley *v.* Van Noppen, 100 N. C. 287, 5 S. E. 1; Orr *v.* McBryde, 7 N. C. 235.

Ohio.— The Propeller Ogontz *v.* Wick, 12 Ohio St. 333.

Pennsylvania.— Com. *v.* Wistar, 142 Pa. St. 373, 28 Wkly. Notes Cas. (Pa.) 97, 21 Atl. 871.

Tennessee.— Patrick *v.* Nelson, 2 Head (Tenn.) 506; Jones *v.* Parson, 2 Yerg. (Tenn.) 320.

Texas.— Perkins *v.* Bates, 61 Tex. 190; Reid *v.* Fernandez, 52 Tex. 379.

Wisconsin.— Drinkwine *v.* Eau Claire, 83 Wis. 428, 53 N. W. 673; Northwestern Mut. Life Ins. Co. *v.* Park Hotel Co., 37 Wis. 125.

however, the conditions of an appeal bond, although not literally in conformity to the statute or the order of court, yet substantially cover the requisite stipulations and contain no defect which, according to a fair construction, might be prejudicial to the interests of the appellee, the bond is sufficient.[25]

5. Form and Contents — a. In General. Although an appeal bond may not be in the exact statutory form, or contain all the proper recitals, or is erroneous in some of its recitals, it may still sustain the appeal. Mere clerical or grammatical errors in either form or contents will not render the bond defective.[26]

United States.— Swan *v.* Hill, 155 U. S. 394, 15 S. Ct. 178, 39 L. ed. 197.

See 2 Cent. Dig. tit. "Appeal and Error," § 2042 *et seq.*

Injunctions.—As to the conditions in a bond given upon appeal from a judgment dissolving an injunction see McWilliams *v.* Morgan, 70 Ill. 62; Talbot *v.* Morton, 5 Litt. (Ky.) 326; State *v.* King, 40 La. Ann. 841, 6 So. 108; Coleman *v.* Rowe, 4 Sm. & M. (Miss.) 747; McKay *v.* Hite, 4 Rand. (Va.) 564; and 2 Cent. Dig. tit. "Appeal and Error," § 2045.

Judgments as to realty.— As to the conditions which are necessary in a bond on an appeal from a judgment concerning real property see Firemen's Ins. Co. *v.* Bay, 3 How. Pr. (N. Y.) 424, 2 Code Rep. (N. Y.) 3; Grow *v.* Snell, 4 N. Y. Civ. Proc. 334; Duncan *v.* Mobile, etc., R. Co., 3 Woods (U. S.) 597, 8 Fed. Cas. No. 4,139, and see also 2 Cent. Dig. tit. "Appeal and Error," § 2044.

Personal representatives.— The following cases have been decided as to the conditions necessary in a bond given by a personal representative. Mason *v.* Johnson, 24 Ill. 159, 76 Am. Dec. 740; Mitchell *v.* Mount, 19 Abb. Pr. (N. Y.) 1; People *v.* Judges, 1 Wend. (N. Y.) 29; Munzesheimer *v.* Wickham, 74 Tex. 638, 12 S. W. 751; and see also 2 Cent. Dig. tit. "Appeal and Error," § 2043.

Where the bond contains no condition whatever it will be dismissed. Jeffery *v.* Marshall, 1 Ark. 47; Mygatt *v.* Ingham, Wright (Ohio) 176.

25. *Alabama.*— Richards *v.* Griffin, 5 Ala. 195.

Florida.— Kilbee *v.* Myrick, 12 Fla. 416.

Indiana.— Carmichael *v.* Holloway, 9 Ind. 519.

Iowa.— Whitehead *v.* Thorp, 22 Iowa 425.

Kentucky.— Cobb *v.* Com., 3 T. B. Mon. (Ky.) 391.

Louisiana.— Bickham *v.* Hutchinson, 50 La. Ann. 765, 23 So. 902.

Minnesota.— Anderson *v.* Meeker County, 46 Minn. 237, 48 N. W. 1022; Riley *v.* Mitchell, 38 Minn. 9, 35 N. W. 472.

Mississippi.— Swann *v.* Horne, 54 Miss. 337.

Missouri.— American Brewing Co. *v.* Talbot, 125 Mo. 388, 28 S. W. 585; Smith *v.* Montreil, 26 Mo. 578.

Montana.— Ramsey *v.* Burns, 24 Mont. 234, 61 Pac. 129.

New York.— Doolittle *v.* Dininny, 31 N. Y. 350; Foster *v.* Foster, 7 Paige (N. Y.) 48.

Ohio.— Bentley *v.* Dorcas, 11 Ohio St. 398; Creighton *v.* Harden, 10 Ohio St. 579; Myres *v.* Parker, 6 Ohio St. 501.

Texas.— Jordan *v.* Moore, 65 Tex. 363; Robinson *v.* Brinson, 20 Tex. 438.

Wisconsin.— C. & J. Michel Brewing Co. *v.* Wightman, 97 Wis. 657, 73 N. W. 316; West *v.* Eau Claire, 89 Wis. 31, 61 N. W. 313; Kasson *v.* Brocker, 47 Wis. 79, 1 N. W. 418.

United States.— Gay *v.* Parpart, 101 U. S. 391, 25 L. ed. 841.

See 2 Cent. Dig. tit. "Appeal and Error," § 2048.

Mere clerical or grammatical errors in the condition of an appeal bond will not invalidate it. Swain *v.* Graves, 8 Cal. 549; Schill *v.* Reisdorf, 88 Ill. 411; People *v.* Judges, 1 Wend. (N. Y.) 28; Farrell *v.* Finch, 40 Ohio St. 337, 9 Am. L. Rec. 412; Wood *v.* Gamble, (Tex. Civ. App. 1895) 32 S. W. 368; Wallace *v.* Dart, (Tex. Civ. App. 1895) 32 S. W. 239; Horton *v.* McKeehan, 1 Tex. App. Civ. Cas. § 468.

26. *Alabama.*— Satterwhite *v.* State, 28 Ala. 65.

Illinois.— Bragg *v.* Fessenden, 11 Ill. 544.

Louisiana.— Broussard *v.* Babin, McGloin (La.) 286.

North Carolina.— Walker *v.* Williams, 88 N. C. 7.

Texas.— Lewis *v.* Sproles, (Tex. Civ. App. 1894) 28 S. W. 94; Brown *v.* Shelton, (Tex. Civ. App. 1893) 23 S. W. 483.

United States.— Smith *v.* Walker, Hempst. (U. S.) 289, 22 Fed. Cas. No. 13,123*a*.

See 2 Cent. Dig. tit. "Appeal and Error," § 2049 *et seq.*

Consideration necessary.— It has been decided that where an undertaking on appeal from a judgment is not in the form prescribed by statute a consideration must be shown. Goodwin *v.* Bunzl, 50 N. Y. Super. Ct. 441, 6 N. Y. Civ. Proc. 226; Robert *v.* Donnell, 10 Abb. Pr. (N. Y.) 454. See *infra*, IX, A, 2.

The distinction existing between a bond and an undertaking or a recognizance has been in some cases recognized and insisted upon. Thus, it has been decided that a bond to prosecute an appeal from the court of probate must be given in the usual form of bonds, and if given in the form of a recognizance, the process will abate even after continuance (Brown *v.* Hinman, Brayt. (Vt.) 29); that in a proceeding by a writ of error, where the bond, intended to be a cost bond for writ of error, was in terms a bond for an appeal, a motion to dismiss should be granted (Thompson *v.* Pine, 41 Tex. 171); but it has been decided, however, that although the statute required a recognizance, and not a bond on appeal, a bond would be a sufficient compliance therewith, as it was as effectual as the other

b. Date of Bond. An appeal bond, if it is filed in time, is not fatally defective because not dated.[27]

c. Naming Appellate Court. The bond should state the name of the court to which the appeal is prayed.[28]

d. Parties — (I) *Obligors.* It seems that the omission of the name of an obligor from the body of the bond is no substantial objection to such bond.[29]

(II) *Obligees.* It would seem that if no obligee is named in the undertaking the latter is defective;[30] but where the obligee is sufficiently designated the bond will not be held deficient because of a slight mistake in his name.[31]

(III) *Sureties.* It is not necessary that the sureties be named in the body of the bond.[32]

e. Recital of Judgment — (I) *In General.* The bond must so describe the judgment as to identify it as the one from which the appeal is taken, otherwise the bond will be insufficient.[33]

(Dean *v.* Hemphill, Hempst. (U. S.) 154, 7 Fed. Cas. No. 3,736*a*). In Wilson *v.* Morrell, 5 Wash. 654, 32 Pac. 733, it was decided that, under the statutory direction to the courts to look at the substance rather than the form in interpreting appeal bonds, the fact that such an instrument was in the form of an undertaking instead of that of a bond did not invalidate it.

In some jurisdictions undertakings on appeal are by statute put on the same footing as bonds. Canfield *v.* Bates, 13 Cal. 606; Matter of Brown, 35 Minn. 307, 29 N. W. 131 — holding a recognizance to be a kind of a bond.

27. Byers *v.* Gilmore, 10 Colo. App. 79, 50 Pac. 370.

The day of the month in the date of the bond need not be specified therein. Bills *v.* Stanton, 69 Ill. 51; Eschert *v.* Harrison, 29 La. Ann. 860; Guez *v.* Dupuis, 152 Mass. 454, 25 N. E. 740.

28. Merserole *v.* Merserole, 13 N. J. L. 239; Smith *v.* Walker, Hempst. (U. S.) 289, 22 Fed. Cas. No. 13,123*a*. But the mere fact that the bond recited that an appeal had been prayed to the supreme court does not prevent the court of appeals from acquiring jurisdiction of the appeal, as such defect is at most a formal one, which would have been amendable in the appellate court. Pershing *v.* Wolfe, 8 Colo. App. 82, 44 Pac. 754.

29. Hirams *v.* Coit, Dall. (Tex.) 148. See also Chamblee *v.* Baker, 95 N. C. 98; and also 2 Cent. Dig. tit. "Appeal and Error," § 2055.

A slight variation between the signature of the obligor and his name as it appears in the body of the appeal bond is therefore immaterial. Guez *v.* Dupuis, 152 Mass. 454, 25 N. E. 740.

30. *Arizona.*— Johnston *v.* Letson, (Ariz. 1892) 29 Pac. 893; Sutherland *v.* Putnam, (Ariz. 1890) 24 Pac. 320.

Louisiana.— Michael *v.* Babin, 19 La. Ann. 197; Voelkel *v.* Voelkel, 18 La. Ann. 639; Percy *v.* Millaudon, 6 La. 584. But see Nugent *v.* McCaffrey, 33 La. Ann. 271, decided under the Louisiana act of Jan. 30, 1869.

North Carolina.—See, *contra,* Clark *v.* Huffsteller, 57 N. C. 449.

Ohio.— *Compare* Job *v.* Harlan, 13 Ohio St. 485.

Rhode Island.— Garrett *v.* Shove, 15 R. I. 538, 9 Atl. 901.

Tennessee.— Eason *v.* Clark, 2 Yerg. (Tenn.) 521.

Texas.— Whiting *v.* Pettus, 1 Tex. 191.

31. Homer College *v.* Vaughn, 18 La. Ann. 525; Morris *v.* Covington, 2 La. Ann. 259; McLaughlin *v.* Richardson, 2 La. Ann. 78; Pleasants *v.* Botts, 5 Mart. N. S. (La.) 127; International, etc., R. Co. *v.* Vanden, 7 Tex. Civ. App. 258, 26 S. W. 767; Newbauer *v.* Joseph, 1 Tex. App. Civ. Cas. § 86; Mullins' Appeal, 40 Wis. 154.

32. *California.*— Dore *v.* Covey, 13 Cal. 502.

Louisiana.— See also Coyle *v.* Creevy, 34 La. Ann. 539; Union Bethel African M. E. Church *v.* Civil Sheriff, 33 La. Ann. 1461; Vignie *v.* Brady, 35 La. Ann. 560.

Massachusetts.— Guez *v.* Dupuis, 152 Mass. 454, 25 N. E. 740.

New York.— *Ex p.* Fulton, 7 Cow. (N. Y.) 484.

Texas.— Baldridge *v.* Penland, 68 Tex. 441, 4 S. W. 565; Cooke *v.* Crawford, 1 Tex. 9, 46 Am. Dec. 93.

See 2 Cent. Dig. tit. "Appeal and Error," § 2054.

Omission from condition of bond.— The omission of the name of one of several sureties from the condition of an appeal bond when such name appears in the penal clause, and was duly signed to the bond, is an immaterial clerical error. Del Bondio *v.* New Orleans Mut. Ins. Assoc., 28 La. Ann. 139.

Residence and occupation of surety.— An undertaking without a statement as to the place of residence and occupation of the sureties, where such statement is required by law, is insufficient to render an appeal effectual. Dobbins *v.* Dollarhide, 15 Cal. 374; Blood *v.* Wilder, 6 How. Pr. (N. Y.) 446. *Compare* Northrup *v.* Sullivan, 47 La. Ann. 715, 17 So. 259; State *v.* Alta Silver Mining Co., 24 Nev. 230, 51 Pac. 982. And it has been held, under a statute requiring at least one surety to be a freeholder in the county, that the county in which the surety resides should be specified in the appeal bond. Merserole *v.* Merserole, 13 N. J. L. 239.

When two sureties sign an appeal bond it is sufficient if only one of them is named in the body of the bond. Briant *v.* Herbert, 30 La. Ann. 1127.

33. *Alabama.*— Dumas *v.* Hunter, 30 Ala. 188; Satterwhite *v.* State, 28 Ala. 65; Wil-

(II) *Amount.* If the judgment is otherwise sufficiently described, an incorrect statement of the amount thereof seems to constitute only an immaterial defect.[34]

(III) *Date of Judgment.* A misrecital of the date of the judgment should not necessarily be held fatal to the bond, provided the other elements of the description show with reasonable certainty that it can be no other than the judgment appealed from.[35]

(IV) *Parties.* The bond should give the names of all parties to the judgment.[36]

liams *v.* State, 26 Ala. 85. See also Street *v.* Street, 113 Ala. 333, 21 So. 138.

Arizona.— Sutherland *v.* Putnam, (Ariz. 1890) 24 Pac. 320.

Florida.— Forbes *v.* Porter, 23 Fla. 47, 1 So. 336.

Illinois.— Best Brewing Co. *v.* Klassen, 85 Ill. App. 464.

Louisiana.— Thibodeaux *v.* Thibodeaux, 45 La. Ann. 1126, 13 So. 805; People's Brewing Co. *v.* Bœbinger, 40 La. Ann. 277, 4 So. 82.

Ohio.— Wilson *v.* Holeman, 2 Ohio 253.

Texas.— Hicks *v.* Oliver, 71 Tex. 776, 10 S. W. 97; Matter of O'Hara, 60 Tex. 179; Dutton *v.* Norton, 1 Tex. App. Civ. Cas. § 358.

Virginia.— Acker *v.* Alexandria, etc., R. Co., 84 Va. 648, 5 N. E. 688.

United States.— Benjamin *v.* Hart, 4 Ben. (U. S.) 454, 3 Fed. Cas. No. 1,302.

See 2 Cent. Dig. tit. "Appeal and Error," § 2050.

Bond need not set out the judgment appealed from when the judgment appears elsewhere in the record. Phelps *v.* Daniel, 86 Ga. 363, 12 S. E. 584. Hence the description of a judgment is sufficient where the bond correctly gives the names of the parties and the amount, and the judgment is embraced in the record of the case. Hab *v.* Johnston, 1 Tex. App. Civ. Cas. § 624.

The phrase "of said county," used in describing the place of the rendition of the judgment, is not enough where the only means of explaining it is by reference to the name of a county appearing in the caption of the bond, for the caption shows where the bond was made, not where the judgment was rendered. McMahan *v.* Chambers, 36 Tex. 277.

Variance between the obligatory and conditional parts of an appeal bond, as to the name of one of the parties who recovered the judgment, has been held to be fatal. Gillilan *v.* Gray, 13 Ill. 705. So, in Binion *v.* Seals, 82 Tex. 397, 18 S. W. 705, it was held that an appeal bond, made and signed by M. W. Binion, when the name of appellant in the judgment appealed from appeared as Whit Binion, was fatally defective.

34. Mathews *v.* Morrison, 13 R. I. 309; Landa *v.* Heermann, 85 Tex. 1, 19 S. W. 885; Jordan *v.* Moore, 65 Tex. 363. *Compare* Stockton School Dist. *v.* Goodell, (Cal. 1899) 56 Pac. 885; Brooks *v.* Jacksonville, 2 Ill. 568; Martin *v.* Hartwell, 1 Tex. App. Civ. Cas. § 491; and see also 2 Cent. Dig. tit. "Appeal and Error," § 2051.

A bond on devolutive appeal need not mention the amount of the judgment appealed from. Broussard *v.* Babin, McGloin (La.) 286.

The amount of the costs need not be stated in the recital of the judgment. People *v.* Chatauque, 2 Wend. (N. Y.) 618.

The condition of the appeal bond need not set out the amount of the judgment. Griffith *v.* Sciples, 10 N. J. L. 228.

Where an appeal bond states the amount of the judgment appealed from, the amount need not be again stated in the binding part of the undertaking, the judgment being there distinctly referred to. Dunseith *v.* Linke, 10 Daly (N. Y.) 363.

35. Dyer *v.* Bradley, 88 Cal. 590, 26 Pac. 511; Swasey *v.* Adair, 83 Cal. 136, 23 Pac. 284; Lackey *v.* Pearson, 101 N. C. 651, 8 S. E. 121; Southern Pac. R. Co. *v.* Stanley, 76 Tex. 418, 13 S. W. 480. *Compare* Dietrich *v.* Rumsey, 40 Ill. 50; Lemon *v.* Stephenson, 40 Ill. 45; Dinkel *v.* Wehle, 67 How. Pr. (N. Y.) 36; Damron *v.* Texas, etc., R. Co., 1 Tex. App. Civ. Cas. § 383; and see also 2 Cent. Dig. tit. "Appeal and Error," § 2053.

Where date of judgment is left blank in the bond it will be sufficiently identified by an allegation, in the petition of appeal, of error in the "final judgment against defendant." Surget *v.* Stanton, 10 La. Ann. 318. So, where the bond sufficiently identifies the judgment by giving the title of the court and case, the amount of judgment, and stating that it was "recovered by the respondent against the above-named appellants on the ——— day of March, 1892," though the day of the month on which it was rendered is not stated. Johnston *v.* King, 83 Wis. 8, 10, 53 N. W. 28.

Failure to specify the term at which the judgment appealed from was rendered has likewise been held to be no ground for dismissing the appeal. Davis *v.* Wakelee, 156 U. S. 680, 15 S. Ct. 555, 39 L. ed. 578; New Orleans Ins. Co. *v.* E. D. Albro Co., 112 U. S. 506, 5 S. Ct. 289, 28 L. ed. 809.

36. **Hence the judgment is misdescribed** if the name of any party is omitted. State *v.* Crawford, 32 La. Ann. 526; Walker's Succession, 32 La. Ann. 525; Morris *v.* Edwards, 1 Tex. App. Civ. Cas. § 525; Kail *v.* Whitmore, 6 Wall. (U. S.) 451, 18 L. ed. 862; and see also 2 Cent. Dig. tit. "Appeal and Error," § 2052.

All the judgment defendants should be named. Dumas *v.* Hunter, 28 Ala. 688; Pittman *v.* Myrick, 16 Fla. 401; Jordan *v.* Terry, 33 Tex. 680; McGarrah *v.* Burney, 4 Tex. 287. But in Herndon *v.* Bremond, 17 Tex. 432 [*followed* in Hodde *v.* Susan, 63 Tex. 307; International, etc., R. Co. *v.* Smith County, 58 Tex. 74], it was held that where the appeal bond stated the title and number of the suit in the court below, and described the judgment accurately in so far as it affected the appellant, the bond was not defective because it omitted

f. Return-Time of Writ. Since the time when a writ of error is returnable need not be recited in a bond conditioned for its successful prosecution, a misrecital in such respect is immaterial.[37]

g. Title and Nature of Proceeding. The title and nature of the action appealed from should be set out in the bond.[38]

6. Execution — a. By Whom — (I) *Appellant and Surety, or Surety Alone.* In some states it seems that appellant, as well as the surety, must sign the bond.[39] The rule in some other states, however, is that appellant himself need not sign the appeal bond.[40]

(II) *Attorney or Agent.* An undertaking on appeal may be executed by a duly authorized agent or attorney.[41] The authority of the agent or attorney

all notice of other defendants against whom judgment was included in the same entry.

Erroneously describing the judgment as in favor of two parties when, in fact, it was rendered in favor of one only, renders the bond defective. Burdine *v.* Mustin, 33 Ala. 634; Willenborg *v.* Murphy, 40 Ill. 46; International, etc., R. Co. *v.* Smith County, 58 Tex. 74.

Reciting a joint decree against two defendants, when it appears from the record that the decree was rendered against one only, renders bond defective. Lemon *v.* Stephenson, 40 Ill. 45.

37. Riggs *v.* State Bank, 11 Ala. 160.

Thus, where an appeal bond recited the time when a judgment was rendered, that an appeal was taken to the "next county court," was itself dated, and in other respects conformable to the statute, it was held sufficient though the time when the court was to sit was not stated. Bancroft *v.* Stanton, 7 Ala. 351.

38. Thibodeaux *v.* Thibodeaux, 45 La. Ann. 1126, 13 So. 805; State *v.* Crawford, 32 La. Ann. 526; Eason *v.* Clark, 2 Yerg. (Tenn.) 521; Whiting *v.* Pettus, 1 Tex. 191; Smith *v.* Walker, 22 Hempst. (U. S.) 289, Fed. Cas. No. 13,123*a*; and see also 2 Cent. Dig. tit. "Appeal and Error," § 2056.

A mistaken indorsement of the title of the case may not, however, render the bond ineffective. Herrlich *v.* McDonald, 72 Cal. 579, 14 Pac. 357.

Where several cases have been consolidated, and a judgment rendered in the consolidated case, the appeal bond should be entitled as in that case. Schlieder *v.* Martinez, 38 La. Ann. 847.

39. Blood *v.* Harvey, 81 Ill. App. 187; Hardaway *v.* Biles, 1 Sm. & M. (Miss.) 657; Drouilhat *v.* Schmidt, (Oreg. 1885) 9 Pac. 67; Rootes *v.* Holliday, 4 Munf. (Va.) 323; Day *v.* Pickett, 4 Munf. (Va.) 104; and see also 2 Cent. Dig. tit. "Appeal and Error," § 2057.

When a reasonable doubt is raised as to the genuineness of the signature of one of two appellants on an appeal bond, the justice of the lower court, to whom the bond is presented for approval, has the right to refuse to approve it. U. S. *v.* Cox, 14 App. Cas. (D. C.) 368.

40. **When signed by the sureties** the bond is considered as having been properly executed.

California.—Sacramento *v.* Dunlap, 14 Cal. 421; Tissot *v.* Darling, 9 Cal. 278.

Colorado.— Cody *v.* Filley, 4 Colo. 342; Byers *v.* Gilmore, 10 Colo. App. 79, 50 Pac. 370.

Georgia.— Pettee *v.* Flewellen, 2 Ga. 236.

Indiana.—Thom *v.* Savage, 1 Blackf. (Ind.) 51; Supreme Council, etc. *v.* Boyle, 15 Ind. App. 342, 44 N. E. 56.

Kentucky.— Harrison *v.* State Bank, 3 J. J. Marsh. (Ky.) 375; Anonymous, Hard. (Ky.) 149.

Louisiana.— Holmes *v.* Tennessee Coal, etc., R. Co., 49 La. Ann. 1465, 22 So. 403; Granier *v.* Louisiana Western R. Co., 42 La. Ann. 880, 8 So. 614.

Maine.— Vallance *v.* Sawyer, 4 Me. 62.

Missouri.— Ober *v.* Pratte, 1 Mo. 8.

New York.— Eldridge *v.* Howell, 4 Paige (N. Y.) 457; North American Coal Co. *v.* Dyett, 4 Paige (N. Y.) 273 [*distinguishing Ex p.* Brooks, 7 Cow. (N. Y.) 428]. *Compare* Matter of King, 2 Edm. Sel. Cas. (N. Y.) 428.

North Carolina.— Walker *v.* Williams, 88 N. C. 7; Cohoon *v.* Morton, 49 N. C. 256.

Ohio.—Johnson *v.* Johnson, 31 Ohio St. 131.

Texas.— McKellar *v.* Peck, 39 Tex. 381; Easton *v.* Wash, (Tex. App. 1890) 16 S. W. 788; Shelton *v.* Wade, 4 Tex. 148, 51 Am. Dec. 722.

Vermont.—Chittenden *v.* Catlin, 2 D. Chipm. (Vt.) 22; Young *v.* Shaw, 1 D. Chipm. (Vt.) 224.

Washington.— Pennsylvania Mortg. Invest. Co. *v.* Gilbert, 18 Wash. 667, 52 Pac. 246; Dahl *v.* Tibbals, 5 Wash. 259, 31 Pac. 868.

Bond should be executed by the person named as surety in the order granting the appeal; if not so executed, the appeal will on motion be dismissed. Shinkell *v.* Letcher, 40 Ill. 48.

Corporation as surety.— A bond on appeal, guaranteed by a corporation authorized by law to become surety on such bonds, must be executed by appellant himself. McGlean *v.* MacKeller, 67 How. Pr. (N. Y.) 273, 6 N. Y. Civ. Proc. 169.

41. *Louisiana.*—Granier *v.* Louisiana Western R. Co., 42 La. Ann. 880, 8 So. 614; Bach *v.* Ballard, 13 La. Ann. 487. See also Barnabé *v.* Snaer, 16 La. Ann. 84.

Massachusetts.—Adams *v.* Robinson, 1 Pick. (Mass.) 461. Under Mass. Pub. Stat. (1882), c. 161, § 104, providing that an appeal bond may be executed by any person other than

should be filed with the officer taking the bond;[42] but, if the authorization of such agent or attorney is questioned, it will be presumed by the appellate court that the court below was satisfied that the agent or attorney was properly constituted as such.[43] Such a bond, however, is at most merely voidable, and not void, and a subsequent ratification under seal will render the bond valid.[44]

b. Manner — (I) *Signature.* Where the obligor signs beneath the condition clause instead of beneath the penalty clause,[45] or signs by making his mark,[46] or signs the justification — his name being mentioned in the body of the bond — the bond may be considered as sufficiently executed by him.[47]

(II) *Seal.* In some states a seal is necessary for the proper execution of an appeal bond.[48] In other states, however, it has been held that an appeal bond creates

the party appealing, when it appears that there is a good reason why the same is not signed by such party appellant, it was held that the fact that such appellant is a town is a good reason why the appeal bond should not be executed in person, but by a selectman of the town. Wellesley *v.* Washburn, 156 Mass. 359, 31 N. E. 8.

Missouri.— Ober *v.* Pratte, 1 Mo. 8.

New York.— *Ex p.* Van Hoesen, 4 Cow. (N. Y.) 505.

North Carolina.—See Rickman *v.* Williams, 32 N. C. 126; Weaver *v.* Parish, 8 N. C. 319 — to the effect that a magistrate who has rendered a judgment on a warrant is not a fit person to execute a bond on behalf of one appealing from such judgment.

Texas.— McKellar *v.* Peck, 39 Tex. 381; Horton *v.* McKeehan, 1 Tex. App. Civ. Cas. § 468.

Washington.— Hill Estate Co. *v.* Whittlesey, 21 Wash. 142, 57 Pac. 345; Pennsylvania Mortg. Invest. Co. *v.* Gilbert, 18 Wash. 667, 52 Pac. 246.

Compare, also, Gordon *v.* Camp, 2 Fla. 23; and Savannah, etc., R. Co. *v.* Clark, 23 Fla. 308, 2 So. 667, holding that an appeal bond purporting to be the bond of the Savannah Railway Co. by its agent Hardaway, and signed "J. M. Hardaway, Agent Savannah, Florida and Western Railway Company," followed by a scroll for a seal, is the bond of the agent and not of appellant, and hence it is insufficient.

Landlord cannot execute bond for his tenant. Armson *v.* Forsyth, 40 Ill. 49, in which case plaintiff in forcible entry and detainer proceedings appealed and his landlord undertook to execute the appeal bond.

When the bond is required to be under seal the agent or attorney must have authority under seal to execute it.

Colorado.— Schofield *v.* Felt, 10 Colo. 146, 14 Pac. 128.

Illinois.— Bragg *v.* Fessenden, 11 Ill. 544.

New Hampshire.— Haydock *v.* Duncan, 40 N. H. 45; Clark *v.* Courser, 29 N. H. 170.

New York.— *Ex p.* Holbrook, 5 Cow. (N. Y.) 35.

Rhode Island.— Bowen *v.* Johnson, 17 R. I. 779, 24 Atl. 830; Murray *v.* Peckam, 15 R. I. 297, 3 Atl. 662.

42. *Ex p.* Van Hoesen, 4 Cow. (N. Y.) 505.

But the omission of an agent to file his power of attorney at the time of executing the bond does not affect the appeal when the power of attorney is produced and the officer who approved the bond swears that at the time of the approval it was exhibited to him. Jackson *v.* Haisly, 27 Fla. 205, 9 So. 648.

43. Sheldon *v.* Reihle, 2 Ill. 519; Carmichael *v.* West Feliciana R. Co., 2 How. (Miss.) 817. *Compare* Schofield *v.* Felt, 10 Colo. 146, 14 Pac. 128.

44. Bragg *v.* Fessenden, 11 Ill. 544; Haydock *v.* Duncan, 40 N. H. 45; Bowen *v.* Johnson, 17 R. I. 779, 24 Atl. 830. See also Clarke *v.* Newport, 5 R. I. 333.

45. Gage County *v.* Fulton, 16 Nebr. 5, 19 N. W. 781.

46. State *v.* Byrd, 93 N. C. 624.

47. Yakima Water, etc., Co. *v.* Hathaway, 18 Wash. 377, 51 Pac. 471.

Where an administrator appeals and the condition of the bond recites that he is administrator, and at the end of his signature to the bond he adds "Adm'r," the court will not hold this an individual bond of the administrator. Beardsley *v.* Hill, 61 Ill. 354.

Where a guaranty company becomes a surety on a bond, the acknowledgment of such undertaking by the president and secretary before a notary public, in the manner usual with acknowledgments by individuals, is insufficient. White *v.* Rintoul, 6 N. Y. Civ. Proc. 259.

Subscribing witnesses.—In Thorpe *v.* Keeler, 18 N. J. L. 251, it was held that a subscribing witness is an ordinary and proper incident to the due execution of an appeal bond, and that a bond without one is defective, and will be dismissed unless appellant and his sureties offer instanter to reëxecute the bond in the presence of one or more witnesses, or to substitute a new bond.

48. Steamboat Lake of the Woods *v.* Shaw, 2 Greene (Iowa) 91; Corbin *v.* Laswell, 48 Mo. App. 626. See also State *v.* Thompson, 49 Mo. 188; St. Louis Dairy Co. *v.* Sauer, 16 Mo. App. 1.

Sealing without signing.— It is not necessary to the validity of an appeal bond which has been sealed by the obligor that it shall be signed by such obligor also. Parks *v.* Hazlerigg, 7 Blackf. (Ind.) 536, 43 Am. Dec. 106.

Two obligors and one seal.— Where an instrument purporting to be an appeal bond contains words of obligation and has a scroll opposite the name of one of the two signers thereto, this is enough, when the instrument is executed by both signers, who contemporaneously verify it by affidavit as their bond.

a valid obligation, even though it has been executed without affixing a seal thereto.[49]

(III) *Revenue Stamp.* A revenue stamp need not be affixed to the certificate of qualification of the sureties on an appeal bond.[50]

c. Material Alterations. When an alteration or interlineation is made in a material part of an undertaking on appeal after its execution and without the authority or consent of the obligors, such undertaking is void, and cannot support the appeal.[51]

7. Approval — a. Necessity.[52] When it is required by statute that the bond shall be approved, its approval is one of the prerequisites necessary for perfecting the appeal.[53]

to make it the bond of both. Canfield *v.* Bates, 13 Cal. 606.

49. Doolittle *v.* Dininny, 31 N. Y. 350; Thompson *v.* Blanchard, 3 N. Y. 335; Fisher *v.* Trevor, 7 Cinc. L. Bul. 322; Boney *v.* Waterhouse, 35 Tex. 178; Russell *v.* McCampbell, 29 Tex. 31.

50. Dawson *v.* McCarty, 21 Wash. 314, 57 Pac. 816, 75 Am. St. Rep. 841, construing the federal war revenue act of 1898, which provided that revenue stamps need not be attached to bonds used in legal proceedings.

Under the federal internal revenue act of 1864 it was decided that an appeal bond to which was affixed the proper revenue stamp was not void because the stamp was not canceled. Goodwine *v.* Wands, 25 Ind. 101.

51. Percy *v.* Miltaudon, 6 La. 584; Bell *v.* Quick, 13 N. J. L. 312; Rockafellar *v.* Rea, 12 N. J. L. 180; Shinn *v.* White, 11 N. J. L. 187; Sutphin *v.* Hardenbergh, 10 N. J. L. 288. See, generally, Alterations of Instruments; and 2 Cent. Dig. tit. "Appeal and Error," § 2058.

Alteration after proper time.— A surreptitious interlineation, made for the purpose of correcting errors, after a motion to dismiss, will be unavailing. Johnson *v.* Clark, 29 La. Ann. 54. So, where the bond was, after the writ of error had been issued in the court below, changed by the erasure of certain words, which erasure altered the character of the bond, it was held that such bond could not support the writ of error. Hart *v.* Mills, 31 Tex. 304. Nor can a bond, executed in blank and delivered to an agent to fill up and make perfect, be altered by such agent after he has filled the blanks and delivered the bond to the proper officer. *Ex p.* Decker, 6 Cow. (N. Y.) 59.

Authorized alteration.— A bond, signed by a surety in blank and delivered to the proper officer to fill up according to law and to fix the sum at his discretion, and which is afterward, within the prescribed time, duly filled up by the officer, is good. Costen's Appeal, 13 Pa. St. 292. So, when a blank in an appeal bond for its amount is filled before the return-day in the presence of the clerk of the court, and with the assent of the surety, the bond is valid. Klotz *v.* Macready, 35 La. Ann. 596.

Without the consent of the sureties, it seems that an undertaking on appeal cannot be amended. Langley *v.* Warner, 1 N. Y. 606, 1 Code Rep. (N. Y.) 111, 3 How. Pr. (N. Y.) 363; Walrath *v.* Klock, 22 N. Y. App. Div. 220, 47 N. Y. Suppl. 1047; Biggert *v.* Nichols, 18 Misc. (N. Y.) 596, 42 N. Y. Suppl. 472. See also O'Dea *v.* Washington County, 3 Nebr. 118; Wilson *v.* Allen, 3 How. Pr. (N. Y.) 369.

52. As to waiver of approval see VII, D, 11, a, (III).

53. *Colorado.*— Orman *v.* Keith, 1 Colo. 81.

Florida.— Hall *v.* Penny, 13 Fla. 593.

Kentucky.— Ford *v.* Com., 3 Dana (Ky.) 46.

Louisiana.— Baker *v.* Schultz, 35 La. Ann. 524; Huppenbauer *v.* Durlin, 23 La. Ann. 739.

Massachusetts.— Fogel *v.* Dussault, 141 Mass. 154, 7 N. E. 17.

Mississippi.— Stebbins *v.* Niles, 13 Sm. & M. (Miss.) 307; Wade *v.* American Colonization Soc., 4 Sm. & M. (Miss.) 670.

New York.— Travis *v.* Travis, 48 Hun (N. Y.) 343, 1 N. Y. Suppl. 357, 15 N. Y. St. 874; Beach *v.* Southworth, 6 Barb. (N. Y.) 173, 1 Code Rep. (N. Y.) 99; Matter of King, 2 Edm. Sel. Cas. (N. Y.) 428; Van Slyke *v.* Schmeck, 10 Paige (N. Y.) 301; Rogers *v.* Paterson, 4 Paige (N. Y.) 450.

See 2 Cent. Dig. tit. "Appeal and Error," § 2060.

Approval at time of appeal.— In Williams *v.* McConico, 27 Ala. 572, it was held that an appeal bond in a probate proceeding, approved by the judge when the appeal was taken, was sufficient. The bond speaks from the time of its filing and approval, and not from the day of its date; and the fact that an appeal was taken on September 10th, and that on such day a bond was approved, rendered the bond sufficient, though it was dated August 13th. Jenkins *v.* Hay, 28 Md. 547.

Approval before appeal.— In Debenture Corp. *v.* Warren, 9 Wash. 312, 37 Pac. 451, it was held that the fact that a bond was approved before the date of taking the appeal was immaterial.

Approval by trial court unnecessary.— In State *v.* Armstrong, 5 Wash. 123, 31 Pac. 427, it was decided that an appeal bond need not be approved by the trial court, as the only remedy for the insufficiency of the sureties was by motion in the supreme court to discharge them.

Clerical error as to date of approval.— Where an appeal was granted on July 22d, and the bond was indorsed as filed on that day, and the order granting the appeal recited the bond as filed and approved that day, it was held that it was no ground for objection

b. By Whom.[54] The undertaking on appeal must be approved by the person designated by law, such person generally being the judge or the clerk of the court;[55] and where it is provided that the bond is to be approved by the judge, he has no power to delegate to the clerk or any other person the power to approve the bond.[56]

c. Manner. In the absence of a statutory requirement that the approval of an appeal bond shall be made in some prescribed form or mode, the approval need not be in explicit terms, but may be inferred from the facts of the transaction.[57]

that, by a clerical error, the bond was indorsed as approved on July 23d. King *v.* Gridley, 69 Mich. 84, 37 N. W. 50. To the same effect see Bass *v.* James, 83 Tex. 110, 18 S. W. 336.

Waiver of approval.— Where a statute requires that the sureties shall be approved by the court, it is competent for the obligee to waive such approval. Irwin *v.* Crook, 17 Colo. 16, 28 Pac. 549.

Withdrawal of approval.—In National Harrow Co. *v.* Hench, 81 Fed. 926, it was held that where a surety on a bond for costs upon appeal had been approved for about a month, it was too late for appellee to move for the withdrawal of the approval.

54. See cases cited *infra*, notes 55, 56; and 2 Cent. Dig. tit. "Appeal and Error," § 2061.

55. Approval by judge.— *Colorado.*— Irwin *v.* Crook, 17 Colo. 16, 28 Pac. 549; Orman *v.* Keith, 1 Colo. 81; Getty *v.* Miller, 10 Colo. App. 331, 51 Pac. 166.

Georgia.— Chapple *v.* Tucker, 110 Ga. 467, 35 S. E. 643.

Illinois.— Henderson *v.* Fitch, 19 Ill. 404.

Indiana.— Midland R. Co. *v.* Wilcox, 111 Ind. 561, 12 N. E. 513; McCloskey *v.* Indianapolis Manufacturers, etc., Union, 87 Ind. 20; Ham *v.* Greve, 41 Ind. 531.

Louisiana.— Perilliat *v.* Fernandez, 16 La. Ann. 192.

Maryland.— Ringgold's Case, 1 Bland (Md.) 5.

Missouri.— Julian *v.* Rogers, 87 Mo. 229.

New York.— Rogers *v.* Paterson, 4 Paige (N. Y.) 450; Bennet *v.* Dodd, 5 Wend. (N. Y.) 79.

Wisconsin.— State *v.* Flint, 19 Wis. 621.

United States.—Anson *v.* Blue Ridge R. Co., 23 How. (U. S.) 1, 16 L. ed. 517; Hudgins *v.* Kemp, 18 How. (U. S.) 530, 15 L. ed. 514.

Approval by court commissioner or justice of supreme court, see Emerson *v.* Atwater, 5 Mich. 34.

Approval by master acting as counselor.— See McLaren *v.* Charrier, 5 Paige (N. Y.) 530, wherein it was held that a master in chancery who acted as a solicitor or counselor in the case, or whose partner had so acted, could not approve the bond on appeal.

Approval by clerk.— *Florida.*— Baars *v.* Creary, 23 Fla. 61, 1 So. 335, holding that though an appeal in a case at law be applied for in term-time, the bond may be approved by the clerk.

Illinois.— People *v.* Leaton, 121 Ill. 666, 13 N. E. 241, holding that under Ill. Rev. Stat. (1874), c. 110, § 68, the clerk may, by order of court, pass upon the sufficiency of the surety offered, but upon no other point in regard to the bond. But, formerly, the court had no authority to refer the question of approval to the clerk. Bowlesville Min., etc., Co. *v.* Pulling, 89 Ill. 58; Abraham *v.* Huntington, 19 Ill. 403. When an appeal, however, is taken from an interlocutory order granting an injunction, the appeal bond must be approved by the clerk of the court from which the appeal is taken, and filing a bond approved by the court below gives the appellate court no jurisdiction. Hartzell *v.* Warren, 77 Ill. App. 274; Schoen *v.* Herzog, 66 Ill. App. 581.

Indiana.— Miller *v.* Burket, 132 Ind. 469, 32 N. E. 309.

Maryland.— Harris *v.* Regester, 70 Md. 109, 16 Atl. 386, holding that a deputy clerk may lawfully approve the bond.

Mississippi.— Eustis *v.* Holmes, 48 Miss. 34, holding that when the clerk grants an appeal in vacation, he is the proper person to approve the bond.

Missouri.— Monett Bank *v.* Moulder, 53 Mo. App. 535, holding that the clerk may approve the bond in vacation. But, formerly, he had no such power. Julian *v.* Rogers, 87 Mo. 229.

Nebraska.— State *v.* Cook, 51 Nebr. 822, 71 N. W. 733.

North Carolina.— Marsh *v.* Cohen, 68 N. C. 283, wherein it was held that the power to revise the action of the clerk in passing upon the sufficiency of the bond to be taken by him exists in the judge, and that the proper mode of bringing the question before the judge is an appeal from the ruling of the clerk.

Rhode Island.— Liscomb *v.* Eldredge, 20 R. I. 335, 38 Atl. 1052.

Execution before clerk.— In Sutton *v.* McCoy, Wright (Ohio) 95, it was decided that though the statute required the bond on appeal to be approved by the clerk, it need not be executed before him. But see Averil *v.* Dickerson, 1 Blackf. (Ind.) 3; Hardin *v.* Owings, 1 Bibb (Ky.) 214, in both of which cases the rule was held to be otherwise.

56. Johnson *v.* Hodges, 24 Ark. 597; Blood *v.* Harvey, 81 Ill. App. 187; Eustis *v.* Holmes, 48 Miss. 34; Parker *v.* Willis, 27 Miss. 766; Pickett *v.* Pickett, 1 How. (Miss.) 267; Haskins *v.* St. Louis, etc., R. Co., 109 U. S. 106, 3 S. Ct. 72, 27 L. ed. 873; O'Reilly *v.* Edrington, 96 U. S. 724, 24 L. ed. 659; Freeman *v.* Clay, 48 Fed. 849, 2 U. S. App. 151, 1 C. C. A. 115.

57. *California.*— People *v.* Harris, 9 Cal. 571.

Illinois.— Illinois Cent. R. Co. *v.* Johnson, 40 Ill. 35.

Indiana.— McCloskey *v.* Indianapolis Manufacturers', etc., Union, 87 Ind. 20. And *compare* Hartlep *v.* Cole, 120 Ind. 247, 22 N. E.

8. Filing — a. Necessity. An undertaking on appeal is not fully executed until it is delivered to the proper officer for filing.[58]

b. Time of Filing — (1) *In General.* In order to perfect the appeal the bond must be filed within the time prescribed by statute or fixed by the order of the court granting the appeal.[59]

130, holding that when a bond which requires the approval of the judge has been properly approved by him, the fact that the clerk assumes to approve the bond by his indorsement does not affect it.

Massachusetts.— Parke *v.* Mabee, 176 Mass. 236, 57 N. E. 355, where the bond was indorsed: "Bond and Surety approved. Bond filed," with the attestation of the clerk.

Michigan.— Maynard *v.* Hoskins, 8 Mich. 260.

Missouri.— But see Monett Bank *v.* Moulder, 53 Mo. App. 535, wherein it was held that, under Mo. Rev. Stat. § 2256, the clerk's approval of a bond filed in vacation must be indorsed upon the bond.

Nebraska.— Asch *v.* Wiley, 16 Nebr. 41, 20 N. W. 21.

New York.— Cullen *v.* Miller, 9 N. Y. Leg. Obs. 62.

Texas.— In Burdett *v.* Marshall, 3 Tex. 24, it was held that the entry upon an appeal bond that it was approved is not a judicial, but a mere clerical, act, and the omission to make entry does not affect the validity of the bond. In Roe *v.* Bridges, (Tex. Civ. App. 1895) 31 S. W. 317, it was held that an appeal bond filed and approved before the trial was not insufficient because it was not approved in writing until after the trial.

Wisconsin.— Bowles *v.* Page, 20 Wis. 309; State *v.* Flint, 19 Wis. 621, to the effect that under Wis. Rev. Stat. c. 117, § 23, the judge's indorsement of approval is unnecessary.

United States.— Silver *v.* Ladd, 6 Wall. (U. S.) 440, 18 L. ed. 828; Davidson *v.* Lanier, 4 Wall. (U. S.) 447, 18 L. ed. 377. See also Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 73 Fed. 314, 19 C. C. A. 477.

See 2 Cent. Dig. tit. "Appeal and Error," § 2063.

For contents of certificate of approval of sureties see Coithe *v.* Crane, 1 Barb. Ch. (N. Y.) 21; Eldridge *v.* Howell, 4 Paige (N. Y.) 457.

So it has been decided that it is a sufficient approval in fact if the officer to whom the duty is intrusted signifies his assent by receiving the bond. Williams *v.* McConico, 25 Ala. 538; Commerce Vault *v.* Hurd, 73 Ill. App. 107; Bowles *v.* Page, 20 Wis. 309. And where the clerk stated that he would approve the bond unless objections were made, and none were made within the time in which a bond could be given, the appeal will not be dismissed on the ground that the bond was not approved. Broadwell *v.* Cody, 3 Cinc. L. Bul. 855.

58. *Colorado.*—Irwin *v.* Crook, 17 Colo. 16, 28 Pac. 549.

Illinois.— Greve *v.* Goodson, 142 Ill. 355, 31 N. E. 677; John F. Alles Plumbing Co. *v.* Alles, 67 Ill. App. 252.

Louisiana.— Littleton *v.* Pratt, 10 La. Ann. 487.

Maine.— Knight *v.* Beam, 18 Me. 219.

Nevada.— State *v.* Alta Silver Min. Co., 24 Nev. 230, 51 Pac. 982.

New York.— Webster *v.* Stephens, 3 Abb. Pr. (N. Y.) 227, 5 Duer (N. Y.) 682.

See 2 Cent. Dig. tit. "Appeal and Error," § 2064 *et seq.*

Delivery is sufficiently shown by the official indorsement of the clerk upon it. Byers *v.* Gilmore, 10 Colo. App. 79, 50 Pac. 370. But see Allen *v.* Rhodebaugh, Wright (Ohio) 322; Sutton *v.* McCoy, Wright (Ohio) 95 — to the effect that when the surety has been approved, and the bond seasonably filed, the appeal is perfected though the bond is not indorsed "filed." So, where a surrogate retains the appeal and bond, and puts them in a drawer in his office, marked as left by an attorney on a certain day, it is a sufficient filing. Cullen *v.* Miller, 9 N. Y. Leg. Obs. 62.

Delivery of incomplete bond.— An appeal bond, signed by four sureties, who gave the clerk to understand, at the time of the execution, that a fifth surety, whose name was contained in the bond, was to sign also, may be considered as delivered absolutely, and not as an escrow. Riley *v.* Johnson, 10 Ga. 414.

Neglect of the clerk to file the bond, which he certifies as part of the record, cannot prejudice appellant, to whom the neglect cannot be imputed. Henderson *v.* Trousdale, 10 La. Ann. 548. See also Beardsley *v.* Smith, 61 Ill. App. 340.

Under Cal. Code Civ. Proc. § 953, providing that the clerk or attorneys shall certify that an undertaking on appeal "in due form" has been filed, is not complied with by a general certificate that the record is correct. Jones *v.* Iverson, (Cal. 1892) 31 Pac. 625. To the same effect see Winder *v.* Hendrick, 54 Cal. 275; Murphy *v.* Northern Pac. R. Co., 22 Mont. 577, 57 Pac. 278.

59. *Alabama.*— Mays *v.* King, 28 Ala. 690.

Arizona.— Sutherland *v.* Putnam, (Ariz. 1890) 24 Pac. 320; Ruff *v.* Hand, (Ariz. 1900) 24 Pac. 257.

California.— Robinson *v.* Templar Lodge No. 17, etc., 114 Cal. 41, 45 Pac. 998; Perkins *v.* Cooper, 87 Cal. 241, 25 Pac. 411.

Colorado.— Reeves *v.* Best, 13 Colo. App. 225, 56 Pac. 985; Allenspach *v.* Wagner, 9 Colo. 127, 10 Pac. 802.

Connecticut.— Ripley *v.* Merchants' Nat. Bank, 41 Conn. 187; Barnum's Appeal, 33 Conn. 122.

Florida.— Brown *v.* Wheeler, etc., Mfg. Co., 25 Fla. 361, 5 So. 673.

Idaho.— Shissler *v.* Crooks, 1 Ida. 369.

Illinois.—Wormley *v.* Wormley, 96 Ill. 129; Case *v.* Spiegel, 44 Ill. App. 588.

(II) *Computation.*[60] In some jurisdictions, the period for filing the bond counts from the day of the rendition of the judgment.[61] In others, it counts from the day on which the term of court at which the judgment was rendered was adjourned.[62] In computing the time for filing a bond, the day on which the act

Indiana.— Lindley *v.* Darnall, 24 Ind. App. 399, 56 N. E. 861; Merryman *v.* Diffenbaugh, (Ind. App. 1894) 38 N. E. 72.

Louisiana.— Glover *v.* Taylor, 38 La. Ann. 634; State *v.* Monroe, 37 La. Ann. 113.

Maine.— Knight *v.* Bean, 19 Me. 259.

Maryland.— Willis *v.* Bryant, 22 Md. 373.

Michigan.— Canfield *v.* The Brig City of Erie, 21 Mich. 160; Emerson *v.* Atwater, 5 Mich. 34.

Mississippi.— Holiman *v.* Dibrell, 51 Miss. 96; Coffman *v.* Davanay, 2 How. (Miss.) 854.

Missouri.— Long *v.* Dismer, 72 Mo. 655; McDonald *v.* Cash, 45 Mo. App. 66.

Montana.— Hines *v.* Carl, 22 Mont. 501, 57 Pac. 88; Pardee *v.* Murray, 4 Mont. 35, 1 Pac. 737.

Nebraska.— Hier *v.* Anheuser-Busch Brewing Assoc., 52 Nebr. 144, 71 N. W. 1005; Malick *v.* McDermot, 25 Nebr. 267, 41 N. W. 157.

Nevada.— Spafford *v.* White River Valley Land, etc., Co., 24 Nev. 184, 51 Pac. 115; Reese Gold, etc., Min. Co. *v.* Rye Patch Consol. Mill, etc., Co., 15 Nev. 341.

New Jersey.— Stille *v.* Wood, 1 N. J. L. 187.

New York.— Matter of Dumesnil, 47 N. Y. 677; Murray *v.* Hathaway, 54 Hun (N. Y.) 633, 7 N. Y. Suppl. 915, 26 N. Y. St. 53; Sheldon *v.* Barnard, 3 How. Pr. (N. Y.) 423; Patullo's Goods, Tuck. Surr. (N. Y.) 106.

North Carolina.— Boyden *v.* Williams, 92 N. C. 546; McCanless *v.* Reynolds, 90 N. C. 648, Clark's Code Civ. Proc. N. C. (1900), pp. 786, 787, and cases cited.

Ohio.—Steinbarger *v.* Steinbarger, 19 Ohio 106.

Oregon.— Northern Pac. Terminal Co. *v.* Lowenberg, 11 Oreg. 286, 3 Pac. 683; Simison *v.* Simison, 9 Oreg. 335.

Pennsylvania.— Page *v.* J. C. McNaughton Co., 2 Pa. Super. Ct. 519.

South Dakota.— McConnell *v.* Spicker, 13 S. D. 406, 83 N. W. 435.

Tennessee.— Lillard *v.* Mitchell, (Tenn. Ch. 1896) 37 S. W. 702; *Ex p.* Ricks, 7 Heisk. (Tenn.) 364.

Texas.— Mauldin *v.* Southern Pac. R. Co., 92 Tex. 267, 47 S. W. 964; Smithwick *v.* Kelly, 79 Tex. 564, 15 S. W. 486.

Vermont.— *Re* Bodwell, 66 Vt. 231, 28 Atl. 989; Lambert *v.* Merrill, 56 Vt. 464.

Virginia.— Bull *v.* Evans, 96 Va. 1, 30 S. E. 468; Pace *v.* Ficklin, 76 Va. 292.

Washington.— Cambridge First Nat. Bank *v.* Hatfield, 20 Wash. 224, 54 Pac. 1135, 55 Pac. 932; Ramage *v.* Littlejohn, 16 Wash. 702, 47 Pac. 888.

Wisconsin.— Perkins *v.* Shadbolt, 44 Wis. 574.

United States.— Beardsley *v.* Arkansas, etc., R. Co., 158 U. S. 123, 15 S. Ct. 786, 39 L. ed. 919; Wickelman *v.* A. B. Dick Co., 85 Fed. 851, 57 U. S. App. 196, 29 C. C. A. 436; Killian *v.* Clark, 111 U. S. 784, 4 S. Ct. 700, 28 L. ed. 599. *Compare* Edmonson *v.* Bloomshire, 7 Wall. (U. S.) 306, 19 L. ed. 91.

See 2 Cent. Dig. tit. "Appeal and Error," § 2066 *et seq.*

Effect of delay in filing.— Caused by adverse party, see Reed *v.* Leffingwell, 30 Mo. 543. Caused by clerk's absence, see Jones *v.* Asheville, 114 N. C. 620, 19 S. E. 631; Jones *v.* Wilson, 103 N. C. 13, 9 S. E. 580; Harrison *v.* Hoff, 102 N. C. 25, 8 S. E. 887.

Filing nunc pro tunc.— The usual rule is that where a party fails to file a bond on appeal within the time allowed by statute or fixed by the court, he cannot be permitted to file such bond *nunc pro tunc.* Brown *v.* Hanley, 2 Ida. 950, 28 Pac. 425; Gorski *v.* Featherstone, 55 Ill. App. 368; Ettelson *v.* Jacobs, 40 Ill. App. 427; Drinkwine *v.* Eau Claire, 83 Wis. 428, 53 N. W. 673. *Compare* Mills *v.* Thursby, 11 How. Pr. (N. Y.) 129; and Brobst *v.* Brobst, 2 Wall. (U. S.) 96, 17 L. ed. 905. See Gilbough *v.* Stahl Bldg. Co., 91 Tex. 621, 45 S. W. 385, where it appears that the bond was filed *nunc pro tunc* under stipulation of the parties.

Reasonable time.— Under the rule that an appeal bond may be filed within a reasonable time after taking the appeal, a bond filed within a month therefrom is in time. Schenck *v.* Diamond Match Co., 73 Fed. 22, 39 U. S. App. 191, 19 C. C. A. 352.

Under Cal. Code Civ. Proc. § 946, the order of the court dispensing with the security on appeal must be made within the time allowed for filing the bond. Matter of Skerrett, 80 Cal. 62, 22 Pac. 85.

As to waiver of time of filing see *infra,* VII, D, 11, a, (IV).

60. See cases cited *infra,* notes 61–63; and 2 Cent. Dig. tit. "Appeal and Error," § 2067.

61. Carson *v.* Merle, 4 Ill. 168; Brainard *v.* Norton, 14 Ill. App. 643; Merryman *v.* Diffenbaugh, (Ind. App. 1894) 38 N. E. 72; Davis *v.* Davis, 27 Nebr. 859, 44 N. W. 40; Jones *v.* Collins, 70 Tex. 752, 8 S. W. 681; San Antonio, etc., R. Co. *v.* Sale, (Tex. Civ. App. 1895) 31 S. W. 325.

Judgment becomes final on the order granting or refusing a motion for new trial, within the rule that the bond must be filed within ten days after final judgment. Missouri Pac. R. Co. *v.* Houston Flour Mills Co., 2 Tex. App. Civ. Cas. § 573.

62. Chamblee *v.* Baker, 95 N. C. 98; Turrentine *v.* Richmond R. Co., 92 N. C. 642; Harris *v.* Gest, 4 Ohio St. 469; Landon *v.* Reid, 10 Ohio 202; Morgan *v.* Stittigan, 10 West. L. J. 74, 1 Ohio Dec. 447.

Judgment rendered out of term.— Where the record did not show on what day the judgment appealed from was rendered, it having been rendered out of term by consent, an ap-

was done, and from which the time is to be computed, must be excluded from the count.[63]

(III) *Extension of Time.* In some jurisdictions, the time for filing an undertaking on appeal may, in a proper case, be extended by the court.[64]

(IV) *Premature Filing.* The general rule seems to be that if the bond or undertaking is filed before the notice of the appeal is filed or served, the appeal must be dismissed.[65]

9. Service. It is provided by statute in some jurisdictions that the undertaking on appeal, or a copy thereof, must be served upon the adverse party or his attorney.[66]

peal bond filed on the same day that the facts were found, the case on appeal filed, and the amount of the bond fixed, was held to have been given in time. Gwathney *v.* Savage, 101 N. C. 103, 7 S. E. 661.

63. First day excluded.— Hax *v.* Leis, 1 Colo. 171; McKinley *v.* Chapman, 37 Nebr. 378, 55 N. W. 882; Bushong *v.* Graham, 4 Ohio Cir. Ct. 138; Bach *v.* Ginacchio, 1 Tex. App. Civ. Cas. § 1315.

Sunday is excluded when it is the last day. Brainard *v.* Norton, 14 Ill. App. 643. To the same effect see West *v.* West, 20 R. I. 464, 40 Atl. 6. But see Nickles *v.* Kendrick, 76 Miss. 334, 24 So. 534.

64. Pennsylvania Mortg. Trust Co. *v.* Elliott, 19 Colo. 394, 35 Pac. 914; Lusk *v.* Kershow, 17 Colo. 481, 30 Pac. 62; Plotke *v.* Chicago Title, etc., Co., 175 Ill. 234, 51 N. E. 754 [*overruling* McGowan *v.* Duff, 41 Ill. App. 57]; Pardridge *v.* Morgenthau, 157 Ill. 395, 42 N. E. 74.

In California, it has been expressly decided that the court has no power to extend this time. Gordon *v.* Wansey, 19 Cal. 82; Elliott *v.* Chapman, 15 Cal. 383.

Computation of extension.— Where, after the time for filing an appeal bond has expired, the court gives additional time, such time is computed from the day it is allowed, and not from the day of such expiration. Plotke *v.* Chicago Title, etc., Co., 175 Ill. 234, 51 N. E. 754.

Granting an extension is a judicial act which can only be performed by the judge in term-time, and when sitting as a court. Pardridge *v.* Morgenthau, 157 Ill. 395, 42 N. E. 74; Marseilles *v.* Howland, 136 Ill. 81, 26 N. E. 495; Hawes *v.* People, 129 Ill. 123, 21 N. E. 777.

Notice necessary.— When appellee has no notice of an application for an extension of time to file a bond on appeal from the county court to the district court, an order extending the time is void, and a motion will lie to dismiss the appeal. Reeves *v.* Best, 13 Colo. App. 225, 56 Pac. 985.

Time extended for diligence.— Appellants who have acted in good faith, and with fair diligence in their efforts to complete and file a proper appeal bond, will be permitted to file the perfected bond out of time. Nottingham *v.* McKendrick, (Oreg. 1899) 57 Pac. 195. See also Tyson *v.* Tyson, 94 Wis. 225, 68 N. W. 1015, where the appeal was from a judgment against infants.

The erroneous extension of the time does not invalidate the appeal if the undertaking is in fact filed within the proper time. Carmichael *v.* School Lands, 3 How. (Miss.) 84.

Form of application to file bond after expiration of time in which it should have been filed is set out in Richardson *v.* Debnam, 75 N. C. 390.

65. *California.*— Little *v.* Jacks, 68 Cal. 343, 8 Pac. 856, 9 Pac. 264, 11 Pac. 128. See also Clarke *v.* Mohr, 125 Cal. 540, 58 Pac. 176.

Colorado.— Alvord *v.* McGauhy, 4 Colo. 97.

Idaho.— Wilson *v.* Bartlett, (Ida. 1900) 62 Pac. 415; Clark *v.* Lowenberg, 1 Ida. 654.

Illinois.— See Atwood *v.* Knowlson, 91 Ill. App. 265.

Nevada.— Reese Gold, etc., Min. Co. *v.* Rye Patch Consol. Mill, etc., Co., 15 Nev. 341.

New York.— Forrest *v.* Havens, 38 N. Y. 469.

Washington.— Laurendeau *v.* Fugelli, 16 Wash. 367, 47 Pac. 759. But *compare* Runyan *v.* Russell, 3 Wash. 665, 29 Pac. 348, to the effect that a bond prematurely given is only defective, and subject to amendment.

See 2 Cent. Dig. tit. "Appeal and Error," § 2069.

Before judgment.— A bond cannot be given till after judgment rendered or decree made. Wilson *v.* Holeman, 2 Ohio 253.

Before order granted.— An appeal will not be dismissed where the bond was furnished, before the order of appeal was granted, for an amount corresponding with that fixed in the order. Le Blanc *v.* Rougeau, 39 La. Ann. 230, 1 So. 420.

Effect of refiling at the proper time see Pierce *v.* Manning, 1 S. D. 306, 47 N. W. 295.

Where, by excusable mistake, the undertaking was filed before notice of the appeal was served, a motion for leave to file an amended undertaking may be allowed on terms. Hawthorn *v.* East Portland, 12 Oreg. 210, 6 Pac. 685.

66. Wick *v.* Ft. Plain, etc., R. Co., 21 Misc. (N. Y.) 718, 49 N. Y. Suppl. 334; Raymond *v.* Richmond, (N. Y. 1879) 19 Alb. L. J. 240. See Robeson *v.* Lewis, 64 N. C. 734; Clark's Code Civ. Proc. N. C. (1900), § 559; McConnell *v.* Spicker, 13 S. D. 406, 83 N. W. 435; Mather *v.* Darst, 11 S. D. 480, 78 N. W. 954; Maxwell *v.* Wessels, 7 Wis. 103; and see 2 Cent. Dig. tit. "Appeal and Error," § 2070.

Under S. D. Comp. Laws, § 5321, it has been decided that service of the undertaking need

10. Amendment or New Bond — a. In General. It is generally provided by statutes regulating appeals that when an appeal bond is defective or insufficient as to parties, as to sureties, as to amount and conditions, as to formal requisites and recitals, or by reason of clerical errors, it may be amended or a new bond given in lieu thereof.[67] When, however, the appeal bond, because of radical defects

not be made on the clerk. Tolerton, etc., Co. *v.* Casperson, 7 S. D. 206, 63 N. W. 908.

67. Right to amend.— See the following cases:

California.— Jarman *v.* Rea, 129 Cal. 157, 61 Pac. 790; Duncan *v.* Times-Mirror Co., 109 Cal. 602, 42 Pac. 147.

Colorado.— Schofield *v.* Felt, 10 Colo. 146, 14 Pac. 128; Jefferson County School Dist. No. 8 *v.* Erskine, 1 Colo. 367.

Georgia.— Burkhalter *v.* Bullock, 18 Ga. 371; Seymore *v.* Howard, 15 Ga. 110.

Illinois.— Horner *v.* Goe, 64 Ill. 178; Wear *v.* Killeen, 38 Ill. 259.

Indiana.— Humble *v.* Williams, 4 Blackf. (Ind.) 473; McCall *v.* Trevor, 4 Blackf. (Ind.) 496.

Kentucky.— Ford *v.* Com., 3 Dana (Ky.) 46; Bates *v.* Courtney, 1 Dana (Ky.) 145.

Michigan.— Cameron *v.* Adams, 31 Mich. 71; Torrent *v.* Muskegon Booming Co., 21 Mich. 159.

Mississippi.— James *v.* Woods, 65 Miss. 528, 5 So. 106.

Missouri.— State *v.* Thompson, 81 Mo. 163.

Montana.—Coleman *v.* Perry, 24 Mont. 237, 61 Pac. 129; Hill *v.* Cassidy, 24 Mont. 108, 60 Pac. 811.

Nebraska.— Chase *v.* Omaha L. & T. Co., 56 Nebr. 358, 76 N. W. 896; Galligher *v.* Wolf, 47 Nebr. 589, 66 N. W. 645.

New Jersey.—Watson *v.* Marple, 18 N. J. L. 8; Robbins *v.* Bonnel, 16 N. J. L. 234.

New York.— Foster *v.* Foster, 7 Paige (N. Y.) 48.

North Carolina.— Robeson *v.* Lewis, 64 N. C. 734.

Ohio.— Reformed Presb. Church *v.* Nelson, 35 Ohio St. 638; Saterlee *v.* Stevens, 11 Ohio 420.

Oregon.— Mendenhall *v.* Elwert, 36 Oreg. 375, 59 Pac. 22; Elwert *v.* Norton, 34 Oreg. 567, 51 Pac. 1097, 59 Pac. 1118.

Pennsylvania.— Koenig *v.* Bauer, 57 Pa. St. 168.

Texas.— Decatur First Nat. Bank *v.* Preston Nat. Bank, 85 Tex. 560, 22 S. W. 579, 3 Tex. Civ. App. 545, 22 S. W. 1048, 24 S. W. 668; George *v.* Lutz, 35 Tex. 694.

Washington.— Miller *v.* Vermurie, 7 Wash. 386, 34 Pac. 1108, 35 Pac. 600.

Wisconsin.— Stolze *v.* Manitowoc Terminal Co., 100 Wis. 208, 75 N. W. 987.

Canada.— Montreal Cotton Co. *v.* Salaberry, (Quebec) 2 Leg. N. 338, 9 Rev. Leg. 551; Marshall *v.* McCaffrey, 7 Rev. Leg. 575.

See 2 Cent. Dig. tit. "Appeal and Error," § 2077.

Defects as to amount and condition.— See the following cases:

Montana.— Woodman *v.* Calkins, 12 Mont. 456, 31 Pac. 63.

New York.— O'Sullivan *v.* Connors, 22 Hun (N. Y.) 137; Van Slyke *v.* Schmeck, 10 Paige (N. Y.) 301.

Ohio.— Johnson *v.* Johnson, 31 Ohio St. 131; Winterfeldt's Appeal, 28 Cinc. L. Bul. 226.

Texas.— Long *v.* Smith, 39 Tex. 160; Shelton *v.* Wade, 4 Tex. 148, 51 Am. Dec. 722; Corley *v.* Renz, (Tex. Civ. App. 1894) 25 S. W. 1130.

United States.—Roberts *v.* Cooper, 19 How. (U. S.) 373, 15 L. ed. 687.

See 2 Cent. Dig. tit. "Appeal and Error," § 2080.

In Louisiana, if the undertaking is not executed for the amount named by the judge in granting a devolutive appeal, the appeal will be dismissed. Beaird *v.* Russ, 32 La. Ann. 304; Burton *v.* Sheriff, 9 La. Ann. 158; Slatter *v.* Commercial, etc., Bank, 12 Rob. (La.) 187; Beasley *v.* Allen, 9 Rob. (La.) 39; Rightor *v.* Phelps, 1 Rob. (La.) 325; Glaze *v.* Russell, 5 Mart. N. S. (La.) 237.

Defects as to formal requisites and recitals. — See the following cases:

Alabama.— Thompson *v.* Campbell, 52 Ala. 583; Alexander *v.* Rea, 50 Ala. 64.

California.— Butler *v.* Ashworth, 100 Cal. 334, 34 Pac. 780.

Illinois.— Winfield *v.* Moffatt, 42 Ill. 47; Pacific Express Co. *v.* Hauptman, 11 Ill. App. 367.

Michigan.— McClintock *v.* Laing, 19 Mich. 300.

Nebraska.— Jacobs *v.* Morrow, 21 Nebr. 233, 31 N. W. 739.

New Jersey.— Freas *v.* Jones, 16 N. J. L. 358.

New York.— Ridabock *v.* Levy, 8 Paige (N. Y.) 197, 35 Am. Dec. 682; People *v.* Herkimer C. Pl., 4 Wend. (N. Y.) 206.

Ohio.—Germania Bldg., etc., Assoc. *v.* Kern, 4 Ohio Cir. Ct. 35; Watts *v.* Shewell, 31 Ohio St. 331.

Utah.— Almy *v.* Raybould, 2 Utah 277.

United States.— Chicago Dollar Directory Co. *v.* Chicago Directory Co., 65 Fed. 463, 24 U. S. App. 525, 13 C. C. A. 8.

See 2 Cent. Dig. tit. "Appeal and Error," § 2081.

Defects as to parties.— See the following cases:

Colorado.— Standley *v.* Hendrie Mfg. Co., 25 Colo. 376, 55 Pac. 723; Wheeler *v.* Kuhns, 9 Colo. 196, 11 Pac. 97.

Illinois.— Kirkpatrick *v.* Cooper, 89 Ill. 210.

Indiana.— Bennett *v.* Seibert, 10 Ind. App. 369, 35 N. E. 35, 37 N. E. 1071.

Missouri.— Smith *v.* Keenan, 14 Mo. 529.

New York.— Matter of King, 2 Edm. Sel. Cas. (N. Y.) 428.

either in matters of form or in matters of substance, is absolutely void, it

Ohio.— Ireland *v.* Ireland, 11 Ohio Cir. Ct. 565, 5 Ohio Cir. Dec. 277; White *v.* Moerlidge, 7 Ohio Cir. Ct. 348.

Texas.— Wadsworth *v.* Cardwell, 14 Tex. Civ. App. 359, 37 S. W. 367.

United States.— Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 73 Fed. 314, 19 C. C. A. 477.

See 2 Cent. Dig. tit. "Appeal and Error," § 2078.

Defects as to sureties.— See the following cases:

California.— Bay City Bldg., etc., Assoc. *v.* Broad, 128 Cal. 670, 61 Pac. 368.

Florida.— Nash *v.* Haycraft, 34 Fla. 449, 16 So. 324.

Georgia.— Thomas *v.* Georgia R., etc., Co., 38 Ga. 222; Eufaula Home Ins. Co. *v.* Plant, 36 Ga. 623.

Illinois.— Zuckermann *v.* Hawes, 146 Ill. 59, 34 N. E. 479; Winfield *v.* Moffatt, 42 Ill. 47.

Michigan.— Beebe *v.* Young, 13 Mich. 221.

Nebraska.— Casey *v.* Peebles, 13 Nebr. 7, 12 N. W. 840.

New York.— Parks *v.* Murray, 109 N. Y. 646, 16 N. E. 485, 14 N. Y. St. 919; Dering *v.* Metcale, 72 N. Y. 613; Elson *v.* Murray, 27 Hun (N. Y.) 536; Wheeler *v.* Millar, 61 How. Pr. (N. Y.) 396; Hardt *v.* Schulting, 59 How. Pr. (N. Y.) 353, 21 Hun (N. Y.) 618.

North Carolina.— McDowell *v.* Bradley, 30 N. C. 92; Flemming *v.* Williams, 3 N. C. 602.

Ohio.— Geier *v.* Metropolitan L. Ins. Co., 7 Ohio N. P. 381, 5 Ohio Dec. 156; Hays *v.* Rush, 5 Cinc. L. Bul. 328.

Oregon.— Skinner *v.* Lewis, (Oreg. 1900) 62 Pac. 523; Matlock *v.* Wheeler, 29 Oreg. 64, 40 Pac. 5, 43 Pac. 867.

Pennsylvania.—Kerr *v.* Martin, 122 Pa. St. 436, 15 Atl. 860; Hummer *v.* Ephrata School Dist., 10 Phila. (Pa.) 494, 31 Leg. Int. (Pa.) 79; Short *v.* Rudolph, 1 Pittsb. (Pa.) 50.

South Dakota.— Skinner *v.* Holt, 9 S. D. 427, 69 N. W. 595, 62 Am. St. Rep. 878; Tolerton, etc., Co. *v.* Casperson, 7 S. D. 206, 63 N. W. 908.

Texas.—Riverside Lumber Co. *v* Lee, 7 Tex. Civ App. 522, 27 S. W. 161.

Washington.— Spurlock *v.* Port Townsend Southern R. Co., 12 Wash. 34, 40 Pac. 420; Maney *v.* Hart, 11 Wash. 67, 39 Pac. 268.

Wisconsin.—Johnston *v.* Northwestern Live Stock Ins. Co., 107 Wis. 337, 83 N. W. 641; Helden *v.* Helden, 9 Wis. 557.

United States.— National Harrow Co. *v.* Hench, 81 Fed. 926.

See 2 Cent. Dig. tit. "Appeal and Error," § 2079.

In case of the insolvency of surety, see Williams *v.* Williams, 19 Colo. 19, 34 Pac. 285; Booten *v.* Empire State Bank, 67 Ga. 358; Midland R. Co. *v.* Wilcox, 111 Ind. 561, 12 N. E. 513; Benton *v.* Mahan, 27 La. Ann. 649; Mahon *v.* Moon, 99 N. Y. 625, 1 N. E. 305. See also Ouimet *v.* Desjardins, 3 Leg. N. 108; Lumsden *v.* Davis, 10 Ont. Pr. 10.

Where a surety disposes of his property pending the appeal, the appellant cannot be required to file a new bond, in the absence of statutory authorization to that effect. Macomber *v.* Conradt, (Cal. 1894) 37 Pac. 382.

Clerical error.— See Billings *v.* Roadhouse, 5 Cal. 71. In Dunlap *v.* Price, 10 La. Ann. 155, it was held that the insertion, by a clerical error, of the names of the obligors in an appeal bond as obligees will render the bond void, and hence no correction thereof can be made.

Bond defective because lacking the approval of the proper officer may be amended. Travis *v.* Travis, 48 Hun (N. Y.) 343, 1 N. Y. Suppl. 357, 15 N. Y. St. 874; Beech *v.* Southworth, 1 Code Rep. (N. Y.) 99. But in Orman *v.* Keith, 1 Colo. 81, it was held otherwise.

Negligence of clerk.— The general rule seems to be that if an appeal bond is defective because of the negligence or carelessness of the clerk or officer who prepared it, the appellants should be allowed to correct the error without prejudice to their rights. Hooks *v.* Stamper, 18 Ga. 471; Hargis *v.* Pearce, 7 Bush (Ky.) 234; Manier *v.* Lindsey, 3 Bush (Ky.) 94; Foster *v.* Foster, 7 Paige (N. Y.) 48. *Aliter* in Louisiana. Green *v.* Bowen, 15 La. Ann. 173; Crawford *v.* Alexander, 14 La. Ann. 708.

New bond for second appeal.— A bond, given on an appeal which is not prosecuted or is dismissed, will not support a second appeal in the same cause. A new bond must be given. Lavigne *v.* May, 2 Mart. N. S. (La.) 628; Spence *v.* Tapscott, 93 N. C. 250; Stoner *v.* Spencer, 32 Tex. 653; and see 2 Cent. Dig. tit. "Appeal and Error," § 2088.

New bond must be offered.— In Cole *v.* Wayne Cir. Judge, 106 Mich. 692, 64 N. W. 741, construing 2 How. Anno. Stat. Mich. §§ 7018, 7020, it was held that appellant must offer to substitute a new bond.

Sufficient excuse necessary.— In De Lashmutt *v.* Sellwood, 10 Oreg. 51, it was held that leave to file a new undertaking will not be granted without a sufficient excuse for an omission or mistake in the original bond being shown. To the same effect see Pencinse *v.* Burton, 9 Oreg. 178.

Want of a stamp on the bond, when such a stamp is required by law, cannot be cured by an order in the appellate court allowing an application to amend by filing a new bond properly stamped. Tipton *v.* Cordova, 1 N. M. 383.

Under Wash. Laws (1893), p. 125, it has been held that only one new bond should be allowed. State *v.* Chapman, 17 Wash. 109, 49 Pac. 224.

Withdrawal of first bond.— The supreme court will not permit the withdrawal of an appeal bond given, as was supposed, as a stay as well as an appeal bond, where, after its insufficiency as a stay bond is determined, a new appeal and stay bond is filed. Watson *v.* Noonday Min. Co., 37 Oreg. 287, 58 Pac. 36, 60 Pac. 994.

cannot be amended or corrected, nor in any such case can a new or other bond be given in its place.[68]

b. Where Bond Has Not Been Filed in Time. The failure to file the bond within the required time is not, in most jurisdictions, such a defect as can be amended or remedied by filing a bond after the expiration of the time.[69]

c. Where No Bond Has Been Filed. In most jurisdictions, as has been previously stated, when no bond has been filed, the appeal must be dismissed; and statutes allowing bonds to be amended or new bonds filed do not usually reach the case of such an omission.[70]

d. When Bond Must Be Amended or New Bond Filed. The time when, and the court in which, defective appeal bonds can be amended or new bonds filed in lieu thereof depend entirely upon the provisions of the statutes and rules of court regulating appellate proceedings.[71]

68. *California.*— Matter of Heydenfeldt, 119 Cal. 346, 51 Pac. 543; Pacific Paving Co. *v.* Bolton, 89 Cal. 154, 26 Pac. 650; Home, etc., Associates *v.* Wilkins, 71 Cal. 626, 12 Pac. 799.

Georgia.— Benson *v.* Shines, 107 Ga. 406, 33 S. E. 439.

Illinois.— Fay *v.* Seator, 88 Ill. App. 419; Western Plaster Works *v.* Lonergan, 85 Ill. App. 530.

Kansas.— St. Louis, etc., R. Co. *v.* Morse, 50 Kan. 99, 31 Pac. 676.

Montana.— Hill *v.* Cassidy, 24 Mont. 108, 60 Pac. 811.

Rhode Island.— Vaill *v.* New Shoreham, 18 R. I. 405, 28 Atl. 344.

South Dakota.— Coburn *v.* Brown County, 10 S. D. 552, 74 N. W. 1026.

Texas.— Long *v.* Smith, 39 Tex. 160; Hollis *v.* Border, 10 Tex. 277.

Utah.— Larson *v.* Utah, etc., R. Co., (Utah 1888) 19 Pac. 196.

Washington.— Erickson *v.* Erickson, 11 Wash. 76, 39 Pac. 241.

See 2 Cent. Dig. tit. "Appeal and Error," § 2077 *et seq.*

69. *Missouri.*— Green *v.* Castello, 35 Mo. App. 127. See also Brown *v.* St. Louis, etc., R. Co., 83 Mo. 478.

New Jersey.— Delaney *v.* Burckle, 57 N. J. L. 323, 30 Atl. 809.

Oregon.— Canyon Road Co. *v.* Lawrence, 3 Oreg. 519.

Texas.— Uvalde County *v.* Uvalde, (Tex. Civ. App. 1895) 31 S. W. 327; Converse *v.* Trapp, (Tex. Civ. App. 1895) 29 S. W. 415.

Utah.— Cook *v.* Oregon Short Line, etc., R. Co., 7 Utah 416, 27 Pac. 5.

Compare Stetson *v.* Corinna, 44 Me. 29; and see *supra*, VII, D, 8, 9.

70. *Alabama.*— See Carey *v.* McDougald, 25 Ala. 109.

California.— Duffy *v.* Greenebaum, 72 Cal. 157, 12 Pac. 74, 13 Pac. 323.

Colorado.— Hennessey *v.* Reed, 15 Colo. App. 56, 60 Pac. 955; Fuller *v.* Fuller, 7 Colo. App. 555, 44 Pac. 72.

Illinois.— Tedrick *v.* Wells, 152 Ill. 214, 38 N. E. 625.

Michigan.— Cavell *v.* Mosely, 15 Mich. 514 (changed by statute).

New York.— Nelson *v.* Tenny, 113 N. Y. 616, 20 N. E. 875, 22 N. Y. St. 992.

North Carolina.— Newman *v.* Newman, 5 N. C. 178.

Oregon.— Cook *v.* Albina, 20 Oreg. 190, 25 Pac. 386.

Tennessee.— Carter *v.* McBroom, 85 Tenn. 377, 2 S. W. 803.

See 2 Cent. Dig. tit. "Appeal and Error," § 2086; and *supra*, VII, D, 1.

In Mississippi, under Miss. Code, § 1407, an appeal will not be dismissed for want of an appeal bond, but a bond and deposit will be received by the appellate court. State *v.* Coahoma County, 64 Miss. 358, 1 So. 501; Hudson *v.* Gray, 58 Miss. 589.

In New York, under N. Y. Code Civ. Proc. § 1303, which provides that, where an appellant seasonably and in good faith serves notice of appeal, but omits, through mistake or excusable neglect, to perfect the appeal, the court in or to which the appeal is taken may permit the omission to be supplied, it has been decided that where appellant has acted in good faith, and, through excusable neglect, failed to file an appeal bond, he may be permitted to file and serve an undertaking on appeal. Matter of Darragh, 1 Connoly Surr. (N. Y.) 170, 3 N. Y. Suppl. 283, 19 N. Y. St. 207. See also Bernhard *v.* McMaster, 25 N. Y. Wkly. Dig. 442.

In Wisconsin, in Russell *v.* Bartlett, 9 Wis. 556, it was held that where, through a mistake of practice, appellant had failed to file his bond, he might, under Wis. Rev. Stat. (1858), c. 139, § 4, on motion to dismiss the appeal, be allowed to cure the defect.

Where bond is dispensed with by order of court.—In Architectural Iron Works *v.* Brooklyn, 85 N. Y. 652, it was decided that where a notice of appeal was served without an undertaking for costs, in reliance on an order of the court dispensing therewith, the omission might be supplied. But in Dennison *v.* Talmage, 29 Ohio St. 433, it was held that one who had omitted to give an appeal bond because the court below improperly made an order excusing him from giving it, could not afterward be allowed to file a bond, and perfect his appeal.

Where bond has been lost, the appeal will not be dismissed, but appellant will be required to give a new bond. Gumberts *v.* Adams Express Co., 28 Ind. 181; White *v.* Bettis, 5 Heisk. (Tenn.) 374; Chisum *v.* Wooten, 1 Overt. (Tenn.) 338; and see 2 Cent. Dig. tit. "Appeal and Error," § 2087.

71. *California.*— Nobmann *v.* Superior Ct., (Cal. 1887) 12 Pac. 869; Palmer *v.* Galvin, (Cal. 1885) 6 Pac. 99.

11. WAIVER[72] — a. Right of Waiver — (I) *OF BOND ITSELF.* In some jurisdictions the giving of an undertaking on appeal is regarded as a prerequisite to appellate jurisdiction, and cannot be waived;[73] in others, it is held that appellee may waive the undertaking, as it is filed for his benefit.[74]

(II) *OF DEFECTS.* It seems that, in all jurisdictions, defects and irregularities in the undertaking may be waived.[75]

(III) *OF APPROVAL.* The approval of an appeal bond may, by express agreement, be waived.[76]

Colorado.— Schofield *v.* Felt, 10 Colo. 146, 14 Pac. 128.

Georgia.— Gordon *v.* Robertson, 26 Ga. 410.

Illinois.— Gillilan *v.* Gray, 13 Ill. 705; Dunaway *v.* Campbell, 59 Ill. App. 665.

Indiana.— Meehan *v.* Wiles, 93 Ind. 52.

Iowa.— Mitchell *v.* Goff, 18 Iowa 424.

Kentucky.— Watters *v.* Patrick, 1 Bush (Ky.) 223.

Louisiana.— Barrow *v.* Clack, 45 La. Ann. 418, 12 So. 631; Crawford *v.* Alexander, 14 La. Ann. 708.

Michigan.— Richardson *v.* Richardson, 82 Mich. 305, 46 N. W. 670; Perrin *v.* Kellogg, 37 Mich. 316.

Missouri.— Corbin *v.* Laswell, 48 Mo. App. 626.

New Jersey.— Egbert *v.* Thatcher, 14 N. J. L. 77.

New York.— Parker *v.* McCunn, 9 N. Y. Wkly. Dig. 245.

North Carolina.— Spence *v.* Tapscott, 93 N. C. 250; McRae *v.* New Hanover County, 74 N. C. 415.

Ohio.— Creighton *v.* Harden, 10 Ohio St. 579; Irwin *v.* Bellefontaine Bank, 6 Ohio St. 81.

Oregon.— Elwert *v.* Norton, 34 Oreg. 567, 51 Pac. 1097, 59 Pac. 1118; Alberson *v.* Mahaffey, 6 Oreg. 412.

Pennsylvania.— Hosie *v.* Gray, 73 Pa. St. 502; Schuylkill County *v.* De Turk, 16 Pa. Co. Ct. 463.

Rhode Island.— Vaill *v.* New Shoreham, 18 R. I. 405, 28 Atl. 344.

Texas.— Cowperthwaite *v.* Fulton, (Tex. Civ. App. 1894) 27 S. W. 588; Boggess *v.* Howard, 40 Tex. 153.

Vermont.— Blake *v.* Kimball, 22 Vt. 632.

Washington.— Northern Counties Invest. Trust *v.* Hender, 12 Wash. 559, 41 Pac. 913.

Wisconsin.— Gilbank *v.* Stephenson, 30 Wis. 155; Branger *v.* Buttrick, 30 Wis. 153.

United States.— Whitney *v.* Frisbie, 1 Hayw. & H. (U. S.) 262; Deen *v.* Hemphill, Hempst. (U. S.) 154, 7 Fed. Cas. No. 3,736*a*.

See 2 Cent. Dig. tit. "Appeal and Error," § 2082 *et seq.*

Before determination of motion to dismiss an appeal for insufficiency of the bond, it seems that appellant may file a new bond (Jarman *v.* Rea, 129 Cal. 157, 61 Pac. 790; Clift *v.* Brown, 95 Ind. 53; Coleman *v.* Perry, 24 Mont. 237, 61 Pac. 129; Robeson *v.* Lewis, 64 N. C. 734; March *v.* Griffith, 53 N. C. 264; and see Clark's Code Civ. Proc. N. C. (1900), p. 785); but a new bond should not be received after the hearing of the motion to dismiss (Wood *v.* Pendola, 77 Cal. 82, 19 Pac. 183); nor after appellant has replied to the appellee's brief on the motion to dismiss (Duncan *v.* Times-Mirror Co., 109 Cal. 602, 42 Pac. 147). But see Jordon *v.* Saunders, 13 La. Ann. 417, holding that the defect in the original bond cannot be cured by the substitution of another bond after motion made to dismiss the appeal. See also 2 Cent. Dig. tit. "Appeal and Error," § 2083.

Effect of failure to file new bond or amend. — The appeal will be dismissed if appellant fails or refuses to obey the order of the court to amend the appeal bond, or file a new one. Crow *v.* French, 3 Greene (Iowa) 124; Dumas *v.* Mary, 29 La. Ann. 808; Benton *v.* Mahan, 27 La. Ann. 649.

See also *infra*, VIII.

72. See 2 Cent. Dig. tit. "Appeal and Error," § 2089 *et seq.*

73. Hilton *v.* Longley, 30 Me. 220; Henderson *v.* Benson, 141 Mass. 218, 5 N. E. 314; Marx *v.* Lewis, 24 Nev. 306, 53 Pac. 600; Mygatt *v.* Ingham, Wright (Ohio) 176.

74. Thompson *v.* Lea, 28 Ala. 453; Ross *v.* Tedder, 10 Ga. 426; Hoagland *v.* Hoagland, 18 Utah 304, 54 Pac. 978. See also Chicago, etc., R. Co. *v.* Marseilles, 104 Ill. 91; Letilhon *v.* New York, Code Rep. N. S. (N. Y.) 111, 3 Sandf. (N. Y.) 721; Bowen *v.* Fox, 99 N. C. 127, 5 S. E. 437; Clark's Code Civ. Proc. N. C. (1900), p. 788, and cases cited; Kingsbury *v.* Buckner, 134 U. S. 650, 10 S. Ct. 638, 33 L. ed. 1047; Dillingham *v.* Skein, Hempst. (U. S.) 181, 7 Fed. Cas. No. 3,912.

In some jurisdictions, by statute, it is expressly provided that the undertaking may be waived. Cal. Code Civ. Proc. § 940; Newman *v.* Maldonado, (Cal. 1892) 30 Pac. 833; Perkins *v.* Cooper, 87 Cal. 241, 25 Pac. 411 [see also Forni *v.* Yoell, 99 Cal. 173, 33 Pac. 887, 95 Cal. 442, 30 Pac. 578]; S. D. Comp. Laws § 5218; Hazeltine *v.* Browne, 9 S. D. 351, 69 N. W. 579. Such waiver, in order to give the appellate court jurisdiction, must be accepted by the appellant. Bonnell *v.* Van Cise, 8 S. D. 592, 67 N. W. 685.

Form of waiver of bond on appeal is set out in Frederick *v.* Hamilton, 38 Tex. 321.

75. Howth *v.* Shumard, (Tex. Civ. App. 1897) 40 S. W. 1079; and see *infra*, note 76 *et seq.*

The execution of a bond by only one surety, when more than one is required, is not a defect which goes to the jurisdiction, but is a mere irregularity which may be waived. Riley *v.* Mitchell, 38 Minn. 9, 35 N. W. 472.

76. Easter *v.* Acklemire, 81 Ind. 163; Small *v.* Kennedy, 12 Ind. App. 155, 39 N. E. 901; and see 2 Cent. Dig. tit. "Appeal and Error," § 2093.

In like manner, the parties to an appeal

(IV) *Of Time of Filing.* It has been decided that the failure to file an appeal bond within the prescribed time is a jurisdictional defect that cannot be waived.[77]

b. Manner of Waiver — (I) *In General.* Objections to any deficiencies in the undertaking or to irregularities in the time of filing may be waived, by agreement of the parties to the appeal, or by implication from the acts or omissions of appellee.[78]

(II) *Failure to Object in Time.* Defects and informalities in the undertaking will be considered as waived when no motion to dismiss on that ground is made or if such motion is not made in apt time.[79] In some jurisdictions,

may waive approval of the bond by the court, and agree that it be approved by the clerk. Smock *v.* Harrison, 74 Ind. 348.

77. Traders Safe, etc., Co. *v.* Calow, 77 Ill. App. 146; Lyell *v.* Guadalupe County, 28 Tex. 57.

But in North Carolina it has been held that the parties may, by consent, extend the time for filing the undertaking, and that the court will respect such agreements if they appear upon the record. Wade *v.* Newbern, 72 N. C. 498. See also Rouse *v.* Quinn, 75 N. C. 354.

78. *Alabama.*— Thompson *v.* Lea, 28 Ala. 453.

California.— Gardiner *v.* California Guarantee Invest. Co., 129 Cal. 528, 62 Pac. 110; Cummins *v.* Scott, 23 Cal. 526.

Illinois.— National Safe, etc., Co. *v.* People, 50 Ill. App. 336; Winona Paper Co. *v.* Kalamazoo First Nat. Bank, 33 Ill. App. 630.

Kentucky.— Clinton *v.* Phillips, 7 T. B. Mon. (Ky.) 117.

Louisiana.— Baldree *v.* Davenport, 7 La. Ann. 589; Carmichael *v.* Armor, 1 Rob. (La.) 197.

Massachusetts.— Norris *v.* Munroe, 128 Mass. 386.

New York.— See Schaffer *v.* Jones, 1 Misc. (N. Y.) 74, 20 N. Y. Suppl. 531, 48 N. Y. St. 408; Slattery *v.* Haskin, 42 Hun (N. Y.) 86.

South Dakota.— Winton *v.* Kirby, 6 S. D. 98, 60 N. W. 409.

Wyoming.— See Johnson *v.* Marion, 1 Wyo. 21.

Advancing appeal.— The right to object to the sufficiency of the undertaking, because such undertaking is filed before the service of notice, is not waived by an agreement to advance the appeal on the calendar. Little *v.* Jacks, 68 Cal. 343, 8 Pac. 856, 9 Pac. 264, 11 Pac. 128.

Filing by an appellee of a certificate of affirmance will not estop him from afterward attacking the appeal bond for insufficiency, after appellant has filed a transcript under leave of court. Howard *v.* Malsch, 52 Tex. 60.

Time of filing.— Where a stipulation between the parties shows that an appeal has been duly perfected and the bond filed within the prescribed time, a motion to dismiss on the ground that the bond was not filed in time will be denied. Pearson *v.* Ashley, 5 Wash. 169, 31 Pac. 410. The failure to file an appeal bond within the time prescribed by statute is not such a defect as will be cured by an agreement for submission. Ten Brook *v.* Maxwell, 5 Ind. App. 353, 32 N. E. 106.

Waiver of objection to sureties.— An objection to the sufficiency of the sureties is waived if appellee does not appear at the time and place for justification set out in the notice, even though the sureties also fail to appear. Escondide Bank *v.* Superior Ct., 106 Cal. 43, 39 Pac. 211; Ballard *v.* Ballard, 18 N. Y. 491. Where one of the sureties was found insufficient, and another surety, by consent of the appellee's counsel, signed the original undertaking, appellee was precluded from taking advantage of such irregularity. Ellis *v.* Lampman, 99 Wis. 81, 74 N. W. 551.

Clark's Code Civ. Proc. N. C. (1900), § 552, provides that the statutory requirement that the sureties on an appeal bond must justify may be waived in writing, and where appellee is in court and the bond is offered and accepted without objection, and this is noted in the record, this is construed to be a sufficient waiver in writing to satisfy the statute. Moring *v.* Little, 95 N. C. 87; Singer Mfg. Co. *v.* Barrett, 94 N. C. 219; Greenlee *v.* McCelvey, 92 N. C. 530; Gruber *v.* Washington, etc., R. Co., 92 N. C. 1; Jones *v.* Potter, 89 N. C. 220; Harshaw *v.* McDowell, 89 N. C. 181; Bryson *v.* Lucas, 85 N. C. 397; Hancock *v.* Bramlett, 85 N. C. 393. The necessity for a justified appeal bond is not waived, however, because the counsel for appellee signs a case-settled upon appeal after an unjustified undertaking was filed. McMillan *v.* Nye, 90 N. C. 11 [*distinguishing* Howerton *v.* Henderson, 86 N. C. 718].

79. *California.*— Gardiner *v.* California Guarantee Invest. Co., 129 Cal. 528, 62 Pac. 110; Matter of Marshall, 118 Cal. 379, 50 Pac. 540.

Florida.— Pace *v.* Lanier, 25 Fla. 558, 6 So. 262.

Illinois.— Kirkpatrick *v.* Cooper, 89 Ill. 210; Frank *v.* Thomas, 35 Ill. App. 547.

Louisiana.— Wegmann *v.* Wegmann, 52 La. Ann. 1309, 27 So. 889; Michel *v.* Meyer, 27 La. Ann. 173.

Massachusetts.— Wheeler, etc., Mfg. Co. *v.* Burlingham, 137 Mass. 581.

New York.— Roberts *v.* White, 37 N. Y. Super. Ct. 168; Craig *v.* Scott, 1 Wend. (N. Y.) 35; Hawley *v.* Bennett, 5 Paige (N. Y.) 104.

North Carolina.— Ferguson *v.* McCarter, 4 N. C. 544. See also Gibson *v.* Lynch, 5 N. C. 495.

Pennsylvania.— Weidner *v.* Matthews, 11 Pa. St. 336; Shank *v.* Warfel, 14 Serg. & R. (Pa.) 205; Duffield *v.* Flahavan, 1 Browne (Pa.) 95.

an objection to the appeal bond, made first in the appellate court, comes too late.[80]

E. Writ of Error, Citation, or Notice — 1. Necessity of Appellate Process or Notice — a. In General. Except in cases of appeals allowed in open court during the term at which the judgment or decree appealed from was rendered, a citation or notice to the appellee or defendant in error is necessary to perfect jurisdiction of the appeal or writ, unless such citation or notice has been waived.[81]

Texas.— Engle *v.* Rowan, (Tex. Civ. App. 1898) 48 S. W. 757; Woodhouse *v.* Cocke, (Tex. Civ. App. 1897) 39 S. W. 948.

Washington.— Seattle, etc., R. Co. *v.* Johnson, 7 Wash. 97, 34 Pac. 567.

Wisconsin.— Johnston *v.* King, 83 Wis. 8, 53 N. W. 28; Parish *v.* Eager, 15 Wis. 532.

See 2 Cent. Dig. tit. "Appeal and Error," § 2090 *et seq.*

When not made within a reasonable time, a motion to dismiss for want of an undertaking has been denied. Johnston *v.* Johnston, 19 D. C. 525 (six years); Critchell *v.* Brown, 72 Ind. 539 (after cause decided); Rich *v.* Eldredge, 42 N. H. 246 (two continuances and a reference); Arrington *v.* Smith, 26 N. C. 59 (two years); Wallace *v.* Corbitt, 26 N. C. 45 (three years).

80. *Arkansas.*— Jester *v.* Hopper, 13 Ark. 43.

Illinois.— Beardsley *v.* Hill, 61 Ill. 354; Knowles *v.* Wayne City, 31 Ill. App. 471..

Kentucky.— Hubble *v.* Mullanphy, Hard. (Ky.) 294.

Louisiana.— Edwards *v.* Edwards, 29 La. Ann. 597; Wood *v.* Harrell, 14 La. Ann. 61.

New York.— Forrest *v.* Havens, 38 N. Y. 469.

North Carolina.— But see Clark's Code Civ. Proc. N. C. (1900), § 52, to the effect that in this state the objection may be made in the appellate court.

Rhode Island.— Clarke *v.* Newport, 5 R. I. 333.

Texas.— McGarrah *v.* Burney, 4 Tex. 287.

Virginia.— Syme *v.* Jude, 3 Call. (Va.) 522; Brown *v.* Matthews, 1 Rand. (Va.) 462.

Washington.— Cook *v.* Tibbals, 12 Wash. 207, 40 Pac. 935; McEachern *v.* Brackett, 8 Wash. 652, 36 Pac. 690, 40 Am. St. Rep. 922.

See 2 Cent. Dig. tit. "Appeal and Error," § 2091.

In jurisdictions, however, where failure to give a bond cannot be waived, the objection that no bond has been given may be urged at any time before the appellate judgment. Henderson *v.* Benson, 141 Mass. 218, 5 N. E. 314; Bradley *v.* Sneath, 6 Ohio 490.

81. *Alabama.*— Williams *v.* Harper, 95 Ala. 610, 10 So. 327; Wyatt *v.* Avery, 14 Ala. 586.

California.— Beets *v.* Chart, 79 Cal. 185, 21 Pac. 730.

Colorado.— Mitchell *v.* Voake, 1 Colo. App. 111, 27 Pac. 872; Webber *v.* Brieger, 1 Colo. App. 92, 27 Pac. 871.

Delaware.— Westcoat *v.* Burbage, 1 Marv. (Del.) 297, 40 Atl. 1116.

Florida.— Player *v.* Bokenfohr, 40 Fla. 415, 24 So. 472; Price *v.* Broward, 39 Fla. 194, 22 So. 650.

Idaho.— Caldwell *v.* Raddy, 1 Ida. 760.

Illinois.— Norton *v.* Coggswell, 35 Ill. App. 566.

Indiana.— Doak *v.* Root, (Ind. App. 1900) 58 N. E. 444.

Iowa.— Weed *v.* Parsons, etc., Co., 52 Iowa 743, 3 N. W. 635; McClellan *v.* McClellan, 2 Iowa 312.

Louisiana.—Schmitt *v.* Drouet, 42 La. Ann. 716, 7 So. 746; Escoubas *v.* Calcasieu Sulphur Min. Co., 33 La. Ann. 484.

Mississippi.— Neel *v.* Neel, 61 Miss. 630.

Missouri.—Davenport *v.* Hannibal, 110 Mo. 574, 19 S. W. 822.

Nebraska.— Wiley *v.* Neal, 24 Nebr. 141, 37 N. W. 926.

Nevada.— Marx *v.* Lewis, (Nev. 1898) 53 Pac. 600.

New Hampshire.— Clark *v.* Courser, 29 N. H. 170.

New Mexico.—Chisum *v.* Ayers, 4 N. M. 48, 12 Pac. 697.

North Carolina.— Applewhite *v.* Fort, 85 N. C. 596.

Ohio.— Baltimore, etc., R. Co. *v.* Ambach, 55 Ohio St. 553, 45 N. E. 719.

Texas.— Smithwick *v.* Kelly, 79 Tex. 564, 15 S. W. 486; Yarnell *v.* Burnett, (Tex. Civ. App. 1901) 61 S. W. 153.

Washington.— Sawtelle *v.* Weymouth, 14 Wash. 21, 43 Pac. 1101; Mt. Vernon First Nat. Bank *v.* McLean, 6 Wash. 296, 32 Pac. 1060.

Wisconsin.— Clark *v.* Fox, etc., Imp. Co., 20 Wis. 421.

United States.—Jacobs *v.* George, 150 U. S. 415, 14 S. Ct. 159, 37 L. ed. 1127; Brown *v.* McConnell, 124 U. S. 489, 8 S. Ct. 559, 31 L. ed. 495; Hewitt *v.* Filbert, 116 U. S. 142, 6 S. Ct. 319, 29 L. ed. 581; Vansant *v.* Electro-Magnetic Gas-Light Co., 99 U. S. 213, 25 L. ed. 265; Railroad Equipment Co. *v.* Southern R. Co., 92 Fed. 541, 34 C. C. A. 519; Peace River Phosphate Co. *v.* Edwards, 70 Fed. 728, 30 U. S. App. 513, 17 C. C. A. 358; West *v.* Irwin, 54 Fed. 419, 9 U. S. App. 547, 4 C. C. A. 401.

See 2 Cent. Dig. tit. "Appeal and Error," § 2099.

In Florida, citations on appeals in chancery have been abrogated by Fla. Laws (1897), c. 4528, which make the record of entry of such appeal a substitute for citation. Under this act it has been held that actual record is indispensable to the jurisdiction of the appellate court. Chamberlain *v.* Finley, 40 Fla. 91, 23 So. 559.

In Kentucky, the issuance of process is not a condition precedent to the appeal from an inferior court to the circuit court, it being sufficient to file a copy of the judgment and

b. Substitutes for Process or Notice. The filing of an appeal or supersedeas bond, and the approval of such bond in open court, have been held, in some jurisdictions, to afford notice to appellee or defendant in error of the appeal or writ.[82] But it has been held that neither an order of appeal, granted at a term subsequent to the judgment, though granted in open court,[83] nor an order to appellee to appear and argue the cause,[84] nor the service of a copy of the case and exceptions, is a legal substitute for a citation.[85]

c. Appeals or Proceedings in Error Taken in Open Court. Where an appeal is taken in open court during the term at which the judgment or decree was rendered, notice or citation is not necessary;[86] but if the appeal is not perfected

statement of costs, and to execute bonds within the statutory time. Brown *v.* Bennett, 102 Ky. 518, 19 Ky. L. Rep. 1579, 44 S. W. 85.

In taking an appeal from an interlocutory order allowing an injunction, no notice or prayer for appeal is necessary; simply filing a proper bond with the clerk is sufficient. Commerce Vault *v.* Hurd, 73 Ill. App. 107.

Refiling of record.— Upon the dismissal of an appeal the parties are no longer in court, and the refiling of the record is so far the institution of a new suit as to require notice to the other side. Huntington County *v.* Brown, 14 Ind. 191.

82. Malick *v.* McDermot, 25 Nebr. 267, 41 N. W. 157; Bazzo *v.* Wallace, 16 Nebr. 293, 20 N. W. 314; Goodwin *v.* Fox, 120 U. S. 775, 7 S. Ct. 779, 30 L. ed. 815. *Contra*, Hunt *v.* Arkell, 13 Colo. 543, 22 Pac. 826; Pratt *v.* Western Stage Co., 26 Iowa 241.

See 2 Cent. Dig. tit. "Appeal and Error," § 2100.

83. Trounstine *v.* Ware, 39 La. Ann. 939, 3 So. 122.

84. Dodge *v.* Knowles, 114 U. S. 430, 5 S. Ct. 1108, 1197, 29 L. ed. 144.

85. Jackson *v.* Fassitt, 33 Barb. (N. Y.) 645, 12 Abb. Pr. (N. Y.) 281, 21 How. Pr. (N. Y.) 279; Sherman *v.* Wells, 14 How. Pr. (N. Y.) 522. But see Van Clief *v.* Mersereau, 8 Abb. Pr. N. S. (N. Y.) 193 note.

In Indiana, either party to a cause is bound, without service of any process or other notice, to take notice of an appeal taken at any proper time. Malone *v.* Hardesty, 1 Ind. 79. See also Tate *v.* Hamlin, 149 Ind. 94, 41 N. E. 356.

In Kentucky, the suing out of a summons to appellee is not necessary to secure an appeal. Jones *v.* Finnell, 8 Bush (Ky.) 25.

Summary proceedings.— For the rule in Maryland in case of appeal from a decree, order, decision, or judgment on a summary proceeding see Bowling *v.* Estep, 56 Md. 564; Gephart *v.* Strong, 20 Md. 522.

86. *Florida.*— Seedhouse *v.* Broward, 34 Fla. 509, 16 So. 425.

Indiana.— Wilson *v.* Bennett, 132 Ind. 210, 31 N. E. 184.

Kentucky.— Colb *v.* Waggoner, 17 B. Mon. (Ky.) 562.

Louisiana.— Sauer *v.* Union Oil Co., 43 La. Ann. 699, 9 So. 566; Trounstine *v.* Ware, 39 La. Ann. 939, 3 So. 122.

Mississippi.— Childs *v.* Rowell, 58 Miss. 512.

Missouri.— Lieberman *v.* Findley, 84 Mo. App. 384.

North Carolina.— Carolina Invest. Co. *v.* Kelly, 123 N. C. 388, 31 S. E. 671.

Washington.— Northern Counties Invest. Trust *v.* Hender, 12 Wash. 559, 41 Pac. 913; Seattle *v.* Liberman, 9 Wash. 276, 37 Pac. 433; Moore *v.* Brownfield, 7 Wash. 23, 34 Pac. 199.

United States.— Brown *v.* McConnell, 124 U. S. 489, 8 S. Ct. 559, 31 L. ed. 495; U. S. *v.* Gomez, 1 Wall. (U. S.) 690, 17 L. ed. 677; The San Pedro, 2 Wheat. (U. S.) 132, 4 L. ed. 202; Reily *v.* Lamar, 2 Cranch (U. S.) 344, 2 L. ed. 300; James H. Rice Co. *v.* Libbey, 105 Fed. 825; McNulta *v.* West Chicago Park Com'rs, 99 Fed. 328, 39 C. C. A. 545; Central Trust Co. *v.* Continental Trust Co., 86 Fed. 517, 58 U. S. App. 604, 30 C. C. A. 235.

See 2 Cent. Dig. tit. "Appeal and Error," § 2101.

In Colorado, if an appeal from the county court to the district court is merely prayed and allowed on the same day on which judgment is rendered, such appeal is not taken, within the meaning of Colo. Laws (1885), p. 159, § 4, providing that unless it be taken on that day written notice of appeal must be served on the adverse party; but that before the appeal can be considered as taken the appeal bond must be filed and approved. Law *v.* Nelson, 14 Colo. 409, 24 Pac. 2.

Failure to fix bond.— In Humphrey *v.* Berchtold, 1 Clev. L. Rep. 89, 4 Ohio Dec. 169, it was held that a memorandum, made by the judge on his calendar, of a notice of appeal, in which the amount of the bond was not fixed, was not a notice of appeal on the record within the statute providing that the party, at the time the judgment is rendered, shall enter on the records of the court notice of his intention to appeal to the district court, and that the court shall fix and determine the amount of the bond to be given.

Including appellee's name in bond.—Where an appeal is granted on motion in open court, the only way to compel appellee to take notice of the appeal is to include his name in the appeal bond. Swearingen *v.* McDaniel, 12 Rob. (La.) 203.

Judgment at chambers.— The fact that a judgment was rendered at chambers does not exempt the case from the operation of La. Code Prac., art. 574, which provides that no citation of appeal shall be necessary when the appeal has been granted upon motion in open court at the same term that the judgment

until after the term, a citation must be issued to bring in the parties, unless they voluntarily appear.[87] A notice of a writ of error, given in open court at the same term at which the judgment is rendered, is not equivalent to such citation, as in case of an appeal in open court.[88]

2. Writ of Error — a. Necessity for Writ. A writ of error, issuing out of the court of error, is essential to such court's jurisdiction. Such writ should be properly attested, and a citation to defendant in error should be annexed within the time prescribed by law; otherwise the case will be dismissed.[89]

b. Issuance of Writ — (I) *In General.* A writ of error must be issued in compliance with the provisions of the statute authorizing its issuance, else it will be dismissed; but the appellate court may allow any amendment of merely technical errors in the writ, though it cannot allow amendments of substantial errors.[90]

(II) *Courts To or From Which Issuable* — (A) *In General.* A writ of error is, as a rule, issuable out of the court having cognizance thereof, and should be directed to whatever court has the custody of the record to be reviewed.[91]

was rendered. Torres *v.* Falgoust, 33 La. Ann. 560.

87. Omaha First Nat. Bank *v.* Omaha, 96 U. S. 737, 24 L. ed. 881; Ruby *v.* Atkinson, 93 Fed. 577, 35 C. C. A. 458. And see Richardson *v.* Green, 130 U. S. 104, 9 S. Ct. 443, 32 L. ed. 872; Dodge *v.* Knowles, 114 U. S. 436, 5 S. Ct. 1108, 1197, 29 L. ed. 296.

88. U. S. *v.* Phillips, 121 U. S. 254, 7 S. Ct. 874, 30 L. ed. 914.

89. *Alabama.*—Harrington *v.* Meriweather, 20 Ala. 607.

Florida.— Knight *v.* Towles, 32 Fla. 473, 14 So. 91; Knight *v.* Weiskopf, 21 Fla. 157.

Georgia.— Pendley *v.* State, 87 Ga. 186, 13 S. E. 443; McDougald *v.* Rutherford, 12 Ga. 602.

New York.— Bradt *v.* Gray, 3 Cai. (N. Y.) 170.

Ohio.—Brownell *v.* Skinner, Wright (Ohio) 682; Vance *v.* Goudy, Wright (Ohio) 307.

Tennessee.— Wooten *v.* Daniel, 16 Lea (Tenn.) 156; Belcher *v.* Steele, (Tenn. Ch. 1898), 48 S. W. 394. See also Vance *v.* McNabb Coal, etc., Co., (Tenn. Ch. 1897) 48 S. W. 235.

United States.— Washington County *v.* Durant, 7 Wall. (U. S.) 694, 19 L. ed. 164. But see, *contra*, Porter *v.* Smith, 1 Wash. Terr. 608.

See 2 Cent. Dig. tit. "Appeal and Error," § 2103 *et seq.*

As to nature and scope of writ of error see I, C, 1.

Duty of attorney.— An attorney prosecuting a writ of error should file a præcipe with the clerk of the appellate court, fully stating the names of the parties to the judgment sought to be reversed. Napper *v.* Short, 17 Ill. 119.

Failure of clerk to issue on due proceedings. — Where the affidavit which is the basis of the writ of error has been duly filed, and where the proceedings below, with all the original papers in the cause, have been certified as though upon a return to a writ of error actually issued, the fact that the clerk failed to issue the writ is not a sufficient reason for dismissing the cause. Rhodes *v.* De Bow, 5 Iowa 260.

90. *Arkansas.*— Rutherford *v.* State Bank, 3 Ark. 493.

Connecticut.— Curtice *v.* Mason, 1 Root (Conn.) 259.

Georgia.— Blood *v.* Martin, 21 Ga. 127; Rowell *v.* Neves, 21 Ga. 125.

Massachusetts.— Pembroke *v.* Abington, 2 Mass. 142.

Mississippi.— Natchez Ins. Co. *v.* Stanton, 4 How. (Miss.) 7.

Ohio.— Snyder *v.* Cincinnati, 1 Cinc. L. Bul. 79; Kerr *v.* Chillicothe Bank, Wright (Ohio) 737.

Tennessee.— Elliott *v.* McNairy, 1 Baxt. (Tenn.) 342.

Washington.— Horton *v.* King County, 1 Wash. Terr. 517; Roberts *v.* Tucker, 1 Wash. Terr. 179.

Wisconsin.—Ward *v.* Price, 1 Pinn. (Wis.) 57.

United States.— Germain *v.* Mason, 154 U. S. 587, 14 S. Ct. 1170, 20 L. ed. 689; Wells *v.* McGregor, 13 Wall. (U. S.) 188, 20 L. ed. 538; West *v.* Barnes, 2 Dall. (U. S.) 401, 1 L. ed. 433; Cotter *v.* Alabama Great Southern R. Co., 61 Fed. 747, 22 U. S. App. 372, 10 C. C. A. 35; Northern Pac. R. Co. *v.* Amato, 49 Fed. 881, 1 U. S. App. 113; 1 C. C. A. 468. *Compare* Blackwell *v.* Patten, 7 Cranch (U. S.) 277, 3 L. ed. 342.

See 2 Cent. Dig. tit. "Appeal and Error," § 2105.

91. Brumagim *v.* Chew, 21 N. J. Eq. 180; Blunt *v.* Greenwood, 1 Cow. (N. Y.) 15; Gerhard *v.* State, 3 Ohio St. 508; and see 2 Cent. Dig. tit. "Appeal and Error," § 2106.

By the common-law practice a writ of error issues out of chancery and is in the nature of a commission to the judges of the court to which it is returnable. 2 Tidd. Pr. 1051. See also *supra*, I, C, 1, b, c.

In New Jersey, before the passage of Pub. Laws (1859), p. 643, writs of error to the supreme court issued out of the court of chancery. Carter *v.* Somers, 21 N. J. L. 561 note; Anonymous. 20 N. J. L. 495.

(B) *From Supreme Court to a State Court.* A writ of error from the United States supreme court, to review errors of a state court, may be directed to whatever court has the custody of the record and judgment.[92]

c. Form and Requisites — (I) *In General.* A writ of error should clearly show the judgment appealed from, and should comply, as to its contents, with the requirements of the statutes of the various jurisdictions. A substantial non-compliance with such requirements will entail a dismissal of the writ.[93]

(II) *Designation and Description of Parties.* A writ of error must properly designate and describe the parties thereto.[94]

92. Atherton *v.* Fowler, 91 U. S. 143, 23 L. ed. 265; Miller *v.* Joseph, 17 Wall. (U. S.) 655, 21 L. ed. 741; McGuire *v.* Com., 3 Wall. (U. S.) 382, 18 L. ed. 164; Webster *v.* Reid, 11 How. (U. S.) 437, 13 L. ed. 761; Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381; and see 2 Cent. Dig. tit. "Appeal and Error," § 2106.

Where, under the state practice, the judgment and record of the highest court of a state are remitted to the inferior court, the United States supreme court may direct a writ of error to such highest court, and reach such judgment and record through the latter's instrumentality, or may direct the writ to the inferior court. Atherton *v.* Fowler, 91 U. S. 143, 23 L. ed. 265. See also Polleys *v.* Black River Imp. Co., 113 U. S. 81, 5 S. Ct. 369, 28 L. ed. 938.

93. *Georgia.*—Lovingood *v.* Roberts, 89 Ga. 417, 15 S. E. 495.

Kentucky.—Brown *v.* McKee, 1 J. J. Marsh. (Ky.) 471.

Massachusetts.— Peirce *v.* Adams, 8 Mass. 383.

Mississippi.— Sherman *v.* Lovejoy, 30 Miss. 105.

Missouri.— Howell *v.* Reynolds County, 51 Mo. 154.

Ohio.—Bechthold *v.* Fisher, 12 Ohio Cir. Ct. 559; Wayne Tp. *v.* Fleming, 1 Ohio Dec. 454.

Texas.—Mills *v.* Paul, 4 Tex. Civ. App. 503, 23 S. W. 395.

United States.— Davenport *v.* Fletcher, 16 How. (U. S.) 142, 14 L. ed. 879.

See 2 Cent. Dig. tit. "Appeal and Error," § 2107 *et seq.*

Sealing and authentication.— A writ of error must be sealed (Anonymous, 20 N. J. L. 495; Overton *v.* Cheek, 22 How. (U. S.) 46, 16 L. ed. 285); or otherwise authenticated (Anonymous, 20 N. J. L. 495). But the writ need not be indorsed, being a judicial, and not an original, writ. Grosvenor *v.* Danforth, 16 Mass. 74; Rochester *v.* Roberts, 25 N. H. 495. See also Warner *v.* Texas, etc., R. Co., 54 Fed. 920, 2 U. S. App. 647, 4 C. C. A. 670.

An indorsement by the judge, upon the petition for a writ of error, of the allowance of such writ is sufficient without an indorsement upon the writ, though the better practice is to indorse both. Warner *v.* Texas, etc., R. Co., 54 Fed. 920, 2 U. S. App. 647, 4 C. C. A. 670.

In a writ of error coram nobis, if plaintiff assigns for error that the bond in question has been altered since its execution, such assignment should be verified by oath. Trotter *v.* Hannegan, 2 A. K. Marsh. (Ky.) 319.

Forms of writs of error may be found set out in Hunter *v.* Heath, 76 Me. 219; Valencia County *v.* Atlantic, etc., R. Co., 3 N. M. 352, 9 Pac. 519; Worcester *v.* Georgia, 6 Pet. (U. S.) 515, 8 L. ed. 483.

94. *Alabama.*— Joseph *v.* Joseph, 5 Ala. 280. *Compare* Green *v.* Foley, 3 Stew. (Ala.) 239, in which it was held that where the writ of error described defendant individually, and in the record below he was described as administrator, the variance was not fatal.

Arkansas.— Borden *v.* State, 8 Ark. 399; Gasquett *v.* Berry, 6 Ark. 246.

Florida.— State *v.* Canfield, 40 Fla. 36, 23 So. 591, 42 L. R. A. 72; Johnson *v.* Polk County, 24 Fla. 28, 3 So. 414.

Georgia.—Cox *v.* Macon, etc., R. Co., 12 Ga. 270; Beall *v.* Fox, 4 Ga. 403.

Illinois.—Robinson *v.* Magarity, 28 Ill. 423; Bowles *v.* Rouse, 8 Ill. 408. *Compare* Bletch *v.* Johnson, 40 Ill. 116.

Mississippi.— Hoggatt *v.* Ferrall, 41 Miss. 642; Whitworth *v.* Carter, 41 Miss. 639.

New York.— Brown *v.* Davenport, 4 Wend. (N. Y.) 205. *Compare* Fleet *v.* Youngs, 11 Wend. (N. Y.) 522.

United States.— Godbe *v.* Tootle, 154 U. S. 576, 14 S. Ct. 1167, 19 L. ed. 831; Smyth *v.* Strader, 12 How. (U. S.) 327, 13 L. ed. 1008; Miller *v.* McKenzie, 10 Wall. (U. S.) 582, 19 L. ed. 1043; Wilson *v.* New York L., etc., Ins. Co., 12 Pet. (U. S.) 140, 9 L. ed. 1032; Deneale *v.* Archer, 8 Pet. (U. S.) 526, 8 L. ed. 1032.

See also Montgomery *v.* Manning, 1 Wash. Terr. 434; and *compare* Denslow *v.* Moore, 1 Day (Conn.) 290.

See 2 Cent. Dig. tit. "Appeal and Error," § 2109.

But it has been held by the supreme court of the United States that a writ of error will not be dismissed for not stating who were plaintiffs and who were defendants in the court below, where such facts are shown by the record. Mussina *v.* Cavazos, 6 Wall. (U. S.) 355, 18 L. ed. 810.

Proceedings in firm-name.— It is error to sue out a writ of error in the firm-name, or without stating all the names of the persons composing the firm. Johnson *v.* Polk County, 24 Fla. 28, 3 So. 414; Godbe *v.* Tootle, 154 U. S. 576, 14 S. Ct. 1167, 19 L. ed. 831. But where all the proceedings have been carried on and judgment entered in the name of the firm, without objection, a writ of error may be sued out in the same name. Robinson *v.* Magarity, 28 Ill. 423; Williams *v.* Kitchen, 43 Mo. App. 338.

(III) *Joining Errors of Law and Fact.* Errors of law and fact should not be joined in the same writ.[95]

(IV) *Joining Several Judgments or Orders.* Two distinct judgments or decrees cannot be joined in the same writ of error.[96]

(V) *Specification of Return-Day.* An appellate court has no jurisdiction where the writ of error is defective in that it fails to name a return-day, or names a day not authorized by statute.[97]

95. Lightfoot *v.* Commonwealth Bank, 4 Dana (Ky.) 492; Logan *v.* Steel, 7 J. J. Marsh. (Ky.) 41; Williams *v.* Clay, 5 Litt. (Ky.) 56. But see Rothschild *v.* Knight, 176 Mass. 48, 57 N. E. 337.

But the joining of errors of law and errors of fact will not, alone, vitiate, if plaintiff in error waives the errors in fact and relies on the errors in law. Trotter *v.* Hannegan, 2 A. K. Marsh. (Ky.) 319; and see 2 Cent. Dig. tit. "Appeal and Error," § 2112.

Striking out errors of fact.— On a plea in abatement to a writ of error for joining errors of law and fact, the appellate court may strike out the errors of fact and hear the cause upon the errors of law. Lewis *v.* Lawson, 1 Root (Conn.) 262.

96. Boyett *v.* Kerr, 7 Ala. 9; Read *v.* Owen, 9 Port. (Ala.) 180; Guthrie *v.* Noel, 5 J. J. Marsh. (Ky.) 295; Carneal *v.* May, 2 A. K. Marsh. (Ky.) 587, 12 Am. Dec. 453. See also American Button-Hole, etc., Co. *v.* Gurnee, 38 Wis. 533. But see Colyer *v.* Thompson, 2 T. B. Mon. (Ky.) 16, in which it was held that a decree dismissing a bill, and an order at a subsequent term overruling a motion to file an amended or supplemental bill, might be embraced in one writ of error.

See 2 Cent. Dig. tit. "Appeal and Error," § 2111.

97. Rutherford *v.* State Bank, 3 Ark. 493; Clapp *v.* Bromagham, 9 Cow. (N. Y.) 304, 8 Cow. (N. Y.) 746; Hunt *v.* Schrieb, 37 Tex. 632; Sea *v.* Connecticut Mut. L. Ins. Co., 154 U. S. 659, 14 S. Ct. 1191, 25 L. ed. 772; Puget Sound Agricultural Co. *v.* Pierce County, 6 Wall. (U. S.) 246, 18 L. ed. 739; Porter *v.* Foley, 21 How. (U. S.) 393, 16 L. ed. 154; Carroll *v.* Dorsey, 20 How. (U. S.) 204, 15 L. ed. 803. But see Riggs *v.* State Bank, 11 Ala. 160, in which it was held that where the statute prescribed a term to which a writ of error shall be returned, the writ will not be dismissed, or an affirmance of judgment denied, because such writ is upon its face made returnable to a day after the court commences its session.

See 2 Cent. Dig. tit. "Appeal and Error," § 2110.

Return-term of a writ of error or an appeal. — The general rule is that an appeal or writ of error should be made returnable to the next succeeding term of the appellate court.

Alabama.—Rodgers *v.* Abercrombie, 48 Ala. 466; Shulman *v.* Brantly, 48 Ala. 193.

Connecticut.— *In re* Shelton St. R. Co., 70 Conn. 329, 39 Atl. 446; Pitkin *v.* New York, etc., R. Co., 67 Conn. 19, 34 Atl. 704.

Florida.— Savannah, etc., R. Co. *v.* Justice, 41 Fla. 508, 26 So. 704; Garrison *v.* Parsons, 41 Fla. 143, 25 So. 336.

Illinois.— Owens *v.* Crossett, 104 Ill. 468.

Iowa.— Whitehead *v.* Thorp, 22 Iowa 425.

Louisiana.— State *v.* Judge, 9 La. Ann. 14; Rodney *v.* Dixon, 8 La. 531; Bridge *v.* Merle, 7 La. 446.

Massachusetts.— Hubbard *v.* Hubbard, 6 Mass. 397.

Missouri.— Ellis *v.* Wyatt, 10 Mo. App. 580.

New Hampshire.— Spaulding's Appeal, 33 N. H. 479.

North Carolina.—State *v.* Deyton, 119 N. C. 880, 26 S. E. 159; Suiter *v.* Brittle, 90 N. C. 19; Officers of Ct. *v.* Bland, 90 N. C. 6.

Pennsylvania.— Dawson *v.* Ryan, 4 Watts & S. (Pa.) 403; Moodie *v.* Vandyke, 4 Yeates (Pa.) 512.

South Carolina.— Verdier *v.* Verdier, 12 Rich. Eq. (S. C.) 138.

Texas.— Chambers *v.* Shaw, 16 Tex. 143; Roberts *v.* Landrum, 3 Tex. 16.

Vermont.— Rogers *v.* Brace, Brayt. (Vt.) 21.

Washington.— Roberts *v.* Tucker, 1 Wash. Terr. 179.

United States.—Garrison *v.* Cass County, 5 Wall. (U. S.) 823, 18 L. ed. 491; Castro *v.* U. S., 3 Wall. (U. S.) 46, 18 L. ed. 163.

Statutes, however, sometimes provide that when the appeal is taken or the writ of error sued out within a prescribed number of days before the next term of such court, such period being allowed for giving notice to the appellee or otherwise perfecting the appeal, the appeal or writ shall be returnable to the next term thereafter instead of to the first term.

Alabama.— Handley *v.* Heflin, 84 Ala. 600, 4 So. 725.

Florida.— Garrison *v.* Parsons, 41 Fla. 143, 25 So. 336.

Illinois.— Hagar *v.* Phillips, 13 Ill. 292.

Iowa.— Whitehead *v.* Thorp, 22 Iowa 425.

Louisiana.— Picard *v.* Prival, 35 La. Ann. 370.

Missouri.— St. Louis *v.* Bambrick, 41 Mo. App. 648.

New Hampshire.—Tilton *v.* Tilton, 35 N. H. 430.

New Mexico.— Cunningham *v.* Conklin, 7 N. M. 127, 34 Pac. 43.

North Carolina.—Gregory *v.* Hobbs, 92 N. C. 39; Clark's Code Civ. Proc. N. C. (1900), p. 905; N. C. Supreme Court Rules, No. 5.

Texas.— Blum *v.* Wettermark, 58 Tex. 125.

Virginia.—Skipwith *v.* Clinch, 2 Call (Va.) 536.

United States.— U. S. *v.* Boisdore, 7 How. (U. S.) 658, 12 L. ed. 860.

See 2 Cent. Dig. tit. "Appeal and Error," § 1969 *et seq.*

d. Service. A writ of error will be dismissed if a copy thereof is not served and an entry made within the time limited by statute or rule of court for such service or entry.[98]

e. Return. The writ of error is a nullity if not returned in compliance with the statutory requirements.[99] But a writ of error, defective for not having been

In computing the time under such statutes the date of taking the appeal or suing out the writ of error is to be excluded, and the return day included. Doyle *v.* Mizner, 41 Mich. 549, 50 N. W. 392; St. Louis *v.* Bambrick, 41 Mo. App. 648. *Compare* Wheeler *v.* Bent, 4 Pick. (Mass.) 167.

Where the appellate court is in session when the appeal is taken, the appeal cannot properly be made returnable to such term, but must be made returnable to the next succeeding term.

Alabama.— Capehart *v.* Granite Mills, 97 Ala. 353, 12 So. 44; Rodgers *v.* Abercrombie, 48 Ala. 466.

Connecticut.— Bristol Sav. Bank *v.* Graham, 67 Conn. 23, 34 Atl. 706; Pitkin *v.* New York, etc., R. Co., 67 Conn. 19, 34 Atl. 704.

Florida.— Fleming *v.* Fleming, 40 Fla. 154, 23 So. 571; Williams *v.* Hilton, 25 Fla. 608, 6 So. 452.

Georgia.— *Compare* Kaufman *v.* Ferst, 55 Ga. 350.

Maine.— Millikin *v.* Morey, 85 Me. 340, 27 Atl. 188.

North Carolina.— If the appeal is docketed at the term of the appellate court which was in session during trial below it will be heard. Caldwell *v.* Wilson, 121 N. C. 423, 28 S. E. 363.

Texas.— But see Kendall *v.* State, (Tex. Civ. App. 1899) 51 S. W. 1102, construing Tex. Rev. Stat. art. 4346.

98. *Arkansas.*—Delany *v.* Pennywit, 5 Ark. 675.

Connecticut.— Colburn *v.* Tolles, 13 Conn. 524; Gaylord *v.* Payne, 3 Conn. 258.

Florida.— Sanchez *v.* Haynes, 36 Fla. 96, 18 So. 115; Kennesaw Mills Co. *v.* Bynum, 34 Fla. 360, 16 So. 276.

Georgia.— Hooper *v.* State, 76 Ga. 100; Hightower *v.* Hightower, 13 Ga. 204.

New Jersey.— Paterson *v.* Shields, (N. J. 1897) 36 Atl. 891.

Ohio.—Bechthold *v.* Fisher, 12 Ohio Cir. Ct. 559.

Texas.— Pierce *v.* Cross, 36 Tex. 187; *Ex p.* King, 35 Tex. 657.

Washington.— Conway *v.* U. S., 2 Wash. Terr. 336, 24 Pac. 678.

United States.—Davidson *v.* Lanier, 4 Wall. (U. S.) 447, 18 L. ed. 377; Wood *v.* Lide, 4 Cranch (U. S.) 180, 2 L. ed. 588.

See 2 Cent. Dig. tit. "Appeal and Error," § 2113.

Defendant in error or his counsel may waive the service of a copy of the writ. Chapman *v.* Gray, 8 Ga. 337.

99. *Arkansas.*— State *v.* Simmons, 1 Ark. 265.

Florida.— Payne *v.* Roche, 41 Fla. 478, 27 So. 29.

Georgia.— Peacock *v.* Eubanks, 51 Ga. 216; Bryan *v.* Walton, 30 Ga. 834.

New Jersey.— Staten Chemical Co. *v.* Miller, (N. J. 1894) 29 Atl. 316; McCourry *v.* Doremus, 10 N. J. L. 245. *Compare* Stevenson *v.* Chetwood, 17 N. J. L. 353.

New York.— Newman *v.* Van Antwerp, 4 Cow. (N. Y.) 711; Van Der Mark *v.* Jackson, 1 Cai. (N. Y.) 251.

Pennsylvania.— But see Gailey *v.* Beard, 4 Yeates (Pa.) 418.

Texas.— Batey *v.* Dibrell, 28 Tex. 172.

Vermont.— Brace *v.* Squire, 2 D. Chipm. (Vt.) 49.

United States.— Blair *v.* Miller, 4 Dall. (U. S.) 21, 1 L. ed. 724; Hamilton *v.* Moore, 3 Dall. (U. S.) 371, 1 L. ed. 642; Janes *v.* May, Hempst. (U. S.) 288, 13 Fed. Cas. No. 7,206*c*.

See 2 Cent. Dig. tit. "Appeal and Error," § 2114.

Amendment of return.— It is too late, after assignment of errors, to amend the return to the writ of error. Dumond *v.* Carpenter, 3 Johns. (N. Y.) 141.

Destruction of writ.— See Mussina *v.* Cavazos, 6 Wall. (U. S.) 355, 18 L. ed. 810.

Presumption of validity.—Where a writ of error is returned to the supreme court in the usual form, it will be presumed that the writ was properly presented during the sitting of the court to which it was directed. Gailey *v.* Beard, 4 Yeates (Pa.) 418.

Stipulation of counsel, as a substitute for a return to a writ of error, will not be judicially noticed by the appellate court. Staten Chemical Co. *v.* Miller, (N. J. 1894) 29 Atl. 316.

By a rule of the supreme court of the United States, the return of a copy of the record of the proper state court, under the seal of such court, annexed to the writ of error, is a sufficient return of such writ. Martin *v.* Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97. See also U. S. *v.* Booth, 18 How. (U. S.) 476, 15 L. ed. 464, in which it was held that where the clerk of the supreme court of a state has neglected to make the return required by a writ of error from the supreme court of the United States, the court will order the clerk to make return before the first day of the ensuing term, and direct another case involving the same points to be continued till that time.

What a sufficient return.— A transcript of the record, certified under the hand of the clerk and seal of the court, with the writ of error annexed, is a legal and sufficient return of such writ. State *v.* Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534.

In Texas the return of the officer on a writ of error must show that he delivered to de-

returned attached to the transcript, is not void, since such attachment may be made in the appellate court;[1] and a writ will not be dismissed because the return thereof was not made until one day after it was by its terms returnable.[2]

f. Defects and Objections — (I) *In General.* Where there is a substantial defect in the writ of error, objection may be taken at any time before the judgment on the ground that the case is not legally before the court, and that the latter has no jurisdiction to try.[3] But a party moving to quash or supersede a writ of error for some defect therein must point out the defect either in his affidavit or notice of motion.[4]

(II) *Amendable Defects* — (A) *In General.* At common law great certainty was required in making the writ of error agree with the record, for, as the writ was the sole authority by which the appellate court was empowered to act, that court could proceed only on that record which the writ authorized them to examine.[5] Under 5 Geo. I, c. 13, an appellate court was enabled to amend writs of error, and this statute has been adopted in many of the states, so that amendments, where they are not of matters of substantial right, are allowable.[6]

(B) *Designation of Parties.* In many jurisdictions a writ of error may be amended in the court of error as to any defect in the parties.[7]

fendant, in person, a copy of the writ. Graves *v.* Holmes, 1 Tex. App. Civ. Cas. § 20.

1. Cotter *v.* Alabama Great Southern R. Co., 61 Fed. 747, 22 U. S. App. 372, 10 C. C. A. 35.

2. Altenberg *v.* Grant, 83 Fed. 980, 54 U. S. App. 312, 28 C. C. A. 244.

Return after day fixed.— If service of a writ of error be made before the return-day, it may be returned thereafter. Wood *v.* Lide, 4 Cranch (U. S.) 180, 2 L. ed. 588.

3. Turner *v.* Collins, 8 Ga. 252; Beaubien *v.* Barbour, 2 Ill. 386; Delaney *v.* Husband, (N. J. 1900) 45 Atl. 265; Wilson *v.* New York L., etc., Ins. Co., 12 Pet. (U. S.) 140, 9 L. ed. 1032; and 2 Cent. Dig. tit. "Appeal and Error," § 2115.

Undated writ.— The mere fact that a writ of error is undated is not ground for quashing it if such writ has been properly returned. Ogden *v.* Lyman, 1 Day (Conn.) 34.

4. Hagar *v.* Coup, 50 Mich. 54, 14 N. W. 698; Wilson *v.* Wetmore, 1 Hill (N. Y.) 216; Showers *v.* Showers, 27 Pa. St. 485, 67 Am. Dec. 487.

Writ contained in moving papers.— It is not enough that the papers on which a party moves to quash or supersede a writ of error contain a copy of the writ in which the defect appeared. Wilson *v.* Wetmore, 1 Hill (N. Y.) 216.

5. Fremon *v.* Carondelet, 25 Mo. 62; Hodge *v.* Williams, 22 How. (U. S.) 87, 16 L. ed. 237; 2 Tidd Pr. 1161.

6. *Alabama.*—Lyon *v.* Malone, 4 Port. (Ala.) 414; De Sylva *v.* Henry, 3 Port. (Ala.) 132.

Florida.— Williams *v.* Pitt, 38 Fla. 162, 20 So. 936; Driggs *v.* Higgins, 19 Fla. 103.

New Mexico.—Valencia County *v.* Atlantic, etc., R. Co., 3 N. M. 621, 9 Pac. 519.

New York.— Heath *v.* Wright, 1 How. Pr. (N. Y.) 250.

United States.— National Bank of Commerce *v.* National Bank of Commerce, 99 U. S. 608, 25 L. ed. 362; Atherton *v.* Fowler, 91 U. S. 143, 23 L. ed. 265; Hampton *v.* Rouse, 15 Wall. (U. S.) 684, 21 L. ed. 250; McVeigh *v.* U. S., 8 Wall. (U. S.) 640, 19 L. ed. 511; U. S. *v.* Six Lots of Ground, 1 Woods (U. S.) 234, 27 Fed. Cas. No. 16,299. But see and *compare* Porter *v.* Foley, 21 How. (U. S.) 393, 16 L. ed. 154; Mossman *v.* Higginson, 4 Dall. (U. S.) 12, 1 L. ed. 720.

See 2 Cent. Dig. tit. "Appeal and Error," § 2116.

Teste of writ.— In Hamilton *v.* Moore, 3 Dall. (U. S.) 371, 1 L. ed. 642, it was held that a writ must bear teste of the term preceding that to which it is returnable, and that if there is a term intervening, it is a defect which cannot be amended.

Extent and limits of rule.— But the writ should itself contain material for the amendment (Ellis *v.* Brown, 1 Ark. 82; Anderson *v.* Darien Bank, 5 Ga. 582), and an amendment by which a new writ virtually is made is not permissible (Graham *v.* Hardin, 4 Dana (Ky.) 559; Smith *v.* Hornback, 3 A. K. Marsh. (Ky.) 379).

7. *Alabama.*— Colvin *v.* Owens, 22 Ala. 782; Knox *v.* Steele, 18 Ala. 815, 54 Am. Dec. 181.

Colorado.— Vance *v.* Rockwell, 3 Colo. 240.

Florida.— Loring *v.* Wittich, 16 Fla. 323.

Georgia.—Cox *v.* Macon, etc., R. Co., 12 Ga. 270; Beall *v.* Fox, 4 Ga. 403.

Kentucky.— Castleman *v.* Homes, 7 T. B. Mon. (Ky.) 591; Chambers *v.* Wilkins, 2 Litt. (Ky.) 145.

New York.— Fleet *v.* Youngs, 11 Wend. (N. Y.) 522; Clapp *v.* Bromagham, 9 Cow. (N. Y.) 304.

Pennsylvania.— Guhr *v.* Chambers, 8 Serg. & R. (Pa.) 157.

United States.— Walton *v.* Marietta Chair Co., 157 U. S. 342, 15 S. Ct. 626, 39 L. ed. 725; Estes *v.* Trabue, 128 U. S. 225, 9 S. Ct. 58, 32 L. ed. 437. But see Pearson *v.* Yewdall, 95 U. S. 294, 24 L. ed. 436, in which it was held that the supreme court would not allow a defect in parties to be cured by amendment where the questions raised by the writ of er-

g. Scire Facias to Hear Errors. In some jurisdictions, upon the grant of a writ of error, a scire facias ad audiendum errores is required to be issued to defendant in error.[8] The writ of error is dependent upon the form and sufficiency of service of the writ of scire facias, the statutory provisions as to which should be strictly followed;[9] but mere errors of form are not fatal.[10]

3. Citation or Other Process — a. In General. A citation on appeal is no part of the record;[11] but such citation should be attested and served by an authorized officer,[12] and in all cases the statutory provisions with regard to its issuance, form, service, and return must be followed.[13]

b. Issuance — (I) *Time of Issuance.* A citation upon appeal should be issued within the time fixed by statute.[14]

(II) *To Whom Addressed.* The citation should be addressed to those who are the actual parties at the time the proceeding is allowed and prosecuted.[15]

ror had been settled by earlier and repeated decisions.

Contra, Gasquett *v.* Berry, 6 Ark. 246.

See 2 Cent. Dig. tit. "Appeal and Error," § 2117.

But the discretionary power of the appellate court to permit such amendment will not be exercised unless the application therefor be made before the expiration of time limited by law for suing out the writ. Cornell *v.* Franklin, 40 Fla. 149, 23 So. 589, 74 Am. St. Rep. 131; State *v.* Canfield, 40 Fla. 36, 23 So. 591, 42 L. R. A. 72. *Compare* Altenberg *v.* Grant, 83 Fed. 980, 54 U. S. App. 312, 28 C. C. A. 244.

8. Roebuck *v.* Duprey, 2 Ala. 352; Lecat *v.* Salle, 1 Port. (Ala.) 287; Orlando First Nat. Bank *v.* King, 36 Fla. 25, 18 So. 1; Christopher *v.* Newnham, 34 Fla. 370, 16 So. 274; Clifford *v.* Keating, 4 Ill. 250.

As to who may issue the writ and the effect of a failure to file the scire facias on the return-day see Orlando First Nat. Bank *v.* King, 36 Fla. 25, 18 So. 1.

As to whom the writ must be directed, and when returnable, see Sammis *v.* Wightman, 25 Fla. 547, 6 So. 173.

In Florida, this writ has now been abrogated. Fla. Laws (1897), c. 4529. See State *v.* Canfield, 40 Fla. 36, 23 So. 591, 42 L. R. A. 72, in which it was held that, although the writ had been abrogated, the rule that the original writ should be returned to, and filed in, the appellate court with the record in the cause, or at least by the return-day named in the writ, was not affected.

Where no writ of error has actually been issued, plaintiff in error has no right to the writ of scire facias until a transcript of the record is filed in the appellate court. Breaton *v.* Johnson, 1 Ill. App. 160.

9. Christopher *v.* Newnham, 34 Fla. 370, 16 So. 274; Kennesaw Mills Co. *v.* Bynum, 34 Fla. 360, 16 So. 276; Driggs *v.* Higgins, 19 Fla. 103; Glover *v.* Heath, 3 Mass. 252; Rochester *v.* Roberts, 25 N. H. 495. *Compare* Birkby *v.* Solomons, 15 Ill. 120.

Statement of errors.— The errors should be stated in the scire facias rather than in the writ of error. Peirce *v.* Adams, 8 Mass. 383.

10. Sammis *v.* Wightman, 25 Fla. 547, 6 So. 173.

Amendment as to parties.—Where a scire facias describes correctly, in its recital, the parties to the judgment complained of, but in the citing part brings in parties whose names do not appear in the writ of error, the irregularity in the scire facias may be cured by amendment. U. S. Mut. Acc. Assoc. *v.* Weller, 30 Fla. 210, 11 So. 786.

Misdescription of parties.—Where, in the citing part of a scire facias ad audiendum errores, a party is described as guardian of another, and in the recital of such writ and in the writ of error is described as the next friend, the word "guardian" will be construed to mean "next friend," and the variance is immaterial. U. S. Mut. Acc. Assoc. *v.* Weller, 30 Fla. 210, 11 So. 786.

Alias writ.— If the scire facias issued on suing out a writ of error is insufficient, an alias writ may issue to the proper party, which, when served, will give jurisdiction. Birkby *v.* Solomons, 15 Ill. 120.

11. Innerarity *v.* Byrne, 5 How. (U. S.) 295, 12 L. ed. 159.

12. Joost *v.* Elliott, 20 Fla. 924.

13. *Arizona.*— Johns *v.* Phœnix Nat. Bank, (Ariz. 1899) 56 Pac. 725.

California.— Ferris *v.* Coover, 11 Cal. 175.

Florida.— See Jacksonville, etc., R., etc., Co. *v.* Broughton, 38 Fla. 139, 20 So. 829.

Georgia.— Williamson *v.* Nabers, 14 Ga. 285.

Indiana.— Price *v.* Baker, 41 Ind. 570.

Kentucky.—Greer *v.* Spencer, 3 Ky. L. Rep. 469.

Louisiana.—Schmitt *v.* Drouet, 42 La. Ann. 716, 7 So. 746; Lambeth *v.* Vawter, 6 Rob. (La.) 127.

Mississippi.— Natchez Ins. Co. *v.* Stanton, 4 How. (Miss.) 7; Trahern *v.* Shackelford, 3 How. (Miss.) 73.

Texas.— Roberts *v.* Landrum, 3 Tex. 16.

See 2 Cent. Dig. tit. "Appeal and Error," § 2120.

14. Harris *v.* Richardson, Minor (Ala.) 97; Bradford *v.* Erwin, 11 La. 509; Peters *v.* Willis, 44 Tex. 568; Graham *v.* Sterns, 16 Tex. 153; Chambers *v.* Shaw, 16 Tex. 143; Roberts *v.* Landrum, 3 Tex. 16; Davidson *v.* Lanier, 4 Wall. (U. S.) 447, 18 L. ed. 377; and 2 Cent. Dig. tit. "Appeal and Error," § 2122.

15. Bigler *v.* Waller, 12 Wall. (U. S.) 142, 20 L. ed. 260. See also U. S. *v.* Hopewell, 51

c. Form and Requisites — (I) *In General.* Generally, the citation or other process on appeal must clearly designate and describe the parties and the judgments or orders appealed from, specify the return-day, and be properly signed and attested.[16]

(II) *Designation of Parties.* The names of all the parties as to whom relief is sought on the appeal should appear in the citation; but where such names do properly appear, the use of general or indefinite expressions in the citation, as descriptive of such parties, will not vitiate it.[17]

(III) *Description of Judgment or Order.* A citation in error should contain such sufficiency of description as to notify defendant in error, with reasonable certainty, what judgment is complained of.[18]

(IV) *Specification of Return-Day.* The return-day of the citation should be set out, though an error in such return-day is not usually fatal.[19]

(V) *Signature — Federal Practice.* On appeal from a circuit or territorial court the citation must be signed by the judge thereof, or by a justice of the supreme court.[20]

d. Service — (I) *In General.* The citation or other process on appeal must in all cases be served, either personally or constructively.[21]

(II) *Persons to Be Served* — (A) *In General.* All parties to the judgment below whose interests may be adversely affected by the result of the appeal must be served.[22]

Fed. 798, 5 U. S. App. 137, 2 C. C. A. 510; and 2 Cent. Dig. tit. "Appeal and Error," § 2121.

16. Harris *v.* Harris, 41 Ala. 364; D. R. Dunlap Mercantile Co. *v.* St. John, 36 Fla. 303, 18 So. 761; Ward *v.* Bowmar, 12 La. 571; Smith *v.* Blount, 10 La. 483; Thompson *v.* Anderson, 82 Tex. 237, 18 S. W. 153; Thomas *v.* Thomas, 57 Tex. 516; and 2 Cent. Dig. tit. "Appeal and Error," § 2123 *et seq.*

17. Guarantee Trust, etc., Co. *v.* Buddington, 23 Fla. 514, 2 So. 885; Demoss *v.* Camp, 5 How. (Miss.) 516; Sydec *v.* Duran, 2 Tex. Unrep. Cas. 304. But see and *compare* Hearing *v.* Mound City L. Ins. Co., 29 La. Ann. 832; Covitt *v.* Anderson, 34 Tex. 262. And see Kail *v.* Whitmore, 6 Wall. (U. S.) 451, 18 L. ed. 862, in which it was held that where the writ of error described plaintiffs in error as "Samuel Kail, Sebert Larson, and Erick Enwell," while the citation described them as "Samuel Kail, Seford Larson, and Erick Envil," the writ would be dismissed.

See 2 Cent. Dig. tit. "Appeal and Error," § 2125.

Effect of acceptance.—Where a citation to defendants in error was issued at the instance of "E. Peale," as plaintiff in error, instead of "Elijah Peale, trustee of the Agricultural Bank of Mississippi," it was held that the error was not a fatal one, especially as the attorney of the parties accepted service of the citation. Peale *v.* Phipps, 8 How. (U. S.) 256, 12 L. ed. 1070.

Form of citation in error may be found set out in Worcester *v.* Georgia, 6 Pet. (U. S.) 515, 8 L. ed. 483.

18. Parker *v.* Des Moines L. Assoc., 108 Iowa 117, 78 N. W. 826; Lynch *v.* Brewer, 16 La. 247; Crane *v.* Hogan, (Tex. 1887) 7 S. W. 57; Schonfield *v.* Turner, (Tex. 1887) 3 S. W. 628; and 2 Cent. Dig. tit. "Appeal and Error," § 2126.

19. Hempkin *v.* Averett, 12 La. 482; Ginn *v.* Clack, 12 La. 480; Shute *v.* Keyser, 149 U. S. 649, 13 S. Ct. 960, 37 L. ed. 884; Segrist *v.* Crabtree, 127 U. S. 773, 8 S. Ct. 1394, 32 L. ed. 323; Virginia Valley Ins. Co. *v.* Mordecai, 21 How. (U. S.) 195, 16 L. ed. 94; Yeaton *v.* Lenox, 7 Pet. (U. S.) 220, 8 L. ed. 664; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 73 Fed. 314, 19 C. C. A. 477.

See 2 Cent. Dig. tit. "Appeal and Error," § 2127; and *supra*, VII, E, 2, c, (V).

20. The signature of the clerk is insufficient. Brown *v.* McConnell, 124 U. S. 489, 8 S. Ct. 559, 31 L. ed. 495; Richards *v.* Mackall, 113 U. S. 539, 5 S. Ct. 535, 28 L. ed. 1132; Palmer *v.* Donner, 7 Wall. (U. S.) 541, 19 L. ed. 99; U. S. *v.* Hodge, 3 How. (U. S.) 534, 11 L. ed. 714; Freeman *v.* Clay, 48 Fed. 849, 2 U. S. App. 151, 1 C. C. A. 115; and see 2 Cent. Dig. tit. "Appeal and Error," § 2124.

When one of the judges of the circuit court has approved an appeal bond, it is competent, under U. S. Rev. Stat. (1878), § 999, for another judge of that court, who might have granted the appeal and approved the bond, to sign the citation. Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 73 Fed. 314, 19 C. C. A. 477.

21. Chenault *v.* Bush, 3 Stew. & P. (Ala.) 342; Sewall *v.* Bates, 2 Stew. (Ala.) 462; Chicago, etc., R. Co. *v.* Guild, 61 Kan. 213, 59 Pac. 283; Mays *v.* Forbes, 11 Tex. 284; Lloyd *v.* Alexander, 1 Cranch (U. S.) 365, 2 L. ed. 137; Smith *v.* Ferst, 66 Fed. 798, 14 C. C. A. 96; and see 2 Cent. Dig. tit. "Appeal and Error," § 2128 *et seq.*

22. Weston *v.* Bonney, 37 Fla. 374, 19 So. 694; Guarantee Trust, etc., Co. *v.* Buddington, 23 Fla. 514, 2 So. 885; Thezan *v.* Thezan, 28 La. Ann. 442; Newman *v.* Levy, 26 La. Ann. 573; Clark *v.* Thompson, 42 Tex. 128; Lopex *v.* Flores, 34 Tex. 234; and see 2 Cent. Dig. tit. "Appeal and Error," § 2129.

(B) *Attorney of Appellee.* Service upon the attorney of an appellee is usually sufficient,[23] though, in some jurisdictions, such service is only allowable where appellee is a non resident or cannot be found.[24]

(III) *Time of Service.* The citation or other process on appeal must be served within the time prescribed by statute;[25] though it has been held by the supreme court of the United States that the appellate court may relieve appellant upon terms.[26]

(IV) *Sufficiency of Service.* The citation or other process on appeal should be served on appellee or defendant in error, or his attorney, personally, at their usual place of residence, if not in some manner personally waived by one of them;[27] and the citation must be addressed to, and served on, appellee

Failure to serve upon all appellees.—Where an appeal has been entered and citation issued to all parties interested, and there has been service of such citation on one or more of such appellees, the failure to make legal service on the other appellees will not vitiate the appeal, and the appellate court may issue a new citation, returnable to its succeeding term. Weston *v.* Bonney, 37 Fla. 374, 19 So. 694; Guarantee Trust, etc., Co. *v.* Buddington, 23 Fla. 514, 2 So. 885.

No notice of appeal need be given to the mortgagor's grantee in order to entitle the mortgagee to have a judgment of foreclosure so modified as to determine that certain lien claimants have no lien upon the mortgaged premises. Pacific Mut. L. Ins. Co. *v.* Fisher, 106 Cal. 224, 39 Pac. 758.

Where an officer of a state is a party prosecuting a suit for the state, the citation, on error to the supreme court of the United States, should be served on such officer. De la Lande *v.* Treasurer, 17 How. (U. S.) 1, 15 L. ed. 93.

23. *California.*— Beardsley *v.* Frame, 73 Cal. 634, 15 Pac. 310.

Indiana.— Hurlbut *v.* Hurlbut, 12 Ind. 346.

Nebraska.— Kinney *v.* Hickox, 24 Nebr. 167, 38 N. W. 816.

Oregon.— Shirley *v.* Burch, 16 Oreg. 1, 18 Pac. 344.

United States.— Bacon *v.* Hart, 1 Black (U. S.) 38, 17 L. ed. 52; Andrews *v.* National Foundry, etc., Works, 77 Fed. 774, 46 U. S. App. 619, 23 C. C. A. 454, 36 L. R. A. 139.

And see, generally, ATTORNEY AND CLIENT.

In Eldridge *v.* Howell, 4 Paige (N. Y.) 457, it was held that upon an appeal in an equity case notice of the appeal must be served on the solicitor of the adverse party as well as upon the registrar or clerk, and within the time limited by law for appealing from the order or decree complained of.

Attorney in fact.— In Louisiana, it has been held, under La. Code Prac., art. 582, providing that where appellee resides without the state, the sheriff must serve the petition and citation on such appellee's advocate, that service on his attorney in fact or agent is insufficient. McIntosh *v.* McLeod, 21 La. Ann. 465; Parker *v.* Davis, 21 La. Ann. 157.

Curator ad hoc.— Where an appellee is a non-resident service cannot be made on a curator *ad hoc.* Stevenson *v.* Edwards, 24 La. Ann. 266.

Executor of attorney.—A citation on a writ of error cannot be served on the executor of the attorney of record. Bacon *v.* Hart, 1 Black (U. S.) 38, 17 L. ed. 52.

24. Borde *v.* Erskine, 29 La. Ann. 822; Stevenson *v.* Edwards, 24 La. Ann. 266; Laws *v.* Harris, 33 Tex. 700; McLamore *v.* Heffner, 31 Tex. 189; and see 2 Cent. Dig. tit. "Appeal and Error," § 2129.

25. Whitfield *v.* Leonard, 38 Fla. 1, 20 So. 764; Gerig *v.* Diamond Phosphate Co., 37 Fla. 335, 19 So. 877; Crawford *v.* Feder, 27 Fla. 523, 8 So. 642; Petit *v.* Drane, 8 La. 218; Plauche *v.* Marigny, 6 La. 111; Smith *v.* Noland, 4 La. 280; Texas, etc., R. Co. *v.* Lennox, 1 Tex. App. Civ. Cas. § 531; Villabolos *v.* U. S., 6 How. (U. S.) 81, 12 L. ed. 352; U. S. *v.* Curry, 6 How. (U. S.) 106, 12 L. ed. 363; Yeaton *v.* Lenox, 7 Pet. (U. S.) 220, 8 L. ed. 664; Welsh *v.* Manderville, 5 Cranch (U. S.) 321, 3 L. ed. 113. See also Montague First Nat. Bank *v.* Robertson, 3 Tex. Civ. App. 150, 22 S. W. 100, 24 S. W. 659. But see Barremore *v.* Bradford, 10 La. 149; Wilcox *v.* Mitchell, 4 Sm. & M. (Miss.) 744; Pierce *v.* Cross, 36 Tex. 187; Washington *v.* Dennison, 6 Wall. (U. S.) 495, 18 L. ed. 863.

See 2 Cent. Dig. tit. "Appeal and Error," § 2130.

Failure to serve due to acts of appellee.— In Vinot *v.* Bertrand, 6 La. Ann. 474, it was held that when appellant, though exercising due diligence, has been unable, in consequence of appellee's acts, to ascertain the residence of the latter, and citation is not served within the statutory time, the appeal will not be dismissed. See also Anderson *v.* Irwin, 6 La. Ann. 793, in which it was held that where the appellee, through the fault of the sheriff, has not been served, he may have further time to answer if he prays for relief.

26. Dayton *v.* Lash, 94 U. S. 112, 24 L. ed. 33. See also Beebe *v.* Guinault, 29 La. Ann. 795; Mendenhall *v.* Hall, 134 U. S. 559, 10 S. Ct. 616, 33 L. ed. 1012.

27. Garfield Tp. *v.* Theis, 9 Kan. App. 770, 59 Pac. 42; Veuve *v.* Righter, 6 La. 138; Coleman *v.* Tidwell, 5 How. (Miss.) 12; and see 2 Cent. Dig. tit. "Appeal and Error," § 2131.

Mailing citation.— Under U. S. Rev. Stat. (1878), § 999, it has been held that the mailing of the citation to the party or his attorney is not sufficient, though, under the laws of the state, it would be a proper service. Tripp *v.* Santa Rosa St. R. Co., 144 U. S. 126, 12 S. Ct. 655, 36 L. ed. 371.

or defendant in error in the capacity in which he was acting in the original suit.[28]

(v) *Return.* An appeal or writ of error will be dismissed where there is no return of the citation or notice,[29] and the return must show that the appellate court has acquired jurisdiction through a proper service of the process.[30]

(vi) *Amendments.* Errors or defects in the citation or notice, or in the return thereon, which are not imputable to appellant or plaintiff in error, are not cause for the dismissal of the appeal or writ. Upon a proper and timely application to the court, amendments will be allowed, or a new citation granted;[31] and where no time is fixed within which to make application for amendment, only laches or equitable reasons can defeat the application.[32]

4. Notice — a. Authority to Give. Notice of appeal should be given by

28. Camutz *v.* State Bank, 20 La. Ann. 35.

But where a party sues in an individual capacity, and afterward, during the progress of the suit, that capacity was changed without notice to defendant, it was held that the latter would not have his appeal in the case dismissed because he had cited plaintiff in her individual capacity only; that in such case appellant will be allowed time to cite the plaintiff in her capacity as administratrix. Hearing *v.* Mound City L. Ins. Co., 29 La. Ann. 832.

29. Dolliole *v.* Azema, 4 Rob. (La.) 424; Tomkins *v.* Bradford, 10 La. 484; Lambert *v.* Moore, 2 Mart. (La.) 134; and see 2 Cent. Dig. tit. "Appeal and Error," § 2133.

Abolition of return-term.— In Wells *v.* Woodley, 5 How. (Miss.) 484, where, after a writ of error was sued out, the return-term was abolished by law, and plaintiff sued out a new citation to the term substituted for the old one, the writ was sustained.

30. Huntstock *v.* His Creditors, 10 La. 488; Knight *v.* Steele, 34 Tex. 440; Hendley *v.* Baccus, 32 Tex. 328.

What constitutes a sufficient service is largely dependent upon statutes, but these, as a rule, will not be strictly construed where it is shown by the return that there has been a substantial compliance with the provisions of such statutes, and that appellee or defendant in error has obtained the notice to which he is entitled. Harris *v.* Harris, 41 Ala. 364; Graham *v.* Gibson, 14 La. 146; Kimball *v.* Dunn, 12 La. 445.

31. *Alabama.*— Alexander *v.* Rae, 50 Ala. 64; Harris *v.* Harris, 41 Ala. 364.

District of Columbia.— Spalding *v.* Crawford, 3 App. Cas. (D. C.) 361.

Georgia.— Chappell *v.* Smith, 17 Ga. 68; Anderson *v.* Darien Bank, 5 Ga. 582.

Louisiana.— Cockerham *v.* Bosley, 52 La. Ann. 65, 26 So. 814; Philips *v.* His Creditors, 37 La. Ann. 701.

New York.— Lavalle *v.* Skelly, 90 N. Y. 546; Thorn *v.* Roods, 47 Hun (N. Y.) 433; Gutbrecht *v.* Prospect Park, etc., R. Co., 28 Hun (N. Y.) 497; Kent *v.* Sibley, 15 Daly (N. Y.) 298, 5 N. Y. Suppl. 447, 25 N. Y. St. 741; Chatfield *v.* Reynolds, 18 N. Y. Civ. Proc. 378, 56 Hun (N. Y.) 648, 9 N. Y. Suppl. 880, 31 N. Y. St. 195; Patterson *v.* McCunn, 9 N. Y. Civ. Proc. 122, 38 Hun (N. Y.) 531; Fraser *v.* Ward, 2 N. Y. City Ct. 345.

South Carolina.— Moody *v.* Dickinson, 54 S. C. 526, 32 S. E. 563.

Texas.— Holloman *v.* Middleton, 23 Tex. 537; Owen *v.* Tankersly, 12 Tex. 38.

Utah.— Larson *v.* Utah, etc., R. Co., (Utah 1888) 19 Pac. 196.

Washington.—Sadler *v.* Niesz, 5 Wash. 182, 31 Pac. 630, 1030.

United States.— Richardson *v.* Green, 130 U. S. 104, 9 S. Ct. 443, 32 L. ed. 872; Renaud *v.* Abbott, 116 U. S. 277, 6 S. Ct. 1194, 29 L. ed. 629; Peale *v.* Phipps, 8 How. (U. S.) 256, 12 L. ed. 1070; McClellan *v.* Pyeatt, 49 Fed. 259, 4 U. S. App. 98, 1 C. C. A. 241.

See 2 Cent. Dig. tit. "Appeal and Error," § 2134.

After lapse of time for appeal.— Leave to amend a notice of appeal, so as to make it an appeal from a judgment instead of from an order, will not be allowed after the time for appeal from the judgment has expired. Biggert *v.* Nichols, 18 Misc. (N. Y.) 596, 42 N. Y. Suppl. 472. Similarly, where an appeal from a decree in equity has failed for lack of notice to all the parties interested, no notice which the court might order after the time for appeal has elapsed can be effective to bring the absent parties within its jurisdiction. Kidder *v.* Fidelity Ins., etc., Co., 105 Fed. 821.

New citation issued, by what court.— In Porter *v.* Foley, 21 How. (U. S.) 393, 16 L. ed. 154, it was held that the supreme court cannot issue a new citation in place of a defective one, since citations must be made by the court issuing the writ of error. But in Louisiana, on the contrary, it has been held that the time allowed for the return of a citation cannot be extended by the court in which the appeal was taken, but only by the supreme court. Harbour *v.* Brickel, 10 Rob. (La.) 419; Hempkin *v.* Averett, 12 La. 482; Ginn *v.* Clack, 12 La. 480; Laville *v.* Rightor, 11 La. 198; Hart *v.* Fisk, 10 La. 481.

32. State Sav. Bank *v.* Ratcliffe, 111 Iowa 662, 82 N. W. 1011.

Laches of appellant.—Where appellant or plaintiff in error is guilty of laches in applying for leave to amend or to issue a new citation, the writ will be denied. Newell *v.* Briggs, 3 How. (Miss.) 45; Dolan *v.* Jenning, 139 U. S. 385, 11 S. Ct. 584, 35 L. ed. 217.

appellant's attorney of record, and the fact that such attorney is not qualified to practise in the appellate court will not affect the validity of the appeal.[33]

b. Parties Entitled to Notice — (I) *In General.* All parties to the cause below whose interests may be adversely affected by the judgment on appeal are entitled to notice of the appeal, except in those jurisdictions where the appeal is taken and perfected in open court, and the appellee is bound to take notice thereof to the same extent as to the rendition of the judgment or other proceedings in the cause.[34]

(II) *Adverse Parties.* The notice of appeal, where required at all, should always be served upon all adverse parties.[35] But where it appears that the decree

33. Beardsley *v.* Frame, 73 Cal. 634, 15 Pac. 310; English *v.* Maxwell, 25 Mich. 462. See also Smith *v.* Wainwright, 24 Vt. 650. And see, generally, Attorney and Client.

34. *California.*— O'Kane *v.* Daly, 63 Cal. 317; *In re* Walkerley, (Cal. 1895) 40 Pac. 13.

Indiana.— Kennedy *v.* Divine, 77 Ind. 490.

Iowa.— Epeneter *v.* Montgomery County, 98 Iowa 159, 67 N. W. 93.

New York.— Argall *v.* Pitts, 78 N. Y. 239; Bemis *v.* Huntington, 15 N. Y. App. Div. 627, 44 N. Y. Suppl. 439.

Oregon.—Hamilton *v.* Blair, 23 Oreg. 64, 31 Pac. 197.

Washington.— Hinchman *v.* Point Defiance R. Co., 14 Wash. 171, 44 Pac. 152; Seattle, etc., R. Co. *v.* Johnson, 7 Wash. 97, 34 Pac. 567.

See 2 Cent. Dig. tit. "Appeal and Error," § 2136.

Assignee of judgment.—Where a judgment has been assigned under a statute providing that the assignment of a judgment shall not abate the action, but that the same may be carried on in the name of the original party, or that the transferee may be substituted, until such substitution has been actually made, notice of appeal is properly served on the judgment creditor. Schroeder *v.* Pratt, 21 Utah 176, 60 Pac. 512, construing Utah Rev. Stat. (1898), § 2920.

Dismissed party.—A notice of appeal by a defendant need not be served on defendants who were dismissed from the action before judgment. Bliss *v.* Grayson, 24 Nev. 422, 56 Pac. 231.

Intervening parties.—In Dawson *v.* Parsons, 16 Misc. (N. Y.) 190, 38 N. Y. Suppl. 1000, 74 N. Y. St. 810, it was held that, in proceedings for the disbursement of partnership assets, a creditor who is allowed to intervene to prove his claim becomes a party to the record, though neither plaintiff nor defendant, and, on appeal from an order adjudging the rights of creditors, is entitled to notice. See also Gray's Harbor Commercial Co. *v.* Wotton, 14 Wash. 87, 43 Pac. 1095.

Mere unnecessary and formal party need not be notified. Sunberg *v.* Babcock, 61 Iowa 601, 16 N. W. 716; Hand Mfg. Co. *v.* Marks, 36 Oreg. 523, 52 Pac. 512, 53 Pac. 1072, 59 Pac. 549; Eldridge *v.* Stenger, 19 Wash. 697, 54 Pac. 541.

One whose interests are identical with, and fully protected by, another party, need not be served with notice. Johnson *v.* Puritan Min. Co., 19 Mont. 30, 47 Pac. 337; The Victorian, 24 Oreg. 121, 32 Pac. 1040, 41 Am. St. Rep. 838. See also Potter *v.* Baker, 4 Paige (N. Y.) 290; Galveston, etc., R. Co. *v.* House, 102 Fed. 112.

Partners.— The service of summons in error upon one of the members of a partnership saves the proceeding in error as to the members not served; but such other parties should be served before the case is heard. Cowie *v.* Meyers, 10 Ohio Dec. 91. See also Ranney-Alton Mercantile Co. *v.* Hanes, 9 Okla. 471, 60 Pac. 284.

Persons who have not appeared, or who have not been made parties below, or as to whom there has been a dismissal in the trial court, are not entitled to notice.

California.— Peck *v.* Agnew, 126 Cal. 607, 59 Pac. 125; Clarke *v.* Mohr, 125 Cal. 540, 58 Pac. 176.

Iowa.— Ward *v.* Walker, 111 Iowa 611, 82 N. W. 1028; Bonnot Co. *v.* Newman, 108 Iowa 158, 78 N. W. 817.

Minnesota.— *In re* Skoll, (Minn. 1899) 80 N. W. 953.

Nevada.— Bliss *v.* Grayson, 24 Nev. 422, 59 Pac. 888, 56 Pac. 231.

Washington.— Home Sav., etc., Assoc. *v.* Burton, 20 Wash. 688, 56 Pac. 940.

Wisconsin.— Wheeler *v.* Hartshorn, 40 Wis. 83.

Principal defendant is not such a party to a judgment against a garnishee as to entitle him to notice of appeal therefrom taken by the garnishee alone. Dittenhoefer *v.* Cœur d'Alene Clothing Co., 4 Wash. 519, 30 Pac. 660.

Upon cross-petition in error.— In Brown *v.* Kuhn, 40 Ohio St. 468, it was held that, where a cross-petition in error is properly filed against a party already in court in the pending case on error, no summons in error should be issued for such party.

Orders denying motion for new trial.— In Ryer *v.* Ryer, 110 Cal. 556, 42 Pac. 1082, it was held that, upon appeal from an order denying a motion for a new trial, notice of appeal need be given only to those parties to whom the motion was directed. See also Bliss *v.* Grayson, 24 Nev. 422, 56 Pac. 231, 59 Pac. 888, in which it was held that, where co-defendants have made separate motions for a new trial, the defendant whose motion is denied may appeal without serving a notice of appeal on his co-defendants whose motion has never been passed upon by the court.

35. **An adverse party,** within the meaning of this rule, is any party whose interests may be affected by the judgment on the appeal or

or judgment appealed from may be modified without affecting the rights of an adverse party, the failure to serve such party with notice is not sufficient to cause a dismissal.[36]

(III) *Co-Parties.* In some jurisdictions notice of appeal is required by statute to be served on all co-parties and in all cases.[37] But even in these jurisdictions, and as a general rule, notice to co-parties is only required where their rights may be adversely affected by the judgment of the appellate court.[38]

writ, and which interests are against those of appellant or plaintiff in error.

California.— Bowering *v.* Adams, 126 Cal. 653, 59 Pac. 134; Herriman *v.* Menzies, 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 56 Am. St. Rep. 81, 35 L. R. A. 318; Bullock *v.* Taylor, 112 Cal. 147, 44 Pac. 457; Barnhart *v.* Edwards, 111 Cal. 428, 44 Pac. 160.

Connecticut.— But see Donovan's Appeal, 40 Conn. 154.

Idaho.— Aulbach *v.* Dahler, (Ida. 1895) 43 Pac. 192; Coffin *v.* Edington, 2 Ida. 595, 23 Pac. 80; Jones *v.* Quantrell, 2 Ida. 141, 9 Pac. 418.

Iowa.— Chase *v.* Christenson, 92 Iowa 405, 60 N. W. 640.

Michigan.— Strang *v.* Hillsdale Cir. Judge, 108 Mich. 227, 65 N. W. 968.

Minnesota.— Frost *v.* St. Paul Banking, etc., Co., 57 Minn. 325, 59 N. W. 308.

Nevada.— Dick *v.* Bird, 14 Nev. 161.

New York.— West *v.* Place, 80 Hun (N. Y.) 255, 30 N. Y. Suppl. 14, 61 N. Y. St. 765; Pickersgill *v.* Read, 7 Hun (N. Y.) 636; Matter of Kingsbridge Road, 4 Hun (N. Y.) 599; Hiscock *v.* Phelps, 2 Lans. (N. Y.) 106; Coates *v.* Carroll, 28 How. Pr. (N. Y.) 436; Coates *v.* Smith, 31 How. Pr. (N. Y.) 146.

Oregon.— Barger *v.* Taylor, 30 Oreg. 228, 42 Pac. 615, 47 Pac. 618; Osborn *v.* Logus, 28 Oreg. 302, 37 Pac. 456, 38 Pac. 190, 42 Pac. 997; Jackson County *v.* Bloomer, 28 Oreg. 110, 41 Pac. 930.

Utah.— Commercial Nat. Bank *v.* U. S. Savings, etc., Co., 13 Utah 189, 44 Pac. 1043.

Wisconsin.— Hunter *v.* Bosworth, 43 Wis. 583; Wheeler *v.* Hartshorn, 40 Wis. 83.

See 2 Cent. Dig. tit. "Appeal and Error," §§ 2137, 2138.

Cross-appeals.— The fact that appeals were prayed by and allowed to both plaintiff and defendant does not dispense with service of written notice of appeal upon the adverse party, unless the appeal is perfected on the same day on which judgment was rendered. Law *v.* Nelson, 14 Colo. 409, 24 Pac. 2. See, *contra*, Republican Valley R. Co. *v.* Linn, 15 Nebr. 234, 18 N. W. 35.

36. Miller *v.* Thomas, 71 Cal. 406, 12 Pac. 432; Miller *v.* Rea, 71 Cal. 405, 12 Pac. 431; Menefee *v.* Chesley, 98 Iowa 55, 66 N. W. 1038; Lillienthal *v.* Caravita, 15 Oreg. 339, 15 Pac. 280; Suttor *v.* Consolidated Apex Min. Co., 12 S. D. 576, 82 N. W. 188.

37. *Indiana.*— Ledbetter *v.* Winchel, 142 Ind. 109, 40 N. E. 1065; Brown *v.* Trexler, 132 Ind. 106, 30 N. E. 418, 31 N. E. 572; Hutts *v.* Martin, 131 Ind. 1, 30 N. E. 698, 31 Am. St. Rep. 412; Walsh *v.* Brockway, 13 Ind. App. 70, 40 N. E. 29, 41 N. E. 76.

Iowa.— Lippold *v.* Lippold, (Iowa 1900) 83 N. W. 809; Ash *v.* Ash, 90 Iowa 229, 57 N. W. 862.

North Carolina.— Rose *v.* Baker, 99 N. C. 323, 5 S. E. 919.

Washington.— Hopkins *v* Satsop R. Co., 18 Wash. 679, 52 Pac. 349; Dewey *v.* South Side Land Co., 11 Wash. 210, 39 Pac. 368; Johnson *v.* Lighthouse, 8 Wash. 32, 35 Pac. 403; Traders' Bank *v.* Bokien, 5 Wash. 777, 32 Pac. 744; Bellingham Bay Nat. Bank *v.* Central Hotel Co., 4 Wash. 642, 30 Pac. 671.

United States.— Downing *v.* McCartney, 131 U. S. xcviii, appendix, 19 L. ed. 757.

And see *supra*, VI; and 2 Cent. Dig. tit. "Appeal and Error," § 2139.

Term-time appeals.—Where the court fixed the penalty on an appeal bond, and named the sureties therein, and the bond was filed in vacation but within the time allowed by the court, the appeal is a term-time appeal, and no notice is necessary to co-parties not appealing. Thompson *v.* Connecticut Mut. L. Ins. Co., 139 Ind. 325, 38 N. E. 796.

38. *California.*— French *v.* McCarthy, 110 Cal. 12, 42 Pac. 302; Warren *v.* Ferguson, 108 Cal. 535, 41 Pac. 417 [*following* Pacific Mut. L. Ins. Co. *v.* Fisher, 106 Cal. 224, 39 Pac. 758].

Indiana.— Klingensmith *v.* Kepler, 41 Ind. 341; Hildebrand *v.* Sattley Mfg. Co., (Ind. App. 1900) 57 N. E. 594.

Iowa.— Ward *v.* Walker, 111 Iowa 611, 82 N. W. 1028; Wolfe *v.* Jaffray, 88 Iowa 358, 55 N. W. 91; Laprell *v.* Jarosh, 83 Iowa 753, 49 N. W. 1021.

Louisiana.— Webb *v.* Keller, 39 La. Ann. 55, 1 So. 423.

New York.— Brown *v.* Richardson, 4 Rob. (N. Y.) 603.

Oregon.— Bennett *v.* Minott, 28 Oreg. 339, 39 Pac. 997, 44 Pac. 288; Osborn *v.* Logus, 28 Oreg. 302, 37 Pac. 456, 38 Pac. 190, 42 Pac. 997.

See 2 Cent. Dig. tit. "Appeal and Error," § 2139.

Questions affecting appellant alone.—Though Iowa Code (1873), § 3174, provides that, where a part of several co-parties appeal, those appealing must serve notice of appeal on all other co-parties, yet the failure to do this does not deprive the supreme court of its jurisdiction, but it may determine any question affecting only appellant and the adverse party. Kellogg *v.* Colby, 83 Iowa 513, 49 N. W. 1001.

Parties against whom no judgment is rendered.— It is improper to serve with notice of appeal, under Ind. Code, § 551, persons who, although made parties defendant in the complaint in order to answer as to their interest in the subject-matter of the action, have not appeared in the lower court, and against whom no judgment has been rendered, so that they

c. Form and Requisites — (I) *In General.* No particular form of words is necessary; but the notice is sufficient if it clearly shows that an appeal is intended, and the judgment or decree appealed from.[39] It need not state the term for hearing the appeal.[40]

(II) *In Writing.* Except where an appeal is taken in open court upon rendition of the judgment or order appealed from,[41] notice of appeal should be served in writing.[42]

(III) *Decisions Included.* A notice of appeal should merely include the

cannot be affected by the judgment rendered on appeal. Keller *v.* Boatman, 49 Ind. 101. See also Alexander *v.* Gill, 130 Ind. 485, 30 N. E. 525; Koons *v.* Mellett, 121 Ind. 585, 23 N. E. 95, 7 L. R. A. 231; Essency *v.* Essency, 10 Wash. 375, 38 Pac. 1130.

Judgment by default.— It is not necessary, where one defendant appeals, to serve notice of appeal, on other defendants, where the latter by default admit the averments of the complaint. Boob *v.* Hall, 107 Cal. 160, 40 Pac. 117. See also Wright *v.* Mahaffey, 76 Iowa 96, 40 N. W. 112.

Similarly where a judgment, by consent of counsel of all parties, is rendered in an action of damages for trespass against three defendants, and one of the latter appeals from an order denying his motion to vacate such judgment, notice need not be served on his co-defendants. Jackson *v.* Brown, 82 Cal. 275, 23 Pac. 142.

Notice of intention to appeal.— Under a statute requiring the appellants, in case some only of several co-parties appeal, to "serve notice thereof" upon the others, if, on the day when the appeal is taken, appellants serve a notice on their co-parties that they "will on this day" appeal, and the co-parties accept service of the notice, and decline to join in the appeal, that is sufficient; and the appeal should not be dismissed for want of notice of an appeal already taken. *Ex p.* Parker, 120 U. S. 737, 7 S. Ct. 767, 30 L. ed. 818.

39. *California.*— Sharon *v.* Sharon, 68 Cal. 326, 9 Pac. 187.

Florida.— Bauknight *v.* Sloan, 17 Fla. 281.

Indiana.— Tate *v.* Hamlin, 149 Ind. 94, 41 N. E. 356; Dougherty *v.* Brown, 21 Ind. App. 115, 51 N. E. 729.

Iowa.— Rickel *v.* Chicago, etc., R. Co., (Iowa 1900) 83 N. W. 957; Geyer *v.* Douglass, 85 Iowa 93, 52 N. W. 111.

Minnesota.— Anderson *v.* Meeker County, 46 Minn. 237, 48 N. W. 1022; Baberick *v.* Magner, 9 Minn. 232.

Missouri.— Runkle *v.* Hagan, 3 Mo. 234.

Nevada.— Bliss *v.* Grayson, 24 Nev. 422, 56 Pac. 231.

New York.— Matter of Stewart, 135 N. Y. 413, 32 N. E. 144, 48 N. Y. St. 434; Silsbee *v.* Gillespie, 9 Abb. Pr. N. S. (N. Y.) 139. And see Clapp *v.* Struglanz, 23 Misc. (N. Y.) 641, 52 N. Y. Suppl. 156.

Ohio.— Hirsh *v.* Kilsheimer, 12 Ohio Cir. Ct. 291.

Oregon.— State *v.* Hanlon, 32 Oreg. 95, 48 Pac. 353; Thomas *v.* Bowen, 29 Oreg. 258, 45 Pac. 768; Neppach *v.* Jordan, 13 Oreg. 246, 10 Pac. 341.

South Dakota.— McConnell *v.* Spicker, 13 S. D. 406, 83 N. W. 435. See Starkweather *v.* Bell, 12 S. D. 146, 80 N. W. 183.

Texas.— Teas *v.* Robinson, 11 Tex. 774; Dutton *v.* Norton, 1 Tex. App. Civ. Cas. § 357.

Washington.— McConnell *v.* Kaufman, 4 Wash. 229, 29 Pac. 1053.

Wisconsin.— Messmer *v.* Block, 100 Wis. 664, 76 N. W. 598.

See 2 Cent. Dig. tit. "Appeal and Error," § 2140 *et seq.*

Change of statute.— A notice of appeal, given in accordance with the practice in vogue at the time the appeal is taken, is sufficient even though the statutory requirements regarding such notices be changed before the appeal is perfected. Sapp *v.* Laughead, 6 Ohio St. 174.

Fact of appeal.— The notice should state that appellants do appeal, not that they will appeal. Simpson *v.* Ogg, 18 Nev. 28, 1 Pac. 827.

Forms of notices of appeal may be found set out in whole, in part, or in substance in Hahn *v.* Chicago, etc., R. Co., 43 Iowa 333; Wilmarth *v.* Reed, 83 Mich. 44, 46 N. W. 1031; Dietritch *v.* Steam Dredge, etc., 14 Mont. 261, 36 Pac. 81; Forrest *v.* Forrest, 6 Duer (N. Y.) 111.

40. Harrison *v.* Palo Alto County, 104 Iowa 383, 73 N. W. 872. See also Geyer *v.* Douglass, 85 Iowa 93, 52 N. W. 111; Mickley *v.* Tomlinson, 79 Iowa 383, 41 N. W. 311, 44 N. W. 684.

41. Elma *v.* Carney, 4 Wash. 418, 30 Pac. 732.

An ambiguous or imperfect entry on the judge's docket, such entry indicating an appeal, cannot be held to be a notice of appeal, given in open court and entered of record. Forrest *v.* Rawlings, 40 Tex. 502.

42. *Montana.*— Cornell *v.* Latta, 1 Mont. 714.

New York.— People *v.* Eldridge, 7 How. Pr. (N. Y.) 108; Potter *v.* Baker, 4 Paige (N. Y.) 290.

Ohio.— Bradford *v.* Watts, Wright (Ohio) 495.

South Carolina.— Barnwell *v.* Marion, 56 S. C. 54, 33 S. E. 719. *Contra,* First Nat. Bank *v.* Gary, 14 S. C. 571.

Washington.— Cole *v.* Price, 22 Wash. 18, 60 Pac. 153; Myers *v.* Landrum, 4 Wash. 762, 31 Pac. 33.

See 2 Cent. Dig. tit. "Appeal and Error," § 2141.

judgment or order appealed from, and two judgments or orders included in one notice of appeal will, in certain jurisdictions, cause dismissal.[43]

(IV) *Description of Judgment or Order.* The notice of appeal must always sufficiently describe the judgment or order appealed from, so as to leave no doubt as to its identity.[44] Thus, a notice of appeal which fails to state the date of the rendition or entry of the judgment or decree appealed from is insufficient.[45]

43. *California.*— Williams *v.* Dennison, 86 Cal. 430, 25 Pac. 244; People *v.* Center, 61 Cal. 191.

Idaho.— See, *contra*, McCoy *v.* Oldham, 1 Ida. 465.

Iowa.— Gulliher *v.* Chicago, etc., R. Co., 59 Iowa 416, 13 N. W. 429.

Montana.— Steuffen *v.* Jefferis, 9 Mont. 66, 22 Pac. 152; Sperling *v.* Calfee, 7 Mont. 514, 19 Pac. 204.

New York.—French *v.* Row, 77 Hun (N. Y.) 380, 28 N. Y. Suppl. 849, 60 N. Y. St. 396; Whitman *v.* Foley, 63 Hun (N. Y.) 626, 19 N. Y. Suppl. 910, 43 N. Y. St. 969; Whitman *v.* Foley, 61 Hun (N. Y.) 623, 10 N. Y. Suppl. 23; Hymes *v.* Van Cleef, 61 Hun (N. Y.) 618, 15 N. Y. Suppl. 341, 39 N. Y. St. 810; McRickard *v.* Flint, 13 Daly (N. Y.) 541, 1 N. Y. St. 608; Pfeffer *v.* Buffalo R. Co., 4 Misc. (N. Y.) 465, 24 N. Y. Suppl. 490, 54 N. Y. St. 342. *Compare* Tyler *v.* Simmons, 6 Paige (N. Y.) 127.

Ohio.— Branch *v.* Dick, 14 Ohio St. 551.

Wisconsin.— Olinger *v.* Liddle, 55 Wis. 621, 13 N. W. 703; Ballou *v.* Chicago, etc., R. Co., 53 Wis. 150, 10 N. W. 87. But see Fehring *v.* Swineford, 33 Wis. 550; Chamberlain *v.* Sage, 14 Wis. 193.

See 2 Cent. Dig. tit. "Appeal and Error," § 2144.

Extent of rule.— But the fact that the notice of appeal also includes an appeal from a non-appealable judgment or order will not defeat the appeal as to the appealable judgment or order (Bryant *v.* Davis, 22 Mont. 534, 57 Pac. 143; Brown *v.* Edmonds, 5 S. D. 508, 59 N. W. 731, and see also Woodside *v.* Hewel, 107 Cal. 141, 40 Pac. 103); and, where there are several appeals in a case, the different notices may be contained in one instrument, if the several appeals are distinctly designated (Sharon *v.* Sharon, 68 Cal. 326, 9 Pac. 187; and see Winter *v.* McMillan, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243).

44. *California.*— Meley *v.* Boulon, 104 Cal. 263, 37 Pac. 931; Gruell *v.* Spooner, 71 Cal. 493, 12 Pac. 511.

Iowa.— Geyer *v.* Douglass, 85 Iowa 93, 52 N. W. 111; Weiser *v.* Day, 77 Iowa 25, 41 N. W. 476. And see Clark *v.* Van Loon, 108 Iowa 250, 79 N. W. 88, 75 Am. St. Rep. 219.

Minnesota.— Gregg *v.* Uhless, 25 Minn. 272.

Missouri.— Smith Drug Co. *v.* Hill, 1 Mo. App. Rep. 447.

Nevada.— Paul *v.* Cragnas, (Nev. 1900) 59 Pac. 857, 47 L. R. A. 540.

New York.— Guarantee Trust, etc., Co. *v.* Philadelphia, etc., R. Co., 160 N. Y. 1, 54 N. E. 575; Ansonia Brass, etc., Co. *v.* Conner, 98 N. Y. 574; Francis *v.* Tilyon, 26 N. Y. App. Div. 340, 49 N. Y. Suppl. 799.

Oregon.— Hamilton *v.* Butler, 33 Oreg. 370, 54 Pac. 200; Mendenhall *v.* Elwert, 36 Oreg. 375, 52 Pac. 22, 59 Pac. 805; Duffy *v.* McMahon, 30 Oreg. 306, 47 Pac. 787; Crawford *v.* Wist, 26 Oreg. 596, 39 Pac. 218.

South Carolina.— Grayson *v.* Harris, 37 S. C. 606, 16 S. E. 154; Boylston *v.* Crews, 2 S. C. 422.

Washington.— Roberts *v.* Skelton Southwestern R. Co., 21 Wash. 427, 58 Pac. 576; Matter of Day, 18 Wash. 359, 51 Pac. 474; Parker *v.* Denney, 2 Wash. Terr. 176, 2 Pac. 351.

Wisconsin.— German Mut. Farmers' F. Ins. Co. *v.* Decker, 74 Wis. 556, 43 N. W. 500; Irvin *v.* Smith, 68 Wis. 220, 31 N. W. 909.

See 2 Cent. Dig. tit. "Appeal and Error," § 2145.

Form of notice.— "You are hereby notified that plaintiff has appealed from the judgment of the district court in this case" refers to the final judgment, and is a sufficiently specific notice of appeal. Searles *v.* Haag, 85 Iowa 754, 52 N. W. 328 [*distinguishing* Weiser *v.* Day, 77 Iowa 25, 41 N. W. 476]. See also Lesure Lumber Co. *v.* Mutual F. Ins. Co., 101 Iowa 514, 70 N. W. 761.

Construction of notice.—Where a notice of appeal speaks of a judgment appealed from, but refers to the decision denying a new trial, and may fairly be construed to read that defendant appeals from the judgment and the decision denying a new trial, and its meaning is apparent, the notice is sufficient. Van Ingen *v.* Snyder, 24 Hun (N. Y.) 81.

Surplusage.—Where the notice of appeal properly describes the judgment from which the appeal is taken, the addition of other words indicating that the appeal is taken from an order dismissing the action, on which order the judgment is founded, should be treated as surplusage, and does not invalidate the appeal. Nevada Cent. R. Co. *v.* Lander County Dist. Ct., 21 Nev. 409, 32 Pac. 673. See also Sands *v.* Cruikshank, 12 S. D. 1, 80 N. W. 173.

45. *California.*— Swasey *v.* Adair, 83 Cal. 136, 23 Pac. 284; Anderson *v.* Goff, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34.

Florida.— Lenfesty *v.* Coe, 26 Fla. 49, 7 So. 2.

Minnesota.— Anderson *v.* Meeker County, 46 Minn. 237, 48 N. W. 1022; Galloway *v.* Litchfield, 8 Minn. 188.

New York.— People *v.* American L. & T. Co., 62 Hun (N. Y.) 622, 17 N. Y. Suppl. 76, 43 N. Y. St. 332; Curtis *v.* Ritzman, 7 Misc. (N. Y.) 400, 27 N. Y. Suppl. 971, 58 N. Y. St. 58.

Oregon.— Luse *v.* Luse, 9 Oreg. 149. But see State *v.* Hanlon, 32 Oreg. 95, 48 Pac. 353.

(v) *Statement of Cause.* So long as the cause appealed from is sufficiently stated in the notice of appeal to give appellee full notice of the cause appealed, it is sufficient.[46]

(vi) *Specification of Interlocutory Judgments or Orders.* As a rule, upon appeal from a final judgment, interlocutory judgments or orders will be reviewed without being specifically designated.[47]

(vii) *Specification of Errors.* The notice of appeal, under the provisions of some statutes, should specify all errors intended to be relied upon, unless such errors relate to the sufficiency of the complaint or the jurisdiction of the lower court, in which case they will be examined whether specified or not.[48]

(viii) *Signature.* The notice of appeal should be signed by appellant's attorney of record.[49]

Washington.— British Bark Latona *v.* McAllep, 3 Wash. Terr. 332*b*, 19 Pac. 131.

Wisconsin.— Atkinson *v.* Chicago, etc., R. Co., 69 Wis. 362, 34 N. W. 63.

See 2 Cent. Dig. tit. "Appeal and Error," § 2146.

46. *California.*— Butler *v.* Ashworth, 100 Cal. 334, 34 Pac. 780; Herrlich *v.* McDonald, 72 Cal. 579, 14 Pac. 357.

Colorado.— Cody *v.* Filley, 4 Colo. 342.

Iowa.— Conklin *v.* Keokuk, 73 Iowa 343, 35 N. W. 444.

Minnesota.— Matter of Allen, 25 Minn. 39.

Missouri.— McGinniss, etc., Hardware Co. *v.* Taylor, 22 Mo. App. 513.

New York.—Wolf *v.* Horn, 12 Misc. (N. Y.) 100, 33 N. Y. Suppl. 173, 66 N. Y. St. 860.

South Dakota.— Marshall *v.* Harney Peak Tin Min., etc., Co., 3 S. D. 473, 54 N. W. 272, 1 S. D. 350, 47 N. W. 290.

Wisconsin.— Jefferson County Bank *v.* Robbins, 67 Wis. 68, 29 N. W. 209, 893.

47. Warren *v.* Stoddart, (Ida. 1899) 59 Pac. 540; Matter of Day, 18 Wash. 359, 51 Pac. 474. See also State *v.* Hunter, 4 Wash. 637, 30 Pac. 673.

In New York, however, if appellant intends to bring up for review an interlocutory judgment or an intermediate order, he must, in the notice of appeal, distinctly specify the interlocutory judgment or intermediate order to be reviewed. N. Y. Code Civ. Proc. § 1301. See also Rich *v.* Manhattan R. Co., 150 N. Y. 542, 44 N. E. 1097; Taylor *v.* Smith, 24 N. Y. App. Div. 519, 49 N. Y. Suppl. 41; Crouch *v.* Moll, 55 Hun (N. Y.) 603, 8 N. Y. Suppl. 183, 28 N. Y. St. 48; Dick *v.* Livingston, 41 Hun (N. Y.) 455; Lyons *v.* Chamberlin, 25 Hun (N. Y.) 49; Townshend *v.* New York, 59 N. Y. Super. Ct. 573, 20 N. Y. Civ. Proc. 200, 12 N. Y. Suppl. 464, 35 N. Y. St. 465; Church *v.* American Rapid Tel. Co., 47 N. Y. Super. Ct. 558; Richards *v.* Brice, 15 Daly (N. Y.) 144, 16 N. Y. Civ. Proc. 398, 3 N. Y. Suppl. 941, 22 N. Y. St. 289; Fraser *v.* Alpha Combined Heating, etc., Mfg. Co., 25 Misc. (N. Y.) 422, 54 N. Y. Suppl. 1087; Purton *v.* Watson, 2 N. Y. Suppl. 661, 19 N. Y. St. 6.

48. *Michigan.*—Michigan Air-Line R. Co. *v.* Barnes, 44 Mich. 222, 6 N. W. 651.

New York.— Matter of Davis, 91 Hun (N. Y.) 53, 36 N. Y. Suppl. 822, 71 N. Y. St. 625; Begley *v.* Chose, 4 Daly (N. Y.) 157; Kelty *v.* Jenkins, 1 Hilt. (N. Y.) 73; Lee *v.* Schmidt, 6 Abb. Pr. (N. Y.) 183, 1 Hilt. (N. Y.) 537; Irwin *v.* Muir, 4 Abb. Pr. (N. Y.) 133, 13 How. Pr. (N. Y.) 409; Gray *v.* Hannah, 30 How. Pr. (N. Y.) 155; Loomis *v.* Higbie, 29 How. Pr. (N. Y.) 232; Forsyth *v.* Ferguson, 27 How. Pr. (N. Y.) 67.

North Carolina.— Ferrell *v.* Thompson, 107 N. C. 420, 12 S. E. 109, 10 L. R. A. 361.

Oregon.— Emison *v.* Owyhee Ditch Co., 37 Oreg. 577, 62 Pac. 13; Osmun *v.* Winters, 30 Oreg. 177, 46 Pac. 780; Cameron *v.* Wasco County, 27 Oreg. 318, 41 Pac. 160.

South Carolina.— Talbott *v.* Padgett, 30 S. C. 167, 8 S. E. 845; Weinges *v.* Cash, 15 S. C. 44.

But see, *contra*, Bacon *v.* Lamb, 4 Colo. 474; Krewson *v.* Purdon, 13 Oreg. 563, 11 Pac. 281; Lewis *v.* Lewis, 4 Oreg. 209.

See 2 Cent. Dig. tit. "Appeal and Error," § 2148.

Decree in equity.— The notice of appeal from a decree in equity need not specify the grounds of error. Lewis *v.* Lewis, 4 Oreg. 209.

49. Cockrill *v.* Hall, 76 Cal. 192, 18 Pac. 318; Harrigan *v.* Bolte, (Cal. 1885) 8 Pac. 184; Pensa *v.* Pensa, 3 Misc. (N. Y.) 417, 23 N. Y. Suppl. 186, 52 N. Y. St. 447 [*disapproving* Webb *v.* Milne, 10 N. Y. Civ. Proc. 27]; Poppleton *v.* Nelson, 10 Oreg. 437; Carstens *v.* Gustin, 18 Wash. 90, 50 Pac. 933; and see 2 Cent. Dig. tit. "Appeal and Error," § 2143.

Signature by appellant.— In Poppleton *v.* Nelson, 10 Oreg. 437, it was held that a notice signed by appellant himself was insufficient where the record did not show that he had substituted himself for his attorney.

Delegation of authority by attorney.— In Wood *v.* Walsh, 7 N. D. 376, 75 N. W. 767, it was held that the signature to a notice of appeal is valid when made by another by authority of the attorney.

Change in attorneys.— In Shirley *v.* Burch, 16 Oreg. 1, 18 Pac. 344, it was held that it is no ground for dismissing an appeal that the notice was signed by different attorneys from those originally in the lower court. But see Harrigan *v.* Bolte, (Cal. 1885) 8 Pac. 184. And see Pensa *v.* Pensa, 3 Misc. (N. Y.) 417, 23 N. Y. Suppl. 186, 52 N. Y. St. 447, in which it was held that a notice of appeal, signed by an attorney who has not been formally substituted as the attorney for appellant, is insufficient, and a motion to compel the attorney of

(IX) *Defects, Objections, and Amendments.* Mere informalities in a notice of appeal do not vitiate the notice so long as they do not mislead, and the notice gives the necessary information to the proper parties. In such cases amendments are freely allowed, in the discretion of the court;[50] but where there is an entire absence of notice, and it is not merely a question of defective notice, the appellate court has no power of amendment.[51]

d. Service of Notice — (I) *In General.* The service and filing of notices of appeal is essential to give the appellate court jurisdiction.[52]

(II) *Who May Serve.* Service of notice can only be made by some person duly authorized by statute to do so.[53]

(III) *Persons to Be Served.* The persons to be served with notice are specified by the statutes of the different states, the provisions of such statutes

the adversary party to accept service thereof will be denied.

Waiver of objection.— In Livermore *v.* Webb, 56 Cal. 489, respondent's attorneys admitted, in writing, the service of a copy of a notice of appeal, without objecting that it was signed by an attorney other than the attorney of record of appellant, and it was held that the objection was thereby waived.

50. *California.*— Matter of Nelson, 128 Cal. 242, 60 Pac. 772; Swasey *v.* Adair, 83 Cal. 136, 23 Pac. 284.

Georgia.— Chappell *v.* Smith, 17 Ga. 68.

Iowa.— State Sav. Bank *v.* Ratcliffe, 111 Iowa 662, 82 N. W. 1011.

Nevada.— Killip *v.* Empire Mill Co., 2 Nev. 34.

New York.— Gutbrecht *v.* Prospect Park, etc., R. Co., 28 Hun (N. Y.) 497; Mott *v.* Lansing, 5 Lans. (N. Y.) 516; Coppernoll *v.* Ketcham, 56 Barb. (N. Y.) 111; Kent *v.* Sibley, 15 Daly (N. Y.) 298, 5 N. Y. Suppl. 447, 25 N. Y. St. 741; Chatfield *v.* Reynolds, 18 N. Y. Civ. Proc. 378, 56 Hun (N. Y.) 648, 9 N. Y. Suppl. 880, 31 N. Y. St. 195; Irwin *v.* Muir, 4 Abb. Pr. (N. Y.) 133, 13 How. Pr. (N. Y.) 409; Ten Eick *v.* Simpson, 11 Paige (N. Y.) 117; Fraser *v.* Ward, 2 N. Y. City Ct. 345.

Washington.— Sadler *v.* Niesz, 5 Wash. 182, 31 Pac. 630, 1030; Parker *v.* Denney, 2 Wash. Terr. 176, 2 Pac. 351.

Wisconsin.— Black *v.* Chicago, etc., R. Co., 18 Wis. 208.

See 2 Cent. Dig. tit. "Appeal and Error," § 2149.

Amendment after time for taking appeal.— In Fry *v.* Bennett, 7 Abb. Pr. (N. Y.) 352, 16 How. Pr. (N. Y.) 385, it was held that the court might not allow an amendment of a notice of appeal from a judgment so as to make the appeal also an appeal from an order denying a new trial after the time of appeal from such order had expired, and so, in effect, allow a new trial. See also, to like effect, Lavalle *v.* Skelly, 90 N. Y. 546; Piper *v.* Van Buren, 27 Hun (N. Y.) 384; Patterson *v.* McCunn, 9 N. Y. Civ. Proc. 122, 38 Hun (N. Y.) 531.

Amendment of date of order appealed from. — A notice of appeal from an order cannot be amended by inserting therein the date of another and different order from that therein mentioned. Bryant *v.* Bryant, 4 Abb. Pr. N. S. (N. Y.) 138, 7 Rob. (N. Y.) 49.

Notice given at chambers.— In *Ex p.* Parker, 131 U. S. 221, 9 S. Ct. 708, 33 L. ed. 123, it was held that it is no objection to the notice of appeal that it was given at the chambers of the trial judge while he was without the territorial limits of his district, but at the place where the supreme court, of which he was a member, and which he was attending, was in session.

Omission to affix a revenue stamp upon the notice of appeal can only be questioned on a motion to dismiss the appeal. Cole *v.* Bell, 48 Barb. (N. Y.) 194. And the omission cannot be cured after the motion to dismiss for the want of a stamp. Lewis *v.* Randall, 1 Abb. Pr. N. S. (N. Y.) 135. But see, *contra*, Killip *v.* Empire Mill Co., 2 Nev. 34.

Abandonment of imperfect notice.—A party who files an imperfect notice of appeal can abandon the attempted appeal, serve another notice, and perfect his appeal through the latter, instead of the former notice. Fisher *v.* Tomlinson, (Oreg. 1900) 60 Pac. 390.

51. Larson *v.* Utah, etc., R. Co., (Utah 1888) 19 Pac. 196.

52. *California.*— Whipley *v.* Mills, 9 Cal. 641.

Colorado.— Peyton *v.* Gregory, 4 Colo. 269.

Dakota.— Matter of Gold St., 2 Dak. 39, 3 N. W. 311.

Iowa.— Flagler *v.* Cameron, 99 Iowa 744, 68 N. W. 580.

Nevada.— Gaudette *v.* Glissan, 11 Nev. 184.

South Dakota.— Pierre Sav. Bank *v.* Ellis, 9 S. D. 251, 68 N. W. 545.

Texas.— Western Union Tel. Co. *v.* O'Keefe, 87 Tex. 423, 28 S. W. 945.

Washington.— Parker *v.* Denny, 2 Wash. Terr. 360, 7 Pac. 892.

See 2 Cent. Dig. tit. "Appeal and Error," § 2150 *et seq.*

Where notices of appeal are voluntarily withdrawn, the case stands as if they had never been served. Zeigler *v.* Jennison, 4 Greene (Iowa) 561.

53. Draper *v.* Taylor, 47 Iowa 407; Marion County *v.* Stanfield, 8 Iowa 406; Tiffin *v.* Millington, 3 Mo. 418; and see 2 Cent. Dig. tit. "Appeal and Error," § 2151.

Service by attorney.— In Oregon and Washington service may be made by appellant's attorney. Wheeler *v.* Cragin, 25 Oreg. 602, 38 Pac. 308; Horr *v.* Aberdeen Packing Co., 7 Wash. 354, 35 Pac. 125.

being mandatory. Service of notice being jurisdictional, a failure to serve on the persons specified is fatal.[54]

(IV) *TIME OF SERVICE*—(A) *In General.* The notice of appeal must be served within the statutory time.[55]

54. *Iowa.*—American Emigrant Co. *v.* Long, 105 Iowa 194, 74 N. W. 940; Bruner *v.* Wade, 85 Iowa 666, 52 N. W. 558; Shoemaker *v.* Smith, 80 Iowa 655, 45 N. W. 744.

Michigan.— McCurdy *v.* Bowman, 27 Mich. 214.

New York.— Clark *v.* Snyder, 40 Hun (N. Y.) 330; Williams *v.* Tradesmen's F. Ins. Co., 1 Daly (N. Y.) 322; Daniels *v.* Rogers, 36 How. Pr. (N. Y.) 230; Coates *v.* Carroll, 28 How. Pr. (N. Y.) 436; Ellsworth *v.* Fulton, 24 How. Pr. (N. Y.) 20.

Oregon.— Fisher *v.* Tomlinson, (Oreg. 1900) 60 Pac. 390.

Washington.— Howard *v.* Shaw, 10 Wash. 151, 38 Pac. 746. See also Home Sav., etc., Assoc. *v.* Burton, 20 Wash. 688, 56 Pac. 940.

Wisconsin.— Eureka Steam Heating Co. *v.* Sloteman, 67 Wis. 118, 30 N. W. 241.

See *supra*, VII, E, 4, b.

Attorneys.— *California.*— Thompson *v.* Alford, 128 Cal. 227, 60 Pac. 686; *In re* Scott, 124 Cal. 671, 57 Pac. 654; Jones *v.* McGarvey, (Cal. 1899) 56 Pac. 896; Lacoste *v.* Eastland, 117 Cal. 673, 49 Pac. 1046.

Colorado.— Lake City First Nat. Bank *v.* Bernard, 4 Colo. 71.

Illinois.—Hartman *v.* Belleville, etc., R. Co., 64 Ill. 24.

Indiana.— Hazleton *v.* De Priest, 143 Ind. 368, 42 N. E. 751; Tate *v.* Hamlin, 149 Ind. 94, 41 N. E. 356; Richardson *v.* Pate, 93 Ind. 423, 47 Am. Rep. 374. *Compare* O'Mara *v.* Wabash R. Co., 150 Ind. 648, 50 N. E. 821.

Kansas.— Henderson *v.* McAfee, (Kan. 1897) 48 Pac. 37.

Minnesota.— Nobles County *v.* Sutton, 23 Minn. 299.

Missouri.— Jordan *v.* Bowman, 28 Mo. App. 608.

Montana.— Mantle *v.* Largey, 15 Mont. 116, 41 Pac. 1077.

Nebraska.— Comstock *v.* Cole, 28 Nebr. 470, 44 N. W. 487; Kinney *v.* Hickox, 24 Nebr. 167, 38 N. W. 816.

New York.— Tuchband *v.* Chicago, etc., R. Co., 53 Hun (N. Y.) 629, 16 N. Y. Civ. Proc. 241, 5 N. Y. Suppl. 493, 24 N. Y. St. 236; Fuchs *v.* Pohlman, 2 Daly (N. Y.) 210; Earll *v.* Chapman, 3 E. D. Smith (N. Y.) 216; Graves *v.* Graham, 18 Misc. (N. Y.) 600, 43 N. Y. Suppl. 508; Loescher *v.* Nordmeyer, 3 Abb. Pr. (N. Y.) 244; Tripp *v.* De Bow, 5 How. Pr. (N. Y.) 114.

Oregon.— Neuberger *v.* Boyce, 29 Oreg. 458, 45 Pac. 908; Wheeler *v.* Cragin, 25 Oreg. 602, 38 Pac. 308; Butler *v.* Smith, 20 Oreg. 126, 25 Pac. 381 [*following* Lindley *v.* Wallis, 2 Oreg. 203].

South Carolina.— McLure *v.* Vernon, 2 Hill (S. C.) 433.

Texas.— Hughes *v.* Burleson, 10 Tex. 290; James *v.* Gray, 3 Tex. 514.

Washington.— Hendricks *v.* Edmiston, 15 Wash. 687, 47 Pac. 29; Cornell University *v.* Denny Hotel Co., 15 Wash. 433, 46 Pac. 654; Tacoma Mill Co. *v.* Sherwood, 11 Wash. 492, 39 Pac. 977.

United States.— Scruggs *v.* Memphis, etc., R. Co., 131 U. S. cciv, appendix, 26 L. ed. 741.

See 2 Cent. Dig. tit. "Appeal and Error," § 2152.

Attorney of decedent.— Notice of appeal, served on the attorney of a party who has died, is insufficient where such attorney has not been retained by decedent's administrator, who has been substituted as a party. Holt *v.* Idleman, 34 Oreg. 114, 54 Pac. 279.

Clerk of court.—*California.*—Silva *v.* Serpa, 86 Cal. 241, 24 Pac. 1013.

Iowa.— Ainslie *v.* Wynn, (Iowa 1895) 65 N. W. 401; Smith *v.* Des Moines, 85 Iowa 725, 51 N. W. 253.

North Dakota.— Hoffman *v.* Minot Bank, 4 N. D. 473, 61 N. W. 1031.

Oregon.— Holladay *v.* Elliott, 7 Oreg. 483.

Wisconsin.—North Hudson Mut. Bldg., etc., Assoc. *v.* Childs, 86 Wis. 292, 56 N. W. 870; Eureka Steam Heating Co. *v.* Sloteman, 67 Wis. 118, 30 N. W. 241.

See 2 Cent. Dig. tit. "Appeal and Error," § 2154.

Deputy clerk.—A notice of appeal may be served on a deputy clerk even though the clerk is accessible at the time. Cullison *v.* Lindsay, 108 Iowa 124, 78 N. W. 847.

Partners.—Where it appears from the pleadings that two parties to an action are partners, and that their claim in the suit belongs to them as partners, service of notice of appeal on one partner binds both. Shirley *v.* Burch, 16 Oreg. 1, 18 Pac. 344.

City officials.— In an action against a city and its board of equalization, notice of appeal served on the mayor or city clerk is a sufficient service as to both defendants when such persons are *ex officio* officers of the board. Farmers' L. & T. Co. *v.* Newton, 97 Iowa 502, 66 N. W. 784. See also MUNICIPAL CORPORATIONS.

Corporations.—In an appeal from a railroad right-of-way assessment, service of notice of the appeal upon a director of the railroad company is sufficient. Robertson *v.* Eldora R., etc., Co., 27 Iowa 245. See also Oregon, etc., Co. *v.* Swinburne, 26 Oreg. 262, 37 Pac. 1030.

Non-resident appellee.— In appeal cases, where a party to be served with a notice is not a resident of the county, and appeared on the trial below by agent or attorney, service of the notice should be on such agent or attorney. Where there is no agent or attorney in the case, notice should be sent by mail to the party himself, if his residence can be ascertained. Chamberlain *v.* O'Keefe, 2 Mich. 357.

55. *Alabama.*— Lecat *v.* Salle, 1 Port. (Ala.) 287.

Arizona.— Zeckendorf *v.* Zeckendorf, 1 Ariz. 401, 25 Pac. 648; Ruff *v.* Hand, (Ariz. 1890) 24 Pac. 257.

(B) *Notice in Open Court.* Notice of appeal given in open court should be given during the term at which the judgment, order, or decree appealed from is rendered;[56] though it has been held that a notice given within the time allowed by law, though at a subsequent term of the court, even when appellees are not present, is sufficient.[57]

California.— Houser, etc., Mfg. Co. *v.* Hargrove, 129 Cal. 90, 61 Pac. 660; Dinan *v.* Stewart, 48 Cal. 567.

Colorado.— But see Coe *v.* Britton, 5 Colo. App. 85, 37 Pac. 37.

Idaho.— Arthur *v.* Mounce, (Ida. 1895) 42 Pac. 509.

Illinois.— MacLachlan *v.* McLaughlin, 126 Ill. 427, 18 N. E. 544; Mason *v.* Gibson, 13 Ill. App. 463.

Indiana.— Clutter *v.* Riddle, 124 Ind. 500, 25 N. E. 6; Joyce *v.* Dickey, 104 Ind. 183, 3 N. E. 252; State *v.* Ruff, 6 Ind. App. 38, 33 N. E. 124.

Iowa.— McNider *v.* Sirrine, 84 Iowa 58, 50 N. W. 200; Brier *v.* Chicago, etc., R. Co., 66 Iowa 602, 24 N. W. 232.

Kansas.—Dowell *v.* Caruthers, 26 Kan. 720.

Kentucky.—Houston *v.* Ducker, 86 Ky. 123, 9 Ky. L. Rep. 421, 5 S. W. 421.

Louisiana.— Untereiner *v.* Miller, 29 La. Ann. 435.

Massachusetts.— De Bang *v.* Scripture, 168 Mass. 91, 46 N. E. 406.

Michigan.— Tucker *v.* Stone, 92 Mich. 298, 52 N. W. 302; Moore *v.* Ellis, 18 Mich. 77.

Mississippi.— Weir *v.* Killian, 59 Miss. 520.

Missouri.— Buelterman *v.* Meyer, 132 Mo. 474, 34 S. W. 67; Randolph *v.* Mauck, 78 Mo. 468.

Montana.— Richter *v.* Eagle L. Assoc., 24 Mont. 346, 61 Pac. 878; Territory *v.* Harris, 7 Mont. 429, 17 Pac. 557.

Nebraska.— Hendrickson *v.* Sullivan, 28 Nebr. 790, 44 N. W. 1135; Witte *v.* Gilbert, 10 Nebr. 539, 7 N. W. 288.

New York.—Clapp *v.* Hawley, 97 N. Y. 610; Sheridan *v.* Andrews, 81 N. Y. 650; Bishop *v.* Empire Transp. Co., 33 N. Y. Super. Ct. 17; Morris *v.* Morange, 17 Abb. Pr. (N. Y.) 86, 26 How. Pr. (N. Y.) 247; Elias *v.* Babcock, 12 Abb. Pr. N. S. (N. Y.) 288.

North Carolina.—Badger *v.* Daniel, 82 N. C. 468.

Ohio.— Twenty-fourth Ward Loan Co. *v.* Joseph, 8 Ohio Cir. Ct. 227.

Pennsylvania.— Overseers of Poor *v.* Overseers of Poor, 96 Pa. St. 528; Westmoreland County *v.* Conemaugh Tp., 34 Pa. St. 231; Johnson's Appeal, 3 Phila. (Pa.) 264, 15 Leg. Int. (Pa.) 357.

South Carolina.— Appleby *v.* South Carolina, etc., R. Co., 58 S. C. 33, 36 S. E. 109; Archer *v.* Long, 46 S. C. 292, 24 S. E. 83; Brayton *v.* Bacon, 33 S. C. 605, 12 S. E. 365. *Compare* Molair *v.* Port Royal, etc., R. Co., 31 S. C. 510, 10 S. E. 243.

Tennessee.— Spurgin *v.* Spurgin, 3 Head (Tenn.) 22.

Texas.— Glavæcke *v.* Delmas, 13 Tex. 495; Burr *v.* Lewis, 6 Tex. 76.

Virginia.— Lee *v.* Frame, 1 Hen. & M. (Va.) 22.

Washington.—King County *v.* Hiel, 1 Wash. 63, 23 Pac. 926; Stark *v.* Jenkins, 1 Wash. Terr. 421.

Wisconsin.— Stevens *v.* Wheeler, 43 Wis. 91; Jarvis *v.* Hamilton, 37 Wis. 87; Rose *v.* Tyrrell, 25 Wis. 563, in which it was held that a statute extending the time in a particular case was unconstitutional.

United States.— U. S. *v.* Curry, 6 How. (U. S.) 106, 12 L. ed. 363; Kidder *v.* Fidelity Ins., etc., Co., 105 Fed. 821.

See 2 Cent. Dig. tit. "Appeal and Error," § 2155 *et seq.*

Computation of time.— *Iowa.*— State *v.* Jones, 11 Iowa 11.

Michigan.— Maynard *v.* Penniman, 7 Mich. 333.

Nevada.— Simon *v.* Matson, (Nev. 1900) 61 Pac. 478.

New Jersey.— State *v.* Hoboken Dist. Ct., 49 N. J. L. 537, 13 Atl. 43.

New York.— Westcott *v.* Platt, 1 Code Rep. (N. Y.) 100.

Ohio.— Taylor *v.* Wallace, 2 Cinc. L. Bul. 115.

South Carolina.— Walters *v.* Laurens Cotton Mills, 53 S. C. 155, 31 S. E. 1; First Nat. Bank *v.* Gary, 14 S. C. 571.

See 2 Cent. Dig. tit. "Appeal and Error," § 2157.

Premature service.— The supreme court acquires no jurisdiction by a summons in error issued before the petition in error has been filed with the transcript of the district court record. Brownville *v.* Middleton, 1 Nebr. 10. See also 2 Cent. Dig. tit. "Appeal and Error," § 2158.

And a notice of appeal, given to the appellee's solicitor before the appeal has been actually entered with the clerk, is irregular. Ten Eick *v.* Simpson, 11 Paige (N. Y.) 177.

Laches of officer is not imputable to the appellant. Arrington *v.* Arrington, 114 N. C. 113, 19 S. E. 105.

Intermediate proceedings.— The requirement that notice of appeal must be served within a certain time after entry of judgment or order appealed from does not apply to intermediate proceedings which the notice states will also be brought up for review on the appeal. Moyer *v.* Moyer, 7 N. Y. App. Div. 523, 40 N. Y. Suppl. 258.

56. Northern Counties Invest. Trust *v.* Hender, 12 Wash. 559, 41 Pac. 913; Cusick *v.* Beyers, 5 Wash. 98, 31 Pac. 422; *Ex p.* Parker, 131 U. S. 221, 9 S. Ct. 708, 33 L. ed. 123; and see 2 Cent. Dig. tit. "Appeal and Error," § 2156.

57. McMillan *v.* Mau, 1 Wash. 26, 23 Pac. 441.

(c) *Time Determined by Time of Filing Notice or Undertaking.* The statutes, as a rule, require the service of notice to be after, or at least contemporaneous with, the filing of the notice,[58] and either to precede or be contemporaneous with the filing of the undertaking.[59]

(d) *Excuse for Delay.* The appellate court, in its discretion, may relieve appellant from the consequences of failing to serve notice within the statutory time, where his failure is due to fraud, accidents, or excusable mistakes.[60]

(v) *Mode and Sufficiency of Service.* Where a mode of service of notice of appeal is prescribed by statute or by the order allowing the appeal, that mode must be pursued. In the absence of a special mode of service, the notice must be served in the manner pointed out by the general statutes relating to the service of process.[61]

58. *California.*— Lynch *v.* Dunn, 34 Cal. 518; Foy *v.* Domec, 33 Cal. 317. But see Galloway *v.* Rouse, 63 Cal. 280; Dinan *v.* Stewart, 48 Cal. 567.

Colorado.— Daniels *v.* Daniels, 9 Colo. 133, 10 Pac. 657; Willoughby *v.* Brown, 4 Colo. 120.

Idaho.— Slocum *v.* Slocum, 1 Ida. 589.

Montana.— Courtright *v.* Berkins, 2 Mont. 404.

Nevada.— Spafford *v.* White River Valley Land, etc., Co., 24 Nev. 184, 51 Pac. 115; Reese Gold, etc., Min. Co. *v.* Rye Patch Consol. Mill, etc., Co., 15 Nev. 341; Lyon County *v.* Washoe County, 8 Nev. 177.

Washington.—*Contra,* Littlejohn *v.* Miller, 5 Wash. 399, 31 Pac. 758; Sadler *v.* Niesz, 5 Wash. 182, 31 Pac. 630, 1030.

See 2 Cent. Dig. tit. "Appeal and Error," § 2159.

As to the requirement that service and notice must be on the same day see Mokelumne Hill Canal, etc., Co. *v.* Woodbury, 10 Cal. 185.

Under Ida. Rev. Stat. § 4838, providing that appeal is taken from a probate court by filing a notice of appeal with the judge and serving a copy on the adverse party, it has been held that the order in which such acts are done is immaterial. Hence, a motion to dismiss an appeal on the ground that the notice of appeal had not been served, because the only service was prior to the filing of the notice of appeal, will not be sustained. Reynolds *v.* Corbus, (Ida. 1901) 63 Pac. 884.

59. Columbet *v.* Pacheco, 46 Cal. 650; Sweeney *v.* Reilley, 42 Cal. 402; Cody *v.* Filley, 4 Colo. 342; Johnson *v.* Badger Mill, etc., Co., 12 Nev. 261; Peran *v.* Monroe, 1 Nev. 484; Weiss *v.* Jackson County, 8 Oreg. 529. But see Heil *v.* Simmonds, 17 Colo. 47, 28 Pac. 475; Straat *v.* Blanchard, 14 Colo. 445, 24 Pac. 561.

60. Westfield Bank *v.* Inman, 133 Ind. 287, 32 N. E. 885; Hutts *v.* Martin, 131 Ind. 1, 30 N. E. 698, 31 Am. St. Rep. 412; Surgi *v.* New Orleans, 13 La. Ann. 32; Barton *v.* Kavanaugh, 12 La. Ann. 332; Garrett *v.* Litchfield, 10 Mich. 451; Zinsser *v.* Seiler, 7 Daly (N. Y.) 464; Claflin *v.* Dubois, 48 Hun (N. Y.) 620, 14 N. Y. Civ. Proc. 290, 1 N. Y. Suppl. 150, 15 N. Y. St. 963; Crittenden *v.* Adams, 5 How. Pr. (N. Y.) 310. See also Coburn *v.* Whitaker, etc., Lumber Co., 12 Ind. App. 340, 38 N. E. 1094, where, however, relief was refused. But see Republican Valley R. Co. *v.* Sayer, 13 Nebr. 280, 13 N. W. 404; Baker *v.* Sloss, 13 Nebr. 230, 13 N. W. 212; Wallace *v.* Carter, 30 S. C. 610, 9 S. E. 659.

In New York there is a conflict of authority. It would seem that N. Y. Code Civ. Proc. § 1303 [Code Proc. § 327] would readily control the question, but even in cases directly under this section there has been a conflict difficult to understand. See, in addition to the cases above cited, Clapp *v.* Hawley, 97 N. Y. 610; Livingston *v.* New York El. R. Co., 19 N. Y. Civ. Proc. 258, 58 Hun (N. Y.) 131, 11 N. Y. Suppl. 359, 33 N. Y. St. 818; Durant *v.* Abendroth, 8 N. Y. Civ. Proc. 87; Salls *v.* Butler, 27 How. Pr. (N. Y.) 133; People *v.* Eldridge, 7 How. Pr. (N. Y.) 108; Westcott *v.* Platt, 1 Code Rep. (N. Y.) 100.

Mere ignorance of the existence of a rule of court is not an excusable mistake. Baker *v.* Terrell, 8 Minn. 195.

61. *California.*— Nathan *v.* Sutphen, 68 Cal. 267, 9 Pac. 162.

Dakota.— Peck *v.* Phillips, 4 Dak. 430, 34 N. W. 65.

Illinois.— Cameron *v.* Savage, 40 Ill. 124.

Indiana.— Wolfe *v.* Pierce, 23 Ind. App. 591, 55 N. E. 872; Shoefer *v.* Nelson, 17 Ind. App. 489, 46 N. E. 1021.

Michigan.— Hosey *v.* Ionia Cir. Judge, 120 Mich. 280, 79 N. W. 177; Simpson *v.* Mansfield, etc., R. Co., 38 Mich. 626.

Minnesota.— State *v.* Klitzke, 46 Minn. 343, 49 N. W. 54; Baberick *v.* Magner, 9 Minn. 232.

Missouri.— Tiffin *v.* Millington, 3 Mo. 418; Fuller *v.* McClure, 25 Mo. App. 418.

Nevada.— Clark *v.* Strouse, 11 Nev. 76.

New York.— Earll *v.* Chapman, 3 E. D. Smith (N. Y.) 216; Livingston *v.* New York El. R. Co., 19 N. Y. Civ. Proc. 258, 58 Hun (N. Y.) 131, 11 N. Y. Suppl. 359, 33 N. Y. St. 818 [*affirmed in* 125 N. Y. 695, 26 N. E. 751, 34 N. Y. St. 1011]; Anonymous, 1 Cow. (N. Y.) 197; Hardenbergh *v.* Thompson, 1 Johns. (N. Y.) 61.

Oregon.— Long Creek Bldg. Assoc. *v.* State Ins. Co., 29 Oreg. 569, 46 Pac. 366.

South Dakota.— Pierre Sav. Bank *v.* Ellis, 9 S. D. 251, 68 N. W. 545; Valley City Land, etc., Co. *v.* Schone, 2 S. D. 344, 50 N. W. 356.

Washington.— Cornell University *v.* Denny Hotel Co., 15 Wash. 433, 46 Pac. 654.

(VI) *Return or Proof of Service.* The return or proof of service must show that all the statutory requisites as to the service of the notice of appeal have been complied with, and in case of substituted service the existence of all the conditions necessary must be shown.[62] Where the statute does not provide a mode of proving service, proof thereof may be made by affidavit of appellant himself,[63] or of a third party.[64]

e. Filing — (I) *Necessity.* By statute in some jurisdictions it is provided that in order for the appellate court to obtain jurisdiction, the notice of appeal must be filed with the clerk of the court below.[65]

(II) *Time of.* The time within which the notice of appeal must be filed is

Wisconsin.— Black *v.* Chicago, etc., R. Co., 18 Wis. 208.

And see, generally, Process; and 2 Cent. Dig. tit. "Appeal and Error," § 2162 *et seq.*

Service by mail.— Service by mail can only be had under the exact circumstances provided for by, and in strict compliance with, the provisions of the statute. Heinlen *v.* Heilbron, 94 Cal. 636, 30 Pac. 8; Luck *v.* Luck, 83 Cal. 574, 23 Pac. 1035; Murdock *v.* Clarke, 73 Cal. 25, 14 Pac. 385; Thorson *v.* St. Paul F. & M. Ins. Co., 32 Minn. 434, 21 N. W. 471; Rowell *v.* McCormick, 5 How. Pr. (N. Y.) 337; Crittenden *v.* Adams, Code Rep. N. S. (N. Y.) 21, 3 Code Rep. (N. Y.) 145, 5 How. Pr. (N. Y.) 310; Horr *v.* Aberdeen Packing Co., 7 Wash. 354, 35 Pac. 125. See also 2 Cent. Dig. tit. "Appeal and Error," § 2163.

Service by publication must be in strict accord with the statutory provisions on the subject.

Illinois.— Cameron *v.* Savage, 40 Ill. 124.

Indiana.— Tate *v.* Hamlin, (Ind. 1895) 41 N. E. 1035.

Iowa.— McClellan *v.* McClellan, 2 Iowa 312.

New Hampshire.— Clough *v.* Sanders, 53 N. H. 618.

Tennessee.— Fitzsimmons *v.* Johnson, 90 Tenn. 416, 17 S. W. 100.

United States.— Nations *v.* Johnson, 24 How. (U. S.) 195, 16 L. ed. 628.

And see, generally, Process; and 2 Cent. Dig. tit. "Appeal and Error," § 2164.

Service of a copy of the notice of appeal, instead of the original notice, is sufficient. Peck *v.* Agnew, 126 Cal. 607, 59 Pac. 125.

62. *California.*—Linforth *v.* White, 129 Cal. 188, 61 Pac. 910; Modesto Bank *v.* Owens, 121 Cal. 223, 53 Pac. 552; Pacific Mut. L. Ins. Co. *v.* Shepardson, 76 Cal. 376, 18 Pac. 398.

Iowa.—Western Stage Co. *v.* Bixby, 10 Iowa 592.

Minnesota.— Graham *v.* Conrad, 66 Minn. 471, 69 N. W. 334.

Missouri.— Williams *v.* Beck, 63 Mo. App. 149.

Nevada.— Elder *v.* Frevert, 18 Nev. 278, 3 Pac. 237; Lambert *v.* Moore, 1 Nev. 344.

New York.— Durant *v.* Abendroth, 53 N. Y. Super. Ct. 15; Haight *v.* Moore, 36 N. Y. Super. Ct. 294.

Oregon.— Moffitt *v.* McGrath, 25 Oreg. 478, 36 Pac. 578; Sloper *v.* Carey, 9 Oreg. 511.

South Dakota.— Houser *v.* Nolting, 11 S. D. 483, 78 N. W. 955.

Washington.— Puckett *v.* Moody, 17 Wash. 609, 50 Pac. 494; Fairfield *v.* Binnian, 13 Wash. 1, 42 Pac. 632; Port Blakely Mill Co. *v.* Clymer, 1 Wash. Terr. 607.

See 2 Cent. Dig. tit. "Appeal and Error," § 2165.

Admission of service of notice of appeal within the time required by law for service of notice is equivalent to service. Wilson *v.* Wilson, (Ida. 1899) 57 Pac. 708.

Admission of service need not be as exact as proof of service (Cody *v.* Filley, 4 Colo. 342; Lillienthel *v.* Caravita, 15 Oreg. 339, 50 Pac. 280); but an admission by an agent is not sufficient where there is nothing to show that he acted as an attorney below (Cremer *v.* Hartmann, 34 Minn. 97, 24 N. W. 341).

Presumption in favor of official act.— In Roy *v.* Horsley, 6 Oreg. 270, it was held that, the presumption being that an officer performs an official act within his precinct or jurisdiction, a sheriff's return of service of notice of appeal, which fails to designate the county in which service was made, may be sustained by the intendment that he served it within his county. See also Ellis *v.* Wait, 4 S. D. 31, 54 N. W. 925. But see Hermann *v.* Hutcheson, 33 Oreg. 239, 53 Pac. 489.

Burden of proof.—Where respondent, by affidavit, denies that notice was served in time, appellant has the burden of showing service in time. Allen *v.* Stokes, 19 S. C. 602.

Amendment of return.— The return of service of notice of appeal, if imperfect, may be amended so as to conform to the facts. Barbre *v.* Goodale, 28 Oreg. 465, 38 Pac. 67, 43 Pac. 378. See also Perri *v.* Beaumont, 88 Cal. 108, 25 Pac. 1109; Dolph *v.* Nickum, 2 Oreg. 202.

63. Mendioca *v.* Orr, 16 Cal. 368. But see Marion County *v.* Stanfield, 8 Iowa 406.

Actual service must be shown.—An affidavit of service of notice which simply states that affiant "alleges and believes" that he served the notice is fatally defective, as not stating positively the fact of service. Pacific Mut. L. Ins. Co. *v.* Shepardson, 76 Cal. 376, 18 Pac. 398.

64. Moore *v.* Besse, 35 Cal. 183.

Where two contradictory affidavits of notices of appeal are filed by appellant, the court may properly disregard both. Bucholz *v.* Windhorst, 7 Mo. App. 584.

65. Bonds *v.* Hickman, 29 Cal. 460; Oliver *v.* Harvey, 5 Oreg. 360; Bonnell *v.* Van Cise, 8 S. D. 592, 67 N. W. 685; *In re* Madden, 104 Wis. 61, 80 N. W. 100; and see 2 Cent. Dig. tit. "Appeal and Error," § 2166.

Compare Keck *v.* Douglass, 6 Ohio Cir. Ct. 649, construing Ohio Rev. Stat. § 6407, relating to appeals from probate courts.

dependent upon statutory enactment, and, to be effectual, such notice must be filed within the prescribed time.[66]

(III) *WHAT CONSTITUTES.* The filing of a notice of appeal is at least the actual delivery thereof to the clerk, and a mere deposit of the notice in the post-office, directed to the clerk, does not constitute delivery thereof.[67] When written notice of appeal is served and filed within the proper time, the appeal will not be defeated by the failure of the clerk to enter the notice in the journal of the court below.[68]

5. EFFECT OF FAILURE TO SERVE PROCESS OR TO GIVE NOTICE. The general effect of a failure to serve process or to give notice is to cause a dismissal of the appellate proceedings on motion;[69] and where the appellate court has, in

66. Circleville Bank *v.* Bowsher, 15 Ohio Cir. Ct. 114; Miller *v.* Albright, 12 Ohio Cir. Ct. 533, 5 Ohio Cir. Dec. 585; Van Dusen *v.* Kelleher, 20 Wash. 716, 56 Pac. 35; Hibbard *v.* Delanty, 20 Wash. 539, 56 Pac. 34; De Yturbide *v.* U. S., 22 How. (U. S.) 290, 16 L. ed. 342; and see 2 Cent. Dig. tit. "Appeal and Error," § 2167.

Date of payment of fees.— When the clerk, upon receiving a notice of appeal, at once notified appellant's attorney that the same would not be filed until the fees were paid, the date of the payment of such fees, and not the date on which the notice was received, will be considered the date of filing the notice. Boyd *v.* Burrel, 60 Cal. 280.

Effect of immaterial amendment.— See Comstock's Appeal, 54 Conn. 116, 6 Atl. 196, construing Conn. Acts (1882), c. 50, § 4.

Extension of time.— See Beard's Appeal, 64 Conn. 526, 30 Atl. 775, construing Conn. Gen. Stat. (1882), §§ 1130, 1131.

Filing before or after service.— In Colorado and Nevada, it has been held that the filing of the notice of appeal must precede or be contemporaneous with the service thereof. Daniels *v.* Daniels, 9 Colo. 133, 10 Pac. 657; Bacon *v.* Lamb, 4 Colo. 474; Willoughby *v.* Brown, 4 Colo. 120; Alvord *v.* McGauhy, 4 Colo. 97; Brooks *v.* Nevada Nickel Syndicate, 24 Nev. 264, 52 Pac. 575; Reese Gold, etc., Min. Co. *v.* Rye Patch Consol. Mill, etc., Co., 15 Nev. 341; Johnson *v.* Badger Mill, etc., Co., 12 Nev. 261; Lyon County *v.* Washoe County, 8 Nev. 177.

Under Cal. Code Civ. Proc. § 940, the notice of appeal may be filed on a day subsequent to that upon which service upon the adverse party was made. Robinson *v.* Templar Lodge No. 17, etc., 114 Cal. 41, 45 Pac. 998; Noonan *v.* Nunan, 76 Cal. 44, 18 Pac. 98; Galloway *v.* Rouse, 63 Cal. 280; Boyd *v.* Burrel, 60 Cal. 280. Under Cal. Prac. Act (1851), § 33, it was held that the notice must be filed before service or at the same time therewith. Moulton *v.* Ellmaker, 30 Cal. 527; Buffendeau *v.* Edmondson, 24 Cal. 94; Hastings *v.* Halleck, 10 Cal. 31.

Filing notice and proof of service.— Ballinger's Anno. Codes & Stat., Wash. (1897), § 6503, provides that, within five days after service of notice of appeal, appellant shall file with the clerk of the superior court the original or a copy of such notice, with proof of the service thereof. Best *v.* Best, 22 Wash. 695, 60 Pac. 58; Howard *v.* Shaw, 10 Wash. 151, 38 Pac. 746; Watson *v.* Pugh, 9 Wash. 665, 38 Pac. 163.

Notice filed before undertaking.— In Buckholder *v.* Byers, 10 Cal. 481, it was held that the notice of appeal must be filed before the undertaking, as there must be some appeal to give effect to the undertaking.

67. Brooks *v.* Nevada Nickel Syndicate, 24 Nev. 264, 52 Pac. 575.

Entered with the clerk.—A requirement that the notice of appeal shall be entered with the clerk is not complied with by handing the notice to the clerk at his residence, or to one employed as a janitor in the office of the clerk. Kiehborth *v.* Bernard, 2 Cinc. L. Bul. 171; Taylor *v.* Wallace, 2 Cinc. L. Bul. 115.

Entry of a notice of appeal on the judge's docket is not sufficient under a statute requiring that the notice of appeal shall be entered of record, as the judge's docket is no part of the records of the court. Circleville Bank *v.* Bowsher, 15 Ohio Cir. Ct. 114; Moore *v.* Brown, 10 Ohio 197.

68. Dahl *v.* Tibbals, 5 Wash. 259, 31 Pac. 868. See also Western Union Tel. Co. *v.* O'Keefe, 87 Tex. 423, 28 S. W. 945.

A notice of intention to appeal is sufficiently entered upon the record at the time a proper entry thereof is formulated, and given to the clerk to be entered of record. Miller *v.* Albright, 12 Ohio Cir. Ct. 533, 5 Ohio Cir. Dec. 585.

69. Dismissal.— *California.*— Matter of Scott, 124 Cal. 671, 57 Pac. 654.

Florida.— Pyles *v.* Beall, 37 Fla. 549, 20 So. 775; Ellsworth *v.* Haile, 29 Fla. 256, 10 So. 612.

Indiana.— Doak *v.* Root, etc., Co., (Ind. App. 1900) 58 N. E. 444.

Iowa.— State Sav. Bank *v.* Ratcliffe, 111 Iowa 662, 82 N. W. 1011; Baxter *v.* Rollins, 110 Iowa 310, 81 N. W. 586; Pratt *v.* Pratt, (Iowa 1897) 69 N. W. 1128.

Missouri.— Tiernan *v.* Richards, 7 Mo. App. 597.

Nevada.— Gaudette *v.* Glissan, 11 Nev. 184.

Washington.— Best *v.* Best, 22 Wash. 695, 60 Pac. 58; Smith *v.* Beard, 21 Wash. 204, 57 Pac. 796; Old Nat. Bank *v.* O. K. Gold Min. Co., 19 Wash. 194, 52 Pac. 1065. *Compare* Wiseman *v.* Eastman, 21 Wash. 163, 57 Pac. 398.

United States.— Monger *v.* Shirley, 131 U. S. cx, appendix, 20 L. ed. 635.

But see Cooper *v.* Maclin, 25 Ala. 298.

See 2 Cent. Dig. tit. "Appeal and Error," § 2173 *et seq.*

Failure to serve a notice of appeal required only by rule of the court is not a ground to

ignorance of the fact that no notice has been served, either allowed the submission of the cause or rendered a decision, it will, on motion, annul such action.[70]

6. Waiver of Process or Defects Therein — a. By Agreement. It has been said that neither notice of appeal, nor the serving nor filing thereof, can be waived, even by express agreement, such requirements being jurisdictional.[71] It has been held, however, that no citation is necessary in a case where, in point of fact, by agreement of parties, actual notice of an intention to appeal appears on the record,[72] and it seems that service of summons in error may be waived by an agreement, made publicly in open court or in writing duly signed.[73]

b. By Accepting Service. Service of citation or notice,[74] and irregularities in

dismiss the appeal; for a court cannot, by a rule, deprive itself of a jurisdiction conferred upon it by law. Shook *v.* Proctor, 26 Mich. 283.

Where a case is docketed in time it will not be dismissed for want of the citation until time has been given to cite appellee. Brown *v.* McConnell, 124 U. S. 489, 8 S. Ct. 559, 31 L. ed. 495.

Appeal in chancery.—Want of notice of the appeal itself does not necessarily require the dismissal of an appeal in chancery, the notice being merely to enable appellee to prepare for the appeal, and he being, besides, entitled to a notice of hearing. Simpson *v.* Mansfield, etc., R. Co., 38 Mich. 626. See also, as to writs of error in Texas, Lacey *v.* Ashe, 21 Tex. 394.

70. Johnson *v.* Miller, 43 Ind. 29; *Ex p.* Crenshaw, 15 Pet. (U. S.) 119, 10 L. ed. 682.

71. *California.*—Bonds *v.* Hickman, 29 Cal. 460.

Dakota.— Matter of Gold St., 2 Dak. 39, 3 N. W. 311.

Iowa.— State Sav. Bank *v.* Ratcliffe, 111 Iowa 662, 82 N. W. 1011.

New York.—People *v.* Eldridge, 7 How. Pr. (N. Y.) 108.

Oregon.— Oliver *v.* Harvey, 5 Oreg. 360.

Texas.— San Antonio, etc., R. Co. *v.* McDonald, (Tex. Civ. App. 1895) 31 S. W. 72; Western Union Tel. Co. *v.* O'Keefe, 87 Tex. 423, 28 S. W. 945; Burr *v.* Lewis, 6 Tex. 76.

Washington.— Sawtelle *v.* Weymouth, 14 Wash. 21, 43 Pac. 1101; Marsh *v.* Degeler, 3 Wash. 71, 27 Pac. 1073.

United States.—Kelsey *v.* Forsyth, 21 How. (U. S.) 85, 16 L. ed. 32.

Compare McDonough *v.* Daly, 3 Mo. App. 606, and McDonald *v.* Penniston, 1 Nebr. 324.

See 2 Cent. Dig. tit. "Appeal and Error," § 2168 *et seq.*

But see Daley *v.* Francis, 153 Mass. 8, 26 N. E. 132, construing Mass. Pub. Stat. (1882), c. 156, § 9.

Applications of the rule.— The right to object that the notice of appeal was not served within the time fixed by law is not waived by a stipulation extending the time to serve a proposed case on appeal (Durant *v.* Abendroth, 8 N. Y. Civ. Proc. 87); or to file briefs (Brooks *v.* Nevada Nickel Syndicate, 24 Nev. 264, 52 Pac. 575); nor by stipulation that no execution shall issue until the determination of the appeal (Moulton *v.* Ellmaker, 30 Cal. 527). The issuance and service of a writ of error and citation is not waived by an agreement between cross-appellants to use one transcript of the record on appeal (Pontier *v.* Jeffares, 25 Fla. 844, 6 So. 830); nor by filing in the lower court a stipulation of the parties that certain exhibits need not be printed for the purposes of review (Chisum *v.* Ayer, 4 N. M. 48, 12 Pac. 697).

If it is stipulated in the transcript that notice of appeal was filed in the court below and served, the appellate court cannot receive evidence contradicting the stipulation, and will not dismiss the appeal on the ground that no notice was in fact filed. Bonds *v.* Hickman, 29 Cal. 460.

Waiver of citation cannot be proved as a matter *in pais* by an affidavit of the clerk. It must appear of record or, at least, be established by the party's written admission. Plauche *v.* Marigny, 6 La. 111.

72. U. S. *v.* Gomez, 1 Wall. (U. S.) 690, 17 L. ed. 677.

73. Haylen *v.* Missouri Pac. R. Co., 28 Nebr. 660, 44 N. W. 873.

After plaintiffs in error have made and served a case-made, and it has been settled and certified by the trial judge, the attorney for defendants in error may, prior to the filing of the petition in error, waive in writing the issuance and service of summons in error. Taylor *v.* Riggs, (Kan. App. 1898) 52 Pac. 910.

In South Carolina, it was decided that where, after the expiration of the time allowed appellant for furnishing the trial judge with notice of the appeal, the appellee, in ignorance of the failure of appellant to furnish such notice, signed an agreement as to what papers should constitute the record of appeal, and as to when the record should be served, the right to take advantage of the failure to furnish notice was not waived. Gibbes *v.* Greeneville R. Co., 14 S. C. 385.

74. Bliss *v.* Stevens, 13 Ga. 401.

"A mere notice, signed by solicitors for appellants, to solicitor for appellees that they have taken an appeal from a decree of the circuit court to a designated term of this court, upon which solicitor for appellees has indorsed 'I accept service of a copy hereof,' is not sufficient to give this court jurisdiction of the persons of the appellees. Such notice is not equivalent to the judicial writ of citation, and such acceptance of service does not waive the issuing and service of a citation. The appellees never having appeared in

appeal process or in the service thereof, may be waived by accepting or acknowledging service.[75]

c. By Appearance. Appeal process, or defects therein, and service thereof, or irregularities in the service, may be waived by a voluntary appearance of appellee or defendant in error in the appellate court, or by his doing some act which amounts to an appearance.[76]

d. By Failure to Object in Time. Failure to object in time to want of proper process, or because of irregularities therein or in the service thereof, may operate as a waiver of such objection.[77]

this court, we have no jurisdiction over them, and cannot enter any judgment affecting their rights." Dillard *v.* Agnew, 37 Fla. 56, 19 So. 338.

75. Bowman *v.* Metzger, 27 Oreg. 23, 39 Pac. 3, 44 Pac. 1090; Holloman *v.* Middleton, 23 Tex. 537; Bigler *v.* Waller, 12 Wall. (U. S.) 142, 20 L. ed. 260.

Objection as to time of service waived.— Struver *v.* Ocean Ins. Co., 9 Abb. Pr. (N. Y.) 23. *Compare* Studer *v.* Federle, 57 Mo. App. 534.

Waiver of want of signature.— Cella *v.* Schnairs, 42 Mo. App. 316. *Compare* Doerr *v.* Southwestern Mut. L. Assoc., 92 Iowa 39, 60 N. W. 225.

Citation waived.— In Hill *v.* Bowden, 3 La. Ann. 258, it was held that where an appellee, by his attorney, wrote at the foot of the petition of appeal and the order granting it the words "Service accepted," this included a waiver of citation.

Acknowledgment of notice to take deposition.— In Gluck *v.* Diebold, 1 Mo. App. 265, it was held that the acknowledgment of notice for the taking of depositions in the cause, with the waiver of *dedimus*, was not a waiver of notice of appeal.

Two petitions of appeal.—Although there are two distinct petitions of appeal, returnable at different times, and two distinct citations, of different dates and with different return-days, yet, where there is but one transcript, and either citation is sufficient, and upon one citation appellee's counsel has indorsed: "Service accepted and cognizance of the appeal taken," the appeal will not be dismissed. Littleton *v.* Pratt, 10 La. Ann. 487.

76. *California.*— Hibernia Sav., etc., Soc. *v.* Lewis, 111 Cal. 519, 44 Pac. 175.

Florida.— State *v.* Canfield, 40 Fla. 36, 23 So. 591, 42 L. R. A. 72; Pyles *v.* Beall, 37 Fla. 549, 20 So. 775.

Iowa.— Morrow *v.* Carpenter, 1 Greene (Iowa) 469.

Kentucky.— Mudd *v.* German Ins. Co., (Ky. 1900) 56 S. W. 977.

Louisiana.— State *v.* Graham, 25 La. Ann. 440; Dunbar *v.* Owens, 10 Rob. (La.) 139.

Missouri.— Kenner *v.* Doe Run Lead Co., 141 Mo. 248, 42 S. W. 683.

Nebraska.—McDonald *v.* Penniston, 1 Nebr. 324.

New York.— Tripp *v.* De Bow, 5 How. Pr. (N. Y.) 114.

Texas.— See Morrison *v.* Lewis, 13 Tex. 64.

See 2 Cent. Dig. tit. "Appeal and Error," § 2168 *et seq.*

By a submission of the cause without objections, want of notice to co-parties and noncompliance with statutory requirements as to process and service are waived. Talburt *v.* Berkshire L. Ins. Co., 80 Ind. 434; Dobbins *v.* Baker, 80 Ind. 52; Hill *v.* Burke, 62 N. Y. 111.

Effect of death of defendant in error.— The waiver of process and entry of appearance upon a petition in error prior to the filing of the same by the attorneys of record of the defendant in error takes effect as of the filing of the petition, and where, after such indorsement of such appearance is made, and before the petition is filed, the defendant in error dies the waiver and entry of appearance is of no legal effect. McGuire *v.* Ranney, 49 Ohio St. 372, 34 N. E. 719.

Filing of a brief on the merits of an appeal amounts to a full appearance, and waives process or defects therein. Cambria Iron Co. *v.* Union Trust Co., 154 Ind. 291, 55 N. E. 745, 56 N. E. 665, 48 L. R. A. 41; Loucheim *v.* Seeley, 151 Ind. 665, 43 N. E. 646; Hazleton *v.* De Priest, 143 Ind. 368, 42 N. E. 751; Truman *v.* Scott, 72 Ind. 258; Ricker *v.* Collins, 81 Tex. 662, 17 S. W. 378; Hayworth *v.* Rogan, 77 Tex. 362, 14 S. W. 70; Talbert *v.* Barbour, 16 Tex. Civ. App. 63, 40 S. W. 187.

Motion to dismiss.— Objections as to process and service are waived by an appearance and a motion to dismiss the appeal on other grounds. Grady *v.* Newman, 1 Indian Terr. 284, 37 S. W. 54; Woods *v.* Walsh, 7 N. D. 376, 75 N. W. 767; Overton *v.* Terry, 49 Tex. 773; Andrews *v.* National Foundry, etc., Works, 77 Fed. 774, 46 U. S. App. 619, 23 C. C. A. 454, 36 L. R. A. 139.

Question of damages argued.—Although a respondent comes before the court on appeal, with the statement at the outset that the cause comes up on appeal from the judgment, but argues the question whether the damages are excessive, and permits the adverse party to argue similar questions, which are appropriate only to an appeal from an order denying a new trial, such respondent does not thereby waive the objection that there was no notice of appeal from such order. Fry *v.* Bennett, 7 Abb. Pr. (N. Y.) 352.

Where appellee has joined issue on the merits it will amount to a waiver of any objections on account of want of citation or the insufficiency of the appeal bond. Carmichael *v.* Armor, 1 Rob. (La.) 197.

77. *Alabama.*— Goss *v.* Davis, 21 Ala. 479.

California.— See De Pedrorena *v.* Hotchkiss, 95 Cal. 636, 30 Pac. 787; Matter of

e. By Fraud. An appellee who has fraudulently prevented the service of notice by the concealment of material facts and a failure to enter his objection to the jurisdiction of the court at the proper time, and who, for the fraudulent purpose of preventing the proper service of the same, has delayed making his objection until it is too late to remedy the defect, is estopped to deny the due service of the notice.[78]

F. Entry on Docket of Appellate Court — 1. Necessity for Entry. A cause transferred from a trial court does not come regularly before the appellate court for action until it has been entered on the appellate court docket,[79] provided that such entry be required by rule of court or by statute.[80]

2. Sufficiency of Entry — a. Manner and Form of Entry. An entry is effected by direction of appellant, or of one duly authorized by him, to the clerk of the appellate court,[81] or by appellee, to procure a dismissal or affirmance.[82] If a precise form of entry or other requirement is prescribed it must be followed;[83]

Castle Dome Min. Soc., etc., Co., 79 Cal. 246, 21 Pac. 746, construing rule of California supreme court.

Iowa.— Morrow *v.* Carpenter, 1 Greene (Iowa) 469.

Louisiana.—Dunbar *v.* Owens, 10 Rob. (La.) 139.

Michigan.— Smith *v.* Mitchell, 9 Mich. 261.

Montana.—Townsley *v.* Hornbuckle, 2 Mont. 580.

Texas.— International, etc., R. Co. *v.* Brett, 61 Tex. 483; Toler *v.* Ayres, 1 Tex. 398.

See 2 Cent. Dig. tit. "Appeal and Error," § 2170.

78. Moyle *v.* Landers, 78 Cal. 99, 20 Pac. 241, 12 Am. St. Rep. 22.

But an appeal will not be dismissed for want of citation when the failure to give the citation was caused by the fault of appellee. Anderson *v.* Birdsall, 19 La. 441.

79. *Colorado.*—Tierney *v.* Campbell, 7 Colo. App. 299, 44 Pac. 948.

Florida.— Garrison *v.* Parsons, 41 Fla. 143, 25 So. 336.

Georgia.— Road Com'rs *v.* Griffin, etc., Plankroad Co., 9 Ga. 487.

Iowa.— Scott *v.* Lasell, 71 Iowa 180, 32 N. W. 322, appeal from road supervisor's action in condemning land for highway.

Kentucky.—Sweeney *v.* Coulter, (Ky. 1900) 57 S. W. 254.

Massachusetts.— Burlingame *v.* Bartlett, 161 Mass. 593, 37 N. E. 748.

New Hampshire.— Smith *v.* McDaniel, 15 N. H. 474.

New York.—Hymann *v.* Cook, 2 Den. (N. Y.) 201.

North Carolina.— Avery *v.* Pritchard, 93 N. C. 266.

Texas.— Roberts *v.* Landrum, 3 Tex. 16.

United States.— Green *v.* Elbert, 137 U. S. 615, 11 S. Ct. 188, 34 L. ed. 792; Grigsby *v.* Purcell, 99 U. S. 505, 25 L. ed. 354.

See 2 Cent. Dig. tit. "Appeal and Error," § 2176.

80. **In Massachusetts,** an appeal in equity from a final judgment of a single justice of the supreme court, and entered on the docket of the court for the county in which the cause is pending, is "thereupon pending before the full court," without further entry; though the provision is otherwise in case of appeals at common law. Cobb *v.* Rice, 128 Mass. 11, 12.

In Ohio, the jurisdiction of the supreme court does not depend upon the docketing, by the clerk, of a proceeding in error. King *v.* Penn, 43 Ohio St. 57, 1 N. E. 84.

In case of a cross-appeal or assignment of cross-errors by appellee or defendant in error, there is no necessity for a second entry. Smith *v.* Wright, 71 Ill. 167; Coleman *v.* Keels, 31 S. C. 601, 9 S. E. 735.

81. **An attorney, without authority to enter an appeal,** cannot effect an entry which will be recognized when the lack of authority is shown. Road Com'rs *v.* Griffin, etc., Plankroad Co., 9 Ga. 487. See, generally, Attorney and Client.

82. **Failure of appellee to enter** the cause on the appellate court docket will prevent him from obtaining a dismissal or affirmance. Sweeney *v.* Coulter, (Ky. 1900) 57 S. W. 254.

Entry to confess error.— The case not having been entered by appellant, the appellee may enter for an affirmance, but he may not be allowed to enter for the purpose of moving to confess error. Cherpin *v.* Tillotson, 6 Ala. 638.

83. **Payment of the docket-fee, or security therefor,** is usually made a condition precedent of the procurement of an entry; and where the fee is not prepaid the clerk is justified in refusing to docket the appeal.

Colorado.— Tierney *v.* Campbell, 7 Colo. App. 299, 44 Pac. 948.

Georgia.— McAlister *v.* Eastman, 92 Ga. 448; 17 S. E. 675.

Massachusetts.—Knapp *v.* Lambert, 3 Gray (Mass.) 377.

North Carolina.— West *v.* Reynolds, 94 N. C. 333.

United States.— Green *v.* Elbert, 137 U. S. 615, 11 S. Ct. 188, 34 L. ed. 792; Edwards *v.* U. S., 102 U. S. 575, 26 L. ed. 293; Van Rensselaer *v.* Watts, 7 How. (U. S.) 784, 12 L. ed. 913.

See 2 Cent. Dig. tit. "Appeal and Error," § 2182.

In the District of Columbia, an entry on the minutes of the special term of an appeal to the general term is all that is necessary (U. S. *v.* Hood, 19 D. C. 372), or an entry in

otherwise the intention to enter the particular case may appear by such acts as are reasonably calculated to effect an entry.[84]

b. Time of Entry — (I) *Premature Entry.* Until the appeal is otherwise perfected it cannot be entered on the docket of the appellate court[85] except by the appellee for the purpose of dismissal or affirmance;[86] nor can a valid entry be made prior to a time fixed for that purpose.[87]

(II) *Entry Beyond Time Limit* — (A) *Inexcusable Delay.* Whenever a limit of time is fixed within which entry must be made,[88] delay beyond such time will subject appellant to suffer the penalty prescribed for such delay — as the loss of a claim against an insolvent estate,[89] a continuance for the term,[90] dismissal of the appeal.[91] It has also been held that delay by the appellant in the entry of the

writing in the clerk's office (*In re* Askins, 20 D. C. 10).

84. **"The entry should be so made** as to show who the parties are that are litigating; that the appellants and appellees should occupy upon the docket the position of plaintiffs and defendants, according to their true relation to the matter in controversy, and that all their names should thus appear on the docket." Spaulding's Appeal, 33 N. H. 479, 481.

Sufficient entries.—A single entry for several appellants (Spaulding's Appeal, 33 N. H. 479); filing a petition of appeal (Platt *v.* Preston, 19 Blatchf. (U. S.) 312, 8 Fed. 182).

Insufficient entries.—Under a different name (Lewis *v.* Minthorn, 73 Iowa 80, 34 N. W. 607); title of cause not named (Garrison *v.* Parsons, 41 Fla. 143, 25 So. 336.

85. Kentucky, etc., Mut. Ins. Co. *v.* Harrison, 5 Ky. L. Rep. 601; Hurst *v.* Cassiday, 5 Ky. L. Rep. 248; Allen *v.* Marchand, 4 Ky. L. Rep. 410; Stowell *v.* Richardson, 1 Allen (Mass.) 401.

A mistake of the clerk by entering an appeal on the docket to a preceding term, at which it would have been premature, is not ground for a dismissal. Lower Augusta Tp. *v.* Howard Tp., 1 Pa. Co. Ct. 373.

Before the time when the writ of error is returnable the cause cannot be entered. Kenney *v.* Wallace, 87 Ga. 506, 13 S. E. 554.

Where a specified notice to appellee of appeal is required, entry cannot be made until after the expiration of such time. New York Hospital Soc. *v.* Knox, 57 Miss. 600.

86. **In the United States supreme court,** the docketing of a cause by appellee in advance of the return-day of the appeal will not prevent appellant from doing what is necessary, while the appeal is alive, to give it full effect. Davies *v.* U. S., 113 U. S. 687, 5 S. Ct. 696, 28 L. ed. 1149.

87. **A premature entry is a nullity,** and will in no way prejudice the right of appellant to make a valid entry at the proper time. Garrison *v.* Parsons, 41 Fla. 143, 25 So. 336; Planchet's Succession, 29 La. Ann. 520.

88. *Georgia.*— Jones *v.* Payne, 41 Ga. 32; Armstrong *v.* Oglethorpe Bridge, etc., Co., 18 Ga. 607.

Massachusetts.—Burlingame *v.* Bartlett, 161 Mass. 593, 37 N. E. 748 (relating to equity appeals); Reed *v.* Home Sav. Bank, 130 Mass. 443, 39 Am. Rep. 468 (relating to reports of superior courts on questions of law); Robinson *v.* Durfee, 7 Allen (Mass.) 242 (relating to probate appeals); Boyle *v.* Burnett, 9 Gray (Mass.) 251 (relating to exceptions in proceedings in error).

Mississippi.— Apperson *v.* Fant, 42 Miss. 252.

North Carolina.—An appeal, taken from the superior court held during a term of the supreme court, may be docketed at the term next ensuing. Suiter *v.* Brittle, 90 N. C. 19; Howerton *v.* Henderson, 86 N. C. 718. And if, through no fault of appellant, the entry is not made at such succeeding term, it is appellant's duty to apply for a certiorari at that term, in default of which the appeal will be lost. Causey *v.* Snow, 116 N. C. 497, 21 S. E. 179; Joyner *v.* Hines, 108 N. C. 413 note, 12 S. E. 901; Rodman *v.* Archbell, 108 N. C. 413 note, 13 S. E. 111; Hinton *v.* Pritchard, 108 N. C. 412, 12 S. E. 838.

Pennsylvania.— Houk *v.* Knop, 2 Watts (Pa.) 72; Wilson *v.* Hathaway, 8 Phila. (Pa.) 235, 28 Leg. Int. (Pa.) 68.

Rhode Island.— Pearsons *v.* Webster, 17 R. I. 86, 20 Atl. 230.

Texas.— Walea *v.* McLean, 14 Tex. 18; Weathered *v.* Lee, 3 Tex. 189; Roberts *v.* Landrum, 3 Tex. 16.

United States.— Green *v.* Elbert, 137 U. S. 615, 11 S. Ct. 188, 34 L. ed. 792; Richardson *v.* Green, 130 U. S. 104, 9 S. Ct. 443, 32 L. ed. 872; Radford *v.* Folsom, 123 U. S. 725, 8 S. Ct. 334, 31 L. ed. 292; Killian *v.* Clark, 111 U. S. 784, 4 S. Ct. 700, 28 L. ed. 599.

See 2 Cent. Dig. tit. "Appeal and Error," § 2181.

The limit of time for appeal is, of necessity, the limit of time within which an entry may be allowed, where entry is a prerequisite of a perfect appeal. Fowler *v.* Hamill, 139 U. S. 549, 11 S. Ct. 663, 35 L. ed. 266; Green *v.* Elbert, 137 U. S. 615, 11 S. Ct. 188, 34 L. ed. 792; U. S. *v.* Certain Hogsheads of Molasses, 1 Curt. (U. S.) 276, 25 Fed. Cas. No. 14,766.

89. Smith *v.* McDaniel, 15 N. H. 474.

90. Sweeney *v.* Coulter, (Ky. 1900) 57 S. W. 254; Tauziede *v.* Jumel, 16 N. Y. Suppl. 377, 38 N. Y. St. 1018; Gregory *v.* Cryder, 9 Abb. Pr. N. S. (N. Y.) 89.

91. **The penalty of dismissal is effected** by permitting appellee to enter, upon default of the appellant, for the purpose of moving therefor. Hinton *v.* Pritchard, 108 N. C. 412, 12 S. E. 838; *Ex p.* Berry, 107 N. C. 326, 12 S. E. 125; Rose *v.* Shaw, 105 N. C. 126, 10 S. E. 1055; Fayolle *v.* Texas Pac. R. Co., 124 U. S.

appeal beyond such time is ground for an affirmance of the judgment below,[92] or for disregarding the appeal[93] or striking it off the docket.[94]

(B) *Excusable Delay.*[95] The court is powerless to excuse a delay beyond the time limit in entering an appeal where the penalty is expressly prescribed by statute and the case comes within the terms of the statute.[96] But where the statute is not mandatory, or where the penalty is prescribed by rule of court, the circumstances of the delay may sometimes permit the party in default to appeal to the discretionary power of the court to save the appeal;[97] and this power has been exerted where the parties, in good faith, acted under a misapprehension;[98] where the delay was due to neglect of the clerk,[99] the unexpected indisposition of the clerk or other officer,[1] to fraud,[2] to an order of the lower court,[3] to rigorous weather,[4] or to a mistake of a justice;[5] but not where the delay was due to appellant's ignorance of the rules,[6] alleged oversight,[7]

519, 8 S. Ct. 588, 31 L. ed. 533; State *v.* Demarest, 110 U. S. 400, 4 S. Ct. 25, 28 L. ed. 191; *In re* McEwen, 9 Biss. (U. S.) 368, 4 Fed. 13; *In re* Coleman, 7 Blatchf. (U. S.) 192, 6 Fed. Cas. No. 2,979.

The court, on its own motion, may dismiss where the fact of entry is not jurisdictional. Grigsby *v.* Purcell, 99 U. S. 505, 25 L. ed. 354.

In South Carolina, the appellant's default in entering on the docket has been held to constitute an abandonment equivalent to a dismissal, without any action by appellee or the court. Guilleaume *v.* Miller, 14 Rich. (S. C.) 118.

92. Affirmance upon motion of appellee is sometimes provided for in case of an insufficient entry. Webb *v.* Robbins, 77 Ala. 176; Sweeney *v.* Coulter, (Ky. 1900) 57 S. W. 254.

In the United States supreme court, a motion to affirm may be united with a motion to dismiss, but a motion to affirm will not be entertained unless there appears on the record at least some color of right to a dismissal. Davies *v.* U. S., 113 U. S. 687, 5 S. Ct. 696, 28 L. ed. 1149.

93. *Colorado.*— Tierney *v.* Campbell, 7 Colo. App. 299, 44 Pac. 948.

Massachusetts.— Knapp *v.* Lambert, 3 Gray (Mass.) 377.

North Carolina.— Avery *v.* Pritchard, 93 N. C. 266.

Rhode Island.— Pearsons *v.* Webster, 17 R. I. 86, 20 Atl. 230.

South Carolina.— Guilleaume *v.* Miller, 14 Rich. (S. C.) 118; Tongue *v.* Gist, 1 Nott & M. (S. C.) 110.

Texas.— Roberts *v.* Landrum, 3 Tex. 16.

94. Houk *v.* Knop, 2 Watts (Pa.) 72; Wilson *v.* Hathaway, 8 Phila. (Pa.) 235, 28 Leg. Int. (Pa.) 68; Berry *v.* Blankenship, 30 Tex. 380.

95. See 2 Cent. Dig. tit. "Appeal and Error," § 2180.

96. *Colorado.*— Tierney *v.* Campbell, 7 Colo. App. 299, 44 Pac. 948.

Kentucky.— Bacon *v.* Brown, 3 Bibb (Ky.) 35.

Massachusetts.— Knapp *v.* Lambert, 3 Gray (Mass.) 377.

New Hampshire.— Smith *v.* McDaniel, 15 N. H. 474 [*criticizing* Dyer *v.* Stanwood, 6 N. H. 411].

Texas.— Walea *v.* McLean, 14 Tex. 18.

97. Sears *v.* Kirksey, 81 Ala. 98, 2 So. 90; Webb *v.* Robbins, 77 Ala. 176. But *compare* York *v.* Noyes, 4 Mass. 645; Dean *v.* Dean, 2 Mass. 150; Jackson *v.* Goddard, 1 Mass. 230, construing an old statute.

A statute fixing a time-limit for entering appeals is not mandatory where the jurisdiction of the appellate court is not made to depend upon it. Hintermeister *v.* Brady, 70 Minn. 437, 73 N. W. 145.

98. Dyer *v.* Stanwood, 6 N. H. 411.

99. Mutual L. Ins. Co. *v.* Phinney, 178 U. S. 327, 20 S. Ct. 906, 44 L. ed. 1088.

Failure of clerk to demand fees, or to notify appellant that such fees must be paid, has been held a sufficient excuse for non-payment of the docket-fee, and a sufficient reason for permitting entry of appeal from justice of the peace to be made two terms thereafter, when the failure to enter came first to appellant's knowledge. West *v.* Reynolds, 94 N. C. 333.

Neglect of clerk to enter, where appellant has done all that is required of him, will not defeat the appeal.

Georgia.— Holt *v.* Edmondson, 31 Ga. 357.

New Jersey.— Thompson *v.* Pippitt, 18 N. J. L. 176.

North Carolina.— Simmons *v.* Allison, 119 N. C. 556, 26 S. E. 171; West *v.* Reynolds, 94 N. C. 333.

Ohio.— King *v.* Penn, 43 Ohio St. 57, 1 N. E. 84.

United States.— Mutual L. Ins. Co. *v.* Phinney, 178 U. S. 327, 20 S. Ct. 906, 44 L. ed. 1088.

Neglect of clerk to prepare transcript has been held to excuse a failure to docket in time. Continental Bldg., etc., Assoc. *v.* Mills, 44 Nebr. 136, 62 N. W. 478. *Contra,* Houk *v.* Knop, 2 Watts (Pa.) 72. Appellant must show he is free from all laches. Brown *v.* House, 119 N. C. 622, 26 S. E. 160.

1. Howerton *v.* Henderson, 86 N. C. 718; Wilson *v.* Hathaway, 8 Phila. (Pa.) 235, 28 Leg. Int. (Pa.) 68.

2. U. S. *v.* Gomez, 3 Wall. (U. S.) 752, 18 L. ed. 212.

3. Ableman *v.* Booth, 21 How. (U. S.) 506, 16 L. ed. 169.

4. Bennet *v.* Whitney, 1 Tyler (Vt.) 59.

5. Shrope *v.* Cauley, 12 Pa. Co. Ct. 217, 2 Pa. Dist. 48.

6. Green *v.* Elbert, 137 U. S. 615, 11 S. Ct. 188, 34 L. ed. 792.

7. Robinson *v.* Durfee, 7 Allen (Mass.) 242. *Aliter* where the oversight was made good be-

want of diligence,[8] undue reliance on misinformation or promises of officers of the lower court,[9] or the illness of counsel where such counsel had assistance.[10]

3. Waiver of Insufficient Entry[11] — **a. In General.** Provisions for entry are in the public interest and for the benefit of the courts, not specially in the interest or for the benefit of appellee. Therefore, when the penalty for non-compliance is not the loss of the appeal, courts will not usually permit appellee to waive appellant's default in that respect.[12] And where the appeal has not been and cannot be otherwise perfected, consent of appellee cannot effect a valid entry.[13]

b. Waiver by Estoppel. An estoppel to claim an insufficient entry may be established by such words or acts on the part of appellee as will reasonably warrant appellant, through reliance thereon, in refraining from entering his appeal.[14]

c. Implied Waiver — (i) *In General.* Waiver of an insufficient entry may be implied by such subsequent action on the part of appellee as will be inconsistent with an intention to take advantage of the insufficiency.[15]

(ii) *By Appearance.* Where the jurisdiction of the appellate court over appellee depends upon the fact of a sufficient entry within time, a general appearance of appellee will be a waiver of entry.[16] But where entry is not such jurisdictional fact, appearance is not a waiver, if objection be made before the hearing.[17]

4. Nunc Pro Tunc Entry. A *nunc pro tunc* entry is one allowed by the court as of a prior time within the time limit, where entry within such time is necessary to save appellant's rights, and a failure to enter within time has been excused or waived.[18]

fore objections. Webb *v.* Robbins, 77 Ala. 176; Edwards *v.* U. S., 102 U. S. 575, 26 L. ed. 293.

8. Grigsby *v.* Purcell, 99 U. S. 505, 25 L. ed. 354.

Absence of counsel will not excuse a failure to enter where such absence was known to appellant in time to procure other counsel. Brendle *v.* Gorley, 13 Pa. Co. Ct. 654.

Laches causing no prejudice.— In a case of unusual delay in bringing up and entering a case, a motion of appellee for leave to issue execution — as in case of an abandoned appeal — was denied, it appearing that there had been no opportunity for a trial, so that the hearing was not delayed by the appellant's laches. Hamilton *v.* The Walla Walla, 44 Fed. 4. To the same effect is Chambers *v.* Fisk, 20 Tex. 343.

9. Houk *v.* Knop, 2 Watts (Pa.) 72; Wilson *v.* Hathaway, 8 Phila. (Pa.) 235, 28 Leg. Int. (Pa.) 68.

Agreement of clerk of lower court to file the record on appeal in the appellate court, and his failure so to do, will not excuse a failure to docket in time. Fayolle *v.* Texas Pac. R. Co., 124 U. S. 519, 8 S. Ct. 588, 31 L. ed. 533.

Failure of trial judge to settle case in time has been held no excuse for a default in entering an appeal within time. Parker *v.* Southern R. Co., 121 N. C. 501, 28 S. E. 347; Pittman *v.* Kimberly, 92 N. C. 562.

10. State *v.* Louisiana Debenture Co., 52 La. Ann. 597, 27 So. 88.

11. See cases cited *infra*, notes 12, 13; and 2 Cent. Dig. tit. "Appeal and Error," § 2184 *et seq.*

12. Palmer *v.* Allen, 1 Conn. 100.

Express consent to a suspension of the rule requiring entry for oral argument was held not effective to permit argument, though the court offered to allow a submission without argument instead of the penalty of a continuance for the term. Gregory *v.* Cryder, 9 Abb. Pr. N. S. (N. Y.) 89.

13. Joyner *v.* Hines, 108 N. C. 413 note, 12 S. E. 901; Walea *v.* McLean, 14 Tex. 18.

14. Hintermeister *v.* Brady, 70 Minn. 437, 73 N. W. 145; King *v.* Penn, 43 Ohio St. 57, 1 N. E. 84.

15. This waiver has been held to arise when appellee made a motion for a new bond (Waldron *v.* Waldron, 156 U. S. 361, 15 S. Ct. 383, 39 L. ed. 453); omitted to move for an affirmance or dismissal until after the entry has been made (Webb *v.* Robbins, 77 Ala. 176; Perryman *v.* Burgster, 4 Port. (Ala.) 505; Richardson *v.* Green, 130 U. S. 104, 9 S. Ct. 443, 32 L. ed. 872; Edwards *v.* U. S., 102 U. S. 575, 26 L. ed. 293; but see, *contra*, Hinton *v.* Pritchard, 108 N. C. 412, 12 S. E. 838); or accepted service of the appeal after time limit (Veeche *v.* Grayson, 1 Mart. N. S. (La.) 133).

In Texas, though, after the term, no excuse will avail to save an appeal which has not been docketed during the term and after the last day fixed for entering appeals, yet if no motion for judgment has been made and the appellee will not be prejudiced, a motion to docket may be allowed. Berry *v.* Blankenship, 30 Tex. 380; Chambers *v.* Fisk, 20 Tex. 343; Walea *v.* McLean, 14 Tex. 18.

16. Garrison *v.* Parsons, 41 Fla. 143, 25 So. 336; Suiter *v.* Brittle, 90 N. C. 19; and see 2 Cent. Dig. tit. "Appeal and Error," § 2184.

17. Grigsby *v.* Purcell, 99 U. S. 505, 25 L. ed. 354.

18. *Georgia.*— Holt *v.* Edmondson, 31 Ga. 357.

Massachusetts.— York *v.* Noyes, 4 Mass. 645.

New Jersey.— Thompson *v.* Rippitt, 18 N. J. L. 176.

G. Appearance in Appellate Court[19]— **1. Appearance for Hearing.** When a case is called, and neither the appellant nor appellee appear, it is usual to dismiss the appeal;[20] and where appellant does not appear the appeal will be dismissed,[21] or, upon motion of appellee, the judgment may be affirmed.[22] Where appellee fails to appear, the hearing will be *ex parte*.[23]

2. General Appearance of Appellee — a. Requisites of a General Appearance. A general appearance is effected by causing an entry thereof, without specifying that the appearance is special for a particular purpose,[24] or by taking such action as precludes the claim of a special appearance[25]— for example, a joinder of

Pennsylvania.— Shrope *v.* Cauley, 12 Pa. Co. Ct. 217, 2 Pa. Dist. 48.

Texas.— Morse *v.* State, 39 Tex. Crim. 566, 50 S. W. 342, 47 S. W. 645.

United States.— Van Rensselaer *v.* Watts, 7 How. (U. S.) 784, 12 L. ed. 913.

Nunc pro tunc entry not necessary.—Where a large number of cases have intervened and appellant's rights will not be prejudiced, the entry may be allowed, but not *nunc pro tunc*, the failure to enter not being a mere clerical omission, though appellee consent to a *nunc pro tunc* entry. Van Rensselaer *v.* Watts, 7 How. (U. S.) 784, 12 L. ed. 913.

19. See cases cited *infra*, notes 20–23; and 2 Cent. Dig. tit. "Appeal and Error," § 2184 *et seq.*

20. De Loach *v.* Richards, 94 Ga. 730, 19 S. E. 717; Radford *v.* Craig, 5 Cranch (U. S.) 289, 3 L. ed. 104.

21. Brice *v.* Chapman, 95 Ga. 799, 22 S. E. 525; McAlister *v.* Eastman, 92 Ga. 448, 17 S. E. 675; Bourne *v.* Mackall, 1 Harr. & G. (Md.) 86; Holmes *v.* Boston, etc., Lumber Co., 40 S. C. 545, 18 S. E. 889; Scott *v.* Carpenter, 13 S. C. 44.

22. Stiles *v.* Chapman, 7 Ga. 1; Woodward *v.* Chester, 42 Mich. 461, 4 N. W. 167.

23. *Delaware.*— Vandegrift *v.* Page, 5 Harr. (Del.) 439.

Louisiana.— Lavigne *v.* May, 2 Mart. N. S. (La.) 628.

New York.— Waters *v.* Travis, 8 Johns. (N. Y.) 566; Stiles *v.* Burch, 5 Paige (N. Y.) 132; Bellony *v.* Alexander, 1 Sandf. (N. Y.) 734.

Vermont.— Winn *v.* Sprague, 35 Vt. 243.

United States.— U. S. *v.* Yates, 6 How. (U. S.) 605, 12 L. ed. 575.

But see Butts *v.* Fenelon, 38 Wis. 664, 665, where the cause not having been submitted for defendant in error and no counsel having appeared for him, the court declined to hear argument for plaintiff in error, or to consider the merits at the request of the latter's counsel, and under a rule of court reversed the judgment below as of course, the court saying: "It is dangerous to pass upon grave questions, such as are presumably involved in cases brought here, upon *ex parte* arguments; and the court is unwilling to do so when it can be avoided."

A later appearance of appellee, before the hearing, was held sufficient to permit him to maintain a motion to dismiss the appeal for want of an appeal bond. Lavigne *v.* May, 2 Mart. N. S. (La.) 628.

24. *Illinois.*— Dinet *v.* People, 73 Ill. 183; Mitchell *v.* Jacobs, 17 Ill. 235.

Indiana.— Newman *v.* Railway Officials', etc., Acc. Assoc., 15 Ind. App. 29, 42 N. E. 650.

Kentucky.— German Ins. Co. *v.* Ingram, 12 Ky. L. Rep. 191.

Louisiana.— Foute *v.* New Orleans, 20 La. Ann. 22.

New York.— Schaffer *v.* Jones, 1 Misc. (N. Y.) 74, 20 N. Y. Suppl. 531, 48 N. Y. St. 408.

North Carolina.—Suiter *v.* Brittle, 90 N. C. 19.

South Dakota.—Holden *v.* Haserodt, 2 S. D. 220, 49 N. W. 97.

Washington.— Yesler *v.* Oglesbee, 1 Wash. Terr. 604.

Wisconsin.— Kemp *v.* Hein, 48 Wis. 32, 3 N. W. 831.

United States.— Farmers L. & T. Co. *v.* Longworth, 83 Fed. 336, 48 U. S. App. 560, 27 C. C. A. 541.

An appearance, general in form, and which does not state that it is for any special purpose, but evidently for the sole purpose of moving to dismiss because of a want of jurisdiction of the person, has been held not a general appearance. Lecat *v.* Salle, 1 Port. (Ala.) 287; Law *v.* Nelson, 14 Colo. 409, 24 Pac. 2; Spurrier *v.* Wirtner, 48 Iowa 486.

An appearance special in terms, though not limited to any particular purpose, is a general appearance. Renaud *v.* Abbott, 116 U. S. 277, 6 S. Ct. 1194, 29 L. ed. 629.

Appearance of attorney-general in United States supreme court.— In the United States supreme court, it has always been the practice for the clerk to enter the appearance of the United States attorney-general in all cases wherein the United States is a party, at the first term to which the appeal or writ of error is returnable, and at the same term he may withdraw such appearance or move to strike it off; but if he lets it pass to the next term the appearance is conclusive. Farrar *v.* U. S., 3 Pet. (U. S.) 459, 7 L. ed. 741. An appearance by the district attorney may be repudiated and set aside by the attorney-general. Castro *v.* U. S., 3 Wall. (U. S.) 46, 18 L. ed. 163.

25. A motion to dismiss for want of jurisdiction of the person is not a general appearance, and does not waive the defect of which it seeks to take advantage. Lecat *v.* Salle, 1 Port. (Ala.) 287; Spurrier *v.* Wirtner, 48 Iowa 486; McMicken *v.* Smith, 5 Mart. N. S. (La.) 427; Seymour *v.* Judd, 2 N. Y. 464;

error,[26] filing an answer,[27] obtaining, asking, consenting to or arguing a motion for a continuance,[28] noticing the appeal for argument or trial,[29] submitting argument,[30] obtaining a rule for justification of sureties,[31] waiving service of motion to perfect the transcript,[32] submitting a brief on the merits,[33] waiving the filing of briefs,[34] filing a cross-petition,[35] acknowledging service of a case-made,[36] stipulating for an amended abstract,[37] applying to withdraw a transcript for the purpose of testing

Seybold *v.* Boyd, 14 Tex. 460. *Contra,* McBee *v.* McBee, 1 Heisk. (Tenn.) 558, which holds that notice of a writ of error is waived by appearance and moving to dismiss for want of notice. See also Libbey *v.* McIntosh, 60 Iowa 329, 14 N. W. 354; and Robertson *v.* Eldora R., etc., Co., 27 Iowa 245.

A motion to set aside a default for want of notice of appeal, and an appearance for that purpose only, is not a general appearance. Houk *v.* Barthold, 73 Ind. 21.

A plea in abatement, and appearance for the purpose of filing it, is not a general appearance. Fare *v.* Gunter, 82 Mo. 522.

Entry of attorney's name in appearance docket for convenience merely, as attorney for appellee, and inquiries by him about the case, has been held not a general appearance. Halford *v.* Coe, 4 Kan. 561; Fisher *v.* Anderson, 101 Mo. 459, 14 S. W. 629.

No intention to appear generally.—Where there was no formal entry of appearance, but the parties both announced themselves ready for jury trial at the calling of the docket on the first day of the term, appellee not really intending to appear generally and the cause not being set for trial, it was held that appellee had not waived the right to move for an affirmance for failure to take the appeal in time and to give statutory notice thereof. Hayes *v.* James, 1 Colo. App. 130, 27 Pac. 894 [*distinguishing* Coby *v.* Halthusen, 16 Colo. 10, 26 Pac. 148, and Robertson *v.* O'Reilly, 14 Colo. 441, 24 Pac. 560].

26. *Alabama.*—Robinson *v.* Murphy, 69 Ala. 543; Bolling *v.* Jones, 67 Ala. 508; McDonald *v.* McMahon, 66 Ala. 115; Alexander *v.* Nelson, 42 Ala. 462; Thompson *v.* Lea, 28 Ala. 453.

Colorado.— Haley *v.* Elliott, 20 Colo. 199, 37 Pac. 27.

Illinois.— Smith *v.* Wright, 71 Ill. 167; Robinson *v.* Magarity, 28 Ill. 423; Matson *v.* Connelly, 24 Ill. 142; Bolton *v.* McKinley, 19 Ill. 404; Cheltenham Imp. Co. *v.* Whitehead, 26 Ill. App. 609.

Indiana.— Lowe *v.* Turpie, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233; State *v.* Walters, 64 Ind. 226.

Iowa.—Romain *v.* Muscatine County, Morr. (Iowa) 357.

Louisiana.— Gayoso de Lemos *v.* Garcia, 1 Mart. N. S. (La.) 324.

Pennsylvania.— Downing *v.* Baldwin, 1 Serg. & R. (Pa.) 298.

Washington.— Although a joinder of error was not necessary to a submission of the cause. Schwabacher *v.* Wells, 1 Wash. Terr. 506.

27. Planchet's Succession, 29 La. Ann. 520; Rogers *v.* Cruger, 3 Johns. (N. Y.) 564; Valentine *v.* Valentine, 2 Barb. Ch. (N. Y.) 430.

28. *California.*— McLeran *v.* Shartzer, 5 Cal. 70, 63 Am. Dec. 84.

Colorado.— Coby *v.* Halthusen, 16 Colo. 10, 26 Pac. 148; Robertson *v.* O'Reilly, 14 Colo. 441, 24 Pac. 530. *Compare* Hayes *v.* James, 1 Colo. App. 130, 27 Pac. 894.

Illinois.— Mitchell *v.* Jacobs, 17 Ill. 235.

Iowa.— Roundy *v.* Kent, 75 Iowa 662, 37 N. W. 146; Wilgus *v.* Gettings, 19 Iowa 82.

Nebraska.— Steven *v.* Nebraska, etc., Ins. Co., 29 Nebr. 187, 45 N. W. 284.

New York.— Overseers of Poor *v.* Overseers of Poor, 5 Cow. (N. Y.) 363.

Pennsylvania.— Wilson *v.* Kelly, 81 Pa. St. 411.

Texas.— Lewis *v.* Mills, 29 Tex. 124.

29. Robertson *v.* O'Reilly, 14 Colo. 441, 24 Pac. 560; Coppernoll *v.* Ketcham, 56 Barb. (N. Y.) 111; Pearson *v.* Lovejoy, 53 Barb. (N. Y.) 407, 35 How. Pr. (N. Y.) 193; Silsbee *v.* Gillespie, 9 Abb. Pr. N. S. (N. Y.) 139; Holden *v.* Haserodt, 2 S. D. 220, 49 N. W. 97.

30. DeHaven *v.* DeHaven, 77 Ind. 236; Roundy *v.* Kent, 75 Iowa 662, 37 N. W. 146; Griffin *v.* Cranston, 5 Bosw. (N. Y.) 658; King *v.* Penn, 43 Ohio St. 57, 1 N. E. 84; Cleveland, etc., R. Co. *v.* Mara, 26 Ohio St. 185. Though the submission includes a protest against the exercise of jurisdiction. Pickersgill *v.* Read, 7 Hun (N. Y.) 636.

31. Schnell *v.* North Side Planing Mill Co., 89 Ill. 581.

32. Yesler *v.* Oglesbee, 1 Wash. Terr. 604.

33. Schmidt *v.* Wright, 88 Ind. 56; Magee *v.* Hartzell, 7 Kan. App. 489, 54 Pac. 129; Louisville *v.* Clark, 20 Ky. L. Rep. 1265, 49 S. W. 18. *Compare* Brier *v.* Chicago, etc., R. Co., 66 Iowa 602, 24 N. W. 232.

Brief by attorney not admitted.—Where no appearance is made for plaintiff in error other than by the filing of a brief by an attorney who, at the time the case to which such brief relates is called in its order for a hearing, is not a licensed practitioner at the bar of the supreme court, the appeal will be dismissed for want of prosecution. Brice *v.* Chapman, 95 Ga. 799, 22 S. E. 525.

In Washington, filing a brief in the supreme court is not an appearance, because the practice of that court has been settled otherwise. Yesler *v.* Oglesbee, 1 Wash. Terr. 604. But see, *contra,* N. C. Supreme Court Rules, No. 12.

34. Stephenson *v.* Chappell, 12 Tex. Civ. App. 296, 33 S. W. 880, 36 S. W. 482.

35. Robinson Female Seminary *v.* Campbell, 60 Kan. 60, 55 Pac. 276.

36. Taylor *v.* Riggs, (Kan. App. 1898) 52 Pac. 910.

37. Price *v.* Pittsburgh, etc., R. Co., 40 Ill. 44.

it,[38] consenting to a reference,[39] or moving to affirm or dismiss for reasons other than a want of jurisdiction of the person.[40]

b. Waiver of Jurisdictional Defects — (I) *Jurisdiction of the Person* — (A) *In General.* The appellate court having jurisdiction of the subject-matter of the appeal, an entry of general appearance by appellee will give the court jurisdiction of the person of appellee, which it would not have had but for the appearance.[41]

(B) *Objections to Appeal.* A general appearance waives an objection to an appeal, otherwise regular, that it was not instituted within the time limited,[42] or at all,[43] or by motion where petition and citation should have been used;[44] that it was made returnable in vacation,[45] or generally, instead of to the proper term;[46] that there was an irregularity in granting the appeal;[47] that the statutory affidavit on appeal is not shown in the record;[48] that the petition of appeal does not contain the reasons of appeal,[49] or does not name all the respondents;[50] that an

38. Williams *v.* La Penotiere, 26 Fla. 333, 7 So. 869.

39. Mason *v.* Alexander, 44 Ohio St. 318, 7 N. E. 435.

40. A special appearance can be only for objection to jurisdiction of the person; otherwise all such objections are waived, the appearance to dismiss for another purpose being general.

Florida.— Oppenheimer *v.* Guckenheimer, 34 Fla. 13, 15 So. 670.

Illinois.— Long *v.* Trabue, 8 Ill. App. 132.

Louisiana.— Baumgarden's Succession, 35 La. Ann. 127; Morton *v.* Graham, 11 La. 449; State *v.* Montegut, 7 Mart. (La.) 447.

Missouri.— Rector *v.* St. Louis County Cir. Ct., 1 Mo. 607.

Texas.— Hall *v.* La Salle County, (Tex. Civ. App. 1898) 46 S. W. 863.

Wisconsin.— Perkins *v.* Shadbolt, 44 Wis. 574.

Contra, Callahan *v.* Jennings, 16 Colo. 471, 27 Pac. 1055; Radford *v.* Folsom, 123 U. S. 725, 8 S. Ct. 334, 31 L. ed. 292.

41. *Alabama.*— Thompson *v.* Lea, 28 Ala. 453.

Colorado.— Las Animas County *v.* Stone, 11 Colo. App. 476, 53 Pac. 616.

Florida.— Garrison *v.* Parsons, 41 Fla. 143, 25 So. 336.

Illinois.— Jarrett *v.* Phillips, 90 Ill. 237; Dinet *v.* People, 73 Ill. 183; Mitchell *v.* Jacobs, 17 Ill. 235.

Indiana.— Goodrich *v.* Stangland, (Ind. 1900) 58 N. E. 148; Indianapolis Union R. Co. *v.* Ott, (Ind. App. 1893) 35 N. E. 517; Newman *v.* Railway Officials', etc., Acc. Assoc., 15 Ind. App. 29, 42 N. E. 650.

Iowa.— Wilgus *v.* Gettings, 19 Iowa 82; Des Moines Branch State Bank *v.* Van, 12 Iowa 523.

Massachusetts.— Santon *v.* Ballard, 133 Mass. 464.

Nebraska.— Steven *v.* Nebraska, etc., Ins. Co., 29 Nebr. 187, 45 N. W. 284.

Tennessee.—Chester *v.* Embree, Peck (Tenn.) 370.

United States.— Dillingham *v.* Skein, Hempst. (U. S.) 181, 7 Fed. Cas. No. 3,912*a*.

In McKoy *v.* Allen, 36 Ill. 429, it is held that the appellate court must have original jurisdiction of the subject-matter in order to entitle appellant to claim a waiver of jurisdiction of the person by appearance of appellee.

As to waiver of objections to sufficient docket-entry see *supra,* VII, F, 3, c, (II).

42. *Alabama.*— Bolling *v.* Jones, 67 Ala. 508; McDonald *v.* McMahon, 66 Ala. 115.

Illinois.— Price *v.* Pittsburgh, etc., R. Co., 40 Ill. 44; Pearce *v.* Swan, 2 Ill. 266.

Indiana.—Newman *v.* Railway Officials', etc., Acc. Assoc., 15 Ind. App. 29, 42 N. E. 650.

Montana.— Payne *v.* Davis, 2 Mont. 381.

New York.— Pearson *v.* Lovejoy, 53 Barb. (N. Y.) 407, 35 How. Pr. (N. Y.) 193.

Contra, King *v.* Penn, 43 Ohio St. 57, 1 N. E. 84; Dias *v.* Munos, 17 Tex. 518, where the distinction is made that, though by a general appearance the instituting of a proceeding in error beyond time cannot be waived, yet that where appellee has by his acts induced appellant to prepare for the hearing, he will be estopped to claim a want of jurisdiction.

Distinction between appeals and proceedings in error.— It has been held that though a statutory appeal could not in any event be maintained if taken after the time limited by law, because it is the creature of the statute, yet the objection that a proceeding in error was not instituted in time could be waived by a general appearance, because "at common law a writ of error is generally regarded as a writ of right," and is the commencement of a new suit — not the continuation of an old one. Haley *v.* Elliott, 20 Colo. 199, 202, 37 Pac. 27.

43. Roundy *v.* Kent, 75 Iowa 662, 37 N. W. 146.

44. Planchet's Succession, 29 La. Ann. 520; Chicago, etc., R. Co. *v.* Blair, 100 U. S. 661, 25 L. ed. 587.

45. Farrar *v.* U. S., 3 Pet. (U. S.) 459, 7 L. ed. 741.

46. Robinson *v.* Murphy, 69 Ala. 543. *Contra, In re* Shelton St. R. Co., 70 Conn. 329, 39 Atl. 446.

47. Indianapolis Union R. Co. *v.* Ott, (Ind. App. 1893) 35 N. E. 517; Louisville *v.* Clark, 20 Ky. L. Rep. 1265, 49 S. W. 18 [*approved* in Louisville *v.* Cassady, 20 Ky. L. Rep. 1348, 49 S. W. 194]; German Ins. Co. *v.* Ingram, 12 Ky. L. Rep. 191; Foute *v.* New Orleans, 20 La. Ann. 22.

48. Wilson *v.* Kelly, 81 Pa. St. 411.

49. Rogers *v.* Cruger, 3 Johns. (N. Y.) 564.

50. As to respondents named, the right to object that the petition of appeal did not contain the names of other respondents is waived

improper return-day was fixed;[51] that the cause was discontinued in the trial court;[52] that there is a defect of parties;[53] that the appeal bond was not filed in time,[54] or at all;[55] that the transcript was not filed in time;[56] that the cause was brought up by appeal instead of by error;[57] or that the court below had not jurisdiction of the person of appellee.[58]

(c) *Objections to Process.* The appeal having been perfected, a general appearance waives any objection to the summons, notice, or citation on account of its non-existence, defectiveness, or want of proper service thereof upon appellee.[59]

by answering the petition. Valentine *v.* Valentine, 2 Barb. Ch. (N. Y.) 430.

51. Gayoso de Lemos *v.* Garcia, 1 Mart. N. S. (La.) 324; Shute *v.* Keyser, 149 U. S. 649, 13 S. Ct. 960, 37 L. ed. 884; Farrar *v.* U. S., 3 Pet. (U. S.) 459, 7 L. ed. 741.

52. Phillips *v.* Hood, 85 Ill. 450.

53. *Illinois.*— Robinson *v.* Magarity, 28 Ill. 423; Hodson *v.* McConnel, 12 Ill. 170.

Indiana.— De Haven *v.* De Haven, 77 Ind. 236; Field *v.* Burton, 71 Ind. 380.

Louisiana.— Dyson *v.* Brandt, 9 Mart. (La.) 493.

Utah.— Belleville Pump, etc., Works *v.* Samuelson, 16 Utah 119, 51 Pac. 150.

Wisconsin.— Kemp *v.* Hein, 48 Wis. 32, 3 N. W. 831.

Contra, Goodrich *v.* Stangland, (Ind. 1900) 58 N. E. 148.

Appearance of necessary party after motion to dismiss.—After a motion to dismiss on the ground that a third party who was not made a party was a necessary party to the appeal, the third party, without notice to any one, entered its general appearance. The appearance having been overlooked, the motion to dismiss was sustained; but thereafter a rehearing was granted for this reason alone, and appellant secured a reversal. Farmers' L. & T. Co. *v.* Longworth, 83 Fed. 336, 48 U. S. App. 560, 27 C. C. A. 541.

54. Mitchell *v.* Jacobs, 17 Ill. 235.

55. Thompson *v.* Lea, 28 Ala. 453; Dillingham *v.* Skein, Hempst. (U. S.) 181, 7 Fed. Cas. No. 3,912*a*. *Contra,* McKoy *v.* Allen, 36 Ill. 429; Santom *v.* Ballard, 133 Mass. 464.

56. Williams *v.* La Penotiere, 26 Fla. 333, 7 So. 869; Jarrett *v.* Phillips, 90 Ill. 237; State *v.* Walters, 64 Ind. 226; Steven *v.* Nebraska, etc., Ins. Co., 29 Nebr. 187, 45 N. W. 284.

57. Bolton *v.* McKinley, 19 Ill. 404.

58. Cheltenham Imp. Co. *v.* Whitehead, 26 Ill. App. 609; Dyson *v.* Brandt, 9 Mart. (La.) 493; Cleveland, etc., R. Co. *v.* Mara, 26 Ohio St. 185.

59. *Alabama.*— De Sylva *v.* Henry, 3 Port. (Ala.) 132; Naylor *v.* Phillips, 3 Stew. (Ala.) 210.

California.— Hibernia Sav., etc., Soc. *v.* Lewis, 111 Cal. 519, 44 Pac. 175; McLeran *v.* Shartzer, 5 Cal. 70, 63 Am. Dec. 84.

Colorado.— Coby *v.* Halthusen, 16 Colo. 10, 26 Pac. 148; Robertson *v.* O'Reilly, 14 Colo. 441, 24 Pac. 560.

Florida.—Oppenheimer *v.* Guckenheimer, 34 Fla. 13, 15 So. 670; Williams *v.* La Penotiere, 26 Fla. 333, 7 So. 869.

Idaho.— Moore *v.* Koubly, 1 Ida. 55.

Illinois.— Schnell *v.* North Side Planing Mill Co., 89 Ill. 581; Burns *v.* Nichols, 89 Ill. 480.

Indiana.— Lowe *v.* Turpie, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233; Schmidt *v.* Wright, 88 Ind. 56; Beck *v.* State, 72 Ind. 250.

Iowa.— Morrow *v.* Carpenter, 1 Greene, (Iowa) 469. *Contra,* Ash *v.* Ash, 90 Iowa, 229, 57 N. W. 862, which holds that the omission of some of the appealing defendants to serve a notice of appeal on their co-defendants could not be remedied by filing in the appellate court the entries of appearance of such co-defendants.

Kansas.— Robinson Female Seminary *v.* Campbell, 60 Kan. 60, 55 Pac. 276; Magee *v.* Hartzell, 7 Kan. App. 489, 54 Pac. 129.

Louisiana.— Baumgarden's Succession, 35 La. Ann. 127; Richardson *v.* Cramer, 28 La. Ann. 357; Foute *v.* New Orleans, 20 La. Ann. 22.

Michigan.— Durfee *v.* McClurg, 5 Mich. 532.

Missouri.— Rector *v.* St. Louis County Cir. Ct., 1 Mo. 607; Deatley *v.* Potter, 29 Mo. App. 222.

Montana.— Payne *v.* Davis, 2 Mont. 381.

Nebraska.— Minneapolis Harvester Works *v.* Hedges, 11 Nebr. 46, 7 N. W. 531; McDonald *v.* Penniston, 1 Nebr. 324.

New York.— Pickersgill *v.* Read, 7 Hun (N. Y.) 636; Coppernoll *v.* Ketcham, 56 Barb. (N. Y.) 111; Silsbee *v.* Gillespie, 9 Abb. Pr. N. S. (N. Y.) 139; Overseers of Poor *v.* Overseers of Poor, 5 Cow. (N. Y.) 363.

Ohio.—Mason *v.* Alexander, 44 Ohio St. 318, 7 N. E. 345; King *v.* Penn, 43 Ohio St. 57, 1 N. E. 84; Hammond *v.* Hammond, 21 Ohio St. 620.

Rhode Island.— Sprague *v.* Luther, 7 R. I. 581.

South Dakota.— Holden *v.* Haserodt, 2 S. D. 220, 49 N. W. 97.

Texas.— Lewis *v.* Mills, 29 Tex. 124; Hall *v.* La Salle County, (Tex. Civ. App. 1898) 46 S. W. 863.

Washington.— Schwabacher *v.* Wells, 1 Wash. Terr. 506.

Wisconsin.— Kasson *v.* Brocker, 47 Wis. 79, 1 N. W. 418; Perkins *v.* Shadbolt, 44 Wis. 574.

United States.— Richardson *v.* Green, 130 U. S. 104, 9 S. Ct. 443, 32 L. ed. 872; Renaud *v.* Abbott, 116 U. S. 277, 6 S. Ct. 1194, 29 L. ed. 629; Pierce *v.* Cox, 9 Wall. (U. S.) 786, 19 L. ed. 786; U. S. *v.* Yates, 6 How. (U. S.) 605, 12 L. ed. 575; U. S. *v.* Hopewell, 51 Fed. 798, 5 U. S. App. 137, 2 C. C. A. 510; Freeman *v.*

(II) *Jurisdiction of the Subject-Matter.* A general appearance by appellee cannot give the appellate court jurisdiction of the subject-matter of the appeal.[60] There is no jurisdiction of the subject-matter where no appeal is taken,[61] though an appeal be attempted,[62] except where the attempted appeal results in a trial *de novo*.[63] In any case, jurisdiction of the subject-matter implies that

Clay, 48 Fed. 849, 2 U. S. App. 151, 1 C. C. A. 115.

See 2 Cent. Dig. tit. "Appeal and Error," § 2188 *et seq.*

Before the expiration of time for notice of appeal, it has been held, an appearance does not waive the want of such notice. Brier *v.* Chicago, etc., R. Co., 66 Iowa 602, 24 N. W. 232.

The abatement of an attorney's authority by death of an appellee for whom the attorney had indorsed on the appeal an entry of appearance, such abatement occurring before the filing of the appeal in the appellate court, prevents the appearance from taking effect as a waiver of process. McGuire *v.* Ranney, 49 Ohio St. 372, 34 N. E. 719.

60. *Alabama.*— Thompson *v.* Lea, 28 Ala. 453.

Colorado.— Las Animas County *v.* Stone, 11 Colo. App. 476, 53 Pac. 616.

Florida.— Garrison *v.* Parsons, 41 Fla. 143, 25 So. 336.

Illinois.— McKoy *v.* Allen, 36 Ill. 429; Mitchell *v.* Jacobs, 17 Ill. 235; Pearce *v.* Swan, 2 Ill. 266.

Indiana.— Indianapolis Union R. Co. *v.* Ott, (Ind. App. 1893) 35 N. E. 517.

Massachusetts.— Santom *v.* Ballard, 133 Mass. 464.

There is, therefore, no necessity to withdraw a general appearance for the purpose of raising this objection. U. S. *v.* Yates, 6 How. (U. S.) 605, 12 L. ed. 575.

61. Kimble *v.* Riggin, 2 Greene (Iowa) 245.

No jurisdiction in the trial court precludes the idea of any jurisdiction on appeal. Stenberg *v.* State, 48 Nebr. 299, 67 N. W. 190.

A cause not appealable under the provisions of the statute cannot lie submitted for adjudication to the appellate court by consent; hence, no appearance, nor any other species of waiver, can in such case confer jurisdiction. Gordon *v.* Gray, 19 Colo. 167, 34 Pac. 840; Harvey *v.* Travelers Ins. Co., 18 Colo. 354, 32 Pac. 935; Thorne *v.* Ornauer, 6 Colo. 39; Moise *v.* Powell, 40 Nebr. 671, 59 N. W. 79 [*distinguishing* Minneapolis Harvester Works *v.* Hedges, 11 Nebr. 46, 7 N. W. 531]. *Contra,* Boone County *v.* Corlew, 3 Mo. 12.

An appeal by some of defendants, without serving the notice of appeal on their co-defendants, has been held not to give the appellate court jurisdiction of the subject-matter, so as to enable the appellants to impart jurisdiction of the persons of the co-defendants by the latter filing their appearances in court. Ash *v.* Ash, 90 Iowa 229, 57 N. W. 862.

Contra, Belleville Pump, etc., Works *v.* Samuelson, 16 Utah 119, 51 Pac. 150, where the appearance of the co-defendants was entered after a motion to dismiss on that ground, and before the case was called.

62. A mere attempt to appeal does not confer jurisdiction of the subject-matter so as to entitle appellant to claim a waiver by an appearance of appellee. It was so held in the case of an omission in the lower court to file a proper entry or notice of appeal (Garrison *v.* Parsons, 41 Fla. 143, 25 So. 336); and also, where the notice of appeal did not show the term to which the appeal was taken, in a case where it might have been to either of two counties (*In re* Shelton St. R. Co., 70 Conn. 329, 39 Atl. 446. To the same effect see Murphy *v.* Bezont, 7 La. 14); where there was a defect of parties appellant (Goodrich *v.* Stangland, (Ind. 1900) 58 N. E. 148); where no proper appeal bond was given (Santom *v.* Ballard, 133 Mass. 464); and where no notice of appeal was served (Brier *v.* Chicago, etc., R. Co., 66 Iowa 602, 24 N. W. 232).

Compare, however, Indianapolis Union R. Co. *v.* Ott, (Ind. App. 1893) 35 N. E. 517, where it is held that where no appeal was prayed, under a statute providing that "it shall only be necessary for a party appealing . . . to pray an appeal," the appearance and submission of the cause in the appellate court by appellee waived the irregularity, and that the appellate court, without the appearance, had jurisdiction of the subject-matter. *Compare,* also, Robinson *v.* Murphy, 69 Ala. 543, which holds that the objection that an appeal, returnable generally instead of to the proper term of court, may be waived by an appearance.

A valid judgment in a bona fide suit in the lower court has been held to be all that is necessary, in addition to general appellate jurisdiction by statute, to give the appellate court jurisdiction of the subject-matter, so that the parties might, by appearance and consent, waive all of the requirements of an appeal. Thompson *v.* Lea, 28 Ala. 453, Rice, C. J., dissenting.

63. A trial de novo on appeal is an exercise of original jurisdiction, and, though no proper appeal be taken, if the parties appear and proceed with the trial all irregularities of an attempted appeal are waived. In such case the court has jurisdiction of the subject-matter if it has statutory power to hold such trial and render judgment *de novo.* Mackey *v.* Briggs, 16 Colo. 143, 26 Pac. 131; Las Animas County *v.* Stone, 11 Colo. App. 476, 53 Pac. 616; Jarrett *v.* Phillips, 90 Ill. 237; Payne *v.* Davis, 2 Mont. 381; Chester *v.* Embree, Peck (Tenn.) 370. But the rule is otherwise where the appellate court has no original jurisdiction of the particular case. Descalso *v.* San Francisco, 60 Cal. 296; McKoy *v.* Allen, 36 Ill. 429.

A judgment wholly void in the trial court, because rendered in favor of a newspaper instead of the proprietor thereof, has been held not to impair the jurisdiction of the appellate court as to the subject-matter, where appellant had a summons issued to the real party

the court is empowered by law to entertain the appeal, when properly taken, and the parties are properly before such court.[64]

3. WITHDRAWAL OF APPEARANCE. The serious objections which often exist to permitting a party defendant to withdraw his appearance in a court exercising original jurisdiction do not apply in an appellate court.[65]

VIII. SUPERSEDEAS OR STAY OF PROCEEDINGS.[66]

A. Definition. A writ of supersedeas is an auxiliary process designed to supersede the enforcement of the judgment of the court below, brought up by writ of error for review. Originally, it was a writ directed to an officer, commanding him to desist from enforcing the execution of another writ which he was about to execute, or which might come into his hands. In modern times the term is often used synonymously with a stay of proceedings, and is employed to designate the effect of an act or proceeding which of itself suspends the enforcement of a judgment.[67]

B. Nature of Right to Supersedeas or Stay. The right to have an appeal or a writ of error made a supersedeas is not a constitutional right. Accordingly, the legislature may impose terms upon which it shall be granted,[68] and with such

in interest upon an order requiring him to file a complaint in his own name, which was done, and the case submitted for trial *de novo*, after which such appellee moved to dismiss on the ground of the invalidity of the judgment below, and, consequently, of the appeal. Ellison *v.* Rerick, 125 Ind. 396, 25 N. E. 454.

No judgment below.—Where there was no judgment below, the fact that there was a trial *de novo* has been held no ground for permitting a waiver by general appearance of the objection to jurisdiction of the subject-matter. "The case would have been different had the parties appeared originally in the district court, and by consent proceeded to trial; but as the appearance, trial, and judgment were predicated upon an appeal unauthorized by law, we can but regard the proceedings as a nullity. . . . Though a trial *de novo* is awarded in the district court, that trial is of an appellate character. The powers of that court over the parties and the subject-matter emanate exclusively from the appeal." Kimble *v.* Riggin, 2 Greene (Iowa) 245, 246.

64. Indianapolis Union R. Co. *v.* Ott, (Ind. App. 1893) 35 N. E. 517; Wilgus *v.* Gettings, 19 Iowa 82; U. S. *v.* Yates, 6 How. (U. S.) 605, 12 L. ed. 575; Dillingham *v.* Skein, Hempst. (U. S.) 181, 7 Fed. Cas. No. 3,912*a*.

65. U. S. *v.* Yates, 6 How. (U. S.) 605, 12 L. ed. 575. But see Robinson *v.* Murphy, 69 Ala. 543, 546, where it is held that an appearance operating as a waiver cannot be withdrawn "without the consent of the appellant."

Thus, withdrawal of a general appearance has been permitted where there has been an omission to state the special purpose of the appearance, through inadvertence (Suiter *v.* Brittle, 90 N. C. 19); where the appearance was improvidently entered by an agent of the attorney of record (U. S. *v.* Yates, 6 How. (U. S.) 605, 12 L. ed. 575); and where the appearance occurred under the erroneous belief that an appeal bond had been filed (Schaffer *v.* Jones, 1 Misc. (N. Y.) 74, 20 N. Y. Suppl. 531, 48 N. Y. St. 408).

66. As to writ of prohibition see PROHIBITION.

67. Dulin *v.* Pacific Wood, etc., Co., 98 Cal. 304, 33 Pac. 123.

Other definitions.— A supersedeas, properly so called, is a suspension of the power of the court below to issue an execution on the judgment or decree appealed from; or, if a writ of execution has issued, it is a prohibition emanating from the court of appeals against the execution of the writ. Hovey *v.* McDonald, 109 U. S. 150, 3 S. Ct. 136, 27 L. ed. 888; Staffords *v.* King, 90 Fed. 136, 32 C. C. A. 536.

A writ of supersedeas is a writ to suspend the execution of a judgment. Its most common function is to stop the execution of a judgment at law, or a decree in equity, whether interlocutory or final, and whether for money or other property, or whether the said execution be for the performance of any other act under the mandate of the court. Mabry *v.* Ross, 1 Heisk. (Tenn.) 769.

The writ is directed to the court whose action is sought to be restrained, or to some one of its officers, and is limited to restraining any action upon the judgment appealed from. Dulin *v.* Pacific Wood, etc., Co., 98 Cal. 304, 33 Pac. 123.

68. Bryant *v.* People, 71 Ill. 32; Hudson *v.* Smith, 9 Wis. 122.

By what court terms fixed.— A statute providing that the execution of a judgment or final order of any judicial tribunal may be stayed, on terms prescribed by the court in which a petition of error is filed, does not authorize the supreme court to fix the terms of the stay of a judgment of an intermediate appellate court affirming the judgment of the trial court. Hyde *v.* Bank, 49 Ohio St. 60, 34 N. E. 720. In Mead *v.* Jenkins, 4 Dem. Surr. (N. Y.) 84, it was held that, where the supreme court has remitted an appealed case to the surrogate's court for further proceedings, it is for the surrogate's court to determine whether the undertaking, given in the

terms there must be a substantial compliance.[69] But, if an appeal is taken or writ of error is sued out in good faith, and the party asking the stay gives the security required, a stay is a matter of right.[70]

C. Conditions Precedent to Supersedeas or Stay — 1. Order of Allowance — a. Necessity. It is not necessary, provided everything has been done as required by the statute, for the court or judge to make an order that the appeal or writ of error is a supersedeas.[71] They become so *per se* upon compliance with the statute.[72]

b. Record. In the absence of a statute requiring it, no record of the issuance of a supersedeas is necessary.[73]

c. Service of Order. On service of an order granting a stay it is not necessary to exhibit the judge's signature to the person on whom the order is served.[74]

supreme court, pending an appeal from the supreme court to the court of appeals, is sufficient in its terms to stay the execution of the mandate sent to the surrogate's court.

69. *Florida.*— Eckman *v.* Meriam, 32 Fla. 425, 14 So. 41.

Michigan.— Markham *v.* Kent Cir. Judge, 121 Mich. 573, 80 N. W. 583.

Minnesota.— Woolfolk *v.* Bruns, 45 Minn. 96, 47 N. W. 460.

Mississippi.— Wade *v.* American Colonization Soc., 4 Sm. & M. (Miss.) 670.

Missouri.— State *v.* Finn, 19 Mo. App. 557; State *v.* Vogel, 6 Mo. App. 526.

New York.— Hawkins *v.* New York, 5 Abb. Pr. (N. Y.) 344.

South Carolina.— Allen *v.* Cooley, 53 S. C. 414, 31 S. E. 634.

Canada.— Robinson *v.* Harris, 14 Ont. Pr. 373.

70. Daniels *v.* Miller, 8 Colo. 542, 9 Pac. 18; Janesville *v.* Janesville Water Co., 89 Wis. 159, 61 N. W. 770; Hudson *v.* Smith, 9 Wis. 122. See also State *v.* Sachs, 3 Wash. 96, 27 Pac. 1075.

71. Spaulding *v.* Milwaukee, etc., R. Co., 11 Wis. 157; Arnold *v.* Frost, 9 Ben. (N. S.) 267, 1 Fed. Cas. No. 558; Tiernan *v.* Booth, 9 Biss. (U. S.) 499, 4 Fed. 620. See also Wade *v.* American Colonization Soc., 4 Sm. & M. (Miss.) 670, wherein it was held that, under a statute providing that before granting an appeal the chancellor shall require a bond, with security, to pay or perform the decree or order appealed from, where the statute is complied with, the appeal by its own force suspends the decree, though there is nothing in the act saying it shall have this effect. *Compare* Williams *v.* Savage Mfg. Co., 1 Md. Ch. 306.

72. *California.*—Pennie *v.* Superior Ct., 89 Cal. 31, 26 Pac. 617; Born *v.* Horstmann, 80 Cal. 452, 22 Pac. 169, 338, 5 L. R. A. 577; Matter of Schedel, 69 Cal. 241, 10 Pac. 334.

Illinois.— Smith *v.* Chytraus, 152 Ill. 664, 38 N. E. 911; Ambrose *v.* Weed, 11 Ill. 488; *Ex p.* Thatcher, 7 Ill. 167.

Iowa.— Burge *v.* Burns, Morr. (Iowa) 287.

New York.— Dyckman *v.* Valiente, 19 Abb. Pr. (N. Y.) 130; Van Antwerp *v.* Newman, 4 Cow. (N. Y.) 82, 15 Am. Dec. 340.

Ohio.— Bassett *v.* Daniels, 10 Ohio St. 617.

Utah.— Bullion, etc., Min. Co. *v.* Eureka Hill Min. Co., 5 Utah 182, 12 Pac. 660.

United States.— Hovey *v.* McDonald, 109 U. S. 150, 3 S. Ct. 136, 27 L. ed. 888.

In Florida, an appeal to the supreme court cannot *ipso facto* operate by way of supersedeas, except where the decree is for the payment of money. In other cases a supersedeas must be the subject of a special order. McIver *v.* Marshall, 24 Fla. 42, 4 So. 563; McGill *v.* McGill, 19 Fla. 341.

In Indiana, it has been held that it is only where the appeal is granted during the term, and bond filed, with such penalty and surety, and within such time, as the court shall direct, that proceedings on a judgment can be stayed without an order of the supreme court in term or a judge thereof in vacation. Burk *v.* Howard, 15 Ind. 219.

Conformity to order.— A supersedeas as issued must conform to the order for it. *Ex p.* Woods, 3 Ark. 532, wherein it was held that, where the order for a supersedeas directs the proceedings to be immediately stayed, the execution having been illegally issued, and the writ only directs them to be suspended, omitting to set forth the facts for reason of which they are to be stayed, it is a variance for which the writ will be quashed.

73. Whitehead *v.* Boorom, 7 Bush (Ky.) 399. But see Seattle Coal, etc., Co. *v.* Lewis, 1 Wash. Terr. 488, wherein it was held that, to have an appeal operate as a supersedeas, entry of the allowance thereof must be made.

Presumption of award.— Where an appeal was docketed in the appellate court, and no entry or record appears as to whether simply an appeal, or an appeal with supersedeas, was granted, it may be inferred by the appellate court that a supersedeas was awarded where the circumstances show that both parties acted on that hypothesis. Baltimore, etc., R. Co. *v.* Vanderwarker, 19 W. Va. 265.

74. Whitman *v.* Johnson, 10 Misc. (N. Y.) 730, 31 N. Y. Suppl. 805, 64 N. Y. St. 613.

Manner of service.— In Kentucky, it is not necessary that an order of supersedeas should be served as a summons. Rodman *v.* Moody, 14 Ky. L. Rep. 202.

Necessity of service.— A writ of error and order to stay does not stay the issuing of an alias execution, where defendant has been arrested on the first one, unless the order was served on defendant's attorney, who issued the first execution. Campbell *v.* Clark, 2 How. Pr. (N. Y.) 257.

2. PERFECTION OF APPEAL OR WRIT OF ERROR.[75] To operate as a supersedeas the appeal must be perfected or the writ of error sued out and served within the time prescribed by statute.[76] It has, however, been held that where irreparable injury might result by carrying the judgment instantly into effect, a reasonable time for filing the appeal may be allowed before the judgment is executed.[77]

D. Judgments or Orders Which May Be Superseded or Stayed — 1. IN GENERAL. The rule obtains in some states that it is only from orders or judgments which command or permit some act to be done,[78] or which are of a

Presumption of service.—Where no evidence of the non-issuance of a supersedeas appears in the record, the appellate court may presume that the appellee has been notified of the supersedeas. Whitehead *v.* Boorom, 7 Bush (Ky.) 399.

75. As to time of giving supersedeas bond see *infra*, VIII, H, 4.

76. *Alabama.*—Crowder *v.* Morgan, 72 Ala. 535.

California.— Dulin *v.* Pacific Wood, etc., Co., 98 Cal. 304, 33 Pac. 123.

Illinois.— Anonymous, 40 Ill. 115.

Indiana.— McKinney *v.* Hartman, 143 Ind. 224, 42 N. E. 681; Hadley *v.* Hill, 73 Ind. 442.

Iowa.— Oyster *v.* Bank, 107 Iowa 39, 77 N. W. 523; Chicago, etc., R. Co. *v.* Grinnell, 53 Iowa 55, 3 N. W. 819; Pratt *v.* Western Stage Co., 26 Iowa 241.

Kentucky.— Hunt *v.* Berryman, 2 Metc. (Ky.) 239; Saddler *v.* Glover, 1 B. Mon. (Ky.) 50.

Louisiana.— Gagneaux *v.* Desonier, 104 La. Ann. 648, 29 So. 282; State *v.* Judge, 27 La. Ann. 697.

Montana.— Helena First Nat. Bank *v.* McAndrews, 7 Mont. 434, 17 Pac. 554.

New Hampshire.— Grant *v.* Lathrop, 23 N. H. 67.

New York.— Guilfoyle *v.* Pierce, 22 N. Y. App. Div. 131, 47 N. Y. Suppl. 899; Barley *v.* Roosa, 59 Hun (N. Y.) 617, 13 N. Y. Suppl. 209, 35 N. Y. St. 898; Rogers *v.* Paterson, 4 Paige (N. Y.) 450.

Pennsylvania.— Pennsylvania R. Co. *v.* Com., 39 Pa. St. 403; Dawson *v.* Ryan, 4 Watts & S. (Pa.) 403; Thomas' Appeal, 4 Kulp (Pa.) 449.

Tennessee.— *Compare* Claiborne *v.* Crockett, Meigs (Tenn.) 607.

Texas.— Shapard *v.* Bailleul, 3 Tex. 26.

Wyoming.— Glafcke *v.* O'Brien, 1 Wyo. 316.

United States.— Western Air-Line Constr. Co. *v.* McGillis, 127 U. S. 776, 8 S. Ct. 1390, 32 L. ed. 324; Crane Iron Co. *v.* Hoagland, 105 U. S. 701, 26 L. ed. 1109; Kitchen *v.* Randolph, 93 U. S. 86, 23 L. ed. 810; Boise County *v.* Gorman, 19 Wall. (U. S.) 661, 22 L. ed. 226; Western Union Tel. Co. *v.* Eyser, 19 Wall. (U. S.) 419, 22 L. ed. 43; Rodd *v.* Heartt, 17 Wall. (U. S.) 354, 21 L. ed. 627; O'Dowd *v.* Russell, 14 Wall. (U. S.) 402, 20 L. ed. 857; Bigler *v.* Waller, 12 Wall. (U. S.) 142, 20 L. ed. 260; French *v.* Shoemaker, 12 Wall. (U. S.) 86, 20 L. ed. 270; Baltimore, etc., R. Co. *v.* Harris, 7 Wall. (U. S.) 574, 19 L. ed. 100; Washington *v.* Dennison, 6 Wall. (U. S.) 495, 18 L. ed. 863; Green *v.* Van Buskirk, 3 Wall. (U. S.) 448, 18 L. ed. 245; Silsby *v.* Foote, 20 How. (U. S.) 290, 15 L. ed. 822; Hudgins *v.* Kemp, 18 How. (U. S.) 530, 15 L. ed. 511; Adams *v.* Law, 16 How. (U. S.) 144, 14 L. ed. 880; Saltmarsh *v.* Tuthill, 12 How. (U. S.) 387, 13 L. ed. 1034; Hogan *v.* Ross, 11 How. (U. S.) 294, 13 L. ed. 702; New England R. Co. *v.* Hyde, 101 Fed. 397, 41 C. C. A. 404; Logan *v.* Goodwin, 101 Fed. 654, 41 C. C. A. 573.

See 2 Cent. Dig. tit. "Appeal and Error," § 2218.

An oral notice of appeal from the overruling of a verbal demurrer to the complaint, made on the calling of the case for trial, is insufficient to stay the further hearing of the case. Elliott *v.* Pollitzer, 24 S. C. 81; Hammond *v.* Port Royal, etc., R. Co., 15 S. C. 10.

Service of notice by attorney not of record. — Service of notice of appeal from a judgment, with an undertaking to stay proceedings thereon, signed by an attorney other than the attorney of record, where no substitution had taken place, is ineffectual to stay the proceedings. Shuler *v.* Maxwell, 38 Hun (N. Y.) 240.

77. Holcombe *v.* Roberts, 19 Ga. 588; Lindsey *v.* Lindsey, 14 Ga. 657. See also Hindman *v.* Field, 101 Ky. 147, 19 Ky. L. Rep. 322, 39 S. W. 828, wherein it was held that where a draft of a judgment, authorizing certain parties litigant to withdraw a sum from a fund in court, is presented to the clerk before entry, both he and the said parties knowing that another party is about to execute a supersedeas bond, the payment of the money is premature and deprives the latter party of his legal right to stay such payment by the execution of such bond.

Failure of clerk to enter appeal.— Where an appeal is prayed and granted in the lower court, and the clerk omits to enter the appeal, the appellant may remove the cause into the supreme court by scire facias, and by supersedeas stay the execution of the decree below. Kearney *v.* Jackson, 1 Yerg. (Tenn.) 293.

78. Dulin *v.* Pacific Wood, etc., Co., 98 Cal. 304, 33 Pac. 123; Bliss *v.* Superior Ct., 62 Cal. 543; Hicks *v.* Michael, 15 Cal. 107. See also Rich *v.* Conley, 64 N. Y. Suppl. 332, wherein it was held that an undertaking is only necessary when it is desired to stay an execution, or to prevent the enforcement of a judgment rendered.

See 2 Cent. Dig. tit. "Appeal and Error," § 2223.

As to supersedeas in injunction or receivership proceedings see *infra*, VIII, J, 5, c, d.

Illustrations.—A judgment directing the delivery of possession of land (Fitzgerald *v.*

nature to be actively enforced against the party, that a stay of proceedings can be had.[79]

Beebe, 7 Ark. 310; Gutierrez *v.* Heblard, 104 Cal. 103, 37 Pac. 749; Neale *v.* Superior Ct., 77 Cal. 28, 18 Pac. 790); a judgment awarding a peremptory mandamus (State *v.* Webber, 31 Minn. 211, 17 N. W. 339; State *v.* Lewis, 76 Mo. 370; People *v.* Highway Com'rs, 25 How. Pr. (N. Y.) 257; Matthews *v.* Nance, 49 S. C. 389, 27 S. E. 100); a judgment in ejectment involving an unpatented mining claim (State *v.* Second Judicial Dist. Ct., 24 Mont. 566, 61 Pac. 882 [but see *Ex p.* Du Bose, 54 Ala. 278]); a judgment ousting appellant from the office of school clerk (State *v.* Sachs, 3 Wash. 96, 27 Pac. 1075); a judgment rendered in a contest of an election for directors of a corporation (Foster *v.* Superior Ct., 115 Cal. 279, 47 Pac. 58); a decree granting a divorce and directing the taking of a reference to determine the property rights of the parties (Graves *v.* Graves, 1 Leigh (Va.) 34); a decree overruling a plea of recusation of a judge on the ground of interest (State *v.* Judge, 42 La. Ann. 317, 7 So. 586); an order directing an administrator to pay to the widow of the deceased a certain sum as accrued and unpaid family allowance (Ruggles *v.* Superior Ct., 103 Cal. 125, 37 Pac. 211); an order of the trial court setting aside a final decree of that court (Saxon *v.* Gamble, 23 Fla. 408, 2 So. 664); an order striking out portions of an answer (Starbuck *v.* Dunklee, 12 Minn. 161); an order denying a new trial in an action for the recovery of money (Holland *v.* McDade, 125 Cal. 353, 58 Pac. 9; Tompkins *v.* Montgomery, 116 Cal. 120, 47 Pac. 1006); an order remanding a cause for further proceedings upon the reversal of a judgment of an inferior court (Texas Bldg. Assoc. No. 2 *v.* Aurora F. & M. Ins. Co., 34 Ohio St. 291); an order reinstating a cause which had been previously dismissed (Kaufman *v.* Superior Ct., 108 Cal. 446, 41 Pac. 476; Livermore *v.* Campbell, 52 Cal. 75); in Mississippi, an order overruling a demurrer (Nesbit *v.* Rodewald, 43 Miss. 304); an involuntary nonsuit (Chouteau *v.* Rowse, 90 Mo. 191, 2 S. W. 209); proceedings to recover costs under the order appealed from (Abell *v.* Allan, 3 Manitoba 479); proceedings against special bail pending a writ of error brought by the principal (Wheeler *v.* Raymond, 6 Cow. (N. Y.) 582); a sale of attached property during an appeal by an interpleader (State *v.* Ranson, 86 Mo. 327), may all be superseded.

But a judgment or order which is self-executing (Allen *v.* Church, 101 Iowa 116, 70 N. W. 127; Jayne *v.* Drorbaugh, 63 Iowa 711, 17 N. W. 433); a judgment for plaintiff in an action of unlawful detainer in the absence of a statute (*Ex p.* Floyd, 40 Ala. 116 [but see Dutton *v.* Tracy, 4 Conn. 365; State *v.* Benson, 21 Wash. 580, 59 Pac. 501]); a judgment removing from office the liquidators of the affairs of a partnership, which liquidators are also the curators of the succession of one of the partners (State *v.* Judge, 14 La. Ann. 240); a judgment pending a provisional syndic in an insolvency proceeding (State *v.* Taylor, 46 La. Ann. 932, 15 So. 407; State *v.* Duffel, 41 La. Ann. 958, 8 So. 541); a judgment on a rule, which judgment carries into execution a judgment already rendered (State *v.* Ellis, 45 La. Ann. 1418, 14 So. 308); an order denying a change of venue (Howell *v.* Thompson, 70 Cal. 635, 11 Pac. 789; People *v.* Whitney, 47 Cal. 584; Fisk *v.* Albany, etc., R. Co., 41 How. Pr. (N. Y.) 365. See also Schoonmaker *v.* Hilliard, 55 N. Y. App. Div. 140, 67 N. Y. Suppl. 160 [*compare* Pierson *v.* McCahill, 23 Cal. 249]); an order, passed after judgment by default, refusing to remove a cause (Rice *v.* West, 42 Md. 614); an order refusing a stay (People *v.* Manhattan R. Co., 9 Abb. N. Cas. (N. Y.) 448 [see also Newbern Bank *v.* Jones, 17 N. C. 284]); an order to show cause why execution on a judgment should not be suspended (Wiley *v.* Woodman, 19 La. Ann. 210); in New York, an order of the general term, affirming a special term order overruling a demurrer to the complaint, where the complaint is one on which the court must subsequently decide at special term what is the nature and extent of the relief to be granted (Ford *v.* David, 3 Abb. Pr. (N. Y.) 385) — all these will not be stayed. And the court may, in its discretion, refuse to stay proceedings upon a judgment while a writ of error is pending, if the writ of error appears to be merely for the purpose of delay. Coughlin *v.* McElroy, 72 Conn. 444, 44 Atl. 743; Brewster *v.* Cowen, 55 Conn. 152, 10 Atl. 509; Dutton *v.* Tracy, 4 Conn. 365; Allen *v.* Hopper, 24 N. J. L. 514; Masterman *v.* Grant, 5 T. R. 714; Kempland *v.* Macauley, 4 T. R. 436; Pool *v.* Charnock, 3 T. R. 79; Entwistle *v.* Shepherd, 2 T. R. 78; Hawkins *v.* Snuggs, 2 M. & S. 476; Spooner *v.* Garland, 2 M. & S. 474.

79. Baird *v.* Cumberland, etc., Turnpike Co., 1 Lea (Tenn.) 394; Cone *v.* Paute, 12 Heisk. (Tenn.) 506; McMinnville, etc., R. Co. *v.* Huggins, 7 Coldw. (Tenn.) 217.

From what courts.— A writ of error, from the supreme court of the United States to a state court, if sued out within the time and with the formalities required in cases of writs of error to the courts of the United States, operates in like manner as a supersedeas and stay of execution.

Florida.— Carter *v.* Bennett, 5 Fla. 92.

Iowa.— Chicago, etc., R. Co. *v.* Tharnish, 54 Iowa 690, 7 N. W. 148.

Massachusetts.— Otis *v.* Warren, 16 Mass. 53.

New Jersey.— Brumagim *v.* Chew, 21 N. J. Eq. 180.

United States.— Slaughter House Cases, 10 Wall. (U. S.) 273, 19 L. ed. 915.

See 2 Cent. Dig. tit. "Appeal and Error," § 2222.

An appeal from a decree of a probate court, like any other appeal, suspends or vacates the judgment or decree appealed from.

Maine.— Tarbox *v.* Fisher, 50 Me. 236.

2. NON-APPEALABLE ORDERS. An appeal allowed from an order that is not appealable will have no effect in staying further proceedings in the cause. To entitle a party to a stay, the judgment or order must be appealable.[80] It has, however, been held that an order allowing an appeal to a court having no jurisdiction of the same operates as a supersedeas, staying all proceedings in the lower court until the appeal is dismissed.[81]

E. Persons Entitled to Supersedeas or Stay. A person not a party to the proceeding in which the judgment of the court below complained of was rendered cannot obtain a supersedeas to such judgment.[82]

F. Operation of Appeal or Writ of Error as Supersedeas or Stay — 1. AT COMMON LAW — a. In General. At common law a writ of error operated, by its own inherent force, as a supersedeas of all proceedings on the judgment in the court below, from the time it was sued out and notice of it served on the adverse party.[83] But, as writs of error came to be sued out for the purpose of delay,

Maryland.— Bruscup *v.* Taylor, 26 Md. 410.

Massachusetts.— Paine *v.* Cowdin, 17 Pick. (Mass.) 142.

Minnesota.— But see Dutcher *v.* Culver, 23 Minn. 415, wherein it was held that an appeal to the district court from an order of the probate court does not stay the operation of such order while the appeal is pending.

New York.— Matter of Gihon, 29 Misc. (N. Y.) 273, 61 N. Y. Suppl. 244; Anonymous, 3 Code Rep. (N. Y.) 69.

Pennsylvania.— Nixon's Estate, 13 Phila. (Pa.) 355, 37 Leg. Int. (Pa.) 202.

An appeal from a court of chancery stays the order appealed from, though such court is not expressly authorized by statute to take appeal bonds. Fullerton *v.* Miller, 22 Md. 1. So, a writ of error to the affirmance of a magistrate's judgment is a supersedeas. Cornog *v.* Phelps, 16 Wkly. Notes Cas. (Pa.) 115. And in Missouri the statute providing for a stay of execution on appeal has been held to extend to appeals to the supreme court from the court of appeals. State *v.* Vogel, 6 Mo. App. 526.

Stay of part of decree.— Where a decree is for money only, and is divisible, and the assignment of error affects only a specific sum, it is proper to stay execution for the specific sum only. Pim *v.* Nicholson, 6 Ohio St. 176.

80. *Illinois.*— Gage *v.* Rohrbach, 56 Ill. 262.

Massachusetts.— Campbell *v.* Howard, 5 Mass. 376.

Minnesota.— State *v.* District Ct., 52 Minn. 283, 53 N. W. 1157.

New York.— Ford *v.* David, 13 How. Pr. (N. Y.) 193.

Pennsylvania.— Kennebec Ice, etc., Co. *v.* Wilmington, etc., R. Co., 13 Wkly. Notes Cas. (Pa.) 223.

South Carolina.— Robertson *v.* Curlee, 59 S. C. 454, 38 S. E. 116.

South Dakota.— Jensen *v.* Petty, (S. D. 1901) 85 N. W. 923.

But see Davis *v.* Speiden, 3 MacArthur (D. C.) 283, wherein it was held that an order overruling a demurrer to an appeal, and giving leave to defendant to answer, is not appealable; but if, in such case, there is an appeal bond approved by one of the justices, it will operate as a stay of proceedings.

See 2 Cent. Dig. tit. "Appeal and Error," § 2221.

Appeal from interlocutory order.— Parties cannot, by excepting to the decisions of the chancellor made during the pendency and progress of a motion before him, upon points of law raised by him, sue out a writ of error, give bond and security, and have the same operate as a supersedeas to the further hearing and decision by the chancellor of the main question involved in the original motion. Jones *v.* Dougherty, 11 Ga. 305. See also Doughty *v.* Somerville, etc., R. Co., 7 N. J. Eq. 629, 51 Am. Dec. 267.

Premature appeal.— A supersedeas bond, executed to stay proceedings under a judgment, the right to appeal from which does not at the time exist, is ineffectual. Louisville *v.* Muldoon, 19 Ky. L. Rep. 1386, 43 S. W. 867.

81. Smith *v.* Chytraus, 152 Ill. 664, 38 N. E. 911.

82. Culpeper County *v.* Gorrell, 20 Gratt. (Va.) 484. See also Hackley *v.* Hope, 2 Abb. Dec. (N. Y.) 298, wherein it was held that an appeal by a party who has transferred all his interest in the suit, though accompanied by the undertaking provided by statute, cannot operate to stay the execution of the judgment as between other parties who alone are affected by the decree. But see Baasen *v.* Eilers, 11 Wis. 277, wherein it was held that an appeal, though taken by a person who has no right to take it, because not a party, will yet stay proceedings if the proper undertakings be given.

Judgment in favor of applicant.— A supersedeas will not be granted on the application of a plaintiff in error who seeks the reversal of a judgment in his own favor. Carr *v.* Miner, 40 Ill. 33.

A party to a decree has no right to a supersedeas of any feature of such decree that does not affect his interest. Warner *v.* Watson, 27 Fla. 518, 8 So. 842. And appellant cannot enforce those parts of the judgment appealed from that are in his favor if they are so connected with the part assailed that all must stand or fall together. Cornell *v.* Donovan, 14 Daly (N. Y.) 295, 12 N. Y. St. 117.

83. *Arkansas.*— Bentley *v.* Fowler, 8 Ark. 375.

various acts of parliament were passed requiring security in certain cases in order that the writ might operate as a supersedeas.[84]

b. Second Writ of Error. At common law, where a first writ of error abates or is put an end to by the act of plaintiff in error, a second writ of error, brought in the same court, is not *per se* a supersedeas of execution.[85]

2. In Equity. Formerly, in England, an appeal to the house of lords had *per se* the effect to stay proceedings in chancery pending the appeal.[86] That rule has since been changed, and now the general rule there is that an appeal does not stay proceedings or execution, and a stay can only be effected by an order of the chancellor, on application made for that purpose, or by a special order of the house of lords.[87]

Delaware.— Pettyjohn *v.* Bloxom, 1 Houst. (Del.) 594.

Kansas.— Central Branch Union Pac. R. Co. *v.* Andrews, 34 Kan. 563, 9 Pac. 213.

Missouri.— Missouri Pac. R. Co. *v.* Atkison, 17 Mo. App. 484; State *v.* Adams, 9 Mo. App. 464; State *v.* Vogel, 6 Mo. App. 526.

Montana.— Helena First Nat. Bank *v.* McAndrews, 7 Mont. 434, 17 Pac. 554.

Wisconsin.— Hudson *v.* Smith, 9 Wis. 122.

United States.— Omaha Hotel Co. *v.* Kountze, 107 U. S. 378, 2 S. Ct. 911, 27 L. ed. 609; Kitchen *v.* Randolph, 93 U. S. 86, 23 L. ed. 810.

England.— Bacon Abr. tit. Supersedeas, D, 4; 1 Tidd Pr. 530; 2 Tidd Pr. 1145; Bishop of Ossory's Case, Cro. Jac. 534; Badger *v.* Lloyd, 3 Salk. 145.

84. Hudson *v.* Smith, 9 Wis. 122; Omaha Hotel Co. *v.* Kountze, 107 U. S. 378, 2 S. Ct. 911, 27 L. ed. 609.

85. Brewster *v.* Cowen, 55 Conn. 152, 10 Atl. 509; Whetcroft *v.* Dorsey, 1 Harr. & J. (Md.) 482; Dyer *v.* Beatty, 3 Harr. & M. (Md.) 219; Sheerer *v.* Greer, 3 Whart. (Pa.) 14; Power *v.* Frick, 2 Grant (Pa.) 306; Cosgrove *v.* Carpenter, 5 Kulp (Pa.) 132; Peters' Estate, 1 Wkly. Notes Cas. (Pa.) 406; Birch *v.* Triste, 8 East 412; Duncombe's Case, 1 Mod. 285; Hartop *v.* Holt, 1 Salk. 263; Entwistle *v.* Shepherd, 2 T. R. 78; Buller *v.* Pinna, 2 Str. 880; Jenkins *v.* Bates, 2 Str. 1015. But see Dutton *v.* Tracy, 4 Conn. 365, wherein it was held that, though a writ of error, brought obviously for the purpose of delay, or after a former one has been brought, and put an end to by the plaintiff's own act, is no supersedeas, yet, where a second writ was brought, without an intention of producing delay, immediately after a former one on the same judgment had been abated on the plea of the defendant in error, it will operate as a supersedeas. See also Hardeman *v.* Anderson, 4 How. (U. S.) 640, 11 L. ed. 1138, wherein it was held that, after a case has been docketed and dismissed, if plaintiff in error sue out another writ of error, the appellate court may, when the case appears to require it, order a supersedeas to stay all proceedings pending the second writ of error.

See 2 Cent. Dig. tit. "Appeal and Error," § 2220.

First writ void.— The rule that a second writ of error is not a supersedeas where the first writ abated by fault of the party, does not apply where the first writ was void. Brace *v.* Squire, 2 D. Chipm. (Vt.) 49.

86. Pennsylvania R. Co. *v.* National Dock, etc., R. Co., 54 N. J. Eq. 647, 35 Atl. 433; Hudson *v.* Smith, 9 Wis. 122; Hovey *v.* McDonald, 109 U. S. 150, 3 S. Ct. 136, 27 L. ed. 888.

History in England.— "The jurisdiction of the House of Lords in England, relative to appeals from the Court of Chancery, was for a long time contested. . . . During this contest, it was a matter of course that the lords, for the purpose of sustaining the jurisdiction which they claimed, should prohibit the respondent from taking any steps in the cause, in the Court of Chancery, pending the appeal; whatever injury he might sustain by the delay. Hence, it became the law of the appellate court that the mere presenting an appeal to the House of Lords suspended all proceedings whatever in the court below. And so far was this principle carried that, as late as 1772, it was supposed that an appeal had the effect of totally suspending the jurisdiction of the lord chancellor as to the whole suit, until the decision of the lords on the appeal. But in the case of Pomfret *v.* Smith, Palmer Proc. H. of L. 9, which came before Lord Apsley at that time, he decided that his jurisdiction was suspended only as to the matter appealed from; but that it was not totally suspended, so as to prevent a proceeding as to any other matter in the cause. The jurisdiction of the lords being finally established, and having remained for a long time undisputed, they saw the necessity of permitting the Court of Chancery, during the recess of Parliament, to take such proceedings in the cause, pending the appeal, as the lord chancellor might deem requisite for the preservation of the rights of the parties. At length this practice became so fully established that in the case of Burke *v.* Browne, Palmer Proc. H. of L. 10, 15 Ves. Jr. 184, the lords decided that an appeal did not stay any of the proceedings, even upon the point appealed from, without an express order of the appellate court; unless the lord chancellor, in the exercise of a judicial discretion, thought proper to suspend the proceedings, wholly or in part, pending the appeal." Per Walworth, Ch., in Hart *v.* Albany, 3 Paige (N. Y.) 381, 383.

87. *Arkansas.*— Davis *v.* Tarwater, 13 Ark. 52.

Maryland.— Thompson *v.* McKim, 6 Harr. & J. (Md.) 302.

3. In United States. In most, if not all, of the states of the United States, stays of proceedings are the subject of a statutory provision, and the doctrine very generally obtains that an appeal or writ of error does not *per se* operate as a supersedeas.[88] It is held, however, in some states that statutes providing special conditions — such as the giving of a bond in order to effect a supersedeas — are merely restrictive in their character, and that an appeal itself works a supersedeas where there is no statute requiring a bond or a compliance with other conditions.[89]

G. Upon Allowance by Court or Judge — 1. Power to Allow — a. In General. The court has power to grant a supersedeas or stay of proceedings pending an appeal or writ of error,[90] and this power in the court has been held

New Jersey — Doughty *v.* Somerville, etc., R. Co., 7 N. J. Eq. 629, 51 Am. Dec. 267.

New York.— Green *v.* Winter, 1 Johns. Ch. (N. Y.) 77; Hart *v.* Albany, 3 Paige (N. Y.) 381.

Wisconsin.— Hudson *v.* Smith, 9 Wis. 122.

United States.— Hovey *v.* McDonald, 109 U. S. 150, 3 S. Ct. 888, 27 L. ed. 888; Butcher's Assoc. *v.* Slaughter House Co., 1 Woods (U. S.) 50, 4 Fed. Cas. No. 2,234.

England.— Way *v.* Toy, 18 Ves. Jr. 452; Willan *v.* Willan, 16 Ves. Jr. 216; Waldo *v.* Caley, 16 Ves. Jr. 206; Huguenin *v.* Basely, 15 Ves. Jr. 180; Gwynn *v.* Lethbridge, 14 Ves. Jr. 585; Warden, etc., of St. Paul's *v.* Morris, 9 Ves. Jr. 316; Otto *v.* Lindford, 18 Ch. D. 394; Atty.-Gen. *v.* Swansea Imp., etc., Co., 9 Ch. D. 46; Macnaghten *v.* Boehm, 1 Jac. & W. 48.

88. See the statutes of the several states and the following cases:

Illinois.— Lancaster *v.* Snow, 184 Ill. 163, 56 N. E. 416.

Iowa.— Allen *v.* Church, 101 Iowa 116, 70 N. W. 127.

Kansas.— Central Branch Union Pac. R. Co. *v.* Andrews, 34 Kan. 563, 9 Pac. 213; Topeka *v.* Smelser, 5 Kan. App. 95, 48 Pac. 874.

Kentucky.— Owensboro, etc., R. Co. *v.* Barclay, 102 Ky. 16, 19 Ky. L. Rep. 997, 43 S. W. 177; State Bank *v.* Vanmeter, 10 B. Mon. (Ky.) 66; Freeman *v.* Patton, 1 J. J. Marsh. (Ky.) 193.

Maryland.— Eakle *v.* Smith, 24 Md. 339; Thompson *v.* McKim, 6 Harr. & J. (Md.) 302.

Minnesota.— Northwestern Express Co. *v.* Landes, 6 Minn. 564.

Nebraska.— Dovey *v.* McCullough, (Nebr. 1900) 83 N. W. 171.

New Hampshire.—Tandy *v.* Rowell, 54 N. H. 384; Rochester *v.* Roberts, 25 N. H. 495; Grant *v.* Lathrop, 23 N. H. 67.

New York.— Klinker *v.* Third Ave. R. Co., 33 N. Y. App. Div. 556, 53 N. Y. Suppl. 1012; Arnoux *v.* Homans, 32 How. Pr. (N. Y.) 382; Seymour *v.* Slocum, 18 Wend. (N. Y.) 509; Oakley *v.* Aspinwall, 1 Sandf. (N. Y.) 694.

Texas.— Castro *v.* Illies, 22 Tex. 479, 73 Am. Dec. 277.

Wisconsin.— Noonan *v.* Orton, 30 Wis. 356.

United States.— Wallen *v.* Williams, 7 Cranch (U. S.) 278, 3 L. ed. 342; Farmers' L. & T. Co. *v.* Central R. Co., 4 Dill. (U. S.) 546, 8 Fed. Cas. No. 4,664.

See 2 Cent. Dig. tit. "Appeal and Error," § 2217.

As to necessity of security, see *infra*, VIII, H.

Error coram nobis.— A writ in the nature of a writ of error coram nobis will not of itself operate as a stay of proceedings. Ferris *v.* Douglass, 20 Wend. (N. Y.) 626; Ribout *v.* Wheeler, Say. 166.

Trial de novo on appeal.— Where an appeal is taken and perfected from the judgment of an inferior court to a superior court, and the cause or matter is triable in the superior court *de novo* upon the original papers, the appeal operates to suspend further proceedings on the judgment from which the appeal is taken. Young *v.* State, 34 Ind. 46. See also *infra*, VIII, J, 3.

89. Northwestern Mut. L. Ins. Co. *v.* Park Hotel Co., 37 Wis. 125; Hudson *v.* Smith, 9 Wis. 122.

In Nebraska, a supersedeas can be had as a matter of right only where it is affirmatively provided for by statute. Home F. Ins. Co. *v.* Dutcher, 48 Nebr. 755, 67 N. W. 766; Cooperrider *v.* State, 46 Nebr. 84, 64 N. W. 372; State *v.* Meeker, 19 Nebr. 444, 27 N. W. 427; State *v.* Judges, 19 Nebr. 149, 26 N. W. 723; Gandy *v.* State, 10 Nebr. 243, 4 N. W. 1019.

In North Carolina, there is a suspension of execution upon giving the bond required, but only to the extent of the judgment appealed from, leaving the court below free to proceed upon any other matter not affected by the judgment. Clark's Code Civ. Proc. N. C. (1900), §§ 552, 558; N. C. Laws (1887), c. 192, § 1; Herring *v.* Pugh, 126 N. C. 852, 36 S. E. 287.

90. *Alabama.*— *Ex p.* Brown, 58 Ala. 536.

Arkansas.— *Ex p.* Woods, 3 Ark. 532.

Florida.— State *v.* Johnson, 13 Fla. 33.

Indiana.— Northern Indiana R. Co. *v.* Michigan Cent. R. Co., 2 Ind. 670.

Iowa.— Winter *v.* Coulthard, 94 Iowa 312, 62 N. W. 732.

Kansas.— McMillan *v.* Baker, 20 Kan. 50.

Maryland.— Thompson *v.* McKim, 6 Harr. & J. (Md.) 302.

Mississippi.— Kimball *v.* Alcorn, 45 Miss. 145.

Nebraska.— Lowe *v.* Riley, 57 Nebr. 252, 77 N. W. 758; Home F. Ins. Co. *v.* Dutcher, 48 Nebr. 755, 67 N. W. 766.

New Hampshire.— Rochester *v.* Roberts, 25 N. H. 495; Grant *v.* Lathrop, 23 N. H. 67.

New Jersey.— Suydam *v.* Hoyt, 25 N. J. L. 330; Schenck *v.* Conover, 13 N. J. Eq. 31.

New York.— New York Security, etc., Co. *v.* Saratoga Gas, etc., Co., 5 N. Y. App. Div.

to exist even in cases where there is no statute entitling a party to such supersedeas or stay.[91]

b. Discretion of Court. A motion for a stay of proceedings is, however, addressed to the discretion of the court,[92] and, in the case of an application to the trial court, mandamus will not lie to control its discretion in the matter.[93]

2. Who May Allow. The power to grant a supersedeas, or stay of proceedings, exists in both the trial court or a judge thereof,[94] and in the appellate court,

535, 39 N. Y. Suppl. 486; Gray *v.* Green, 14 Hun (N. Y.) 18; Sticker *v.* Wakeman, 13 Abb. Pr. (N. Y.) 85; Orchard *v.* Binninger, 4 Abb. Pr. N. S. (N. Y.) 368; Tiers *v.* Carnahan, 3 Abb. Pr. (N. Y.) 69; Munn *v.* Barnum, 2 Abb. Pr. (N. Y.) 409; Mills *v.* Thursby, 11 How. Pr. (N. Y.) 129; Clark *v.* Clark, 7 Paige (N. Y.) 607; Vail *v.* Remsen, 7 Paige (N. Y.) 206.

Oklahoma.— *In re* Epley, (Okla. 1901) 64 Pac. 18.

South Carolina.— Trapier *v.* Wilson, 2 McCord (S. C.) 191.

Utah.— Bullion, etc., Min. Co. *v.* Eureka Hill Min. Co., 5 Utah 182, 12 Pac. 660.

Wisconsin.— Waterman *v.* Raymond, 5 Wis. 185.

United States.— Staffords *v.* King, 90 Fed. 136, 32 C. C. A. 536.

England.— Lewis *v.* Morgan, 5 Price 468.

Canada.— Connor *v.* Vroom, 33 N. Brunsw. 178; Lewis *v.* Talbot-St. Gravel Road Co., 10 Ont. Pr. 15; Canadian Land, etc., Co. *v.* Dysart, 9 Ont. 495.

See 2 Cent. Dig. tit. "Appeal and Error," § 2247.

91. Home F. Ins. Co. *v.* Dutcher, 48 Nebr. 755, 67 N. W. 766; Gandy *v.* State, 10 Nebr. 243, 4 N. W. 1019; *In re* Epley, (Okla. 1901) 64 Pac. 18; Haught *v.* Irwin, 166 Pa. St. 548, 31 Atl. 260; Janesville *v.* Janesville Water Co., 89 Wis. 159, 61 N. W. 770; Hudson *v.* Smith, 9 Wis. 122.

In Tennessee, it has been held that the jurisdiction conferred on the supreme court to supersede an interlocutory order, decree, or execution issued thereon, as in case of final decree, only applies to such orders as are to be executed by some affirmative action or process of the court. Baird *v.* Cumberland, etc., Turnpike Co., 1 Lea (Tenn.) 394; Park *v.* Meek, 1 Lea (Tenn.) 78; Mabray *v.* Ross, 1 Heisk. (Tenn.) 769; McMinnville, etc., R. Co. *v.* Huggins, 7 Coldw. (Tenn.) 217.

92. *California.* — Gross *v.* Kelleher, 73 Cal. 639, 15 Pac. 362.

Kansas.— McMillan *v.* Baker, 20 Kan. 50.

Maryland.— Williams *v.* Savage Mfg. Co., 1 Md. Ch. 306.

Nebraska.— Lowe *v.* Riley, 57 Nebr. 252, 77 N. W. 758; Penn Mut. L. Ins. Co. *v.* Creighton Theatre Bldg. Co., 51 Nebr. 659, 71 N. W. 279; Home F. Ins. Co. *v.* Dutcher, 48 Nebr. 755, 67 N. W. 766.

New Jersey.— Chesapeake, etc., R. Co. *v.* Swayze, (N. J. 1900) 47 Atl. 28; Suydam *v.* Hoyt, 25 N. J. L. 230; Doughty *v.* Somerville, etc., R. Co., 7 N. J. Eq. 629, 51 Am. Dec. 267.

New York.— Kager *v.* Brenneman, 52 N. Y. App. Div. 446, 65 N. Y. Suppl. 129 [*affirmed* in 59 N. E. 1124]; Winterhoff *v.* Siegert, 13 Abb. Pr. (N. Y.) 182; Orchard *v.* Binninger, 4 Abb. Pr. N. S. (N. Y.) 368; Tiers *v.* Carnahan, 3 Abb. Pr. (N. Y.) 69; Munn *v.* Barnum, 2 Abb. Pr. (N. Y.) 409; Mills *v.* Thursby, 11 How. Pr. (N. Y.) 129; Clark *v.* Clark, 7 Paige (N. Y.) 607; Riggs *v.* Murray, 3 Johns. Ch. (N. Y.) 160; Bradwell *v.* Weeks, 1 Johns. Ch. (N. Y.) 325; Wilkes *v.* Henry, 4 Sandf. Ch. (N. Y.) 390.

Ohio.— Cincinnati, etc., R. Co. *v.* Duckworth, 2 Ohio Cir. Ct. 518.

Oklahoma.— *In re* Epley, (Okla. 1901) 64 Pac. 18.

Pennsylvania.— Barker *v.* Hartman Steel Co., 23 Wkly. Notes Cas. (Pa.) 109.

South Carolina.— Trapier *v.* Wilson, 2 McCord (S. C.) 191.

Texas.— People's Cemetery Assoc. *v.* Oakland Cemetery Co., (Tex. Civ. App. 1901) 60 S. W. 679.

Wisconsin.— Whereatt *v.* Ellis, 103 Wis. 348, 79 N. W. 416, 74 Am. St. Rep. 865; Waterman *v.* Raymond, 5 Wis. 185.

United States.— Matter of Haberman Mfg. Co., 147 U. S. 525, 13 S. Ct. 527, 37 L. ed. 266; Staffords *v.* King, 90 Fed. 136, 32 C. C. A. 536.

England.— Gloucester *v.* Wood, 3 Hare 131, 25 Eng. Ch. 131.

Canada.— Miller *v.* Henry, 3 Manitoba 454; Card *v.* Weeks, 16 Nova Scotia 93.

See 2 Cent. Dig. tit. "Appeal and Error," § 2252.

Upon an appeal to the United States circuit court of appeals from an interlocutory decree granting or continuing an injunction, defendant is not entitled to a supersedeas as a matter of right, and it is within the discretion of the circuit court to grant or refuse the same. Lalance, etc., Mfg. Co. *v.* Habermann Mfg. Co., 54 Fed. 375 [*disapproving* Societe Anonyme, etc. *v.* Blount, 51 Fed. 610].

93. State *v.* Scott, (Nebr. 1900) 82 N. W. 320; State *v.* Fawcett, 58 Nebr. 371, 78 N. W. 636. On an appeal from an order granting or refusing an injunction there is, ordinarily, no supersedeas. High Inj. § 893; Green *v.* Griffin, 95 N. C. 50; Fleming *v.* Patterson, 99 N. C. 404, 6 S. E. 396; James *v.* Markham, 125 N. C. 145, 34 S. E. 241. See *infra*, VIII, J, 5, c, as to orders relating to injunctions.

Abuse of discretion.— Where an interlocutory judgment against defendants was rendered and proceedings were stayed pending an intended appeal, and nothing further was done until three years afterward, the subsequent staying of proceedings on the judgment, in order that an appeal might thereafter be taken, is an abuse of discretion. Bauer *v.* Parker, 61 N. Y. Suppl. 1021.

94. *Alabama.*— *Ex p.* Brown, 58 Ala. 536.

Iowa.— Winter *v.* Coulthard, 94 Iowa 312, 62 N. W. 732.

or a judge thereof,[95] provided the jurisdiction of the appellate court over the appeal or writ of error has attached.[96] It has, however, been held that, after an

Kansas.— McMillan *v.* Baker, 20 Kan. 50.
Maryland.— Thompson *v.* McKim, 6 Harr. & J. (Md.) 302.
Mississippi.— Kimball *v.* Alcorn, 45 Miss. 145.
Nebraska.— Penn Mut. L. Ins. Co. *v.* Creighton Theatre Bldg. Co., 51 Nebr. 659, 71 N. W. 279; Cooperrider *v.* State, 46 Nebr. 84, 64 N. W. 372.
New Jersey.— Suydam *v.* Hoyt, 25 N. J. L. 230; Chegary *v.* Scofield, 5 N. J. Eq. 525.
New York.— Genet *v.* Delaware, etc., Canal Co., 113 N. Y. 472, 21 N. E. 390, 23 N. Y. St. 111; Eno *v.* New York El. R. Co., 15 N. Y. App. Div. 336, 44 N. Y. Suppl. 61; Sixth Ave. R. Co. *v.* Gilbert El. R. Co., 3 Abb. N. Cas. (N. Y.) 53; Clark *v.* Clark, 7 Paige (N. Y.) 607; Green *v.* Winter, 1 Johns. Ch. (N. Y.) 77; Bradwell *v.* Weeks, 1 Johns. Ch. (N. Y.) 325.
Oklahoma.— *In re* Epley, (Okla. 1901) 64 Pac. 18.
South Carolina.— Trapier *v.* Wilson, 2 McCord (S. C.) 191.
Wisconsin.— Whereatt *v.* Ellis, 103 Wis. 348, 79 N. W. 416, 74 Am. St. Rep. 865.
United States.— Hovey *v.* McDonald, 109 U. S. 150, 3 S. Ct. 136, 27 L. ed. 888; Interstate Commerce Commission *v.* Louisville, etc., R. Co., 101 Fed. 146.
England.— Lewis *v.* Morgan, 5 Price 468; Gloucester *v.* Wood, 3 Hare 131, 25 Eng. Ch. 131.
See 2 Cent. Dig. tit. "Appeal and Error," § 2249.

95. *Arkansas.*— Davis *v.* Tarwater, 13 Ark. 52 [*overruling* Bentley *v.* Fowler, 8 Ark. 375]; Taylor *v.* Adams, 13 Ark. 61.
California.— McClatchy *v.* Sperry, 126 Cal. xvii, 58 Pac. 529; Hale, etc., Silver Min. Co. *v.* Fox, 122 Cal. 56, 54 Pac. 270; Brown *v.* Rouse, 115 Cal. 619, 47 Pac. 601.
Florida.— Saxon *v.* Gamble, 23 Fla. 408, 2 So. 664; State *v.* Johnson, 13 Fla. 33.
Georgia.— Herrington *v.* Block, 98 Ga. 236, 25 S. E. 426.
Indiana.—Northern Indiana R. Co. *v.* Michigan Cent. R. Co., 2 Ind. 670.
Iowa.— Norris *v.* Tripp, (Iowa 1900) 82 N. W. 610.
Louisiana.— State *v.* Monroe, 51 La. Ann. 161, 24 So. 790.
Maryland.— Thompson *v.* McKim, 6 Harr. & J. (Md.) 302.
Nebraska.— Home F. Ins. Co. *v.* Dutcher, 48 Nebr. 755, 67 N. W. 766; Cooperrider *v.* State, 46 Nebr. 84, 64 N. W. 372; State *v.* Judges, 19 Nebr. 149, 26 N. W. 723; Gandy *v.* State, 10 Nebr. 243, 4 N. W. 1019.
New Hampshire.—Tandy *v.* Rowell, 54 N. H. 384; Rochester *v.* Roberts, 25 N. H. 495; Grant *v.* Lathrop, 23 N. H. 67.
New Jersey.— Allen *v.* Joice, 8 N. J. L. 135; Van Walkenburgh *v.* Rahway Bank, 8 N. J. Eq. 725; Doughty *v.* Somerville, etc., R. Co., 7 N. J. Eq. 629, 51 Am. Dec. 267; Chegary *v.* Scofield, 5 N. J. Eq. 525.
New York.— Messonnier *v.* Kauman, 3 Johns. Ch. (N. Y.) 66; Bradwell *v.* Weeks, 1 Johns. Ch. (N. Y.) 325.
Oklahoma.— *In re* Epley, (Okla. 1901) 64 Pac. 18.
Pennsylvania.— Haught *v.* Irwin, 166 Pa. St. 548, 31 Atl. 260; Smith *v.* Ramsay, 6 Serg. & R. (Pa.) 573.
South Carolina.— Salinas *v.* Aultman, 49 S. C. 378, 27 S. E. 407.
Texas.— People's Cemetery Assoc. *v.* Oakland Cemetery Co., (Tex. Civ. App. 1901) 60 S. W. 679.
Washington.— State *v.* Board of Education, 19 Wash. 8, 52 Pac. 317, 67 Am. St. Rep. 706, 40 L. R. A. 317.
Wisconsin.— Tilley *v.* Washburn, 91 Wis. 105, 64 N. W. 312; Janesville *v.* Janesville Water Co., 89 Wis. 159, 61 N. W. 770; Levy *v.* Goldberg, 40 Wis. 308; Northwestern Mut. L. Ins. Co. *v.* Park Hotel Co., 37 Wis. 125.
United States.—Leonard *v.* Ozark Land Co., 115 U. S. 465, 6 S. Ct. 127, 29 L. ed. 445; Peugh *v.* Davis, 110 U. S. 227, 4 S. Ct. 17, 28 L. ed. 127; Sage *v.* Central R. Co., 96 U. S. 712, 24 L. ed. 641; Slaughter House Cases, 10 Wall. (U. S.) 273, 19 L. ed. 915; *Ex p.* Milwaukee, etc., R. Co., 5 Wall. (U. S.) 188, 18 L. ed. 676; Hardeman *v.* Anderson, 4 How. (U. S.) 640, 11 L. ed. 1138; American Strawboard Co. *v.* Indianapolis Water Co., 81 Fed. 423, 46 U. S. App. 526, 26 C. C. A. 470; Tiernan *v.* Booth, 9 Biss. (U. S.) 499, 4 Fed. 620.
See 2 Cent. Dig. tit. "Appeal and Error," § 2248.

In New Jersey, it has been held that, where a constable is sued before a justice for neglect of duty in executing an execution issued upon a judgment which has been removed by certiorari into the supreme court, the supreme court will not grant a rule upon the justice to stay proceedings in the suit against the constable. Combs *v.* Johnson, 12 N. J. L. 178.

In Ohio, it has been held that where a judgment of the court of common pleas has been reversed and remanded by the circuit court, and a writ of error sued out of the supreme court to the circuit court, a motion in the supreme court, by plaintiff in error, to stay the judgment of the circuit court until the decision by the supreme court, will be denied, the proper practice being to move the court of common pleas for a continuance pending the writ of error. Neubert *v.* Phillips, 46 Ohio St. 559, 24 N. E. 596.

Refusal by trial court.— Under a statute providing that "an appeal taken by the defendant shall not stay proceedings upon the judgment, unless the judge or justice before whom the same was rendered so directs," the supreme court will not order a stay where it appears that an undertaking designed for a stay was set aside by the trial court for insufficiency of the sureties, as such action by the appellate court would override the discretion of the trial court. Gross *v.* Kelleher, 73 Cal. 639, 641, 15 Pac. 362.

96. Home F. Ins. Co. *v.* Dutcher, 48 Nebr. 755, 67 N. W. 766; Newbern Bank *v.* Stanly, 13

appeal to the court of last resort has been perfected, an intermediate appellate court cannot direct a supersedeas to the trial court.[97] It has also been held that one judge cannot, after appeal from an order of another judge vacating an attachment, make an order staying the proceedings pending the determination of the appeal.[98] Of course, an inferior court has no power to grant an order for a supersedeas to a judgment or decree of a superior court.[99]

3. When Allowed — a. In General. An order staying the execution of a judgment will only be granted on good cause shown.[1]

b. Irreparable Injury to Appellant. A stay should be granted where the enforcement of the judgment or decree pending the appeal will result in irreparable injury to appellant if he is successful in his appeal.[2]

4. Application — a. Manner of Application. An application for a stay of proceedings pending appeal may be made by motion.[3]

N. C. 476 (wherein it was held that an appellate court cannot supersede the process of a trial court unless the writ of supersedeas is auxiliary to the appellate jurisdiction of the former); *Ex p.* Ralston, 119 U. S. 613, 7 S. Ct. 317, 30 L. ed. 506 (wherein it was held that an appellate court cannot allow a supersedeas except as an incident to an appeal actually taken, or a writ of error actually sued out). See also Carit *v.* Williams, 67 Cal. 580, 8 Pac. 93, wherein it was held that, pending an appeal from an order made after final judgment, the appellate court has no authority to grant a stay of execution upon the judgment, where no appeal has been taken from such judgment.

97. *In re* Life Assoc. of America, 12 Mo. App. 584.

98. Hammacher *v.* Morse, 15 N. Y. Civ. Proc. 321.

99. Dibrell *v.* Eastland, 3 Yerg. (Tenn.) 506.

1. Texas Bldg. Assoc. No. 2 *v.* Aurora F. & M. Ins. Co., 34 Ohio St. 291.

In Florida, it has been held that, where the damage which may result from a supersedeas to a decree is of such a character that it can be compensated in money, a supersedeas will be granted. Tampa St. R., etc., Co. *v.* Tampa Suburban R. Co., 30 Fla. 400, 11 So. 908; Jacoby *v.* Shoemaker, 26 Fla. 502, 7 So. 855.

In New York, a stay will not be granted pending an appeal to the court of appeals from a judgment which has been unanimously affirmed by the appellate division. Connolly *v.* Manhattan R. Co., 40 N. Y. Suppl. 1007, 75 N. Y. St. 391.

Annexation of territory to city.— Pending appeal from a judgment declaring territory annexed to a city, the supreme court will not stay the exercise by the city of governmental functions over the annexed territory, and restrain consideration of the judgment of annexation in the elections, taxation, and internal improvements of the city, the exercise of none of such acts being alleged to be inconvenient, except that of the voting by the residents of the annexed territory at an approaching election, and there being no immediate and imperious necessity for interference as to the other acts. Forsythe *v.* Hammond, 137 Ind. 426, 37 N. E. 537.

Opportunity to put in bail.— A court will not stay execution in order to give time to plaintiff in error to put in bail. Den *v.* Hamilton, 3 N. J. L. 446.

Overruling doctrine of decision.— An order staying proceedings should be granted where, since the judgment appealed from has been rendered, the doctrine on which it was founded has been overruled by the appellate court. Sixth Ave. R. Co. *v.* Gilbert El. R. Co., 3 Abb. N. Cas. (N. Y.) 53.

Where it is doubtful whether an order appealed from be appealable, the appellate court will not, on application, stay proceedings pending the appeal. Gelpeke *v.* Milwaukee, etc., R. Co., 11 Wis. 454.

2. *Georgia.*— Lindsey *v.* Lindsey, 14 Ga. 657.

Louisiana.— State *v.* Lewis, 42 La. Ann. 847, 8 So. 602; State *v.* Judge, 39 La. Ann. 225, 1 So. 417.

Maryland.— Thompson *v.* McKim, 6 Harr. & J. (Md.) 302.

New Jersey.— Riehle *v.* Hulings, 38 N. J. Eq. 83; Jewett *v.* Dringer, 29 N. J. Eq. 199; Ratzer *v.* Ratzer, 29 N. J. Eq. 162; Van Walkenburgh *v.* Rahway Bank, 8 N. J. Eq. 725.

New York.— Hart *v.* Albany, 3 Paige (N. Y.) 381; Jewett *v.* Albany City Bank, Clarke (N. Y.) 59.

Pennsylvania.—Woodward *v.* Wilkes-Barre, 4 Kulp (Pa.) 138.

Wisconsin.—Waterman *v.* Raymond, 5 Wis. 185.

England.— Walford *v.* Walford, L. R. 3 Ch. 812.

Canada.— See McDonald *v.* Murray, 9 Ont. Pr. 464.

See 2 Cent. Dig. tit. "Appeal and Error," § 2253.

3. Eno *v.* New York El. R. Co., 15 N. Y. App. Div. 333, 44 N. Y. Suppl. 61; 2 Daniels Ch. Pr. 1470. See also McMahon *v.* Allen, 13 Abb. Pr. (N. Y.) 126, wherein it was held that the only way in which a stay of proceedings can be procured in the court below, after an order for a new trial has been made by the general term, is by motion directly for that purpose.

Costs.— It seems that the applicant must pay the costs of the application. Topham *v.* Portland, 1 De G. J. & S. 603, 66 Eng. Ch. 603; Willan *v.* Willan, 16 Ves. Jr. 216; Waldo *v.* Caley, 16 Ves. Jr. 206; Merry *v.* Nickalls,

b. Notice. In the absence of a statute requiring it, notice need not be given to the adverse party of an application to a justice of the supreme court for a stay of proceedings pending appeal.[4]

c. Matters Determinable. It has been held that it is neither necessary nor proper for a judge, on application for a supersedeas, to consider the merits of the appeal except so far as to see whether the appeal is frivolous.[5]

5. Imposition of Terms. As the allowance of a stay is a matter of discretion, it follows that the court may, in allowing the stay, affix such conditions as in its judgment are necessary for the protection of the parties.[6] It has, however, been held that any insufficiency of a bond, filed under an order directing a stay of proceedings pending an appeal on the giving of a bond, does not impair the order.[7]

H. Upon Security — 1. Necessity — a. In General. It is a very general statutory requirement that security must be given to effect a stay of proceedings on appeal or writ of error.[8]

L. R. 8 Ch. 205. But see Burdick *v.* Garrick, L. R. 5 Ch. 453; Shrewsbury *v.* Trappes, 2 De G. F. & J. 172, 63 Eng. Ch. 172.

Motion to dismiss appeal.— Whether appellants are entitled to have the execution of the judgment stayed until the determination of an appeal from an order denying a new trial cannot be considered on a motion to dismiss the appeal from the judgment. Kirman *v.* Hunnewill, 91 Cal. 157, 2. Pac. 587.

To whom made.— In New York, an application for a stay of proceedings, pending an appeal from the appellate division to the court of appeals, should be made to the appellate division rather than to the special term. Eno *v.* New York El. R. Co., 15 N. Y. App. Div. 336, 44 N. Y. Suppl. 61. See also *In re* Ciancimino, 13 N. Y. Suppl. 836, wherein it was held that it is proper practice, upon an appeal taken from an order of a judge to the general term, where it is sought to stay execution, to make the application to the court in or from which the appeal is taken, or a judge thereof, for such stay.

4. Matthews *v.* Nance, 49 S. C. 389, 27 S. E. 100; Salinas *v.* Aultman, 49 S. C. 378, 27 S. E. 407. But see Grand Trunk R. Co. *v.* Ontario, etc., R. Co., 9 Ont. Pr. 420, wherein it was held that application should not be made *ex parte*.

Sufficiency of notice.— On a motion for a stay of execution, pending an appeal, the ordinary notice is sufficient. Heenan *v.* Dewar, 3 Ch. Chamb. (U. C.) 199.

5. Jacoby *v.* Shomaker, 26 Fla. 502, 7 So. 855; Williams *v.* Hilton, 25 Fla. 608, 6 So. 452; Saxon *v.* Gamble, 23 Fla. 408, 2 So. 664.

See 2 Cent. Dig. tit. "Appeal and Error," § 2254.

6. *California.*— McClatchy *v.* Sperry, 126 Cal. xvii, 58 Pac. 529; Hill *v.* Finnigan, 54 Cal. 493.

Nebraska.— Home F. Ins. Co. *v.* Dutcher, 48 Nebr. 755, 67 N. W. 766.

New York.— Kager *v.* Brenneman, 52 N. Y. App. Div. 446, 65 N. Y. Suppl. 129; New York Security, etc., Co. *v.* Saratoga Gas, etc., Co., 5 N. Y. App. Div. 535, 39 N. Y. Suppl. 486; Winterhoff *v.* Siegert, 13 Abb. Pr. (N. Y.) 182; Sixth Av. R. Co. *v.* Gilbert El. R. Co., 3 Abb. N. Cas. (N. Y.) 53; Bradt *v.* Kirkpatrick, 7 Paige (N. Y.) 62; Gregory *v.* Dodge, 3 Paige (N. Y.) 90.

Oklahoma.— *In re* Epley, (Okla. 1901) 64 Pac. 18.

South Carolina.— Matthews *v.* Nance, 49 S. C. 389, 27 S. E. 100; Salinas *v.* Aultman, 49 S. C. 378, 27 S. E. 407.

Wisconsin.— Whereatt *v.* Ellis, 103 Wis. 348, 79 N. W. 416, 74 Am. St. Rep. 865.

England.— Monkhouse *v.* Bedford, 17 Ves., Jr., 380.

Canada.— Heward *v.* Heward, 2 Ch. Chamb. (U. C.) 245.

See 2 Cent. Dig. tit. "Appeal and Error," § 2257.

Estoppel to question conditions.— Where the court required defendants to stipulate that they "would contest the plaintiffs' rights in this action only," as a condition precedent to granting a stay of an injunction, pending an appeal, defendants, having obtained the stay of the injunction, cannot say that the court had no power to impose such a condition. American Bank Note Co. *v.* Manhattan R. Co., 66 Hun (N. Y.) 627, 20 N. Y. Suppl. 819, 49 N. Y. St. 375.

Payment of sheriff's fees.— Where an appeal was entered and the appeal bond perfected after execution was levied, but before it was fully executed, the execution will not be set aside, so as to destroy the lien on the goods of the appellant, except on condition that the sheriff's fees on the execution be paid. Clark *v.* Clark, 7 Paige (N. Y.) 607.

Rights of intervener.— A third person who intervenes to prosecute an appeal has no claim to a stay upon more favorable terms than the judgment debtor. State *v.* Judge, 22 La. Ann. 115.

7. Dell *v.* Marvin, 31 Fla. 152, 12 So. 216. In Harmon *v.* Wagener, 33 S. C. 487, 12 S. E. 98, it was held that where an executor obtains an order from a justice of the supreme court, staying all proceedings under the order appointing a receiver, on condition that such executor give bond within a certain time, which he fails to do, the order staying the proceedings becomes a nullity, and the court may proceed to enforce the delivery of the property to the receiver because, in such case, the condition precedent is not complied with.

8. See the statutes of the several states and the following cases:

Alabama.— *Ex p.* Sibert, 67 Ala. 349; Pow-

b. Appeal In Forma Pauperis. An order allowing a party to appeal *in forma pauperis* does not, of itself, operate to stay proceedings upon the judgment appealed from.[9]

ell *v.* Central Plank Road Co., 24 Ala. 441; Williams *v.* Hart, 17 Ala. 102.

Arkansas.— Childress *v.* Foster, 2 Ark. 123.

California.— McMillan *v.* Hayward, 84 Cal. 85, 24 Pac. 151; Englund *v.* Lewis, 25 Cal. 337; Bryan *v.* Berry, 8 Cal. 130.

Colorado.— Daniels *v.* Miller, 8 Colo. 542, 9 Pac. 18.

Florida.— McIver *v.* Marshall, 24 Fla. 42, 4 So. 563; Kilbee *v.* Myrick, 12 Fla. 416.

Georgia.— Cummings *v.* Clegg, 82 Ga. 763, 9 S. E. 1042; Irwin *v.* Jackson, 34 Ga. 101.

Illinois.— Branigan *v.* Rose, 8 Ill. 123.

Indiana.— *Ex p.* Sweeney, 131 Ind. 81, 30 N. E. 884; June *v.* Payne, 107 Ind. 307, 7 N. E. 370, 8 N. E. 556; Mitchell *v.* Gregory, 94 Ind. 363.

Iowa.— Watson *v.* Niles, (Iowa 1900) 84 N. W. 702; Harrison *v.* Stebbins, 104 Iowa 462, 73 N. W. 1034.

Maryland.— Eakle *v.* Smith, 24 Md. 339; McKim *v.* Mason, 3 Md. Ch. 186.

Michigan.— Peterson *v.* Wayne Cir. Judge, 108 Mich. 608, 66 N. W. 487; Douglass *v.* Judge, 42 Mich. 495, 4 N. W. 225.

Mississippi.— Winters *v.* Claitor, 54 Miss. 341; Swann *v.* Horne, 54 Miss. 337.

Missouri.— Tipton Bank *v.* Cochel, 27 Mo. App. 529.

Nebraska.— Creighton *v.* Keith, 50 Nebr. 810, 70 N. W. 406; State *v.* Ramsey, 50 Nebr. 166, 69 N. W. 758; Parker *v.* Courtnay, 28 Nebr. 605, 44 N. W. 863, 26 Am. St. Rep. 360; Welton *v.* Beltezore, 17 Nebr. 399, 23 N. W. 1.

New Hampshire.— Tandy *v.* Rowell, 54 N. H. 384.

New York.— Roberts *v.* Donnell, 31 N. Y. 446; Moak *v.* Hayes, 25 Hun (N. Y.) 316; Hallenbeck *v.* Company E, Thirteenth Regiment, 17 Hun (N. Y.) 234; Kitching *v.* Diehl, 40 Barb. (N. Y.) 433; Cruger *v.* Douglass, 8 Barb. (N. Y.) 81; Quinlan *v.* Russell, 48 N. Y. Super. Ct. 537; Carter *v.* Hodge, 6 Misc. (N. Y.) 575, 27 N. Y. Suppl. 219, 57 N. Y. St. 785; Halsey *v.* Flint, 15 Abb. Pr. (N. Y.) 367; Waring *v.* Ayres, 12 Abb. Pr. (N. Y.) 112; Sternhaus *v.* Schmidt, 5 Abb. Pr. (N. Y.) 66; Chemung Canal Bank *v.* Judson, 10 How. Pr. (N. Y.) 133; Laimbeer *v.* Mott, 2 Code Rep. (N. Y.) 15; Ferris *v.* Douglass, 20 Wend. (N. Y.) 626; Mirick *v.* Hill, 30 N. Y. Suppl. 853, 63 N. Y. St. 160.

South Carolina.— Pelzer Mfg. Co. *v.* Cely, 40 S. C. 430, 18 S. E. 790; Harmon *v.* Wagener, 33 S. C. 487, 12 S. E. 98.

South Dakota.— *In re* Taber, 13 S. D. 62, 82 N. W. 398.

Texas.—Crumley *v.* McKinney, (Tex. 1888) 9 S. W. 157; Gibbs *v.* Belcher, 30 Tex. 79.

Washington.— Gilmore *v.* H. W. Baker Co., 14 Wash. 52, 44 Pac. 101; Seattle Coal, etc., Co. *v.* Lewis, 1 Wash. Terr. 488.

Wisconsin.— Hudson *v.* Smith, 9 Wis. 122.

United States.— Stafford *v.* Union Bank, 17 How. (U. S.) 275, 15 L. ed. 101.

England.— Lane *v.* Bacchus, 2 T. R. 44.

Canada.— McMaster *v.* Radford, 16 Ont. Pr. 20; Grand Trunk R. Co. *v.* Ontario, etc., R. Co., 9 Ont. Pr. 420; Powell *v.* Peck, 8 Ont. Pr. 85; Kenney *v.* Dudman, 11 Nova Scotia 376.

See 2 Cent. Dig. tit. "Appeal and Error," § 2225.

As to requirement of security upon allowance by court or judge see *supra*, VIII, G.

Compelling execution on failure to give security.— Where appellant is not entitled to a supersedeas because of failure to give the necessary bond, and the trial judge refuses, on behalf of appellee, to issue process to carry the decree into effect, the appellate court may grant a peremptory mandamus commanding the trial judge to do so. Stafford *v.* Union Bank, 17 How. (U. S.) 275, 15 L. ed. 101. See also Societe Francaise, etc. *v.* McHenry, 49 Cal. 351.

Fund in court.— Where the fund which is the subject of litigation is in court, and a decree is made directing its payment to one of the parties, from which decree the adverse party appeals, it is not necessary for appellant to give security for the payment of the money in order to make the appeal a stay of proceedings. Broder *v.* Conklin, 121 Cal. 289, 53 Pac. 797; McCallion *v.* Hibernia Sav., etc., Soc., 98 Cal. 442, 33 Pac. 329; Parker's Succession, 18 La. Ann. 644; Steinback *v.* Diepenbrock, 5 N. Y. App. Div. 208, 39 N. Y. Suppl. 137; Curtis *v.* Leavitt, 10 How. Pr. (N. Y.) 481; Quackenbush *v.* Leonard, 10 Paige (N. Y.) 131; City Bank *v.* Bangs, 4 Paige (N. Y.) 285; Wright *v.* Miller, 3 Barb. Ch. (N. Y.) 382. See also *Ex p.* Brown, 58 Ala. 536, wherein it was held that the fact that property is in the hands of the court, through its receiver, is a good reason for fixing easy terms upon which a stay of execution of the decree should be granted pending appeal.

9. Leach *v.* Jones, 86 N. C. 404. See also Ledbetter *v.* Burns, 42 Tex. 508, wherein it was held that an appeal, under a statute allowing appeals to persons unable to give an appeal bond, by giving bond in no more than the costs and damages of the appeal, does not operate as a supersedeas. But see Fite *v.* Black, 85 Ga. 413, 11 S. E. 782, wherein it was held that an appeal *in forma pauperis* from an order, made in a proceeding against an executor for mismanagement, operates as a supersedeas.

Application to dispense with security.— In New York, an application to dispense with security on appeal to the supreme court, under N. Y. Code Civ. Proc. § 1312, can only be made to the court from which the appeal is taken. Hills *v.* Peekskill Sav. Bank, 95 N. Y. 675.

In Tennessee, a supersedeas *in forma pauperis* may be granted upon notice to the adverse party, or upon the appearance of the

c. Waiver of Security. A statute requiring an appellant, on taking an appeal, to enter into a recognizance in order to stay execution is made for the benefit of the appellee, and the latter may waive it, and agree of record that the appeal shall operate as a supersedeas.[10]

2. Persons Required to Give. In some states no bond is required on an appeal by an executor, administrator,[11] receiver,[12] trustee, or other person acting in another right.[13]

3. Requisites and Sufficiency — a. In General. Generally, it may be said that a supersedeas bond should conform to the requirements of the statute.[14]

parties to defend the writ of error. Morwy *v.* Davenport, 6 Lea (Tenn.) 80; Campbell *v.* Boulton, 3 Baxt. (Tenn.) 354.

In Texas, on error *in forma pauperis*, an affidavit by plaintiff in error that "he is unable to give bond for supersedeas as required by law, and that he has tried to give such bond, and failed," is not in compliance with the statute. Sharp *v.* Arledge, 1 Tex. App. Civ. Cas. § 632.

In Georgia, where a judgment appointing a receiver and granting an injunction is brought to the supreme court by a fast bill of exceptions, no supersedeas results from filing the bill of exceptions, and making an affidavit of inability, from poverty, to pay costs and give security, as the statute provides that "no such writ of error, or other proceeding for the obtainment of the same, shall have the effect to establish or deny any injunction independently of the order of such judge." Ryan *v.* Kingsbery, 88 Ga. 361, 14 S. E. 596.

In Iowa it has been held that defendant, appealing from a judgment for plaintiff without giving a supersedeas bond, is not entitled, on petition alleging his inability to file such bond, to have plaintiff give bond to refund in case of reversal. Watson *v.* Niles, (Iowa 1900) 84 N. W. 702.

10. Wilson *v.* Dean, 10 Ark. 308; Carit *v.* Williams, 67 Cal. 580, 8 Pac. 93; Sterrett *v.* National Safe Deposit, etc., Co., 10 App. Cas. (D. C.) 131.

What constitutes waiver.—Where the award of a supersedeas to a judgment has been obtained, the act of counsel in marking his name on the docket as counsel for appellee, though it may be a waiver of process, cannot be considered as a waiver of the supersedeas bond. Otterback *v.* Alexandria, etc., R. Co., 26 Gratt. (Va.) 940.

11. *Arkansas.*— Fishback *v.* Weaver, 34 Ark. 569.

California.— *Ex p.* Orford, 102 Cal. 656, 36 Pac. 928; Matter of Sharp, 92 Cal. 577, 28 Pac. 783.

Illinois.— See also Smith *v.* Dennison, 94 Ill. 582, wherein it was held that an administrator may execute a supersedeas bond in his capacity as administrator without incurring any personal liability in respect to such bond.

Kentucky.— Green *v.* Gill, Ky. Dec. 271.

Louisiana.— Coyle *v.* Creevy, 34 La. Ann. 539; State *v.* Judge, 21 La. Ann. 43.

Mississippi.— Wade *v.* American Colonization Soc., 4 Sm. & M. (Miss.) 607.

New York.— The court may, in its discretion, dispense with security. Butler *v.* Jarvis, 117 N. Y. 115, 22 N. E. 561, 26 N. Y. St. 841; Matter of Morey, 6 Dem. Surr. (N. Y.) 287. *Compare* Williamson *v.* Field, 2 Barb. Ch. (N. Y.) 281.

North Carolina.— The court, in its discretion, may dispense with a supersedeas bond when the appellant is an executor, administrator, or trustee. Clark's Code Civ. Proc. N. C. (1900), § 558.

Pennsylvania.— A statute making a writ of error brought by an executor a supersedeas to an execution, without putting in bail, does not apply where the writ is brought by an executor against whom judgment was recovered on a contract made with him in his individual capacity. Gebler *v.* Culin, 6 Phila. (Pa.) 130, 23 Leg. Int. (Pa.) 133.

Texas.— Dawson *v.* Hardy, 33 Tex. 198. But see Bills *v.* Scott, 49 Tex. 430, wherein it was held that an order requiring an administrator to give a new bond affects his right to administer, and an appeal taken from such order by the administrator and without bond, will not suspend the order so appealed from.

See 2 Cent. Dig. tit. "Appeal and Error," § 2226.

12. Central Trust Co. *v.* St. Louis, etc., R. Co., 41 Fed. 551.

13. Corporations may have a writ of error without bail, but it is not a supersedeas. Savings Inst. *v.* Smith, 7 Pa. St. 291.

Counties.— The rule that an appeal from a judgment does not stay proceedings, where no supersedeas bond is filed, applies, in the absence of a statute exempting it from giving such bond, to a cause in which a county is a party litigant. Harrison *v.* Stebbins, 104 Iowa 462, 73 N. W. 1034.

A state board of public works, invested by statute with power to sue and be sued as a body corporate, is not exempt from giving a supersedeas bond on appeal from a judgment against it. Tompkins *v.* Kanawha Board, 19 W. Va. 257.

Superintendent of insurance.— An appeal taken by the state superintendent of insurance is a supersedeas without a bond. *In re* Life Assoc. of America, 12 Mo. App. 584.

The United States, when appealing from a decree of the district court of the United States approving a survey of a Mexican or Spanish grant, need not give a bond in order to stay proceedings. Treadway *v.* Semple, 28 Cal. 652; Thornton *v.* Mahoney, 24 Cal. 569.

14. *Alabama.*— Hughes *v.* Hatchett, 55 Ala. 539.

California.— Hoppe *v.* Hoppe, 99 Cal. 536, 34 Pac. 222; Mokelumne Hill Canal, etc., Co. *v.* Woodbury, 10 Cal. 185.

Bonds substantially complying with the statute have, however, been held sufficient.[15]

Florida.— Wheeler, etc., Mfg. Co. *v.* Johns, 37 Fla. 262, 20 So. 236; Dell *v.* Marvin, 31 Fla. 152, 12 So. 216; Tampa St. R., etc., Co. *v.* Tampa Suburban R. Co., 30 Fla. 400, 11 So. 908; McMichael *v.* Eckman, 26 Fla. 43, 7 So. 365.

Indian Territory.— Ranney-Alton Mercantile Co. *v.* Mineral Belt Constr. Co., (Indian Terr. 1899) 48 S. W. 1028.

Louisiana.— State *v.* Judge, 27 La. Ann. 697.

Maryland.— Johnson *v.* Goldsborough, 1 Harr. & J. (Md.) 499.

Missouri.— Parker *v.* Hannibal, etc., R. Co., 44 Mo. 415; State *v.* Dillon, 31 Mo. App. 535; Missouri Pac. R. Co. *v.* Atkison, 17 Mo. App. 484; State *v.* Adams, 9 Mo. App. 464; State *v.* Vogel, 6 Mo. App. 526.

Montana.— Mason *v.* Germaine, 1 Mont. 279.

Nebraska.—State *v.* Ramsey, 50 Nebr. 166, 69 N. W. 758; O'Chander *v.* State, 46 Nebr. 10, 64 N. W. 373; State *v.* Thiele, 19 Nebr. 220, 27 N. W. 109.

New York.— Newton *v.* Harris, 8 Barb. (N. Y.) 306; Dyckman *v.* Valiente, 19 Abb. Pr. (N. Y.) 130; Halsey *v.* Flint, 15 Abb. Pr. (N. Y.) 367; Sternhaus *v.* Schmidt, 5 Abb. Pr. (N. Y.) 66; Dinkel *v.* Wehle, 13 Abb. N. Cas. (N. Y.) 478; Hoppock *v.* Cottrell, 13 How. Pr. (N. Y.) 461; Willoughby *v.* Comstock, 7 Hill (N. Y.) 162; Sea Ins. Co. *v.* Ward, 20 Wend. (N. Y.) 588; Cram *v.* Mitchell, 11 Paige (N. Y.) 156.

North Carolina.— Alderman *v.* Rivenbark, 96 N. C. 134, 1 S. E. 644.

Pennsylvania.— Magill *v.* Kauffman, 4 Serg. & R. (Pa.) 317, 8 Am. Dec. 713.

Texas.— White *v.* Harris, 85 Tex. 42, 19 S. W. 1077; Grumley *v.* McKinney, (Tex. 1888) 9 S. W. 157; Reid *v.* Fernandez, 52 Tex. 379; Britt *v.* Lowry, 50 Tex. 75.

Washington.— Ritchey *v.* Cedar Mill Co., 22 Wash. 511, 61 Pac. 160.

United States.— Seward *v.* Comeau, 102 U. S. 161, 26 L. ed. 86; Peace River Phosphate Co. *v.* Edwards, 70 Fed. 728, 30 U. S. App. 513, 17 C. C. A. 358.

See 2 Cent. Dig. tit. "Appeal and Error," § 2230.

A bond in the name of a firm, but not giving the names of the individuals who compose the firm, is bad. *In re* Woerishoffer, 74 Fed. 915, 21 C. C. A. 175.

Additional conditions.— A condition imposed in a bond, in addition to those required by statute, is void. Derrington *v.* Conrad, 7 Kan. App. 295, 53 Pac. 881. See also Omaha Hotel Co. *v.* Kountze, 107 U. S. 378, 2 S. Ct. 911, 27 L. ed. 609.

Security in form of recognizance.— Where the statute provides that security by a recognizance shall be given before a supersedeas shall issue, security in the form of a bond is not a compliance with the statute. Ward *v.* Price, 1 Pinn. (Wis.) 57.

15. *Kansas.*—Stillings *v.* Porter, 22 Kan. 17.

Kentucky.— See Clinton *v.* Phillips, 7 T. B. Mon. (Ky.) 117.

Louisiana.— Glover *v.* Taylor, 38 La. Ann. 634.

New York.— See Carter *v.* Hodge, 6 Misc. (N. Y.) 575, 27 N. Y. Suppl. 219, 57 N. Y. St. 785.

Ohio.— Kelly *v.* Nichols, 10 Ohio St. 318.

Pennsylvania.— Com. *v.* Ewing, 176 Pa. St. 491, 35 Atl. 215; Com. *v.* Finney, 17 Serg. & R. (Pa.) 282; Smith *v.* Winder, 1 Pa. L. J. Rep. 386.

Texas.— Prewitt *v.* Day, 86 Tex. 166, 23 S. W. 982.

Washington.— Northwestern, etc., Hypotheek Bank *v.* Griffitts, 17 Wash. 98, 49 Pac. 223.

Wisconsin.— See Yellow River Imp. Co. *v.* Arnold, 41 Wis. 509.

United States.— Omaha Hotel Co. *v.* Kountze, 107 U. S. 378, 2 S. Ct. 911, 27 L. ed. 609; Chateaugay Ore, etc., Co. *v.* Blake, 35 Fed. 804.

Canada.— McSweeney *v.* Reeves, 28 Nova Scotia 422.

See also State *v.* Dotts, 31 W. Va. 819, 8 S. E. 391, wherein it was held that a bond on error which recites that a writ of error has been obtained, without also reciting that a supersedeas has been awarded, but which is conditioned as required for both supersedeas and writ of error, and mentions in the condition that proceedings have been stayed, is sufficient as a supersedeas bond. And see Ward *v.* Buell, 18 Ind. 104, 81 Am. Dec. 349, wherein it was held that any instrument in writing, however defective, which the parties execute for the purpose of staying execution on appeal, and which the officer accepts for such purpose, will have the force and effect of an appeal bond against all the parties executing it, and will stay execution till the court quashes the bond.

As to filing new or additional security see *infra*, VIII, H, 5.

For form of undertaking: On appeal from a judgment of a justice of the peace, in an action of forcible entry and detainer, see Kelly *v.* Nichols, 10 Ohio St. 318. On appeal by defendant in a motion for possession of real estate by an execution purchaser see Fitzgerald *v.* Beebe, 7 Ark. 310. On appeal by a railroad company from a decree fixing a lien against its assets, and ordering its property sold to satisfy the same, see Ranney-Alton Mercantile Co. *v.* Mineral Belt Constr. Co., (Indian Terr. 1899) 48 S. W. 1028. On a writ of error, where a prior writ of error has been dismissed, see Hardeman *v.* Anderson, 4 How. (U. S.) 640, 11 L. ed. 1138. On a decree in chancery pending an appeal see Thompson *v.* McKim, 6 Harr. & J. (Md.) 302. On appeal, generally, see:

b. Test of Sufficiency. The test of a good supersedeas bond is that it will not only confer jurisdiction on the appellate court, but will authorize the court to render judgment on appeal against the sureties in accordance with the original decree against the principal.[16]

c. Amount. A supersedeas bond, in the absence of a statute fixing the amount thereof, should be ample to protect the adverse party in the event his judgment is affirmed.[17] Of course, if the statute fixes the amount or conditions

California.— Sharon *v.* Sharon, 68 Cal. 326, 9 Pac. 187.

Connecticut.— Conn. Pub. Acts (1897), c. 194, § 13.

Illinois.— Keegan *v.* Kinnare, 123 Ill. 280, 14 N. E. 14.

Maine.— Longley *v.* Vose, 27 Me. 179.

Michigan.— Busch *v.* Fisher, 89 Mich. 192, 50 N. W. 788.

Nebraska.— Polk *v.* Covell, 43 Nebr. 884, 62 N. W. 240.

New York.— Hill *v.* Burke, 62 N. Y. 111; Onderdonk *v.* Emmons, 2 Hilt. (N. Y.) 504.

Ohio.— Reformed Presb. Church *v.* Nelson, 35 Ohio St. 638; The Propeller Ogontz *v.* Wick, 12 Ohio St. 333.

Pennsylvania.— Lynch *v.* Lynch, 150 Pa. St. 336, 24 Atl. 625.

Texas.— Houston, etc., R. Co. *v.* Greenwood, 40 Tex. 361.

Washington.— Hanna *v.* Savage, 8 Wash. 432, 36 Pac. 269.

West Virginia.— State *v.* Dotts, 31 W. Va. 819, 8 S. E. 391.

United States.— Tuskaloosa Northern R. Co. *v.* Gude, 141 U. S. 244, 11 S. Ct. 1004, 35 L. ed. 742.

16. Alderman *v.* Rivenbark, 96 N. C. 134, 1 S. E. 644; White *v.* Harris, 85 Tex. 42, 19 S. W. 1077. See also Tucker *v.* State, 11 Md. 322, wherein it was held that an appeal bond upon which no recovery can be had by the obligor will not stay execution upon the judgment.

17. Edgerton *v.* West, 38 Fla. 338, 21 So. 278; Rose *v.* Richmond Min. Co., 17 Nev. 70, 27 Pac. 1115; Eno *v.* New York El. R. Co., 15 N. Y. App. Div. 336, 44 N. Y. Suppl. 61; Briggs *v.* Brown, 13 Abb. N. Cas. (N. Y.) 481; Morss *v.* Hasbrouck, 10 Abb. N. Cas. (N. Y.) 407; Remsen *v.* Metropolitan El. R. Co., 45 N. Y. Suppl. 536; Stafford *v.* Union Bank, 16 How. (U. S.) 135, 14 L. ed. 876; Catlett *v.* Brodie, 9 Wheat. (U. S.) 553, 6 L. ed. 158; National Bank *v.* McGahan, 45 Fed. 280; Massachusetts, etc., Constr. Co. *v.* Cherokee, 42 Fed. 750; Holladay's Case, 28 Fed. 117.

See 2 Cent. Dig. tit. "Appeal and Error," § 2235.

The practice in England, in case of an appeal from the master of the rolls to the lord chancellor, was for the party appealing to deposit ten pounds, this to be paid to the other party if the decree was not materially varied, and the party appealing was also required to pay the costs of the appeal; and, on appeal from the court of chancery to the house of lords, the appellant was obliged to make a deposit of twenty pounds, and give security, by recognizance, in the sum of two hundred pounds, to pay such costs to defendant in the appeal as the court should appoint in case the decree should be affirmed. Omaha Hotel Co. *v.* Kountze, 107 U. S. 378, 2 S. Ct. 911, 27 L. ed. 609.

A blank writ-of-error bond will not operate as a supersedeas of execution. Gibbs *v.* Frost, 4 Ala. 720. See also Gray *v.* Gordon, 2 Harr. (Del.) 158. So an appeal bond filed "in the sum of ——— hundred dollars," without filling in the blank, is insufficient. McGuirk *v.* Marchand, 45 La. Ann. 732, 13 So. 161. But where one signs as principal a supersedeas bond in blank, and delivers it to the clerk, who fills it up and has the sureties to sign, although without the knowledge of the principal, the bond is valid. Lindon *v.* Sewell, 5 Ky. L. Rep. 304. To the same effect see Mitchell *v.* Stephens, 14 Ky. L. Rep. 861; State *v.* Judge, 19 La. 174. *Compare* Bowes *v.* Isaacs, 33 Md. 535. So, if the instrument specifies no amount or contains no penalty, the law will hold the obligors in it liable to the extent required by the statute on a supersedeas in such case. Ward *v.* Buell, 18 Ind. 104, 81 Am. Dec. 349.

Notice of order fixing amount.— An order fixing the amount of a stay-bond in a foreclosure suit may be made *ex parte*, though it would be better practice to give the respondent an opportunity to be heard. Hubbard *v.* University Bank, 120 Cal. 632, 52 Pac. 1070.

On appeal from a decree dissolving an injunction and dismissing a bill of injunction, the bond should be with a condition to indemnify and save harmless the surety in the injunction bond. Cardwell *v.* Allen, 28 Gratt. (Va.) 184. See also Terre Haute, etc., R. Co. *v.* Peoria, etc., R. Co., 182 Ill. 501, 55 N. E. 377.

On appeal from a judgment directing the delivery of personal property such as will depreciate by time and use, a stay of proceedings will not be granted upon an undertaking merely to obey the order of the court on appeal, but appellant must give indemnity for the use and depreciation of the property. Read *v.* Potter, 11 Abb. Pr. (N. Y.) 413.

On appeal, by plaintiff in replevin, to whom the property has been delivered by the officer levying the writ, a bond given for the purpose of superseding the judgment should be conditioned in the alternative, so as to obligate the parties giving it either to deliver possession of the specific property, with damages for its detention and costs, or to pay the amount adjudged as its value, together with interest and costs, as the obligee in the bond may elect. Wheeler, etc., Mfg. Co. *v.* Johns, 37 Fla. 262, 20 So. 236.

of the bond, as it usually does in the case of a judgment for the payment of money,[18] or a judgment directing a sale to satisfy a lien,[19] the bond must be in the amount and conditions so fixed.[20] Where appellant is not required by the

Where the writ of error operates as a supersedeas, the security should be for the costs and such damages as the supreme court may award for the delay. Renner *v.* Columbia Bank, 2 Cranch C. C. (U. S.) 310, 20 Fed. Cas. No. 11,699.

18. England *v.* Lewis, 25 Cal. 337; State *v.* Superior Ct., 14 Wash. 365, 44 Pac. 859, holding that the rule applies to any appellant, whether he is or is not liable to pay the judgment.

What is money judgment.— A decree for a money payment, and the establishment of a lien on a petition to foreclose a mechanic's lien (Flynn *v.* Des Moines, etc., R. Co., 62 Iowa 521, 17 N. W. 769; State *v.* Cornish, 48 Nebr. 614, 67 N. W. 481; State *v.* Superior Ct., 11 Wash. 366, 39 Pac. 644); or a judgment upon scire facias *sur* mortgage (Smead *v.* Stuart, 194 Pa. St. 578, 45 Atl. 343; Koecker *v.* Fidelity Trust, etc., Co., 103 Pa. St. 331 [*distinguishing* Hosie *v.* Gray, 73 Pa. St. 502]); a judgment on a note and for foreclosure of a mortgage securing the same (State *v.* Superior Ct., 14 Wash. 365, 44 Pac. 859), is a judgment for the payment of money. But a judgment for costs (McCallion *v.* Hibernia Sav., etc., Soc., 98 Cal. 442, 33 Pac. 329; *contra*, City Bank *v.* Bangs, 4 Paige (N. Y.) 285); or a judgment for a deficiency upon confirmation of the sale of real estate under a decree foreclosing a mortgage (Kountze *v.* Erck, 45 Nebr. 288, 63 N. W. 804); or a judgment in mandamus against a city, compelling the levy of a tax (U. S. *v.* New Orleans, 8 Fed. 112 [but see Fuller *v.* Aylesworth, 75 Fed. 694, 43 U. S. App. 657, 21 C. C. A. 505]); or a decree declaring void a transfer of real estate held by a trustee, and directing a reference to ascertain the value of portions thereof sold to *bona fide* purchasers, and what sum (if any) must be paid to reimburse the trust estate (Wright *v.* Miller, 3 Barb. Ch. (N. Y.) 382), is not a judgment for the payment of money. So a decree which declares a lien in favor of a party on specific property, and requires the payment of a sum of money, is not a decree for the recovery of money, not otherwise secured within the meaning of a rule of court as to supersedeas bonds. Louisville, etc., R. Co. *v.* Pope, 74 Fed. 1, 46 U. S. App. 25, 20 C. C. A. 253.

19. Commercial Bank *v.* Foltz, 35 N. Y. App. Div. 237, 54 N. Y. Suppl. 764; New York Security, etc., Co. *v.* Saratoga Gas, etc., Co., 5 N. Y. App. Div. 535, 36 N. Y. Suppl. 486.

In Alabama, on appeal from a decree declaring a lien on lands for a specific sum, and ordering the registrar, on default of payment, to sell the land, a bond, to operate as a supersedeas, must be in such sum as will indemnify appellee from loss in the execution of the decree, if affirmed, and covering costs, unless there be separate security therefor. *Ex p.* Sibert, 67 Ala. 349 [*following* Hughes *v.* Hatchett, 55 Ala. 539].

In California, where the judgment directs a sale for the purpose of satisfying a lien other than a mortgage lien, the undertaking on appeal to stay a sale need not provide for the payment of any deficiency which the judgment may direct to be paid. Painter *v.* Painter, 98 Cal. 625, 33 Pac. 483; Englund *v.* Lewis, 25 Cal. 337. See also Root *v.* Bryant, 54 Cal. 182. The judge of the trial court has power to fix the amount of the bond on appeal from a decree of foreclosure in all three matters mentioned in the statute relating thereto — namely, waste, use and occupation, and deficiency. Boob *v.* Hall, 105 Cal. 413, 38 Pac. 977. It is not necessary that the court's order for a bond to stay proceedings on appeal from a decree of foreclosure should name the separate amounts for waste, occupation and deficiency. Wheeler *v.* Karnes, 130 Cal. 618, 63 Pac. 62. The ordinary undertaking is sufficient to supersede an appeal from a judgment foreclosing a mortgage on personal property. Snow *v.* Holmes, 64 Cal. 232, 30 Pac. 806. But see *Ex p.* Clancy, 90 Cal. 553, 27 Pac. 411.

In New York, upon an appeal in an action for the foreclosure of a mortgage, an undertaking against waste and for the value of the use and occupation of the mortgaged premises, operates as a stay of proceedings without a covenant to pay a deficiency, if the mortgagor is in possession. Werner *v.* Tuch, 119 N. Y. 632, 23 N. E. 573, 29 N. Y. St. 36; Grow *v.* Garlock, 29 Hun (N. Y.) 598. See also Quackenbush *v.* Leonard, 10 Paige (N. Y.) 131. But, if the mortgagor is not in possession, there must be a covenant to pay a deficiency. Sternbach *v.* Friedman, 29 N. Y. App. Div. 480, 51 N. Y. Suppl. 1068; New York Security, etc., Co. *v.* Saratoga Gas, etc., Co., 5 N. Y. App. Div. 535, 39 N. Y. Suppl. 486; National Sav. Bank *v.* Slade, 42 N. Y. Suppl. 455.

In Texas it has been held that an appeal bond covering costs and damages will suspend, pending appeal, the execution of a judgment ordering the sale of land, though it may fail to state the inability of appellant to execute a supersedeas bond. Ridley *v.* Henderson, 43 Tex. 135.

20. Hart *v.* Lazarus, 34 La. Ann. 1210; State *v.* Parish Judge, 30 La. Ann. 314; Malain *v.* Judge, 29 La. Ann. 793; State *v.* Judge, 28 La. Ann. 877; State *v.* Judge, 27 La. Ann. 231; Marchand *v.* Casanave, 22 La. Ann. 626; Gawtry *v.* Adams, 10 Mo. App. 29; Sea Ins. Co. *v.* Ward, 20 Wend. (N. Y.) 588.

Mandamus to fix amount.— One who has a right to file a bond staying proceedings pending an appeal may compel by mandamus the trial judge to order and fix the amount of the bond. State *v.* Sachs, 3 Wash. 96, 27 Pac.

judgment to do anything, the filing of the ordinary undertaking on appeal *ipso facto* operates as a supersedeas, staying all proceedings on the judgment.[21]

d. Approval. A bond for a supersedeas should be approved by the court when so required by statute.[22] A substantial compliance with a statutory requirement as to approval is, however, sufficient.[23]

e. Delivery and Filing. A supersedeas bond must be delivered to and filed with the clerk of the court in which the judgment is rendered.[24]

1075. See also *In re* Taber, 13 S. D. 62, 82 N. W. 398.

Second appeal on dismissal of first.— Where an appeal has been dismissed, without prejudice, because it was improperly taken, the order fixing the amount of the first undertaking for a stay of execution is *functus officio*, and, on the taking of a second appeal, it is the duty of the court to again fix the amount of the undertaking for a stay of execution. State *v.* Second Judicial Dist. Ct., 24 Mont. 566, 61 Pac. 882.

In Washington, an order of court fixing the amount of an appeal bond is only necessary in cases where a stay of proceedings is desired, and the appeal is from a final judgment, and is other than one for the recovery of money. Rockford Watch Co. *v.* Rumpf, 12 Wash. 647, 42 Pac. 213.

21. Born *v.* Horstmann, 80 Cal. 452, 22 Pac. 169, 338, 5 L. R. A. 577; State *v.* Judge, 51 La. Ann. 466, 25 So. 65; Bank of America *v.* Fortier, 27 La. Ann. 243; Blanchin *v.* Steamer Fashion, 10 La. Ann. 345; State *v.* Judge, 19 La. 167. See also Daly *v.* Ruddell, 129 Cal. 300, 61 Pac. 1080, wherein it was held that, upon appeal from a judgment in an action to determine water-rights which confer upon plaintiff the right to lay a pipe through the land of defendant, the statutory appeal bond stays proceedings in the court below upon the judgment appealed from.

In Kentucky, the statute requires an appeal bond only for the purpose of securing the amount of the judgment that is superseded. Costs in the appellate court are not secured by such bond. Allan *v.* Sudduth, 1 J. J. Marsh. (Ky.) 15.

A judgment for costs may be stayed by the ordinary undertaking on appeal. Campbell, etc., Co. *v.* Frost, 24 Misc. (N. Y.) 87, 52 N. Y. Suppl. 487.

Appeal from order granting new trial.— Where, on a verdict for defendant, he appeals from an order granting a new trial, an undertaking for damages and costs is sufficient to stay proceedings. Ford *v.* Thompson, 19 Cal. 118. See also Reitan *v.* Goebel, 35 Minn. 384, 29 N. W. 6.

22. Crowder *v.* Morgan, 72 Ala. 535; Burk *v.* Howard, 15 Ind. 219; Covington Short-Route R. Transfer Co. *v.* Piel, 9 Ky. L. Rep. 665, 6 S. W. 122; Omaha First Nat. Bank *v.* Omaha, 96 U. S. 737, 24 L. ed. 881; O'Reilly *v.* Edrington, 96 U. S. 724, 24 L. ed. 659.

See 2 Cent. Dig. tit. "Appeal and Error," § 2241.

In Kentucky, a *de facto* circuit court clerk, appealing from a judgment awarding the office to another, is the proper person to take and approve a supersedeas bond, executed by himself, to enable him to hold the office pending the appeal. Anderson *v.* Likens, 20 Ky. L. Rep. 471, 46 S. W. 512.

In Pennsylvania, a deputy prothonotary has power to take recognizance to stay proceedings. Com. *v.* Finney, 17 Serg. & R. (Pa.) 282.

Approval by person without authority.— A supersedeas bond executed in the course of a judicial proceeding is not valid, either as a statutory or common-law obligation, where the tribunal or officer who took the bond had no authority to do so. Couchman *v.* Lisle, 15 Ky. L. Rep. 543.

Effect of approval.— The approval of an appeal bond determines the question of its sufficiency as a stay of proceedings until further order of some competent court. Tampa St. R., etc., Co. *v.* Tampa Suburban R. Co., 30 Fla. 400, 11 So. 908; State *v.* Klein, 137 Mo. 673, 39 S. W. 272; State *v.* Hirzel, 137 Mo. 435, 37 S. W. 921, 38 S. W. 961; American Brewing Co. *v.* Talbot, 135 Mo. 170, 36 S. W. 657; State *v.* Dillon, 98 Mo. 90, 11 S. W. 255 [*reversing* 31 Mo. App. 535]; State *v.* Superior Ct., 3 Wash. 696, 29 Pac. 202. See also Kreling *v.* Kreling, 116 Cal. 458, 48 Pac. 383, wherein it was held that where the sureties on a bond to stay execution have justified before the county clerk upon notice, the decision of the latter in favor of the sufficiency of the sureties is conclusive, and cannot be reviewed upon a motion for a writ of supersedeas to stay the execution of the judgment and all proceedings thereon pending the appeal. To same effect see McDonald *v.* Hanlon, 71 Cal. 535, 12 Pac. 515.

23. Atchison, etc., R. Co. *v.* Martin, (N. M. 1893) 34 Pac. 536.

In Colorado, it has been held that it is not essential to the approval of a bond upon appeal from an order of court or its efficiency in operating as a stay that the amount should first have been fixed by the judge. Daniels *v.* Miller, 8 Colo. 542, 9 Pac. 18.

24. Riegel *v.* Fields, 9 Kan. App. 800, 59 Pac. 1088.

Execution on Sunday.— A supersedeas bond is not invalid because it was executed on Sunday, if it was not delivered to the one to whom it was payable until a week-day. Babcock *v.* Carter, 117 Ala. 575, 23 So. 487, 67 Am. St. Rep. 193.

Sufficiency of service.— A bond, given to stay proceedings in an action, is sufficiently served if the directions of the court in that regard are followed. Whereatt *v.* Ellis, 103 Wis. 348, 79 N. W. 416, 74 Am. St. Rep. 865. See also Rice *v.* Whitlock, 15 Abb. Pr. (N. Y.) 419, wherein it was held that an order requiring a bond to be executed by one party in an

f. Deposit in Lieu of Bond. A deposit in court of money, equal in amount to the sum prescribed for a suspensive appeal bond, stands in lieu of the bond.[25]

g. Identification of Judgment. A supersedeas bond should identify the judgment or decree appealed from.[26] But an identification, if certain, is sufficient, even though it be inartificial.[27]

h. Justification of Sureties. The sureties must justify within the time[28] and in the amount prescribed by statute.[29] A reasonable discretion should be exer-

action to another party in the action is sufficiently complied with by filing the bond, when duly made, with the clerk of the court by which the order was made.

To whom payable.— In Alabama, it has been held that a supersedeas bond made payable to the clerk of the court, instead of to the proper party, is not void, but may be enforced as a common-law obligation. Babcock *v.* Carter, 117 Ala. 575, 23 So. 487, 67 Am. St. Rep. 193.

In Virginia, it has been held that a supersedeas bond made payable to the commonwealth is sufficient. Acker *v.* Alexandria, etc., R. Co., 84 Va. 648, 5 S. E. 688.

In Wisconsin, it has been held that the statutory undertaking on appeal is not required to run to any designated payee. Northwestern Mut. L. Ins. Co. *v.* Park Hotel Co., 37 Wis. 125.

25. State *v.* Monroe, 37 La. Ann. 113.

Amount of deposit.— In New York, the deposit of a sum of money in lieu of an undertaking on appeal must, where the judgment appealed from is for a sum of money and execution is to be stayed, include security for the costs of the appeal. Pringle *v.* Leverich, 1 N. Y. Civ. Proc. 372.

Mortgage in lieu of bond.— Though appellee is not required to accept a mortgage from appellant in lieu of an undertaking on appeal, yet if appellant give, and appellee accept, such mortgage, it is valid and can be enforced. Comron *v.* Standland, 103 N. C. 207, 9 S. E. 317, 14 Am. St. Rep. 797.

26. McMichael *v.* Eckman, 26 Fla. 43, 7 So. 365; Jackson *v.* Relf, 24 Fla. 198, 4 So. 534; White *v.* Harris, 85 Tex. 42, 19 S. W. 1077; *In re* Woerishoffer, 74 Fed. 915, 21 C. C. A. 175. See also Dinkel *v.* Wehle, 61 How. Pr. (N. Y.) 159, wherein it was held that where the undertaking and notice of appeal describe the judgment appealed from as a judgment entered on March 11th, when in fact the judgment was entered on March 12th, respondent is not required to move to set aside the undertaking, but is entitled to disregard it and issue execution.

Insertion of amount of judgment.— The amount of the judgment should be inserted in the undertaking. Harris *v.* Bennett, 3 Code Rep. (N. Y.) 23.

Judgment not appealed from.— A supersedeas bond, which, by mistake of the clerk, supersedes a judgment not appealed from, should be quashed. Greene *v.* Buckler, 19 Ky. L. Rep. 286, 40 S. W. 382.

Where the bond omits the term at which the judgment was rendered the omission is not necessarily fatal, and, before dismissing a case on that account, opportunity should be given to furnish new security. New Orleans Ins. Co. *v.* E. D. Albro Co., 112 U. S. 506, 5 S. Ct. 289, 28 L. ed. 809.

27. Forbes *v.* Porter, 23 Fla. 47, 1 So. 336; Thomas *v.* Bienvenu, 35 La. Ann. 936; Prewitt *v.* Day, 86 Tex. 166, 23 S. W. 982; Herndon *v.* Bremond, 17 Tex. 432. See also Acker *v.* Alexandria, etc., R. Co., 84 Va. 648, 5 S. E. 688, wherein it was held that a bond reciting the judgment as that of "the Circuit Court of Alexandria," omitting the words "the city of," is not vitiated by such omission.

28. Manning *v.* Gould, 90 N. Y. 476 [*reversing* 47 N. Y. Super. Ct. 387]; Lewin *v.* Towbin, 51 N. Y. App. Div. 477, 64 N. Y. Suppl. 740; Hoffman *v.* Smith, 34 Hun (N. Y.) 485; Buck *v.* Buck, 11 Paige (N. Y.) 170; Carter *v.* Hodge, 6 Misc. (N. Y.) 575, 27 N. Y. Suppl. 219, 57 N. Y. St. 785; Clark's Code Civ. Proc. N. C. (1900), § 560. But see Edgerton *v.* West, 38 Fla. 338, 21 So. 278, wherein it was held that the approval of a supersedeas bond without a justification of the surety may render the clerk liable; but the mere fact of the absence of the justification is no ground for vacating the supersedeas. See also Hubbard *v.* University Bank, 120 Cal. 632, 52 Pac. 1070, wherein it was held that where the sureties on a stay-bond, after exception to their sufficiency, appeared at the proper time, and offered to justify, but, at respondent's suggestion, the matter was postponed from time to time until the proceedings to justify seemed to have been abandoned, respondent cannot thereafter complain that the sureties did not justify.

See 2 Cent. Dig. tit. "Appeal and Error," § 2242.

Stay pending justification.— An execution is stayed until the expiration of the time allowed for the justification of the sureties on the stay-bond. Wheeler *v.* Karnes, 130 Cal. 618, 63 Pac. 62. See also Laux *v.* Gildersleeve, 22 N. Y. App. Div. 98, 47 N. Y. Suppl. 770.

29. Murray *v.* Buck, 10 Wend. (N. Y.) 619.

Fractional part of bond.— A supersedeas bond executed by several sureties, each of whom obligates himself for only a fractional part of the bond, is not good. Poyntz *v.* Reynolds, 37 Fla. 533, 19 So. 649.

Sufficiency of sureties.— A man who owns land worth seventy-five thousand dollars, encumbered for thirteen thousand dollars, and other land worth twelve thousand dollars, and encumbered for three thousand dollars, is a sufficient surety for a bond for five thousand dollars. Zuckerman *v.* Hawes, 146 Ill. 59, 34 N. E. 479.

As to the sufficiency of a surety company as a surety upon an undertaking to stay execu-

cised, however, in passing upon the sufficiency of a surety. One should be required of such pecuniary ability as will, in all probability, enable respondent to collect his bond.[30] And where appellant, when called on, does not affirmatively adduce proof to show that his surety is good, but no evidence to impeach him is offered, the court cannot pronounce him to be insufficient, and order execution to issue.[31] So, the failure of a surety upon a supersedeas bond to appear and justify after notice will not disqualify him as a surety upon a new bond given upon the abandonment of the old one.[32]

i. Number of Sureties. Under a statute providing that a supersedeas bond must have two obligors, a bond with only one obligor is not sufficient.[33] So a statutory requirement that defendant "shall enter into a bond, with one or more sufficient sureties," etc., is not answered by giving a mere undertaking, executed by sureties alone.[34] The fact that some of the sureties, on a bond

tion pending an appeal see Rosenwald *v.* Phenix Ins. Co., 9 N. Y. Civ. Proc. 444.

A supersedeas bond executed by several sureties, only one of whom resides in the county in which the undertaking is required, the others being residents of a different county, should not be rejected on the ground that the resident surety lacks the necessary property qualifications, provided his co-sureties possess all the qualifications prescribed by law. State *v.* Baker, 45 Nebr. 39, 63 N. W. 139.

A non-resident who does not own sufficient property in the state to answer the amount of the supersedeas bond upon which he becomes security is not qualified. Poyntz *v.* Reynolds, 37 Fla. 533, 19 So. 649.

In California, where a corporation becomes sole surety on an appeal from a money judgment, the sufficiency of the surety may be excepted to, and it must show surplus assets equal to its undertaking. Fox *v.* Hale, etc., Silver Min. Co., 97 Cal. 353, 32 Pac. 446.

In Indian Territory, a supersedeas bond may be accepted, having as surety any surety company authorized by the attorney-general to do business under the act of congress of Aug. 13, 1894, § 7, in Indian Territory. Ranney-Alton Mercantile Co. *v.* Mineral Belt Constr. Co., (Indian Terr. 1899) 48 S. W. 1028.

30. Zuckerman *v.* Hawes, 146 Ill. 59, 34 N. E. 479.

Bond of large amount.— Where the amount of the penalty of the bond is large, more than two persons may be received as sureties; and it is not necessary that each of the sureties should justify in double the penalty of the bond, provided the amounts in which they can each severally justify are equal in the aggregate to two sureties who are worth double the penalty of the bond. Clark *v.* Clark, 7 Paige (N. Y.) 607. See also Hatch *v.* Coddington, 5 Blatchf. (U. S.) 523, 11 Fed. Cas. No. 6,205.

31. State *v.* Judge, 25 La. Ann. 616.

Waiver of exception to sureties.— An exception taken to sureties on appeal is waived by the failure of respondent to attend the officer before whom the notice of justification is given, even though the sureties also fail to attend. Ballard *v.* Ballard, 18 N. Y. 491.

32. State *v.* Superior Ct., 12 Wash. 677, 42 Pac. 123.

33. *Florida.*— Tampa Street R., etc., Co. *v.* Tampa Suburban R. Co., 30 Fla. 400, 11 So. 908.

Maryland.— Harris *v.* Regester, 70 Md. 109, 16 Atl. 386.

Michigan.— Beebe *v.* Young, 13 Mich. 221.

Mississippi.— Pfiefer, *v.* Hartman, 60 Miss. 505; Baskin *v.* May, 9 Sm. & M. (Miss.) 373.

New York.— North American Coal Co. *v.* Dyett, 4 Paige (N. Y.) 273; Van Wezel *v.* Van Wezel, 3 Paige (N. Y.) 38.

Pennsylvania.— Rheem *v.* Naugatuck Wheel Co., 33 Pa. St. 356; Henry *v.* Boyle, 1 Miles (Pa.) 386.

See 2 Cent. Dig. tit. "Appeal and Error," § 2242.

See also White *v.* Rintoul, 6 N. Y. Civ. Proc. 259, wherein it was held that a company authorized to guarantee bonds on an undertaking is not competent to guarantee an undertaking to stay proceedings pending appeal so as to be accepted in place of the two sureties required by statute. And see Driggs *v.* Ballard, 3 La. Ann. 135, wherein it was held that where a suspensive appeal is allowed to a party on his giving bond, with surety, in a certain amount, if the surety does not sign the bond, but writes on the back of it, "I am surety for the appellant for costs only on the within appeal bond, but not for the principal," the appeal will be dismissed for want of a sufficient bond.

Appellant cannot be one of the two sureties required upon an undertaking on appeal. Morss *v.* Hasbrouck, 10 Abb. N. Cas. (N. Y.) 407.

Estoppel to question.— If a party has enjoyed the benefit of a supersedeas bond, though it was executed by his attorney at law alone when the statute required it to be executed with security, in a proceeding to enforce the debt, after the appeal has been dismissed, he will be estopped from alleging that the supersedeas bond was invalid. Baltimore, etc., R. Co. *v.* Vanderwarker, 19 W. Va. 265.

34. Gregory *v.* Cameron, 7 Nebr. 414. See also Miller *v.* Blannerhassett, 5 Munf. (Va.) 197, wherein it was held that a bond for prosecuting a writ of supersedeas, executed by a surety only, without any principal obligor, is insufficient, and a supersedeas issued thereupon will be quashed. But see Florida Orange

given to stay proceedings, were on bonds twice for different sums, does not vitiate it.[35]

4. Time of Giving.[36] An undertaking to stay proceedings on an appeal must, to be effectual, be given within the time prescribed by statute.[37]

5. New or Additional Security — a. Right to Permit. If the bond originally filed is insufficient to effect a stay, or does not comply with the statute, or the condition of the sureties, or the circumstances of the case have changed, permission may be given to file new or additional security, or the court may require such security.[38] In such case the new or additional security, to avail as a stay of

Hedge Fence Co. *v.* Branham, 27 Fla. 526, 8 So. 841, wherein it was held that, where a writ of error has been obtained and a supersedeas granted, the supersedeas bond being executed by some of plaintiffs in error, as principals, and by two sureties, the supersedeas will not be vacated on the ground that some of plaintiffs in error have not joined in executing the bond. To same effect see McClellan *v.* Pyeatt, 49 Fed. 259, 4 U. S. App. 98, 1 C. C. A. 241.

In some jurisdictions it has been held that the execution of an appeal bond by the surety alone, without the principal, is sufficient. Thom *v.* Savage, 1 Blackf. (Ind.) 51; Harrison *v.* State Bank, 3 J. J. Marsh. (Ky.) 375; Anonymous, Hard. (Ky.) 149; Lindsay *v.* Price, 33 Tex. 280; Shelton *v.* Wade, 4 Tex. 148, 51 Am. Dec. 722; Keene *v.* Deardon, 8 East 298; Dixon *v.* Dixon, 2 B. & P. 443.

35. Wheeler *v.* Karnes, 130 Cal. 618, 63 Pac. 62.

36. As to time of perfecting appeal or writ of error, see *supra*, VIII, C, 2.

37. *Kentucky.*— Clinton *v.* Phillips, 7 T. B. Mon. (Ky.) 117.

Louisiana.— Philips *v.* Her Creditors, 37 La. Ann. 701; Dwight *v.* Barrow, 25 La. Ann. 424.

New York.— Niles *v.* Battershall, 18 Abb. Pr. (N. Y.) 161, 26 How. Pr. (N. Y.) 93; Smith *v.* Heermance, 18 How. Pr. (N. Y.) 261; Mills *v.* Thursby, 11 How. Pr. (N. Y.) 129.

Ohio.— Bayless *v.* Belmont Bank, 15 Ohio 606.

Pennsylvania.— Taggart *v.* Cooper, 3 Binn. (Pa.) 34.

Virginia.— Acker *v.* Alexandria, etc., R. Co., 84 Va. 648, 5 S. E. 688; Otterback *v.* Alexandria, etc., R. Co., 26 Gratt. (Va.) 940; Yarborough *v.* Deshazo, 7 Gratt. (Va.) 374.

Wisconsin.— Spaulding *v.* Milwaukee, etc., R. Co., 11 Wis. 157.

United States.— Danville *v.* Brown, 128 U. S. 503, 9 S. Ct. 149, 32 L. ed. 507; Slaughter House Cases, 10 Wall. (U. S.) 273, 19 L. ed. 915; Washington, etc., R. Co. *v.* Washington, 7 Wall. (U. S.) 575, 19 L. ed. 274; Providence Rubber Co. *v.* Goodyear, 6 Wall. (U. S.) 153, 18 L. ed. 762; Hudgins *v.* Kemp, 18 How. (U. S.) 530, 15 L. ed. 511; Adams *v.* Law, 16 How. (U. S.) 144, 14 L. ed. 880.

See 2 Cent. Dig. tit. "Appeal and Error," § 2229.

But see Patrick *v.* Laprelle, (Tex. Civ. App. 1896) 37 S. W. 872, wherein it was held, under a statute which permits an appellant to file a supersedeas bond in lieu of the bond for costs of the appeal, or in addition thereto, that, where the bond for costs is filed within the statutory time, a supersedeas bond filed afterward, but before the execution has been executed, or the transcript has been delivered, will be effectual.

Computation of time.— In Louisiana, in computing the time within which a suspensive appeal may be taken, neither the day judgment was signed, nor Sundays, nor the day the appeal was taken, is to be counted. Tupery *v.* Edmondson, 29 La. Ann. 850; State *v.* Judge, 29 La. Ann. 223; Garland *v.* Holmes, 12 Rob. (La.) 421.

Deposit in lieu of bond.—A deposit of money in court in lieu of a bond must be made within the time that the bond is required to be given. State *v.* Monroe, 37 La. Ann. 113.

Extension of time.— If appellant has not been guilty of laches in perfecting his appeal, the appellate court may enlarge the time for filing the bond, and in the meantime order a stay of proceedings for that purpose, upon proper terms. Bradley *v.* Hall, 1 Cal. 199.

Premature filing.— An undertaking, filed in the trial court to stay proceedings while the case is pending on petition in error in the supreme court, is not void because it was filed before the petition in error was filed. Stillings *v.* Porter, 22 Kan. 17; McClellan *v.* Pyeatt, 49 Fed. 259, 4 U. S. App. 98, 1 C. C. A. 241. See also Chateaugay Ore, etc., Co. *v.* Blake, 35 Fed. 804, wherein it was held that a supersedeas bond executed before the judgment was in fact rendered, but not delivered until after its entry, is valid. *Compare* Anderson *v.* Likens, 20 Ky. L. Rep. 471, 46 S. W. 512.

38. *Florida.*— Florida Orange Hedge Fence Co. *v.* Branham, 32 Fla. 289, 13 So. 281.

Indiana.— Ruschaupt *v.* Carpenter, 63 Ind. 359.

Kentucky.— Marders *v.* Jones, 8 Ky. L. Rep. 524; Lynch *v.* Bullet, Hard. (Ky.) 314; Ross *v.* Wilson, 7 Bush (Ky.) 29.

Michigan.— People *v.* Judge, 33 Mich. 111.

Mississippi.— Baskin *v.* May, 9 Sm. & M. (Miss.) 373.

Missouri.— American Brewing Co. *v.* Talbot, 135 Mo. 170, 36 S. W. 657, 125 Mo. 388, 28 S. W. 585.

Nebraska.— Kountze *v.* Erck, 45 Nebr. 288, 63 N. W. 804; Tulleys *v.* Keller, 42 Nebr. 788, 60 N. W. 1015; State *v.* Thiele, 19 Nebr. 220, 27 N. W. 109.

New York.— Beeman *v.* Banta, 113 N. Y. 615, 20 N. E. 568, 21 N. Y. St. 932; Sternhaus *v.* Schmidt, 5 Abb. Pr. (N. Y.) 66; Katz *v.* Kuhn, 9 Daly (N. Y.) 172; Ritter *v.* Krekeler, 44 How. Pr. (N. Y.) 445; Clark *v.* Clark, 7 Paige (N. Y.) 607.

proceedings in the court below, must be filed within the time prescribed by the court.[39]

b. Court Which May Permit. After the jurisdiction of the appellate court over an appeal or writ of error has attached, power to permit new or additional security to be filed exists only in the appellate court.[40]

6. Waiver of Objections. Where it is obvious that an undertaking was intended as a stay of proceedings and is defective only in some slight particular, an omission to object to it, or to disregard it until after judgment in the appellate court, is tantamount to an acceptance of it as a stay of proceedings.[41]

Oklahoma.— Deming Invest. Co. *v.* Fariss, (Okla. 1897) 50 Pac. 130.

Pennsylvania.— Haines *v.* Levin, 51 Pa. St. 412.

Virginia.— Acker *v.* Alexandria, etc., R. Co., 84 Va. 648, 5 S. E. 688.

Wisconsin.— Lee *v.* Lord, 75 Wis. 35, 43 N. W. 799, 44 N. W. 771.

United States.— Mexican Nat. Constr. Co. *v.* Reusens, 118 U. S. 49, 6 S. Ct. 945, 30 L. ed. 77; Harwood *v.* Dickerhoff, 117 U. S. 200, 6 S. Ct. 669, 29 L. ed. 887; New Orleans Ins. Co. *v.* E. D. Albro Co., 112 U. S. 506, 5 S. Ct. 289, 28 L. ed. 809; Williams *v.* Claflin, 103 U. S. 753, 26 L. ed. 606; Seward *v.* Comeau, 102 U. S. 161, 26 L. ed. 86; Florida Cent. R. Co. *v.* Schulte, 100 U. S. 644, 25 L. ed. 605; Martin *v.* Hazard Powder Co., 93 U. S. 302, 23 L. ed. 885.

See 2 Cent. Dig. tit. "Appeal and Error," § 2244.

The accidental omission of a bond to continue a temporary restraining order to state the penal sum may be cured on motion in the appellate court. Tenney *v.* Madison, 99 Wis. 539, 75 N. W. 979.

Failure of sureties to justify.— If appellant has been unable to secure a stay by reason of the failure of his sureties to justify, the appellate court has authority to permit such undertaking to be filed after an appeal has been taken. Tompkins *v.* Montgomery, 116 Cal. 120, 47 Pac. 1006; Hill *v.* Finnigan, 54 Cal. 311; Willoughby *v.* Comstock, 1 How. Pr. (N. Y.) 177. But leave to file a stay-bond in the supreme court will not be granted where the only excuse of appellant for failure of the sureties on his original stay-bond to justify was that they were out of the county on the day set for justification, without a showing that they were notified to appear for justification, or that their absence was without appellant's consent, or that an attempt was made to secure other sureties. Williams *v.* Borgwardt, 115 Cal. 617, 47 Pac. 594.

Form of notice of motion to require additional security on appeal is set out in Chase *v.* Miller, 88 Va. 791, 14 S. E. 545.

Form of order for additional security on appeal is set out in Rose *v.* Burr, 43 Nebr. 358, 61 N. W. 593; Collins *v.* Ball, 31 Hun (N. Y.) 187.

39. Florida Orange Hedge Fence Co. *v.* Branham, 32 Fla. 289, 13 So. 281; Chamberlain *v.* Dempsey, 22 How. Pr. (N. Y.) 356. But see Lee *v.* Lord, 75 Wis. 35, 43 N. W. 799, 44 N. W. 771, wherein it was held that where an appellant is permitted to file, in the appellate court and within thirty days, a new undertaking to stay execution, but fails to do so until the expiration of forty-five days, and such delay is satisfactorily excused, the appellate court may, in its discretion, extend the time for filing.

Stay pending the filing of new bond.— Where the appellate court orders an appeal dismissed, unless within a certain time a new undertaking is filed in place of a defective original one, the order operates as a stay during the time prescribed. Katz *v.* Kuhn, 9 Daly (N. Y.) 172. But see Lee Chuck *v.* Quan Wo Chong Co., 81 Cal. 222, 22 Pac. 594, 15 Am. St. Rep. 50.

40. *California.*— Hubbard *v.* University Bank, 120 Cal. 632, 52 Pac. 1070; Mansfield *v.* Stern, (Cal. 1884) 4 Pac. 777; Hill *v.* Finnigan, 54 Cal. 493.

District of Columbia.— Bradley *v.* Galt, 7 Mackey (D. C.) 614.

Indiana.— Ruschaupt *v.* Carpenter, 63 Ind. 359.

Kentucky.— Lynch *v.* Bullet, Hard. (Ky.) 314.

Michigan.— People *v.* Judge, 33 Mich. 111.

Missouri.— American Brewing Co. *v.* Talbot, 125 Mo. 388, 28 S. W. 585.

Nebraska.— Kountze *v.* Erck, 45 Nebr. 288, 63 N. W. 804.

New York.— Beeman *v.* Banta, 113 N. Y. 615, 20 N. E. 568, 21 N. Y. St. 932.

United States.— Mexican Nat. Constr. Co. *v.* Reusens, 118 U. S. 49, 6 S. Ct. 945, 30 L. ed. 77; Harwood *v.* Dickerhoff, 117 U. S. 200, 6 S. Ct. 669, 29 L. ed. 887; Keyser *v.* Farr, 105 U. S. 265, 26 L. ed. 1025; Williams *v.* Claflin, 103 U. S. 753, 26 L. ed. 606; Seward *v.* Comeau, 102 U. S. 161, 26 L. ed. 86; Draper *v.* Davis, 102 U. S. 370, 26 L. ed. 121; Martin *v.* Hazard Powder Co., 93 U. S. 302, 23 L. ed. 885; Jerome *v.* McCarter, 21 Wall. (U. S.) 17, 22 L. ed. 515; French *v.* Shoemaker, 12 Wall. (U. S.) 86, 20 L. ed. 270; Providence Rubber Co. *v.* Goodyear, 6 Wall. (U. S.) 153, 18 L. ed. 762.

Power of judge in chambers.— After a writ of error has been granted to bring a judgment of a federal circuit court to the United States supreme court for review, and the required security given to cause a stay of the proceedings, a justice of the supreme court in chambers has no power to order an increase of the amount of such security. Butchers' Assoc. *v.* Slaughter House Co., 1 Woods (U. S.) 50, 4 Fed. Cas. No. 2,234.

41. Halsey *v.* Flint, 15 Abb. Pr. (N. Y.) 367.

I. Modification or Vacation — 1. Power to Modify or Vacate. An order granting a supersedeas or stay of proceedings may be modified, or vacated and set aside.[42]

2. Grounds — a. For Modification. An order granting a stay, which order is too broad in its scope, may be corrected.[43]

b. For Vacation — (1) *In General.* A supersedeas may be set aside and vacated upon a showing that it has been improperly issued,[44] or has been obtained by fraud.[45]

42. *Arkansas.*— Farrelly *v.* Cross, 10 Ark. 197.

Florida.— Warner *v.* Watson, 27 Fla. 518, 8 So. 842.

Kentucky.— Tracy *v.* Elizabethtown, etc., R. Co., 3 Ky. L. Rep. 813.

Louisiana.— State *v.* Judge, 32 La. Ann. 814; Mathison *v.* Field, 3 Rob. (La.) 42.

Missouri.— American Brewing Co. *v.* Talbot, 135 Mo. 170, 36 S. W. 657.

New York.— Kager *v.* Brenneman, 52 N. Y. App. Div. 446, 65 N. Y. Suppl. 129; Willoughby *v.* Comstock, 7 Hill (N. Y.) 162.

United States.— Florida Cent. R. Co. *v.* Schulte, 100 U. S. 644, 25 L. ed. 605; Hudgins *v.* Kemp, 18 How. (U. S.) 530, 15 L. ed. 511.

Canada.— Wintemute *v.* Brotherhood of Railway Trainmen, 19 Ont. Pr. 6.

See 2 Cent. Dig. tit. "Appeal and Error," § 2260.

43. Kager *v.* Brenneman, 52 N. Y. App. Div. 446, 65 N. Y. Suppl. 129, wherein it was held that an order granting a stay, pending appeal from an order commanding the execution of a deed to lands, which order does not limit the duration of the stay, or provide for the contingency of an affirmance of the judgment, or a failure to perfect the appeal, is too broad, and will be corrected on application. See also Sweeney *v.* Coulter, (Ky. 1900) 57 S. W. 470, wherein it was held that where a judgment in favor of appellees, for the possession of state offices awarded to them by the state board of contest, has been superseded, the court of appeals will, on motion of the attorney-general, on behalf of the state, modify the supersedeas bond and discharge the supersedeas to the extent that they prevent appellees from taking possession of the public buildings, public records, and other public property pertaining to the offices in dispute, and interfere with their right to fully perform the public business, which will leave the bond and supersedeas in force to the extent of preserving all rights to which appellants are, or may be, entitled.

Appeal bond operating as supersedeas.— An order staying proceedings upon an appeal will not be modified where the appeal bond operates *ipso facto* as a supersedeas. Born *v.* Horstmann, 80 Cal. 452, 22 Pac. 169, 338, 5 L. R. A. 577.

44. *Arkansas.*— Farrelly *v.* Cross, 10 Ark. 197.

Florida.— Stockton *v.* Harmon, 32 Fla. 312, 13 So. 833; Hardee *v.* Hutchinson, 31 Fla. 392, 12 So. 212.

Kentucky.— Tracy *v.* Elizabethtown, etc., R. Co., 3 Ky. L. Rep. 813.

Louisiana.— State *v.* Judge, 32 La. Ann. 814.

Oklahoma.— *In re* Epley, (Okla. 1901) 64 Pac. 18.

United States.— Florida Cent. R. Co. *v.* Schulte, 100 U. S. 644, 25 L. ed. 605; Hudgins *v.* Kemp, 18 How. (U. S.) 530, 15 L. ed. 511.

Canada.— McMaster *v.* Radford, 16 Ont. Pr. 20.

See 2 Cent. Dig. tit. "Appeal and Error," § 2261.

In Florida, it has been held that a supersedeas, granted on an order dissolving a temporary injunction, will not be vacated on appeal where it appears that the damages which may result to appellee by reason of the granting thereof are such as can be compensated for in money. Tampa St. R., etc., Co. *v.* Tampa Suburban R. Co., 30 Fla. 400, 11 So. 908; Williams *v.* Hilton, 25 Fla. 608, 6 So. 452.

In Mississippi, it has been held that the statute (Miss. Code (1880), § 1421), allowing a motion to discharge a supersedeas in any appeal, applies only to cases where a supersedeas should not have been permitted. Alabama, etc., R. Co. *v.* Bolding, 69 Miss. 264, 13 So. 846.

Failure to pay sheriff's fees.— Where defendant in judgment, after the levy of an execution issued thereunder on his property, has taken an appeal and given a supersedeas bond, as provided by statute, the supersedeas will not be quashed on motion of the sheriff, for failure to pay to the latter a bill of one per cent. from the amount of the judgment, as allowed by statute, when sale after levy is stayed by a restraining order, as the right to appeal from and supersede a judgment is dependent upon the execution of the bond only, and not upon the payment of the sheriff's costs. Burns *v.* Tennessee, etc., R. Co., 112 Ala. 498, 20 So. 501.

Vacation unnecessary.— A motion to vacate a supersedeas, or for an order declaring that the appeal bond filed in the case does not operate as a supersedeas, will be denied as unnecessary where the writ of error was not sued out or served within the time required by the statute in order that the bond operate as a supersedeas. Western Air Line Constr. Co. *v.* McGillis, 127 U. S. 776, 8 S. Ct. 1390, 32 L. ed. 324.

45. Florida Cent. R. Co. *v.* Schulte, 100 U. S. 644, 25 L. ed. 605, wherein it was held that an appellate court will vacate a supersedeas where the approval of the supersedeas bond, by the justice of the appellate court who allowed the appeal, was obtained by fraud.

(II) *Insufficiency of Bond.* An order directing a stay may be vacated for insufficiency of the stay bond.[46]

3. Application — a. Manner of Application. An application to modify or vacate a supersedeas may be made by motion.[47]

b. To What Court Made. If the jurisdiction of the appellate court over the appeal or writ of error has attached, an application for the discharge or vacation of a supersedeas should be addressed to it.[48]

c. Matters Determinable. On an application to discharge a supersedeas, argument cannot be addressed to the merits of the judgment or decree appealed from.[49]

46. *Florida.*— Hays *v.* Todd, 26 Fla. 214, 7 So. 851.

Kentucky.— Lynch *v.* Bullet, Hard. (Ky.) 314; Marders *v.* Jones, 8 Ky. L. Rep. 524.

Louisiana.—*Ex p.* Barrett, 4 La. Ann. 236; State *v.* Buchanan, 13 La. 574.

New York.— Parfitt *v.* Warner, 13 Abb. Pr. (N. Y.) 471; Willoughby *v.* Comstock, 7 Hill (N. Y.) 162.

North Carolina.—See Alderman *v.* Rivenbark, 96 N. C. 134, 1 S. E. 644.

Pennsylvania.— Haines *v.* Levin, 51 Pa. St. 412; Greenough *v.* Kase, 6 Wkly. Notes Cas. (Pa.) 254.

Texas.— Dawson *v.* Hardy, 33 Tex. 198.

See 2 Cent. Dig. tit. "Appeal and Error," § 2262.

As to filing new bond on insufficiency of first bond see *supra*, VIII, H, 5.

Showing as to insufficiency.— Where the evidence adduced by a defendant in error, on a motion to vacate a supersedeas, raises serious doubts as to the sufficiency of the sureties, and no evidence is offered by plaintiff in error to meet such proof, the supersedeas will be vacated. Hays *v.* Todd, 26 Fla. 214, 7 So. 851.

47. *Florida.*— Hardee *v.* Hutchinson, 31 Fla. 392, 12 So. 212; Hays *v.* Todd, 26 Fla. 214, 7 So. 851.

Mississippi.— Alabama, etc., R. Co. *v.* Bolding, 69 Miss. 264, 13 So. 846.

New York.— Parfitt *v.* Warner, 13 Abb. Pr. (N. Y.) 471.

Tennessee.— Richmond *v.* Yates, 3 Baxt. (Tenn.) 204.

United States.— Hudgins *v.* Kemp, 18 How. (U. S.) 530, 15 L. ed. 511.

Motion to dismiss appeal.— The propriety of an order granting a supersedeas cannot be considered on a motion to dismiss the appeal. Hudgins *v.* Kemp, 18 How. (U. S.) 530, 15 L. ed. 511.

Statement of facts.— A motion to vacate a supersedeas made before the record is printed must be accompanied by a statement of the facts on which it rests, agreed to by the parties, or supported by printed copies of so much of the record as will enable the appellate court to act understandingly without reference to the transcript on file. Power *v.* Baker, 112 U. S. 710, 5 S. Ct. 361, 28 L. ed. 825.

Sufficiency of showing.— A motion to discharge a supersedeas suspending an interlocutory decree for the appointment of a receiver to take possession of and rent out land will not be granted if the proper parties in interest are not properly before the court, and if the proof of such parties has not been taken, and the cause is not ready for hearing. Richmond *v.* Yates, 3 Baxt. (Tenn.) 204.

48. Continental Nat. Bldg., etc., Assoc. *v.* Scott, 41 Fla. 421, 26 So. 726; Bates *v.* Stanley, 51 Nebr. 252, 70 N. W. 972. See also Stateler *v.* Superior Ct., 107 Cal. 536, 40 Pac. 949, wherein it was held that the trial court cannot, after appeal from an order adjudging a debtor insolvent, and staying proceedings against him, modify such order. But see Ferguson *v.* Dent, 29 Fed. 1, wherein it was held that though a trial court may not have the power to permit an amendment of the supersedeas bond pending appeal, yet, in the exercise of its jurisdiction to determine whether it will grant an application to execute the decree because of a defective bond which cannot operate as a supersedeas, it may withhold execution until the supreme court can act in the matter, and should do so if there be equitable considerations of mistake which would induce a court of equity to reform the bond on a bill for that purpose.

In chambers.— The supreme court will not, while sitting at chambers, hear a motion to discharge or set aside a supersedeas, unless it be by the consent of both parties to the cause in which it was granted. Northern Indiana R. Co. *v.* Michigan Cent. R. Co., 2 Ind. 670.

Insufficiency of bond.— In *Ex p.* Renfro, 8 Ala. 490, it was held that the appellate court cannot set aside a supersedeas which has been issued upon the suing out of a writ of error and executing a bond, on the ground of defects in the bond. In such case the appropriate remedy should be sought in the primary court.

Stay granted by other court.— The supreme court, upon the dismissal of an insolvent's petition, has no power to dissolve an order of the court of common pleas staying an execution of that court against the insolvent until further orders. Matter of Allen, 5 R. I. 384.

49. Ryerson *v.* Boorman, 7 N. J. Eq. 640; Riggs *v.* Murray, 3 Johns. Ch. (N. Y.) 160; Pim *v.* Nicholson, 6 Ohio St. 176; Warren *v.* Smith, 7 Lea (Tenn.) 75, wherein it was held that a motion will not lie to discharge a supersedeas, superseding the execution of a judgment brought up by a writ of error, where the only ground for the motion is that the judgment below was correct.

J. Scope and Effect — 1. In General. The effect of a supersedeas is to preserve the *status in quo* pending the determination of the appeal.[50] It suspends further proceedings on the judgment or decree appealed from;[51] but does not reverse or undo what has already been done.[52] It has also been held that the

50. *California.*— Dulin *v.* Pacific Wood, etc., Co., 98 Cal. 304, 33 Pac. 123.

Illinois.— Harris *v.* People, 66 Ill. App. 306.

Iowa.— Lindsay *v.* Clayton Dist. Ct., 75 Iowa 509, 39 N. W. 817.

New York.— Graves *v.* Maguire, 6 Paige (N. Y.) 379.

Pennsylvania.—New Brighton, etc., R. Co.'s Appeal, 105 Pa. St. 13, wherein it was held that, notwithstanding an appeal which operates as a supersedeas, the court below, as well as the appellate court, may so control the actions of the parties as to preserve the *status in quo*, and may enforce its orders by attachment, if necessary.

Virginia.— Martin *v.* South Salem Land Co., 94 Va. 28, 26 S. E. 591; Bristow *v.* Home Bldg. Co., 91 Va. 18, 20 S. E. 946, 947.

United States.— Thornhill *v.* Louisiana Bank, 23 Fed. Cas. No. 13,991, 1 Am. L. T. Rep. Bankr. 287, 4 Am. L. T. Rep. U. S. Cts. 245, 5 Nat. Bankr. Reg. 377.

Divestiture of jurisdiction.— The issuance of a writ of error and supersedeas, to stay proceedings until the case can be heard in the appellate court, has not the effect to divest the trial court of jurisdiction either of the case or of the parties. *Ex p.* Caldwell, 5 Ark. 390; Briggs *v.* Shea, 48 Minn. 218, 50 N. W. 1037; State *v.* Young, 44 Minn. 76, 46 N. W. 204.

51. *Arkansas.*— Harrison *v.* Trader, 29 Ark. 85.

California.— Hoppe *v.* Hoppe, 99 Cal. 536, 34 Pac. 222; Ewing *v.* Jacobs, 49 Cal. 72. See also Romine *v.* Cralle, 83 Cal. 432, 23 Pac. 525.

Colorado.— Hurd *v.* People, 14 Colo. 207, 23 Pac. 342.

Delaware.— Pettyjohn *v.* Bloxom, 1 Houst. (Del.) 594.

Florida.— Bacon *v.* Green, 36 Fla. 313, 18 So. 866.

Illinois.—Rock Island Nat. Bank *v.* Thompson, 173 Ill. 593, 50 N. E. 1089, 64 Am. St. Rep. 137; Smith *v.* Chytraus, 152 Ill. 664, 38 N. E. 911; Harris *v.* People, 66 Ill. App. 306.

Indiana.— Line *v.* State, 131 Ind. 468, 30 N. E. 703; State *v.* Krug, 94 Ind. 366.

Iowa.— Danforth *v.* Carter, 4 Iowa 230.

Kansas.— Heizer *v.* Pawsey, 47 Kan. 33, 27 Pac. 125; Central Branch Union Pac. R. Co. *v.* Andrews, 34 Kan. 563, 9 Pac. 213.

Kentucky.— Johnson *v.* Williams, 82 Ky. 45; Drake *v.* Simonin, 5 Ky. L. Rep. 225; Runyon *v.* Bennett, 4 Dana (Ky.) 598, 29 Am. Dec. 431.

Maryland.— Everett *v.* State, 28 Md. 190; Blondheim *v.* Moore, 11 Md. 365; State *v.* Page, 1 Harr. & J. (Md.) 475.

Massachusetts.— Gassett *v.* Cottle, 10 Gray (Mass.) 375.

Michigan.— Beal *v.* Chase, 31 Mich. 490.

Minnesota.— St. Paul, etc., R. Co. *v.* Hinckley, 53 Minn. 102, 54 N. W. 940; Briggs *v.* Shea, 48 Minn. 218, 50 N. W. 1037.

Missouri.— State *v.* Wood, 142 Mo. 127, 44 S. W. 225; Burgess *v.* Hitt, 21 Mo. App. 313.

Nebraska.— State Bank *v.* Green, 8 Nebr. 297, 1 N. W. 210.

New Jersey.— National Union Bank *v.* Dodge, 42 N. J. L. 316; Pennsylvania R. Co. *v.* National Docks, etc., R. Co., 54 N. J. Eq. 647, 35 Atl. 433.

New York.— Britton *v.* Phillips, 16 Abb. Pr. (N. Y.) 33; Mackellar *v.* Farrell, 57 N. Y. Super. Ct. 398, 8 N. Y. Suppl. 307, 29 N. Y. St. 350; Swan *v.* Mutual Reserve Fund L. Assoc., 50 N. Y. Suppl. 46.

Ohio.— Bassett *v.* Daniels, 10 Ohio St. 617.

Oklahoma.— Annis *v.* Bell, (Okla. 1901) 64 Pac. 11; *In re* Epley, (Okla. 1901) 64 Pac. 18.

Tennessee.—Rocco *v.* Parczyk, 9 Lea (Tenn.) 328; McCamy *v.* Lawson, 3 Head (Tenn.) 256.

Texas.— Burns *v.* Ledbetter, 54 Tex. 374; Stone *v.* Spillman, 16 Tex. 432.

Washington.— Fawcett *v.* Superior Ct., 15 Wash. 342, 46 Pac. 389, 55 Am. St. Rep. 894.

Wisconsin.— Treat *v.* Hiles, 77 Wis. 475, 46 N. W. 810; Ela *v.* Welch, 9 Wis. 395.

United States.— Natal *v.* Louisiana, 123 U. S. 516, 8 S. Ct. 253, 31 L. ed. 233; *Ex p.* French, 100 U. S. 1, 25 L. ed. 529; Slaughter House Cases, 10 Wall. (U. S.) 273, 19 L. ed. 915.

Canada.— O'Donohoe *v.* Robinson, 10 Ont. App. 622.

See 2 Cent. Dig. tit. "Appeal and Error," § 2268.

Offset of judgment.— A stay of execution upon a judgment is a protection against the collection of any part of it by legal process, and hence another judgment cannot be offset against it during such stay. Treat *v.* Hiles, 77 Wis. 475, 46 N. W. 810.

52. *California.*— Ewing *v.* Jacobs, 49 Cal. 72.

Iowa.— Hyatt *v.* Clever, 104 Iowa 338, 73 N. W. 831.

Minnesota.— Woolfolk *v.* Bruns, 45 Minn. 96, 47 N. W. 460; Robertson *v.* Davidson, 14 Minn. 554.

New York.— Matter of Berry, 26 Barb. (N. Y.) 55; Stricker *v.* Wakeman, 13 Abb. Pr. (N. Y.) 85; Rathbone *v.* Morris, 9 Abb. Pr. (N. Y.) 213; Kinnie *v.* Whitford, 17 Johns. (N. Y.) 34; Burr *v.* Burr, 10 Paige (N. Y.) 166.

Ohio.— Arnold *v.* Fuller, 1 Ohio 458.

Tennessee.—Rocco *v.* Parczyk, 9 Lea (Tenn.) 328; McCamy *v.* Lawson, 3 Head (Tenn.) 256.

Wisconsin.— Tilley *v.* Washburn, 91 Wis. 105, 64 N. W. 312.

judgment or decree is not vacated or annulled, nor is its validity or effect impaired thereby.[53]

2. Commencement and Continuance. A supersedeas operates from the time of the completion of those acts which are requisite to call it into existence;[54] and stays proceedings only while the cause is pending and undetermined in the appellate court.[55]

United States.— Boise County *v.* Gorman, 19 Wall. (U. S.) 661, 22 L. ed. 226.

As to discharge of previous levy see *infra*, VIII, J, 5, e.

53. *Arkansas.*— Clay *v.* Notrebe, 11 Ark. 631.

Illinois.—Shirk *v.* Metropolitan, etc., Gravel Road Co., 110 Ill. 661; Oakes *v.* Williams, 107 Ill. 154.

Kentucky.— Runyon *v.* Bennett, 4 Dana (Ky.) 598, 29 Am. Dec. 431.

Missouri.— Burgess *v.* Hitt, 21 Mo. App. 313; Merchants' Mut. Ins. Co. *v.* Hill, 17 Mo. App. 590.

New York.— Sixth Ave. R. Co. *v.* Gilbert El. R. Co., 71 N. Y. 430.

Tennessee.— McMinnville, etc., R. Co. *v.* Huggins, 7 Coldw. (Tenn.) 217.

Washington.— Fawcett *v.* Superior Ct., 15 Wash. 342, 46 Pac. 389, 55 Am. St. Rep. 894.

Disbarment of attorney.—In Walls *v.* Palmer, 64 Ind. 493, 496, a judgment had been rendered, suspending the petitioner from practising as an attorney, and it was urged that an appeal therefrom had the effect of restoring him to his right to practise during the pendency of the appeal. The court, however, held that to give that effect to the appeal would be to reverse the judgment of the suspension before the appeal was judicially decided, saying: "The effect of the appeal and supersedeas is to stay the judgment of suspension as it is, and prevent further proceedings against the petitioner. It does not reverse, suspend, or supersede the force of the judgment." See also Tyler *v.* Presley, 72 Cal. 290, 13 Pac. 856; Heffren *v.* Jayne, 39 Ind. 463, 13 Am. Rep. 281. *Compare* Bird *v.* Gilbert, 40 Kan. 469, 19 Pac. 924.

54. State Bank *v.* Vanmeter, 10 B. Mon. (Ky.) 66; Runyon *v.* Bennett, 4 Dana (Ky.) 598, 29 Am. Dec. 431 (wherein it was held that a supersedeas takes effect, not at the moment when it is issued, but when the certificate is filed in the office of the clerk below, or when notice of it is given to the officer or party to be restrained by it); Freeman *v.* Patton, 1 J. J. Marsh. (Ky.) 193; Arnold *v.* Fuller, 1 Ohio 458; Foster *v.* Kansas, 112 U. S. 201, 5 S. Ct. 8, 97, 28 L. ed. 629; Hovey *v.* McDonald, 109 U. S. 150, 3 S. Ct. 136, 27 L. ed. 888; Kitchen *v.* Randolph, 93 U. S. 86, 23 L. ed. 810; Boise County *v.* Gorman, 19 Wall. (U. S.) 661, 22 L. ed. 226.

But see Thompson *v.* Blanchard, 2 N. Y. 561, wherein it was held that an appeal, properly taken and with the proper security, stays proceedings on the judgment or order appealed from, though the time for excepting to the sureties has not expired.

See 2 Cent. Dig. tit. "Appeal and Error," § 2266.

55. Stewart *v.* Preston, 1 Fla. 1; Jackson *v.* Varick, 7 Cow. (N. Y.) 412. See also Petrie *v.* Fitzgerald, 2 Abb. Pr. N. S. (N. Y.) 354, wherein it was held that an order, staying proceedings until the hearing and decision of an appeal, does not extend the time to answer beyond the time of the decision of the appeal.

In Arkansas it has been held that a judgment stayed by a recognizance remains superseded until the supersedeas is discharged by some action of the appellate court. Clay *v.* Notrebe, 11 Ark. 631.

Appeal to intermediate appellate court.— Where an appeal is taken from a decree of the trial court to an intermediate appellate court, and the order fixing the amount of the appeal-bond provides that the decree be stayed "during the pendency of this appeal," and the decree is affirmed in the intermediate appellate court, and an appeal is taken to the supreme court, the staying order is not in force pending the appeal to the supreme court. Allegretti *v.* Allegretti Chocolate Cream Co., 85 Ill. App. 416 [*disapproving* Russell *v.* O'Dowd, 48 Ga. 474]. See also Slaughter House Cases, 10 Wall. (U. S.) 273, 19 L. ed. 915, wherein it was held that a supersedeas from the supreme court of the United States to the supreme court of a state, in a case taken to the former court by writ of error to the trial court, does not operate upon the trial court, but only upon the supreme court of the state.

Failure to prosecute appeal.— If defendant in the judgment takes an appeal and does not prosecute it at the term of the appellate court prescribed by statute, the supersedeas is at an end, and plaintiff may sue out his execution. Shapard *v.* Bailleul. 3 Tex. 26. See also Newcomb *v.* Drummond. 4 Leigh (Va.) 57; Roberts *v.* Landrum, 3 Tex. 16. But see Campbell *v.* Howard, 5 Mass. 376, wherein it was held that a judgment is not enforceable after a valid appeal has been taken, though appellant has not prosecuted such appeal. If appellant neglects to docket transcript in the appellate court at prop r time, the trial court may adjudge appeal abandoned and proceed. Avery *v.* Pritchard, 93 N. C. 266; Cline *v.* Bryson City Mfg. Co., 116 N. C. 837, 21 S. E. 791.

Filing of mandate of affirmance.— After a writ of error is made a supersedeas, plaintiff cannot take out an execution until the mandate of the supreme court is filed in the clerk's office after the affirmance of the judgment. Rock Island Nat. Bank *v.* Thompson, 173 Ill. 593, 50 N. E. 1089, 64 Am. St. Rep. 137.

Limitation of time.— An order, made in vacation by a judge of the supreme court, staying execution until the next term of the court, ceases to operate when the court adjourns at

3. On Non-Appealing Defendants. An appeal, with an undertaking, to stay execution by one of several defendants will not prevent the enforcement of the judgment against the non-appealing defendants.[56] It has, however, been held that where, on appeal, the trial is *de novo*, an appeal by any party against whom the judgment was rendered annuls the judgment and divests it of all power to support an execution.[57]

4. On Removal of Cause to Federal Court. On appeal to the supreme court of the United States, in an action removed from a state court to a federal court, a supersedeas will be limited to the effect of a supersedeas in case of an appeal to the supreme court of the state.[58]

5. Proceedings Affected — a. In General. A stay extends only to proceedings touching the enforcement or carrying into effect the judgment or decree appealed from.[59] It does not discharge interlocutory orders made for the preservation of

the next term, unless a further order is made continuing the stay. Pim *v.* Nicholson, 6 Ohio St. 176.

56. Prueitt *v.* Cheltenham Quarry Co., 32 Mo. App. 384; State *v.* Finn, 19 Mo. App. 557 [*distinguishing* Welch *v.* Eyermann, 7 Mo. App. 588]; Commercial Tel. Co. *v.* Smith, 19 N. Y. Civ. Proc. 32, 10 N. Y. Suppl. 433, 32 N. Y. St. 445; Rollins *v.* Love, 97 N. C. 210, 2 S. E. 166; Friberg *v.* Embree, 1 Tex. App. Civ. Cas. § 1095.

Severance in appellate court.— On a judgment against several, and appeal by one, execution against the others cannot issue before a judgment of severance has been issued by the appellate court. Cumberland Coal, etc., Co. *v.* Jeffries, 27 Md. 526.

57. Moore *v.* Jordan, 65 Tex. 395.

In Georgia, by statute, where a joint judgment is rendered against two or more defendants, an appeal by one of them suspends the entire case, and, pending it, execution cannot be issued against the others. Lewis *v.* Armstrong, 69 Ga. 752. See also Allison *v.* Chaffin, 8 Ga. 330.

Appeal from award of arbitrators.— On an appeal by one of two defendants from an award against both, a fieri facias should not issue against him who does not appeal until the appeal of the other is determined. Sterrett *v.* Ramsay, 2 Watts (Pa.) 91.

Judgment against firm.— Where defendants are sued as a firm, and judgment is rendered against the firm and its members as such *in solido*, a suspensive appeal by the firm, with bond in its name, suspends execution of the judgment as to the firm and its individual members. Marshal *v.* Sims, McGloin (La.) 223.

58. East Tennessee, etc., R. Co. *v.* Southern Tel. Co., 112 U. S. 306, 5 S. Ct. 168, 28 L. ed. 746.

Proceedings for removal.— A writ of error issued out of the supreme court of the United States, directed to a circuit court of the United States, upon proceedings there for the removal of a cause to such circuit court, will not operate as a stay of proceedings in the original suit in the state court. National Union Bank *v.* Dodge, 42 N. J. L. 316.

59 *Alabama.*— Espy *v.* Balkum, 45 Ala. 256 (wherein it was held that an appeal bond given on an appeal from an order of costs on a refusal to grant a new trial does not supersede the original judgment, but only the one appealed from); Boren *v.* Chisholm, 3 Ala. 513.

California.— Stewart *v.* Superior Ct., 100 Cal. 543, 35 Pac. 156, 563.

Colorado.— Hurd *v.* People, 14 Colo. 207, 23 Pac. 342.

Florida.— State *v.* Jacksonville, etc., R. Co., 15 Fla. 201.

Louisiana.— Carman *v.* Anderson, 15 La. 135.

New York.— Ireland *v.* Nichols, 9 Abb. Pr. N. S. (N. Y.) 71. See also Johnson *v.* Scriver, 3 Abb. Pr. (N. Y.) 208; Mackellar *v.* Farrell, 57 N. Y. Super. Ct. 398, 8 N. Y. Suppl. 307, 29 N. Y. St. 350.

Virginia.— Bristow *v.* Home Bldg. Co., 91 Va. 18, 20 S. E. 946.

United States.— Grant *v.* Phœnix Mut. L. Ins. Co., 121 U. S. 118, 7 S. Ct. 849, 30 L. ed. 909; U. S. *v.* Knox County, 39 Fed. 757.

Canada.— Robinson *v.* Gordon, 24 U. C. Q. B. 285.

Demand not decided by decree.— A stay of proceedings does not prevent the party who was successful below from prosecuting, in the same or any other court while the appeal is pending, a demand which was involved in the former suit but was not decided by the decree. Wilkes *v.* Henry, 4 Sandf. Ch. (N. Y.) 390. See also State *v.* Monroe, 45 La. Ann. 1322, 14 So. 59, wherein it was held that the right to bond property sequestered is not suspended by a suspensive appeal from a judgment in which that right was not involved.

Proceedings in suit.— A stay on appeal is confined to proceedings in the suit in which the judgment or decree appealed from is made. State *v.* Thayer, 80 Mo. 436; Tipton Bank *v.* Cochel, 27 Mo. App. 529; Missouri Pac. R. Co. *v.* Atkison, 17 Mo. App. 484; State *v.* Ramsey, 50 Nebr. 166, 69 N. W. 758; Welch *v.* Cook, 7 How. Pr. (N. Y.) 282; Hart *v.* Albany, 3 Paige (N. Y.) 381. See also Bowman *v.* Cornell, 39 Barb. (N. Y.) 69, wherein it was held that when a right of action has accrued against a sheriff for neglecting to return an execution, such right cannot be divested by an appeal being taken from the judgment by defendant therein, even though the

the property;[60] it does not discharge from custody a defendant arrested and committed before its service;[61] it does not extend the lien of the judgment beyond the time prescribed by statute;[62] it does not prevent a rule *nisi* for judgment;[63] it does not prevent respondent from filing transcripts of the judgment appealed from;[64] it does not prevent the prosecution of collateral or independent proceedings;[65] and it does not prohibit the clerk below from issuing his fee-bills to collect

appeal is brought prior to the commencement of the action, as such action is not "a proceeding upon the judgment."

Proceedings subsequent to judgment.— An appeal from a decision overruling a motion to set aside proceedings subsequent to judgment does not supersede the proceedings under the principal judgment. Hayden *v.* Herbert, Hard. (Ky.) 143.

Recording of mandate of affirmance.— A judgment of the trial court which has been affirmed by the appellate court is not suspended by a writ of error with supersedeas, prosecuted to reverse the order of the trial court permitting the mandate of affirmance to be recorded. Taylor *v.* Tibbatts, 13 B. Mon. (Ky.) 177.

The term "execution," with reference to a stay of "execution" during proceedings on appeal, comprehends not merely the ordinary writ of execution to collect money, but also any and all process to enforce any affirmative command of a judgment, whatever its nature. State *v.* Klein, 137 Mo. 673, 39 S. W. 272. The enforcement of an interlocutory order for the appointment of a receiver is within the scope of the term "execution." State *v.* Hirzel, 137 Mo. 435, 37 S. W. 921, 38 S. W. 961.

60. Goode *v.* Wiggins, 12 Ohio St. 341.

Appointment of receiver.— As a stay extends only to proceedings under the judgment, it is no violation of a stay pending an appeal from a judgment of foreclosure for respondent to obtain the appointment of a receiver of the mortgaged premises. Mackellar *v.* Farrell, 57 N. Y. Super. Ct. 398, 8 N. Y. Suppl. 307, 29 N. Y. St. 350.

Discharge of receiver.— Notwithstanding a stay of proceedings on a judgment, the court below has power to discharge a receiver whose appointment was ordered before judgment as a provisional order. Ireland *v.* Nichols, 9 Abb. Pr. N. S. (N. Y.) 71.

Preservation of property.— A receiver in whose hands the court places property is not guilty of contempt in dealing with the property pending an appeal and supersedeas on the order appointing him receiver. Bristow *v.* Home Bldg. Co., 91 Va. 18, 20 S. E. 946, 947; Grant *v.* Phœnix Mut. L. Ins. Co., 121 U. S. 118, 7 S. Ct. 849, 30 L. ed. 909. See also Hitz *v.* Jenks, 16 App. Cas. (D. C.) 530, wherein it was held that a court which appoints a receiver may continue to make all proper orders for the conservation of the fund, notwithstanding an appeal.

61. Campbell *v.* Clark, 2 How. Pr. (N. Y.) 257; Sherrill *v.* Campbell, 21 Wend. (N. Y.) 287. But see Wilson *v.* Ryder, 13 N. Y. Civ. Proc. 69, wherein it was held that, upon the recovery of final judgment in favor of defendant who had been arrested on an order of arrest and discharged by making a deposit in lieu of bail, the deposit must be refunded to him, though plaintiff has appealed from the judgment and given security to stay proceedings.

62. Christy *v.* Flanagan, 87 Mo. 670 [*affirming* 14 Mo. App. 253]; Chouteau *v.* Nuckolls, 20 Mo. 442; Merchants' Mut. Ins. Co. *v.* Hill, 17 Mo. App. 590.

Revival of judgment.— The time within which it is necessary, by statute, to sue out a scire facias to revive a judgment begins to run, where there is a stay of execution, from the expiration of the period during which the execution was suspended. Pennock *v.* Hart, 8 Serg. & R. (Pa.) 369. But the pendency of a suspensive appeal from a judgment in appellant's favor will not prevent the latter from instituting proceedings to revive the judgment. Weiller *v.* Blanks, McGloin (La.) 296.

63. Moran *v.* Dawes, 4 Cow. (N. Y.) 22.

64. Bulkley *v.* Keteltas, Code Rep. N. S. (N. Y.) 119.

65. Line *v.* State, 131 Ind. 468, 30 N. E. 703; State *v.* Krug, 94 Ind. 366; Mull *v.* McKnight, 67 Ind. 525; Randles *v.* Randles, 67 Ind. 434; State *v.* Chase, 41 Ind. 356; Burton *v.* Burton, 28 Ind. 342; Burton *v.* Reeds, 20 Ind. 87; Nili *v.* Comparet, 16 Ind. 107, 79 Am. Dec. 411. But see Johnson *v.* Williams, 82 Ky. 45, wherein it was held that, after a judgment has been obtained and a supersedeas bond has been executed by defendant, it is not proper for plaintiff to bring an action upon the judgment and take out an attachment against defendant's property.

Bond answerable for judgment.— The fact that an appeal has been taken from a judgment, and security given to stay proceedings, is no bar to an action on a special bond or agreement to be answerable for the judgment. Rice *v.* Whitlock, 16 Abb. Pr. (N. Y.) 225.

Bond to discharge from arrest.— The institution of proceedings in error, and the giving of a supersedeas bond, will not prevent plaintiff below from maintaining an action upon a bond given to secure the discharge of defendant from arrest in the original case. Heizer *v.* Pawsey, 47 Kan. 33, 27 Pac. 125.

Bond to transfer case.— Pending an appeal with supersedeas from a judgment dismissing a stay, appellee cannot proceed against the surety on the bond given by appellant in transferring the case to equity. Daugherty *v.* Ringo, 1 Ky. L. Rep. 272.

Garnishment.— Plaintiff in a judgment which has been carried by certiorari to a superior court does not place himself in contempt of the latter court by suing out a gar-

the costs in the cause.[66] But a notice of the entry of judgment is a proceeding in the cause within the meaning of an order staying proceedings on the judgment, and will be set aside as irregular.[67] And so long as there is an order of court in force staying execution on the judgment against a party who has appealed, the sureties on his appeal bond cannot be sued.[68] It has also been held that an appeal by remonstrants, from an order granting a license to retail liquors, operates to suspend the order and the right to sell under the license.[69]

b. Accounting. An appeal from a decree directing an account to be taken will not stay the accounting.[70] It has, however, been held that where an account is ordered to be taken before a master on principles laid down in the decree, the court will refuse to allow the account to be taken pending an appeal from the decree.[71]

nishment upon that judgment during the pendency of the certiorari. Miller *v.* Gay, 98 Ga. 536, 25 S. E. 577.

66. Carr *v.* Miner, 40 Ill. 33; State *v.* Emmerson, 74 Mo. 607; Curtis *v.* Leavitt, 19 Barb. (N. Y.) 530. But see Adams *v.* Missouri Pac. R. Co., 18 Mo. App. 373, wherein it was held that where the right of a person to demand of defendant in the judgment payment of any costs rests upon the judgment alone, that right can be enforced only by an execution issued in pursuance of the judgment, and is therefore suspended by a supersedeas.

Cost bonds.— Defendant cannot prosecute the bond, given by plaintiff as security for costs on commencing the action, after proceedings on the judgment against plaintiff have been stayed on appeal. Van Vleeck *v.* Clark, 24 How. Pr. (N. Y.) 190.

67. White *v.* Klinken, 16 Abb. Pr. (N. Y.) 109; Bagley *v.* Smith, 2 Sandf. (N. Y.) 651. See also St. Paul, etc., R. Co. *v.* Hinckley, 53 Minn. 102, 54 N. W. 940, wherein it was held that an appeal from an order granting or refusing a new trial, and the filing of the prescribed bond, suspends the right to proceed to the entry of judgment. And see Gassett *v.* Cottle, 10 Gray (Mass.) 375, wherein it was held that after judgment has been rendered in the superior court and exceptions allowed, though not entered in the supreme court, the superior court cannot enter final judgment.

An attempt to collect alimony by a writ of execution is a "proceeding upon the judgment," and, pending the appeal, is stayed by giving the undertaking required by statute. Anderson *v.* Anderson, 123 Cal. 445, 56 Pac. 61.

Default judgment.— An appeal from an order refusing to open a default and allow an answer to be made does not stay the entry of judgment upon the default. Exley *v.* Berryhill, 37 Minn. 182, 33 N. W. 567.

Stay after notice of entry.— A stay of proceedings for a specified time, after notice of entry of judgment, operates only in case judgment is entered, and does not prevent the successful party from moving to dismiss an appeal, taken before such entry, from an order denying a motion for a new trial. Kenney *v.* Sumner, 12 Misc. (N. Y.) 86, 33 N. Y. Suppl. 95, 66 N. Y. St. 696.

68. Parnell *v.* Hancock, 48 Cal. 452.

Bond in trial of right of property.— Pending an appeal from a judgment against claimant in a trial of the right of property, no forfeiture of the claimant's bond can be declared. Davis *v.* Hart, 1 Tex. App. Civ. Cas. § 1143.

A forthcoming or delivery bond, executed to procure the release of attached property, remains in force notwithstanding an appeal has been taken and a supersedeas bond given. State *v.* McGlothlin, 61 Iowa 312, 16 N. W. 137; Williams *v.* Robison, 21 Iowa 498. See also Spencer *v.* Pilcher, 10 Leigh (Va.) 512, wherein it was held that the right to move for judgment on a forthcoming bond is not suspended by a supersedeas to the original judgment.

Sheriff's bond.— Where a sheriff appeals from a judgment against him for failure to return an execution, and gives the statutory undertaking to stay all proceedings upon the judgment pending such appeal, the court will not allow an action to be brought upon his official bond until such appeal is decided. People *v.* Conner, 8 Hun (N. Y.) 533.

69. Molihan *v.* State, 30 Ind. 266. But see Lantz *v.* Hightstown, 46 N. J. L. 102, wherein it was held that a writ of error, to review the judgment of the supreme court dismissing a writ of certiorari bringing up certain proceedings of a common council concerning the revocation of a license, does not stay that body from proceeding after the dismissal of the writ of certiorari from the point at which they were stayed by its allowance.

70. Morton *v.* Beach, 56 N. J. Eq. 791, 41 Atl. 214 [*distinguishing* Pennsylvania R. Co. *v.* National Docks, etc., R. Co., 54 N. J. Eq. 647, 35 Atl. 433]; Ratzer *v.* Ratzer, 29 N. J. Eq. 162; Burdick *v.* Garrick, L. R. 5 Ch. 453; Nerot *v.* Burnand, 2 Russ. 56, 3 Eng. Ch. 56; 2 Daniel Ch. Pr. 1470; 2 Smith Ch. Pr. 70. See also Cheney *v.* Gleason, 125 Mass. 166.

Supplemental account.— Where an appeal has been taken from a decree in an accounting, a hearing on a supplemental account, filed by one of the parties after the appeal, is properly denied. Petrie *v.* Dickerman, 98 Mich. 130, 56 N. W. 1108.

71. Green *v.* Winter, 1 Johns. Ch. (N. Y.) 77. See also Guibert *v.* Saunders, 13 N. Y. Civ. Proc. 220, wherein it was held that a judgment directing an accounting in an action to determine title to real property, and a sale of certain premises, may be stayed.

c. Orders Relating to Injunctions. Though there are decisions which hold that taking an appeal and giving bond has the effect of staying and suspending the operation of a decree granting or dissolving an injunction,[72] by the great weight of authority an appeal from such a decree does not disturb its operative force.[73] And this has been held to be true even in cases where the party com-

Reference to state account.— On appeal, in an action to set aside a deed obtained by fraud, from an interlocutory judgment in favor of plaintiff and referring the case to a referee to state an account of rents received and payments made, a stay of proceedings should be granted. Coleman *v.* Phelps, 24 Hun (N. Y.) 320.

72. *Kentucky.*—Elizabethtown, etc., R. Co. *v.* Ashland, etc., St. R. Co., 94 Ky. 478, 22 S. W. 855; Kentucky, etc., Bridge Co. *v.* Krieger, 91 Ky. 625, 13 Ky. L. Rep. 219, 16 S. W. 824; Smith *v.* Western Union Tel. Co., 83 Ky. 269; Yocom *v.* Moore, 4 Bibb (Ky.) 221. *Compare* Roberts *v.* Jenkins, 4 Ky. L. Rep. 648.

Louisiana.— A suspensive appeal on bond lies from an order dissolving an injunction when the commission of the acts enjoined will cause irreparable injury. State *v.* Monroe, 41 La. Ann. 241, 6 So. 21; Schmidt *v.* Foucher, 37 La. Ann. 174; State *v.* Judge, 33 La. Ann. 760; State *v.* Judge, 25 La. Ann. 666.

Maryland.—Hamilton *v.* State, 32 Md. 348; Gelston *v.* Sigmund, 27 Md. 345; Northern Cent. R. Co. *v.* Canton Co., 24 Md. 500; Fullerton *v.* Miller, 22 Md. 1; Blondheim *v.* Moore, 11 Md. 365.

Minnesota.— State *v.* District Ct., 78 Minn. 464, 81 N. W. 323; State *v.* Duluth St. R. Co., 47 Minn. 369, 50 N. W. 332. *Compare* State *v.* District Ct., 52 Minn. 283, 53 N. W. 1157; Sullivan *v.* Weibeler, 37 Minn. 10, 32 N. W. 787.

Mississippi.— Kimball *v.* Alcorn, 45 Miss. 145; Penrice *v.* Wallis, 37 Miss. 172.

Missouri.— Lewis *v.* Leahey, 14 Mo. App. 564.

Texas.— Gulf, etc., R. Co. *v.* Ft. Worth, etc., R. Co., 68 Tex. 98, 2 S. W. 199, 3 S. W. 564; Williams *v.* Pouns, 48 Tex. 141.

Virginia.— Turner *v.* Scott, 5 Rand. (Va.) 332. See also Graves *v.* Graves, 2 Hen. & M. (Va.) 22.

West Virginia.— State *v.* Harness, 42 W. Va. 414, 26 S. E. 270; State *v.* Harper's Ferry Bridge Co., 16 W. Va. 864.

73. *Alabama.*—Griffin *v.* Huntsville Branch Bank, 9 Ala. 201; Boren *v.* Chisholm, 3 Ala. 513.

Arkansas.— Payne *v.* McCabe, 37 Ark. 318.

California.— Rogers *v.* Superior Ct., 126 Cal. 183, 58 Pac. 452; Dulin *v.* Pacific Wood, etc., Co., 98 Cal. 304, 33 Pac. 123.

District of Columbia.— Carrington *v.* Sweeny, 2 MacArthur (D. C.) 68.

Florida.— An appeal from an order dissolving an injunction does not of itself reinstate the injunction; but an order directing the appeal to operate as a supersedeas, and a compliance with the terms of the order, give it such effect. Powell *v.* Florida Land, etc., Co., 41 Fla. 494, 26 So. 700; Bacon *v.* Green, 36 Fla. 313, 18 So. 866; Jacoby *v.* Shomaker, 26 Fla. 502, 7 So. 855; McMichael *v.* Eckman, 26 Fla. 43, 7 So. 365. But a supersedeas so perfected does not retroact so as to deprive strangers to the litigation of intervening rights *bona fide* acquired. Smith *v.* Whitfield, 38 Fla. 211, 20 So. 1012.

Georgia.— Maccochee Hydraulic Min. Co. *v.* Davis, 40 Ga. 309; Powell *v.* Parker, 38 Ga. 644. See also Ryan *v.* Kingsbery, 88 Ga. 361, 14 S. E. 596.

Illinois.— Bressler *v.* McCune, 56 Ill. 475, wherein it was held that where the court below has awarded a temporary injunction, which is continued to the final hearing and is then dissolved and the bill dismissed, and the party prays for and perfects his appeal, such appeal will operate to suspend the decree dissolving the injunction. But, if the injunction is dissolved by an interlocutory order, and the cause afterward proceeds to a final judgment, the appeal will not operate to revive the injunction.

Iowa.— Lindsay *v.* Clayton Dist. Ct., 75 Iowa 509, 39 N. W. 817, wherein it was held that the taking of an appeal from a decree abating and enjoining a liquor nuisance, and the filing of a supersedeas bond, does not suspend the injunction, but only the abatement of the nuisance.

Michigan.— Brevoort *v.* Detroit, 24 Mich. 322.

New Jersey.— National Docks, etc., R. Co. *v.* Pennsylvania R. Co., 54 N. J. Eq. 167, 33 Atl. 936; Chegary *v.* Scofield, 5 N. J. Eq. 525.

New York.— Gardner *v.* Gardner, 87 N. Y. 14; Sixth Ave. R. Co. *v.* Gilbert El. R. Co., 71 N. Y. 430; Hoyt *v.* Carter, 7 How. Pr. (N. Y.) 140; Howe *v.* Searing, 6 Bosw. (N. Y.) 684; Stone *v.* Carlan, 2 Sandf. (N. Y.) 738; Hoyt *v.* Gelston, 13 Johns. (N. Y.) 139; Graves *v.* Maguire, 6 Paige (N. Y.) 379; Wood *v.* Dwight, 7 Johns. Ch. (N. Y.) 295.

North Carolina.— James *v.* Markham, 125 N. C. 145, 34 S. E. 241; Fleming *v.* Patterson, 99 N. C. 404, 6 S. E. 396.

South Carolina.— Klinck *v.* Black, 14 S. C. 241.

Tennessee.— Baird *v.* Cumberland, etc., Turnpike Co., 1 Lea (Tenn.) 394; Park *v.* Meek, 1 Lea (Tenn.) 78.

Utah.— Elliot *v.* Whitmore, 10 Utah 238, 37 Pac. 459, holding, however, that where defendant, by means of a ditch, appropriated to his own use the water in a stream, and plaintiff obtained a judgment entitling him to the use of a part of the water, and secured an injunction restraining defendant from taking more than a certain amount, defendant is entitled to a supersedeas to stay the injunction pending appeal, as such judgment is one directing the delivery of possession of property.

United States.—Knox County *v.* Harshman,

plaining of the decree has complied in all respects with the requirements for a supersedeas or stay of proceedings.[74]

d. Orders Relating to Receivers. There is also diversity in judicial utterance as to the effect of an appeal from an order appointing a receiver. In some states it is held that such an appeal stays proceedings under the order upon giving the proper undertaking.[75] In other states the contrary view obtains.[76]

132 U. S. 14, 10 S. Ct. 8, 33 L. ed. 249; Leonard *v.* Ozark Land Co., 115 U. S. 465, 6 S. Ct. 127, 29 L. ed. 445; Slaughter House Cases, 10 Wall. (U. S.) 273, 19 L. ed. 915; Interstate Commerce Commission *v.* Louisville, etc., R. Co., 101 Fed. 146; Whitney *v.* Mowry, 2 Bond (U. S.) 45, 29 Fed. Cas. No. 17,592; Grundy *v.* Young, 1 Cranch C. C. (U. S.) 443, 11 Fed. Cas. No. 5,850.

Canada.— McLaren *v.* Caldwell, 29 Grant Ch. (U. C.) 438. But see McGarvey *v.* Strathroy, 6 Ont. 138.

See 2 Cent. Dig. tit. "Appeal and Error," §§ 2277, 2278.

Emergency restraining order.— Where, on the ground of emergency, a restraining order has been granted without notice to the adverse party, and an order made requiring the adverse party to show cause on a day certain why a temporary injunction should not be granted, but, before hearing upon the application for the temporary injunction, the court dismisses the cause, such restraining order cannot be kept in force pending appeal from the judgment of dismissal. Coleman *v.* Columbia, etc., R. Co., 8 Wash. 227, 35 Pac. 1077; State *v.* Lichtenberg, 4 Wash. 407, 30 Pac. 716.

Mandatory injunction.— An appeal from a mandatory injunction is stayed and suspended in its effect by an appeal from the order granting the same. Mark *v.* Superior Ct., 129 Cal. 1, 61 Pac. 436; Foster *v.* Superior Ct., 115 Cal. 279, 47 Pac. 58; Schwarz *v.* Superior Ct., 111 Cal. 106, 43 Pac. 580; Dewey *v.* Superior Ct., 81 Cal. 64, 22 Pac. 333.

74. Central Union Telephone Co. *v.* State, 110 Ind. 203, 10 N. E. 922, 12 N. E. 136; State *v.* Chase, 41 Ind. 356; Lindsay *v.* Clayton Dist. Ct., 75 Iowa 509, 39 N. W. 817; Hovey *v.* McDonald, 109 U. S. 150, 3 S. Ct. 136, 27 L. ed. 888; Interstate Commerce Commission *v.* Louisville, etc., R. Co., 101 Fed. 146; Whitney *v.* Mowry, 2 Bond (U. S.) 45, 29 Fed. Cas. No. 17,592. See also State *v.* Greene, 48 Nebr. 327, 67 N. W. 162, wherein it was held that where a temporary injunction has never been operative because of the failure to give the bond required by statute, the giving of a supersedeas bond upon the dismissal of the suit will not give the order of injunction any validity.

Committal for breach of injunction.— A defendant in equity having appealed from an order directing his committal for breach of an injunction, a stay of proceedings under the order, pending the appeal, will be refused. Gamble *v.* Howland, 3 Grant Ch. (U. C.) 281.

Grant by court.— On appeal from an order granting an injunction, the court has power to grant a stay of respondent's proceedings upon the order. Genin *v.* Chadsey, 12 Abb. Pr. (N. Y.) 69. See also *supra*, VIII, G.

75. *Connecticut.*— Catlin *v.* Baldwin, 47 Conn. 173.

Florida.— State *v.* Johnson, 13 Fla. 33.

Indiana.— Wabash R. Co. *v.* Dykeman, 133 Ind. 56, 32 N. E. 823.

Iowa.— Cook *v.* Cole, 55 Iowa 70, 7 N. W. 419.

Louisiana.—Metropolitan Bank *v.* Commercial Soap, etc., Manufactory, 48 La. Ann. 1383, 20 So. 899.

Maryland.— Everett *v.* State, 28 Md. 190.

Minnesota.—Farmers' Nat. Bank *v.* Backus, 63 Minn. 115, 65 N. W. 255.

Mississippi.— Buckley *v.* George, 71 Miss. 580, 15 So. 46.

Missouri.— State *v.* Hirzel, 137 Mo. 435, 37 S. W. 921, 38 S. W. 961.

Texas.— People's Cemetery Assoc. *v.* Oakland Cemetery Co., (Tex. Civ. App. 1901) 60 S. W. 679; Carter *v.* Carter, (Tex. Civ. App. 1897) 40 S. W. 1030.

Virginia.—Virginia, etc., Steel, etc., Co. *v.* Wilder, 88 Va. 942, 14 S. E. 806.

Washington.— State *v.* Superior Ct., 12 Wash. 677, 679, 42 Pac. 123.

United States.— Tornanses *v.* Melsing, 106 Fed. 775.

See 2 Cent. Dig. tit. "Appeal and Error," § 2279.

See also Stanton *v.* Heard, 100 Ala. 515, 14 So. 359, wherein it was held that the lien acquired by the appointment of a receiver of a debtor's property by the register of the chancery court, and by the taking of possession by the receiver, is not abrogated by the debtor's appeal to the chancellor from the register's order, and the execution of a supersedeas bond.

Proceedings in lower court.— Where an appeal from a decree appointing a receiver for a corporation is perfected, such appeal becomes in effect a supersedeas, and operates to prevent any distribution or application by the trial court of the assets of the corporation. Continental Invest., etc., Soc. *v.* McKay, 69 Ill. App. 72. See also Harris *v.* People, 66 Ill. App. 306.

Receiver appointed under judgment.— An appeal from a judgment vacates such judgment, and hence vacates the appointment of a receiver previously made under such judgment. Allen *v.* Chadburn, 3 Baxt. (Tenn.) 225. See also Havemeyer *v.* Superior Ct., 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627.

Receiver in possession of litigated property.— If at the time a supersedeas is awarded a receiver is in possession of the property in litigation, he is not thereby removed. Bristow *v.* Home Bldg. Co., 91 Va. 18, 20 S. E. 946, 947.

76. Swing *v.* Townsend, 24 Ohio St. 1; Haught *v.* Irwin, 166 Pa. St. 548, 31 Atl.

e. Previous Levy. Taking an appeal and giving the security prescribed by statute do not operate to discharge a previous levy, nor supersede an execution issued before the appeal was taken.[77] In such case the court, either trial[78] or appellate,[79] may, in its discretion, make an order recalling or staying proceedings under the execution until the determination of the appeal.[80] But a sale on execution, made before the perfection of an appeal, cannot be confirmed afterward.[81]

K. Proceedings in Violation of Stay. Any action or proceeding in disregard and defiance of the force and effect of a supersedeas or stay is a contempt of the authority and jurisdiction of the appellate court,[82] and such action or pro-

260. See also Matter of Real Estate Associates, 58 Cal. 356, wherein it appeared that, in an involuntary proceeding against an insolvent, a receiver was appointed, and afterward an appeal was taken from an order adjudicating him an insolvent. It was held that the functions of the receiver were not suspended during the appeal.

In Nebraska, under the doctrine that a supersedeas can be had as a matter of right only where it is affirmatively provided for by statute, a supersedeas cannot be had as a matter of right to an order appointing a receiver. State *v.* Scott, (Nebr. 1900) 82 N. W. 320; Lowe *v.* Riley, 57 Nebr. 252, 77 N. W. 758; State *v.* Stull, 49 Nebr. 739, 69 N. W. 101; Home F. Ins. Co. *v.* Dutcher, 48 Nebr. 755, 67 N. W. 766.

In Tennessee it has been held that an order appointing a receiver is not such an interlocutory order or decree as can be superseded. Roberson *v.* Roberson, 3 Lea (Tenn.) 50; Baird *v.* Cumberland, etc., Turnpike Co., 1 Lea (Tenn.) 394; Bramley *v.* Tyree, 1 Lea (Tenn.) 531. *Compare* Cone *v.* Paute, 12 Heisk. (Tenn.) 506.

77. *California.*—Ewing *v.* Jacobs, 49 Cal. 72.

Maryland.— Beatty *v.* Chapline, 2 Harr. & J. (Md.) 7; Slusser *v.* Chapline, 4 Harr. & M. (Md.) 221.

Michigan.— Peterson *v.* Wayne Cir. Judge, 108 Mich. 608, 66 N. W. 487.

Minnesota.— Robertson *v.* Davidson, 14 Minn. 554; Hastings First Nat. Bank *v.* Rogers, 13 Minn. 407, 97 Am. Dec. 239.

New York.— Matter of Berry, 26 Barb. (N. Y.) 55; Cook *v.* Dickerson, 1 Duer (N. Y.) 679; Smith *v.* Allen, 2 E. D. Smith (N. Y.) 259; Stricker *v.* Wakeman, 13 Abb. Pr. (N. Y.) 85; Rathbone *v.* Morris, 9 Abb. Pr. (N. Y.) 213; Blunt *v.* Greenwood, 1 Cow. (N. Y.) 15; Kinnie *v.* Whitford, 17 Johns. (N. Y.) 34; Burr *v.* Burr, 10 Paige (N. Y.) 166. *Compare* Delafield *v.* Sandford, 3 Hill (N. Y.) 473.

Ohio.— Bassett *v.* Daniels, 10 Ohio St. 617; Arnold *v.* Fuller, 1 Ohio 458.

Wisconsin.— Tilley *v.* Washburn, 91 Wis. 105, 64 N. W. 312.

United States.— Boyle *v.* Zacharie, 6 Pet. (U. S.) 648, 8 L. ed. 532.

Canada.— Gilmour *v.* Hall, 10 U. C. Q. B. 508.

A supersedeas has no retroactive operation so as to deprive the judgment of its force and authority from the beginning, but only suspends them after and while it is itself effectual. Runyon *v.* Bennett, 4 Dana (Ky.) 598, 29 Am. Dec. 431.

78. Livingstone *v.* New York El. R. Co., 21 N. Y. Civ. Proc. 210, 15 N. Y. Suppl. 191, 39 N. Y. St. 535; Bentley *v.* Jones, 8 Oreg. 47.

79. Stricker *v.* Wakeman, 13 Abb. Pr. (N. Y.) 85; Burr *v.* Burr, 10 Paige (N. Y.) 166; Tilley *v.* Washburn, 91 Wis. 105, 64 N. W. 312.

80. Return of property.— In some states the practice obtains, on a supersedeas after levy, to return, as of course, the property to defendant.

Kentucky.—Keith *v.* Wilson, 3 Metc. (Ky.) 201; Eldridge *v.* Chambers, 8 B. Mon. (Ky.) 411.

Mississippi.—Walker *v.* McDowell, 4 Sm. & M. (Miss.) 118, 43 Am. Dec. 476.

North Carolina.— Hamilton *v.* Henry, 27 N. C. 218.

Tennessee.—Conway *v.* Jett, 3 Yerg. (Tenn.) 481, 24 Am. Dec. 590.

Virginia.— Rucker *v.* Harrison, 6 Munf. (Va.) 181.

Wisconsin.— Ela *v.* Welch, 9 Wis. 395.

81. Bassett *v.* Daniels, 10 Ohio St. 617.

82. *Florida.*— Continental Nat. Bldg., etc., Assoc. *v.* Scott, 41 Fla. 421, 26 So. 726; State *v.* Johnson, 13 Fla. 33.

Iowa.— Lindsay *v.* Clayton Dist. Ct., 75 Iowa 509, 39 N. W. 817.

Kentucky.— Smith *v.* Caldwell, Ky. Dec. 341.

Virginia.— McLaughlin *v.* Janney, 6 Gratt. (Va.) 609.

West Virginia.— State *v.* Harper's Ferry, Bridge Co., 16 W. Va. 864.

United States.— *In re* McKenzie, 180 U. S. 536, 21 S. Ct. 468, 45 L. ed. 468.

See, generally, CONTEMPT: and 2 Cent. Dig. tit. "Appeal and Error," § 2281.

See also Deming Invest. Co. *v.* Fariss, (Okla. 1897) 50 Pac. 130, wherein it was held that the only way by which a supersedeas may be set aside is by direct attack. It cannot be ignored or execution issued so long as it remains on record. And see Balkum *v.* Harper, 50 Ala. 372, wherein it was held that where an execution on a judgment at law has been enjoined, and the injunction, though dissolved by the chancellor, has been restored pending an appeal from his decree, the issue of another execution before the appeal has been determined is a violation of the injunction and punishable as a contempt of the chancery court.

Advice of counsel.— It is no answer to a proceeding, as for a contempt for the breach of a supersedeas order, that the breach was committed under the advice of counsel. Con-

ceeding has been held to be punishable by the appellate court and not by the trial court.[83]

L. Effect of Failure to Obtain Supersedeas or Stay. A failure to supersede a judgment, or to stay process upon it, in no way affects the right of plaintiff in error to a review of the proceedings which resulted in it.[84]

M. Counter Bond for Restitution. In some states, by statute, a judgment for plaintiff in an action on a contract for the payment of money may be enforced by execution, though an appeal therefrom is pending wherein a supersedeas bond was filed, if defendant in error gives security to make restitution in case the judgment is reversed.[85]

IX. LIABILITY ON APPEAL BONDS.[86]

A. Validity of the Bond—1. Defective Instrument—a. The Execution—(I) *Generally*—(A) *The Signing.* One cannot be charged with liability upon an appeal bond which he does not execute.[87] Therefore, an appellant who fails

tinental Nat. Bldg., etc., Assoc. *v.* Scott, 41 Fla. 421, 26 So. 726; State *v.* Harper's Ferry Bridge Co., 16 W. Va. 864.

83. Continental Nat. Bldg., etc., Assoc. *v.* Scott, 41 Fla. 421, 26 So. 726; State *v.* Harper's Ferry Bridge Co., 16 W. Va. 864, wherein it was held that where there is a dissolution of an injunction, and an appeal and supersedeas, contempt proceedings for a violation of the supersedeas must be had in the appellate court. But see State *v.* Harness, 42 W. Va. 414, 26 S. E. 270, wherein it was held that where the order of the lower court does not dissolve, but refuses to dissolve, an injunction, and an appeal and supersedeas is taken, proceedings for a violation of the injunction must be had in the trial court. See also Russell *v.* Kinney, 10 Paige (N. Y.) 315, wherein it was held that, if a decree is appealed from and security given to make the appeal a stay of proceedings, and the party in whose favor the decision was made proceeds upon the decree notwithstanding the appeal, an application to set aside his proceedings for irregularity should be made to the vice-chancellor, and not to the chancellor.

An appeal will not be dismissed on the ground that the appellant has violated a stipulation by which he obtained a stay of proceedings pending the appeal. Baker *v.* Stephens, 10 Abb. Pr. N. S. (N. Y.) 1.

An execution issued in the court below, after a writ of error has been sued out and bond given, may be quashed, either in the court below, or in the appellate court. Stockton *v.* Bishop, 2 How. (U. S.) 74, 11 L. ed. 184. So a sale under such an execution may be set aside. Loomis *v.* McKenzie, 57 Iowa 77, 8 N. W. 779, 10 N. W. 298. The execution is irregular, but not void. Shirk *v.* Metropolis, etc., Gravel Road Co., 110 Ill. 661; Briggs *v.* Shea, 48 Minn. 218, 50 N. W. 1037; Bowman *v.* Tallman, 28 How. Pr. (N. Y.) 482.

84. Creighton *v.* Keith, 50 Nebr. 810, 70 N. W. 406; State *v.* Ramsey, 50 Nebr. 166, 69 N. W. 758; Parker *v.* Courtnay, 28 Nebr. 605, 44 N. W. 863, 26 Am. St. Rep. 360; McAusland *v.* Pundt, 1 Nebr. 211, 93 Am. Dec. 358; Logan *v.* Goodwin, 104 Fed. 490.

85. American Cent. Ins. Co. *v.* Cox, 54 Kan. 502, 38 Pac. 558; Commercial Union Assur. Co. *v.* Norwood, 54 Kan. 500, 38 Pac. 557; Bentley *v.* Brown, 37 Kan. 17, 14 Pac. 435; Grant *v.* Dabney, 19 Kan. 390; Bodewig *v.* Standard Cattle Co., 56 Nebr. 217, 76 N. W. 580; Ah Lep *v.* Gong Choy, 13 Oreg. 429, 11 Pac. 72.

See 2 Cent. Dig. tit. "Appeal and Error," § 2280.

Implied contract.— A judgment on an implied as well as on an express contract for the payment of money is within the meaning of the statute, and may be thus enforced. St. Louis, etc., R. Co. *v.* Kirkpatrick, 52 Kan. 201, 34 Pac. 804; Water-Power Co. *v.* Brown, 23 Kan. 695.

In Ohio, it has been held that a motion for leave to issue execution, notwithstanding a petition in error and a supersedeas obtained, is addressed to the judicial discretion of the court or judge. The motion must be in writing, accompanied with a copy of the record, the undertaking proposed to be given, and proof that a written notice of the motion, and of the time and place of its hearing, has been served on plaintiff in error. Gardner *v.* Cline, 2 Ohio Dec. 301. The motion will be granted where the amount of the judgment is plainly divisible, and the error applies to one part only, provided the moving party agrees to stay execution as to that part in dispute. Valley Bank *v.* West, 2 Handy (Ohio) 60. See also Going *v.* Schnell, 5 Cinc. L. Bul. 423.

86. See *infra*, IX, A–D; and 3 Cent. Dig. tit. "Appeal and Error," § 4724 *et seq.*

87. **Proof of execution.**— In order to authorize a summary judgment against a surety, upon affirmance of the appealed judgment, the fact that the surety signed the appeal bond must appear in the record. It is not enough that the fact is stated in the bill of exceptions. Hydraulic Press-Brick Co. *v.* Zeppenfeld, 9 Mo. App. 595.

Secondary evidence of signature.— In case of the loss of an appeal bond, the signature of an obligor may be proved by secondary evidence, either written or oral. Cincinnati Ins. Co. *v.* Harrison, 25 La. Ann. 1.

to sign his appeal bond cannot be bound thereby, although it be binding on his sureties, who do sign.[88]

(B) *The Delivery.*[89] Delivery of an appeal bond is a necessary part of the contract; so, where it appears that there was no delivery, there is no bond and no liability.[90] Statutes usually provide for the filing of appeal bonds with certain officers, and in such case filing constitutes delivery.[91]

(C) *Alterations.* Material alterations of the terms of a bond, enlarging the obligations of the obligors without their consent, will discharge the latter from all liability thereunder.[92]

Execution is admitted by failure to deny execution after it has been properly alleged. Robert *v.* Good, 36 N. Y. 408.

An immaterial variance.— A suit against an obligor under the name of "Barnabas," upon an appeal bond signed "Barney," was upheld notwithstanding the variance, it being admitted that the latter name was a nickname of the former. McGregor *v.* Balch, 17 Vt. 562.

Admissible without proof of execution.— Where a plea of *non est factum* is interposed but not verified, the appeal bond is admissible in evidence without preliminary proof of execution. Anderson *v.* Sloan, 1 Colo. 484.

Failure of plea of non est factum.— The plea of *non est factum* puts in issue only the execution, and, upon failure of such plea, other defenses cannot be urged. Sugden *v.* Beasley, 9 Ill. App. 71; Commercial Bank *v.* Harrison, 24 La. Ann. 361.

Evasive plea.— Where the allegation was that the appeal bond was signed by "T. G. Anderson, Edwin Scudder, and A. C. Hunt," a verification to a plea of *non est factum,* signed "Thomas G. Anderson, Edwin Scudder, and A. C. Hunt," and averring that defendants did not make their said supposed writing obligatory, was held insufficient and properly stricken out on motion as evasive. Anderson *v.* Sloan, 1 Colo. 484.

Execution on Sunday.— The fact that an appeal bond is executed on Sunday does not invalidate it, where it is later delivered by filing with the clerk on a week-day. Babcock *v.* Carter, 117 Ala. 575, 23 So. 487, 67 Am. St. Rep. 193.

Signing a printed form with blanks is nevertheless a good execution, unless it appears that blanks were material and were afterward filled out, and that the person filling them did so without authority from the signer. Franklin Bank *v.* Bartlet, Wright (Ohio) 741.

Issue of fact as to execution.— See Waite *v.* Ward, 93 Ala. 271, 9 So. 227.

Names of sureties need not be in body of instrument.— Dore *v.* Covey, 13 Cal. 502; Hyatt *v.* Washington, 20 Ind. App. 148, 50 N. E. 402; Scott *v.* Whipple, 5 Me. 336; *Ex p.* Fulton, 7 Cow. (N. Y.) 484.

88. Appellant who does not sign not bound, though sureties bound (Gleason's Estate, 8 Pa. Dist. 46), notwithstanding a statute that no appeal bond shall be invalid "for want of form or substance" (Supreme Council, etc., *v.* Boyle, 15 Ind. App. 342, 42 N. E. 827, 44 N. E. 56.

Firm-name of principal obligor regarded as surplusage.— In the case of an appeal from a judgment against a firm where one member signed the firm-name and also his own, the firm-name was disregarded as surplusage, the individual member was held as bound, and the sureties liable for any judgment rendered against him. Anderson *v.* Arnette, 30 La. Ann. 72.

89. See 3 Cent. Dig. tit. "Appeal and Error," § 4733 *et seq.*

90. No bond without delivery.— Riegel *v.* Fields, (Kan. App. 1900) 59 Pac. 1088; Howard *v.* Hess, 63 Mich. 725, 30 N. W. 333.

Production on trial of an appeal bond is *prima facie* evidence of its delivery. Byers *v.* Gilmore, 10 Colo. App. 79, 50 Pac. 370.

Revocation after delivery.— At any time before final delivery the execution of a bond may be revoked by sufficient notice of that intention to the officer with whom the bond is afterward filed; and where the notice of revocation reaches the officer whose duty it is to receive and approve the bond, before the latter is received by him, there is no valid delivery. But it is otherwise if the notice is not received until after the bond is received and approved, although the notice had previously been communicated to the principal. Covert *v.* Shirk, 58 Ind. 264.

After delivery and before approval — Insufficient answer.— Where an answer to a suit on an appeal bond alleged that, on the same day of the delivery of the bond to the clerk and before approval by him, a notification of withdrawal of the execution was given the clerk by the sureties, the answer was held bad on demurrer for want of facts, it appearing that the court had, and on motion of appellants, subsequently, by formal order, approved the bond. Irwin *v.* Crook, 11 Colo. App. 172, 52 Pac. 683.

91. Filing constitutes delivery.— Babcock *v.* Carter, 117 Ala. 575, 23 So. 487, 67 Am. St. Rep. 193; Holmes *v.* Ohm, 23 Cal. 268; Dore *v.* Covey, 13 Cal. 502; Riegel *v.* Fields, (Kan. App. 1900) 59 Pac. 1088.

92. Anselm *v.* Groby, 62 Mo. App. 421. See, generally, ALTERATIONS OF INSTRUMENTS.

Evidence of alteration and consent thereto. — Where a bond was shown to have been materially altered in a manner fatal to the validity of such bond unless the alterations were made with the consent of the sureties, it was held reversible error to exclude evidence that the alterations were made in the

(II) *Incapacity of Obligor.* Where, by statute, certain persons are wholly incapacitated from becoming sureties on appeal bonds, one of such persons cannot, in the face of the statute, assume any liability by executing a bond as such surety.[93]

(III) *Conditional Execution.* The conditional execution of a bond is incomplete and amounts to no execution at all until the condition is fulfilled, unless the circumstances of the case be such that it may be said that no valid condition exists, as where the obligee has no knowledge of the condition,[94] and is not put on inquiry about it by facts appearing on the face of the bond.[95]

(IV) *Mistake or Fraud in Execution.* Mistake or fraud in the execution

handwriting of the approving judge, with the knowledge of, and without objection from, the sureties. Brand *v.* Johnrowe, 60 Mich. 210, 26 N. W. 883.

Addition of another surety.— Where a bond as executed was rejected as insufficient, and, with the knowledge of, and without objection from, the surety, the bond was taken and executed by another surety, and thus approved, the first signer was held not discharged. Tiernan *v.* Fenimore, 17 Ohio 545.

Subsequent interlineation of the date of an order denying a new trial, in a bond given on appeal from such order as well as from the judgment entered, was held fatal to the obligation of the bond where, without the alteration, the bond was partially insufficient. Clarke *v.* Mohr, 125 Cal. 540, 58 Pac. 176.

Filling blanks, by the principal, in a bond executed in blank by the surety, the bond as filled out creating a greater obligation than that agreed on with such surety, will not, if the obligee has no notice of the fraud, prevent liability according to the terms of the bond after the blanks are filled. Chalaron *v.* McFarlane, 9 La. 227.

93. Absolute disability — Married woman. — Cruger *v.* McCracken, 87 Tex. 584, 30 S. W. 537, where it was held that, after entry of summary judgment, against a married woman as surety, whose marriage did not appear of record, the court would entertain a motion to vacate.

Disability not absolute — Attorneys at law.— Ullery *v.* Kokott, (Colo. App. 1900) 61 Pac. 189; Short *v.* Rudolph, 1 Pittsb. (Pa.) 50; McKellar *v.* Peck, 39 Tex. 381.

Non-residents.— Dore *v.* Covey, 13 Cal. 502.

Corporations — Ultra vires — Estoppel.— "The general rule is that a corporation can do only those acts which are within the scope of its charter, and if the signing of the bond in question, as surety, was an act not originally within the express or necessarily implied powers of the corporation it is void, and no subsequent act could make it valid, by way of estoppel. . . . *Prima facie*, the signing, by the company, of an appeal bond in such a suit was an act beyond the purpose for which it was organized, and consequently illegal. If it had been shown that it was executed clearly for the purpose of promoting or protecting its own business . . . it would have been within the scope of the corporate power." Per Wilkin, J., in Best Brewing Co. *v.* Klassen, 185 Ill. 37, 39, 57 N. E. 20, 76 Am. St. Rep. 26, 50 L. R. A. 765.

94. No valid condition without knowledge of obligee.— Wilson *v.* King, 59 Ark. 32, 26 S. W. 18, 23 L. R. A. 802; Allen *v.* Marney, 65 Ind. 398, 32 Am. Rep. 73; Ney *v.* Orr, 2 Mont. 559; Grimwood *v.* Wilson, 31 Hun (N. Y.) 215, 66 How. Pr. (N. Y.) 283.

95. In a bond regular on its face, though purporting to be signed and delivered on condition that it be executed by others, there is nothing to put the obligee upon inquiry about the manner of its execution, and, if obligee have no actual knowledge of the condition, the signers will be liable. Tidball *v.* Halley, 48 Cal. 610; Webb *v.* Baird, 27 Ind. 368, 89 Am. Dec. 507; Deardorff *v.* Foresman, 24 Ind. 481; Nash *v.* Fugate, 24 Gratt. (Va.) 202, 18 Am. Rep. 640; Dair *v.* U. S., 16 Wall. (U. S.) 1, 21 L. ed. 491.

Erasure of name before delivery has been held not to affect this rule; and in the same case it was also held that the officer accepting and approving such bond is, for that purpose, agent of the obligee. Allen *v.* Marney, 65 Ind. 398, 32 Am. Rep. 73.

Obligee, it has been held, is put on inquiry by an insufficient conditional execution of the bond (Grimwood *v.* Wilson, 31 Hun (N. Y.) 215, 66 How. Pr. (N. Y.) 283), or by the fact that the principal (Ney *v.* Orr, 2 Mont. 559), or one named as co-obligor, did not sign the bond (Allen *v.* Marney, 65 Ind. 398, 32 Am. Rep. 73; Davis *v.* Bryant, 23 Ind. App. 376, 55 N. E. 261).

It is no ground for demurrer to a complaint in an action on a bond that it contains the name of an obligor not signing, because such fact is not an invalidity and no defense in itself, but only a fact to charge the obligee with notice of a conditional execution; and such conditional execution not appearing in the allegations of the complaint must be pleaded as a defense. Davis *v.* Bryant, 23 Ind. App. 376, 55 N. E. 261; Supreme Council, etc. *v.* Boyle, 15 Ind. App. 342, 44 N. E. 56; Hentig *v.* Collins, 1 Kan. App. 173, 41 Pac. 1057; Harrison *v.* State Bank, 3 J. J. Marsh. (Ky.) 375; Gleeson's Estate, 192 Pa. St. 279, 44 Wkly. Notes Cas. (Pa.) 321, 43 Atl. 1032, 73 Am. St. Rep. 808. So the signing by one only of two appellants is no defense. Railsback *v.* Greve, 58 Ind. 72; Gleeson's Estate, 8 Pa. Dist. 46.

The burden of proving conditional execu-

of a bond, whereby the obligors execute a bond different from the one intended, is available as a defense only in case the obligee was a party to the fraud or mistake.[96]

b. Omissions and Irregularities — (I) *In Terms of Bond* — (A) *Necessary Elements Omitted.* An omission from the terms of a bond of a substantial element thereof, whereby evidence *dehors* the record is required to lend certainty to its terms, deprives the bond of all validity, and such instrument imposes no liability;[97] as where a wrong appellee is named,[98] an avoiding clause omitted,[99] the appellant not made a party to the bond,[1] or where the bond does not show in whose favor the judgment appealed from was rendered.[2]

(B) *Inconsequential Defects.* Where the intention can be gathered from the terms of the bond and the record without the aid of extrinsic evidence, minor omissions and irregularities may be disregarded and the bond upheld; as where the obligation of the bond is absolute to pay the judgment;[3] the appellant's name is omitted from the bond;[4] the bond bears a date antecedent to its execution;[5] where there is an error in the description of the judgment appealed from;

tion, in defense to an action on an appeal bond, is on the obligor alleging it. Gleeson's Estate, 8 Pa. Dist. 46.

96. Mistake must be mutual.— In a case of a judgment and order of attachment, both being appealed from, where appellant intended to supersede only the order of attachment, but the clerk, by mistake, made the bond so as to also supersede the judgment, this additional obligation to pay the judgment after affirmance was enforced, the appellee having had no knowledge of the mistake. Gaines *v.* Griffith, 13 Ky. L. Rep. 263.

Mutuality is a question of fact.— Burnett *v.* Nicholson, 86 N. C. 728.

Misinformation by officer — Stay not intended.— Where one signs a bond conditioned for the satisfaction of a judgment, which bond is necessary to secure a stay pending an appeal, and the stay is effected, the fact that the officer taking the bond informed the signer that it was security only for costs, without a stay, will not constitute a defense in the absence of knowledge of the mistake on the part of appellee. McMinn *v.* Patton, 92 N. C. 371.

Partial stay intended.— That the obligors intended only a partial stay of execution will not avail them where the bond, by its terms, applies to the whole judgment, and the obligee is not responsible for the mistake. Brown *v.* Brown, 17 Ky. L. Rep. 1143, 33 S. W. 830.

Different bond.— Where a surety executed a proper bond he was held liable, though he thought he was executing a different bond, owing to a mistake of the clerk taking it. Watson *v.* Johnson, 13 Ky. L. Rep. 336.

97. Defects cured by statute.— Where a bond is made in view of a statute in existence at the time, so that it may be said that the statute is a part of the bond, and the statute purports to supply defects "of form, or substance, or recital, or condition," such defects as might otherwise be fatal or limit liability have been held to be cured. Stults *v.* Zahn, 117 Ind. 297, 20 N. E. 154; Opp *v.* Ten Eyck, 99 Ind. 345; Bitting *v.* Ten Eyck, 85 Ind. 357; Smock *v.* Harrison, 74 Ind. 348; Broden *v.* Thorpe Block Sav., etc., Assoc., 20 Ind. App. 684, 50 N. E. 403.

98. A mistake in the name of appellee of such a nature that no record could be produced showing a judgment rendered in favor of the appellee named, has been held to prevent a recovery on the bond. Block *v.* Blum, 33 Ill. App. 643.

99. Omission of avoiding clause.— Where a bond omitted to state that if the appellant performed the judgment of the appellate court the obligation was to be void, it was held that there could be no recovery thereon. Waller *v.* Pittman, 1 N. C. 237.

1. A bond by one other than the appellant has been held void as against public policy. Reid *v.* Quigley, 16 Ohio 445.

2. Brown *v.* McLaughlin, 8 Humphr. (Tenn.) 140.

3. An absolute condition to pay the judgment, considered in connection with the other language used, the record, the situation of the parties, and surrounding circumstances, was held alternative and conditioned to prosecute the appeal in Field *v.* Schricher, 19 Iowa 119. See also Hawes *v.* Sternheim, 57 Ill. App. 126, where it was claimed that the condition was absolute, but the language was construed to mean that the obligors would be liable only in the event of affirmance or dismissal. To the same effect, the language differing only in punctuation, see Daggitt *v.* Mensch, 141 Ill. 395, 31 N. E. 153 [*affirming* 41 Ill. App. 403].

4. Appellant's name omitted from the bond has been held to be curable by proper averment and proof of identification. Wile *v.* Koch, 54 Ohio St. 608, 44 N. E. 236.

5. Date antecedent to execution.— An appeal bond dated August 13th, but reciting proceedings as having occurred in court on August 16th, and filed on September 1st, has been held good, the date of the bond being disregarded, because the bond took effect only from the date of its filing. Pray *v.* Wasdell, 146 Mass. 324, 16 N. E. 266.

6. A mistake in describing the judgment appealed from, by inserting a wrong date of its rendition, is of no consequence if the

an omission to cite the name of the court to which the appeal is taken,[7] or the names of sureties,[8] or appellant;[9] making one only of several joint appellees obligee in the bond;[10] failing to state a maximum penalty;[11] and, generally, all incorrect recitals which are unnecessary,[12] and recitals of facts not substantially inaccurate.[13]

(II) *In Performance of Requirements* — (A) *Mandatory Provisions.* The omission to perform such requirements in regard to the making of appeal bonds as are mandatory — that is, which relate to the jurisdiction of the court — cannot be waived, and because of their non-fulfilment the bond is void, no valid or legal result can be secured by it, and it imposes no liability.[14] Such has been held to be the case in respect to the taking and approval of bonds by one not authorized,[15] at a prohibited time, as in vacation,[16] or after the time limited for

judgment is otherwise described sufficiently for identification. Handy *v.* Burrton Land, etc., Co., 59 Kan. 395, 53 Pac. 67; Blanchard *v.* Gloyd, 7 Rob. (La.) 542. The same is true where the date of its rendition is left blank. Bills *v.* Stanton, 69 Ill. 51. So, also, where the judgment was stated to be against the appellant in his personal, instead of official, capacity. Sturgis *v.* Rogers, 26 Ind. 1. Also where the judgment was for "interest and attorneys' fees," and the bond recited "interest and costs." Landa *v.* Heermann, 85 Tex. 1, 19 S. W. 885.

7. Omitting to state name of appellate court has been held not a substantial omission, because "said judgment could be affirmed only by the supreme court, and hence said undertaking was certain enough in this respect." Stillings *v.* Porter, 22 Kan. 17, 19.

8. Names of sureties omitted from bond does not invalidate it, provided it be duly executed. Cooke *v.* Crawford, 1 Tex. 9, 46 Am. Dec. 93.

9. Name of appellant omitted.— Where a bond was given by one to stay execution of a judgment against another not a party to the bond, this was held a sufficient consideration, conceding that such a bond would not be a compliance with the statute. Martin *v.* Davis, 2 Colo. 313. But see Reid *v.* Quigley, 16 Ohio 445.

10. One only of several joint appellees named as obligee.— Lynch *v.* Lynch, 150 Pa. St. 336, 24 Atl. 625; Shroyer *v.* Simons, 14 Ind. App. 631, 43 N. E. 275, 276, in which last case it is said: "By virtue of the appeal, Shroyer held the possession of the farm, and the appellees were deprived of the use and rental of said property during the year 1893. Under the circumstances disclosed in the complaint, the defect in the bond growing out of the omission of the name of Dorinda J. Simons therein will be regarded as cured."

11. Maximum penalty need not be stated where the obligation otherwise required by statute is sufficiently expressed (Wile *v.* Koch, 54 Ohio St. 608, 44 N. E. 236; Johnson *v.* Noonan, 16 Wis. 687), and where a blank was left for that purpose it was presumed to have been left in order to ascertain the amount by calculation (Stille *v.* Beauchamp, 13 La. Ann. 604).

12. An incorrect recital of the time of return of writ of error may be disregarded in determining the validity of the bond, it being held that such recital is unnecessary. Riggs *v.* State Bank, 11 Ala. 160.

13. Recitals held not substantially inaccurate have no effect upon the obligation of the bond, as where a recognizance upon "bill of exceptions" recited that the excepting party had "appealed" and bound himself to prosecute the "appeal." Merrick *v.* Farwell, 33 Me. 253. Also where, through a clerical error, the amount of the judgment is stated as "twn" hundred instead of "two" hundred dollars. Ten Hopen *v.* Taylor, 103 Mich. 178, 61 N. W. 265.

14. Contrary view — Estoppel to deny non-compliance with mandatory provisions. — Though, because of non-compliance with some mandatory provision of the statute, a bond is insufficient to effect the purpose for which it was intended, wherefore it cannot be said that such purpose has been effected by it nor that there was any consideration for it, yet the doctrine of estoppel has here been held to apply to prevent a denial of such intended result where the result has been effected through the forbearance of the obligee. Gille *v.* Emmons, 61 Kan. 217, 59 Pac. 338; Mix *v.* People, 86 Ill. 329; Courson *v.* Browning, 78 Ill. 208.

And, again, it has been held that the bond is good notwithstanding it is conceded that it could not and did not produce the intended result. Mitchell *v.* Thorp, 5 Wend. (N. Y.) 287.

Omission supplied by statute.— Where a bond is made in view of a statute providing for the curing of any omission of a statutory requirement, such a bond has been held to embrace the provision by virtue of the statute, if the omission be suggested in the complaint. Gavisk *v.* McKeever, 37 Ind. 484.

15. Bond taken or approved by one not authorized held void.— Ham *v.* Greve, 41 Ind. 531; Ingram *v.* Greenwade, 12 Ky. L. Rep. 942; Keen *v.* Whittington, 40 Md. 489; Gross *v.* Bouton, 9 Daly (N. Y.) 25. *Contra*, Irwin *v.* Crook, 17 Colo. 16, 28 Pac. 549; Buchanan *v.* Milligan, 125 Ind. 332, 25 N. E. 349; Smock *v.* Harrison, 74 Ind. 348; Jones *v.* Droneberger, 23 Ind. 74; Spooner *v.* Best, 8 Ky. L. Rep. 185; Gopsill *v.* Decker, 67 Barb. (N. Y.) 211, 4 Hun (N. Y.) 625; Hooker *v.* Townsend, 66 How. Pr. (N. Y.) 349.

16. Bond taken in vacation held void.— Julian *v.* Rogers, 87 Mo. 229.

that purpose;[17] receiving and filing stay-bond without service of writ of error;[18] condition made much less onerous than required;[19] failing to execute a supersedeas bond in the clerk's office;[20] and failing to return the bond to the appellate court;[21] or file it in the court below.[22]

(B) *Directory Provisions* — (1) CAPABLE OF BEING WAIVED. Provisions for the making of appeal bonds which are directory merely — that is, which are intended for the benefit of the obligee or beneficiary — may be waived by him, and, when so waived, non-compliance with such provisions will not avail the obligors as a defense in an action on such defective bond.[23] This has been held with respect to the following provisions: That the sureties justify;[24] that the residence and occupation of sureties be stated;[25] that the penalty be in an ascertained amount, as double the amount of the judgment appealed from,[26] or as fixed by the

17. **Bond given after time limited held void.**— Mueller *v.* Kelly, 8 Colo. App. 527, 47 Pac. 72; Duckwall *v.* Rogers, 15 Ohio St. 544. *Contra*, Mitchell *v.* Thorp, 5 Wend. (N. Y.) 287.

18. **Stay-bond filed without service of writ of error held void.**—Howard *v.* Hess, 63 Mich. 725, 30 N. W. 333. But see Stillings *v.* Porter, 22 Kan. 17.

19. **Less onerous bond than required by statute.**— Where the statute required a condition to pay the judgment, damages, and costs, a bond for costs only was held to impose no liability, though the appeal had been perfected and decided. Orr *v.* McBryde, 7 N. C. 235. *Contra*, Van Deusen *v.* Hayward, 17 Wend. (N. Y.) 67.

20. Mills *v.* Conner, 1 Blackf. (Ind.) 5.

Place of execution is a question of fact to be proved or disproved like any other fact, and need not appear on the bond or in the clerk's certificate. Woodburn *v.* Fleming, 1 Blackf. (Ind.) 4.

21. Patterson *v.* Goldsmith, 9 Gray (Mass.) 258; Tarbell *v.* Gray, 4 Gray (Mass.) 444.

22. **Nul tiel record is not a proper plea** to an action on an appeal bond, though the bond be required to be filed in the court below. Herrick *v.* Swartwout, 72 Ill. 340.

23. **Directory provisions waived — Non-compliance no defense.**— Dore *v.* Covey, 13 Cal. 502, 509 (wherein the court said: "The respondent's argument that the undertaking shall not stay execution unless made in precise conformity with the statutory rules, is answered by the authorities cited, which hold, in effect, that these provisions are intended for the benefit of the other party, and that he may waive them, just as if the statute declared that no judgment should be rendered without service of process; but the defendant might waive the process or service. This waiver was made by the plaintiff below. He considered the appeal as regularly made, made no motion to dismiss, issued no execution, and suffered the undertaking to have the full effect of a regularly executed instrument"); Murdock *v.* Brooks, 38 Cal. 596, 602 (wherein it was said: "The provisions of the statute which require the residence and occupation of the sureties to be stated, the penalty of the undertaking to be double the amount of the judgment, and the affidavit of the sureties that they are worth the amount specified in the undertaking over and above all their just debts and liabilities, exclusive of property exempt from execution, are directory, and a compliance therewith may be waived by the respondent, either expressly or impliedly, by failing to take advantage of their non-observance, and treating and accepting the undertaking as sufficient"); Van Deusen *v.* Hayward, 17 Wend. (N. Y.) 67.

Must allege either statutory bond or waiver.— In Ham *v.* Greve, 41 Ind. 531, 537, a case of a bond held void because not approved according to law, the court said: "We are not required, in the present case, to decide to what extent defects may be waived by the obligee in an appeal bond, as the party who sues on such a bond must either show that it has been executed according to the statute, or that such defect has been either expressly or by implication waived."

24. **Justification of sureties may be waived.**— Murdock *v.* Brooks, 38 Cal. 596; Hill *v.* Burke, 62 N. Y. 111; Gopsill *v.* Decker, 67 Barb. (N. Y.) 211, 4 Hun (N. Y.) 625; Gibbons *v.* Berhard, 3 Bosw. (N. Y.) 635; McSpedon *v.* Bouton, 5 Daly (N. Y.) 30; Ward *v.* Whitney, 3 Sandf. (N. Y.) 399.

Justification need not be alleged.— Sutherland *v.* Phelps, 22 Ill. 92. It may be inferred from the fact of filing. Keen *v.* Whittington, 40 Md. 489. An averment of affirmance on appeal carries the presumption that the appeal bond was duly approved and filed. Courson *v.* Browning, 78 Ill. 208.

25. **Statement of residence and occupation of sureties waived.**— Dore *v.* Covey, 13 Cal. 502.

26. **Penalty less than double amount of judgment** does not invalidate bond.

Alabama.—Anderson *v.* Rhea, 7 Ala. 104.

California.— Dore *v.* Covey, 13 Cal. 502.

Ohio.— Franklin Bank *v.* Bartlet, Wright (Ohio) 741.

Oregon.— Cain *v.* Harden, 1 Oreg. 360.

Tennessee.— Jenkins *v.* Skillern, 5 Yerg. (Tenn.) 288.

Texas.— Landa *v.* Heermann, 85 Tex. 1, 19 S. W. 885.

Washington.— Sears *v.* Seattle Consol. St. R. Co., 7 Wash. 286, 34 Pac. 918.

Penalty more than double amount of judgment held not to invalidate bond.— Smith *v.* Whitaker, 11 Ill. 417; Bentley *v.* Dorcas, 11 Ohio St. 398. *Contra*, Johnson *v.* Goldsborough, 1 Harr. & J. (Md.) 499.

court;[27] that the bond be approved by a designated officer;[28] that attorneys at law shall not become sureties;[29] that a certain person be made obligee;[30] that the bond be spread upon the records of the appellate court;[31] or that there be two or more sureties.[32] And the rule applies in all cases where the bond, either by omission from, or addition to, its terms, is merely less onerous than the statute requires,[33] or than is required by an order of court.[34]

(2) Express Waiver. Express waiver of directory statutory provisions occurs when the obligee or beneficiary signifies by word or deed his willingness to accept the defective bond as sufficient for the statutory purpose.[35]

(3) Implied Waiver. Directory provisions of the statute are impliedly waived when the obligee or beneficiary omits to take advantage of or object to the defect, so that the same result is secured to the obligors by means of the defective bond as if it had been in full compliance with the statute.[36]

27. Amount not fixed by court, where the court is by statute required to fix the amount of the penalty, but by the parties, does not invalidate the bond. Braithwaite *v.* Jordan, 5 N. D. 196, 65 N. W. 701, 31 L. R. A. 238; Coughran *v.* Sundback, 13 S. D. 115, 82 N. W. 507, 79 Am. St. Rep. 886; Johnson *v.* Noonan, 16 Wis. 687.

Allegation of compliance or waiver.— Unless there be an allegation that the amount of the bond was fixed by the court, it must be alleged that the statutory purpose of the bond was served, or that the obligee waived compliance. Buchanan *v.* Milligan, 68 Ind. 118.

A recital in an appeal bond, that the penal sum waived was the amount fixed by the court, is conclusive of an order fixing the amount, pursuant to Cal. Code Civ. Proc., § 945. Ogden *v.* Davis, 116 Cal. 32, 47 Pac. 772.

28. Approval may be waived.— See following cases:

Alabama.— Crowder *v.* Morgan, 72 Ala. 535.

Colorado.— Irwin *v.* Crook, 17 Colo. 16, 28 Pac. 549.

Indiana.— Buchanan *v.* Milligan, 125 Ind. 332, 25 N. E. 349; Smock *v.* Harrison, 74 Ind. 348; Jones *v.* Droneberger, 23 Ind. 74.

Kentucky.— Spooner *v.* Best, 8 Ky. L. Rep. 185.

New York.— Gopsill *v.* Decker, 67 Barb. (N. Y.) 211, 4 Hun (N. Y.) 625; Hooker *v.* Townsend, 66 How. Pr. (N. Y.) 349.

Contra, Ingram *v.* Greenwade, 12 Ky. L. Rep. 942; Keen *v.* Whittington, 40 Md. 489; Gross *v.* Bouton, 9 Daly (N. Y.) 25.

Allegations of waiver of approval.— An allegation that the bond was seasonably filed and approval waived by obligee sufficiently alleges waiver of compliance. Easter *v.* Acklemire, 81 Ind. 163.

29. Though attorneys at law are by statute prohibited from becoming sureties on appeal bonds, there has been held not to be an absolute incapacity; but that if an attorney does sign as surety he is bound, as is also his co-obligors, the defect having been waived by reliance on the bond. Ullery *v.* Kokott, (Colo. App. 1900) 61 Pac. 189; Short *v.* Rudolph, 1 Pittsb. (Pa.) 50; McKellar *v.* Peck, 39 Tex. 381.

30. Clerk instead of appellee as obligee.— Where a statute required that supersedeas bonds be made payable to him whose judgment is sought to be superseded, the naming of the clerk of court as obligee and delivery to him has been held not a fatal defect. Babcock *v.* Carter, 117 Ala. 575, 23 So. 487, 67 Am. St. Rep. 193.

That plaintiff instead of sheriff was obligee in a bond to stay execution, after levy and return of the property by the sheriff on the faith of the bond, has been held no defense to an action of the bond by the obligee named. Slack *v.* Heath, 4 E. D. Smith (N. Y.) 95.

31. Bond not spread upon appellate court records.— Paul *v.* Nowell, 6 Me. 239.

32. Only one surety where two required is no defense to the one surety where the bond has, without objection, served its purpose. Cochran *v.* Wood, 29 N. C. 215; Allen *v.* Kellam, 94 Pa. St. 253. It was so held when the bond was executed only by the attorney of appellant. Baltimore, etc., R. Co. *v.* Vanderwarker, 19 W. Va. 265. One surety not bound because of the invalidity of the instrument executed by him, has been held not to release another surety upon a separate instrument. Gottwald *v.* Tuttle, 7 Daly (N. Y.) 105.

33. Bond less onerous than statute requires not void, though recovery cannot be had for more than the terms of the bond. Van Deusen *v.* Hayward, 17 Wend. (N. Y.) 67; Boulden *v.* Estey Organ Co., 92 Ala. 182, 9 So. 283; Gille *v.* Emmons, 61 Kan. 217, 59 Pac. 338; Shaw *v.* McIntier, 5 Allen (Mass.) 423.

34. Non-compliance with order of court in minor particulars.— Broden *v.* Thorpe Block Sav., etc., Assoc., 20 Ind. App. 684, 50 N. E. 403.

35. Affirmative act of waiver.— Blair *v.* Hamilton, 32 Cal. 49; Buchanan *v.* Milligan, 125 Ind. 332, 25 N. E. 349 (agreement to substitute sureties); Smock *v.* Harrison, 74 Ind. 348 (indorsement of consent by attorney); Small *v.* Kennedy, 12 Ind. App. 155, 39 N. E. 901 (consent by attorney in open court to waive justification); Gopsill *v.* Decker, 67 Barb. (N. Y.) 211, 4 Hun (N. Y.) 625 (written waiver of justification by attorney).

36. Execution delayed pending appeal is a waiver of approval.— In Jones *v.* Droneberger, 23 Ind. 74, 76, the court said: "The bond

(4) Rebuttal of Implied Waiver — (a) By Procuring Dismissal. Where objections to defects are made and, because thereof, the appeal is dismissed, the implication of waiver because of statutory results secured by the obligor is thereby rebutted.[37] However, where the bond is not objected to when filed, a subsequent insufficiency, arising from a failure of sureties to justify when excepted to, and a consequent dismissal of the appeal, may not invalidate the bond.[38]

(b) By Issuance of Execution. Procuring the issuance of execution by appellee pending the appeal successfully repels the idea of waiver by him of an insufficient stay-bond.[39]

(c) *Substantial Compliance With Requirements.* Irrespective of the question of waiver, it has been held, in numerous instances, that slight deviations from statutory requirements are not available as matters of defense if there has been substantial compliance — as where the bond was filed before the filing of the

in question is not a part of the appeal to the Supreme Court. That was perfect without any bond. The object and effect of the bond were, or were intended to be, to stay execution on the judgment below, and make the appellee secure during the pendency of the appeal. The bond was for the individual benefit of the appellee; and the provisions in the statute requiring the court to approve it in term-time, and the clerk in vacation, were inserted for the purpose of securing a good bond for the appellee, and of creating an arbiter to decide between the parties where they might not be able to agree as to what, in the given case, was a good bond; and the question is, cannot the parties waive the approval of the court or clerk in any given case, where their own individual interests are alone at stake, and mutually agree upon a bond? If they can, and do so, the bond given in such case is valid. Delay of execution is a good consideration of the bond." To the same effect see Spooner *v.* Best, 8 Ky. L. Rep. 185. See also Allen *v.* Kellam, 94 Pa. St. 253 [*distinguishing* Rheem *v.* Naugatuck Wheel Co., 33 Pa. St. 356]; and cases cited *supra*, notes 23–24.

37. Dismissal of appeal for defective bond rebuts waiver of insufficiency.

Arizona.— Reilly *v.* Atchison, (Ariz. 1893) 32 Pac. 262.

Louisiana.— Agelasto *v.* Mills, 30 La. Ann. 1345.

New York.— Manning *v.* Gould, 90 N. Y. 476; Ward *v.* Syme, 4 N. Y. 171.

Pennsylvania.— Tilden *v.* Worrell, 30 Pa. St. 272.

Washington.— Columbia, etc., R. Co. *v.* Braillard, 12 Wash. 22, 23, 40 Pac. 382, wherein it was said: "We think that by refusing to accept the bond as sufficient, and by taking proceedings to have it determined ineffectual for the purposes of an appeal, the respondent is not entitled to judgment against the sureties. Here the appeal is dismissed because the sureties upon the bond are found insufficient, and we think it inconsistent that respondent should be permitted to treat it as an effectual obligation after it has secured an adjudication that it is not such."

Contra, Meserve *v.* Clark, 115 Ill. 580, 4 N. E. 770; Hascall *v.* Brooks, 105 Mich. 383, 63 N. W. 413.

38. Bond valid though appeal dismissed for insufficiency — Reasons.—In Moffat *v.* Greenwalt, 90 Cal. 368, 370, 27 Pac. 296, the court, by Harrison, J., said: "By their undertaking the defendants promised and agreed that 'if the appeal be withdrawn or dismissed,' the appellant would pay the amount of the judgment so appealed from. This was an original and independent agreement on their part [Tissot *v.* Darling, 9 Cal. 278], and in legal effect was entered into by them with the plaintiff. By virtue of the provisions of section 979 of the Code of Civil Procedure, upon the filing of the undertaking staying proceedings, all proceedings under the execution are to be stayed; and it was shown at the trial that upon the making and filing of said undertaking the property levied upon under an execution upon the judgment was released. The consideration recited in the undertaking was 'staying of the execution of the judgment appealed from.' As soon as this undertaking was filed, it became an executed obligation on their part, and whenever the contingency upon which the obligation was to depend arose, their liability became fixed. This liability could not thereafter be defeated by any act or omission on their part, or on the part of their principal. Their agreement to be bound in case the appeal should be dismissed extended as well to a dismissal resulting from their failure to justify as to a dismissal resulting from a failure on the part of their principal to prosecute the appeal." See also Davis *v.* Sturgis, 1 Ind. 213; Hascall *v.* Brooks, 105 Mich. 383, 63 N. W. 413; Skidmore *v.* Hull, 33 Mo. App. 41; Carter *v.* Hodge, 6 Misc. (N. Y.) 575, 27 N. Y. Suppl. 219, 57 N. Y. St. 785 [*distinguishing* Manning *v.* Gould, 90 N. Y. 476, 3 N. Y. Civ. Proc. 58, 64 How. Pr. (N. Y.) 429].

39. State *v.* Sixth Judicial Dist. Ct., 22 Mont. 449, 57 Pac. 89, 145, 74 Am. St. Rep. 618; Hemmingway *v.* Poucher, 98 N. Y. 281; Collins *v.* Ball, 31 Hun (N. Y.) 187; Allen *v.* Kellam, 94 Pa. St. 253; Geiselman *v.* Shomo, 13 Pa. Super. Ct. 1. But an unauthorized execution, issued by appellee's attorney against instructions of his client and in violation of the stay, does not have the same effect. Lyons *v.* Cahill, 20 Abb. N. Cas. (N. Y.) 42, 13 N. Y. Civ. Proc. 314.

petition in error;[40] or the language of the statute was not followed;[41] or a bond instead of a recognizance was given.[42]

(III) *Senseless Conditions.* No recovery can be had upon an appeal bond where the terms of its condition are so lacking in sense that its meaning cannot fairly be understood upon inspection of the instrument, or which, when understood, obliges the obligors to do nothing.[43]

(IV) *Impossible Conditions.* And a similar reason prevents a recovery upon an appeal bond which contains a condition impossible of performance — as that of prosecuting an appeal to a court not in existence at the time,[44] or to a court having no jurisdiction of such appeal.[45]

2. Absence of Consideration — a. In General. An appeal bond without consideration is void, and therefore cannot be enforced;[46] and, as a fundamental proposition of law, an appeal boud which is void for want of consideration, like any other instrument in the same condition, cannot be made valid by estoppel.[47] Yet, in

40. Bond may be filed before petition in error.— Stillings *v.* Porter, 22 Kan. 17. But in Howard *v.* Hess, 63 Mich. 725, 30 N. W. 333, under a slightly different statute, the court held that a stay-bond filed before service of writ of error was void.

41. Language of statute need not be followed in the condition of the bond, if the language used is, in substance, of the same import.

Alabama.— Sanders *v.* Rives, 3 Stew. (Ala.) 109.

Colorado.— Crane *v.* Andrews, 10 Colo. 265, 15 Pac. 331.

Iowa.— Field *v.* Schricher, 14 Iowa 119.

Kentucky.— Forquar *v.* Collins, 4 T. B. Mon. (Ky.) 447.

Michigan.—Ten Hopen *v.* Taylor, 103 Mich. 178, 61 N. W. 265.

Ohio.—Smith *v.* Huesman, 30 Ohio St. 662; Bentley *v.* Dorcas, 11 Ohio St. 398; Gardener *v.* Woodyear, 1 Ohio 170.

Wisconsin.— Johnson *v.* Noonan, 16 Wis. 687.

Vermont.— Way *v.* Swift, 12 Vt. 390.

Additional words may be treated as surplusage.— Conger *v.* Robinson, 4 Sm. & M. (Miss.) 210; Landa *v.* Heermann, 85 Tex. 1, 19 S. W. 885.

Language of the statute extended by interpretation.— Where the language of the statute simply was that the bond should be conditioned "for the due prosecution of the appeal," this, in connection with the custom of thirty years' practice, and the mischief of a literal interpretation, was held to mean, substantially, that bonds should be conditioned for "prosecuting the appeal with effect, or on failure to do so, to pay the amount of the judgment, and all damages and costs." Moore *v.* Gorin, 2 Litt. (Ky.) 186.

42. The giving a bond instead of a recognizance has been held a virtual compliance with a statute directing that a recognizance be taken on appeal, the condition of the bond being substantially the same as a recognizance. Granger *v.* Parker, 142 Mass. 186, 7 N. E. 785; Dowlin *v.* Standifer, Hempst. (U. S.) 290, 7 Fed. Cas. No. 4,041*a*.

43. If appellant does not prosecute, obligation to be void.— Where such is the condition of the bond, the obligation is by its terms to be void whether the appellant prosecute or not, and is therefore void as lacking in sense. Johnson *v.* Goldsborough, 1 Harr. & J. (Md.) 499.

44. Tucker *v.* State, 11 Md. 322.

45. Ward *v.* Syme, 8 N. Y. Leg. Obs. 95.

46. Two bonds for same purpose — First bond void.— A bond, given to supersede an order appointing a receiver, on appeal therefrom was found to be insufficient because of non-compliance with the statute, and the court permitted the obligors to remain in possession of the property pending the appeal upon the making of a second bond. In an action on the second bond it was held to be supported by a sufficient consideration, the first bond having been void. Lowe *v.* Riley, 57 Nebr. 252, 77 N. W. 758.

Partial consideration sufficient to support bond.— Where, at the time of the issuance of a supersedeas on appeal for the purpose of superseding a judgment of attachment, the attachment had been issued and returned and the return-day had passed, it was nevertheless held that there was a consideration for the bond and the supersedeas not wholly ineffectual, in that, the judgment being still in force, the appellee's right to all the coercive final process in the power of the chancellor for its enforcement was ended pending the appeal. Rodman *v.* Moody, 14 Ky. L. Rep. 202.

47. Void bond not made valid by estoppel. — An unauthorized and ineffectual stay-bond, given for the purpose of staying the collection of a tax, on appeal from a decision that the tax was legal, was held void and without any liability, though the collection was actually prevented by the obligee's reliance thereon. Roberts *v.* Jenkins, 4 Ky. L. Rep. 648.

No estoppel to plead want of consideration. — Matter of Kennedy, 129 Cal. 384, 389, 62 Pac. 64, wherein the court, by Temple, J., said: "When want of consideration is pleaded there is no estoppel, whatever the terms of the instrument may be, which can interfere with that defense. The idea of such estoppel comes down to us from the days of sealed instruments."

Test: Could bond legally operate?— In Ham *v.* Greve, 41 Ind. 531, 535, where a stay-bond was held void because not legally ap-

many cases, it has been held that recovery may be had on an appeal bond, otherwise void for want of consideration, because of estoppel to deny the consideration.[48] Where an appeal bond does not comply with the statute requiring it, or the bond itself is not required by any statute, so that it cannot be sued on as a statutory obligation, it may be binding, according to its terms, as a common-law obligation, provided it be supported by a consideration aside from the statutory requirements,[49] and is not contrary to a mandatory statute,[50] nor prohibited by

proved, the court said: "The question is not whether execution and other proceedings were, in fact, stayed on the judgment during the pendency of the appeal in this court, but was the bond legally operative as a supersedeas? If it was, there was a valid consideration; if not, then the bond was without consideration and void."

48. See cases cited *infra*, note 49 *et seq.*

49. **Separate consideration essential.**— In Powers *v.* Chabot, 93 Cal. 266, 269, 28 Pac. 1070, where a bond to stay execution was held void because the usual appeal bond operated as a stay, the court said: "The undertaking was not given in pursuance of any agreement between the parties, but simply to secure a statutory privilege. It did not have that effect, and was therefore wholly without consideration and void, and could not be valid as a common-law undertaking." In O'Beirne *v.* Cary, 34 N. Y. App. Div. 328, 332, 54 N. Y. Suppl. 337, it is said: "It cannot be denied that an undertaking upon appeal has no force at common law, and that it cannot be enforced unless it has been effectual to accomplish the purpose intended, and that is to stay the proceedings upon the judgment appealed from."

Stipulation to file bond out of time.— In Mueller *v.* Kelly, 8 Colo. App. 527, 47 Pac. 72, 73, the court said: "The effect of an appeal bond is to stay proceedings upon the judgment until the appeal is disposed of. At the solicitation of Roth & Co., a stipulation was procured from the adverse party, permitting them to file their appeal bond after the time allowed had expired. In pursuance of the stipulation, the bond was filed and approved. It must have been filed for the purpose of staying proceedings upon the judgment. It could have been filed for no other purpose. And the defendant, when he signed the bond as surety, is presumed to have known the object it was intended to accomplish. It seems to have efficiently served the purpose for which it was designed; and, after the full benefit of the stipulation, and of the bond executed in pursuance of it, has been taken and appropriated, it is too late to question the validity of the bond."

Failure to perfect appeal.— In Gimerling *v.* Hanes, 40 Ohio St. 114, 116, the court said: "Counsel for plaintiff in error refer to Duckwall *v.* Rogers, 15 Ohio St. 544, and upon authority of that case submit that the defendants below are liable upon the undertaking for appeal as a common-law obligation. In that case the undertaking was for the stay of execution, and while it was in the form of a statutory undertaking for stay of execution, it was supported by a distinct consideration. . . . In this case no consideration appears. The undertaking was only for appeal. It was given within the time required, but both parties after it had been given neglected to take further action in the case, until this suit was brought. The appeal never had any existence, and the parties to the judgment were left to enforce it as if no appeal had ever been attempted."

Contract for stay.— In Duckwall v. Rogers, 15 Ohio St. 544, 546 [*citing* State *v.* Findley, 10 Ohio 51; Barret *v.* Reed, 2 Ohio 409; Croy *v.* State, Wright (Ohio) 135; U. S. *v.* Linn, 15 Pet. (U. S.) 290, 10 L. ed. 742; U. S. *v.* Bradley, 10 Pet. (U. S.) 343, 9 L. ed. 448], it was said: "Although the period had elapsed, within which a statutory stay of execution could be procured, the parties to the judgment were competent to secure the same thing in substance, by contract. Such a contract would be neither immoral nor illegal, and might be a valid common-law contract, though not a good statutory undertaking."

Agreement for stay to support insufficient bond.— In Carter *v.* Hodge, 150 N. Y. 532, 538, 44 N. E. 1101, it was said: "The undertaking cannot be enforced as a common-law contract. The plaintiff refused to regard it as effectual to stay proceedings. There is nothing from which a mutual agreement of the parties can be inferred that proceedings on the judgment should be stayed in consideration of the undertaking, or from which a request of forbearance acted upon by the plaintiff, can be implied." But in Goodwin *v.* Bunzl, 102 N. Y. 224, 6 N. E. 399 [*citing* Cook *v.* Freudenthal, 80 N. Y. 202; Decker *v.* Judson, 16 N. Y. 439], under a slightly different state of facts a different conclusion was reached. See also Concordia Sav., etc., Assoc. *v.* Read, 124 N. Y. 189, 26 N. E. 347, 35 N. Y. St. 222.

Bond without any consideration for a portion, void pro tanto.— In Post *v.* Doremus, 60 N. Y. 371, 377, it was held that a bond conditioned to do more than the statute required in order to take an appeal was as to such excessive portion without consideration. See also Carter *v.* Hodge, 6 Misc. (N. Y.) 575, 27 N. Y. Suppl. 219, 57 N. Y. St. 785; Slack *v.* Heath, 4 E. D. Smith (N. Y.) 95, 101.

Consent of appellee to appeal after statutory limit is a sufficient consideration to support the appeal bond, it being held that the appeal, through such consent, is valid. Carroll *v.* McGee, 25 N. C. 16, where it is said: "No consent can give jurisdiction where the law withholds it: but consent may enlarge the time within which a legal privilege can be exercised."

50. See *supra*, IX, A, 1, b, (II), (A).

public policy.[51] However, in some cases, it is held that whenever the intended purpose of the bond has been effected by the obligee's reliance upon it, this is a sufficient consideration to support it as a common-law obligation,[52] as is also the procuring of a stay of proceedings,[53] and again, also, the necessity of the disposal of a void appeal.[54]

b. Bond Not Required by Law — (1) *Voluntarily Given.* A bond given on appeal to effect a purpose which by law requires no bond is, though voluntary, without any consideration other than that which its recitals import or the forbearance of the obligee lends, and more often, though not always, has been held to afford no basis for a recovery.[55] So, a bond given in a penal sum greater than

51. Bond contrary to public policy.— An appeal bond by a stranger to the record, in Reid *v.* Quigley, 16 Ohio 445, 448, was held an absolute nullity, upon which a good declaration could not be framed though the cause was taken to the appellate court and there decided without objection, and a consideration was conceded, the court saying: "The bond cannot be valid as a common-law bond, admitting the consideration which the seal imparts. It carries on its face, evidence that it is against public policy, and nothing in the record relieves it from this apparent difficulty. We cannot sustain it, without sanctioning the doctrine that one man may officiously interfere with another man's business, and appeal his causes from an inferior to a superior tribunal."

52. Obligee's reliance on bond sufficient consideration.— *Colorado.*— Martin *v.* Davis, 2 Colo. 313.

Illinois.— Mix *v.* People, 86 Ill. 329.

Kansas.— Gille *v.* Emmons, 61 Kan. 217, 59 Pac. 338, where the reasons for this doctrine are set forth.

Michigan.—Ten Hopen *v.* Taylor, 103 Mich. 178, 61 N. W. 265; Healy *v.* Newton, 96 Mich. 228, 55 N. W. 666.

New York.— Concordia Sav., etc., Assoc. *v.* Read, 124 N. Y. 189, 26 N. E. 347, 35 N. Y. St. 222; Goodwin *v.* Bunzl, 102 N. Y. 224, 6 N. E. 399.

53. Procuring stay of proceedings.—Where an order staying proceedings was procured by a bond not sufficient for that purpose under the statute, it was nevertheless held that the stay was a good consideration for the bond. Hester *v.* Keith, 1 Ala. 316; Ryan *v.* Webb, 39 Hun (N. Y.) 435.

Insufficient stay-bond — Intention of parties.— In Coughran *v.* Sundback, 13 S. D. 115, 119, 82 N. W. 507, 79 Am. St. Rep. 886, the court, by Fuller, P. J., said: "The undisputed evidence, admitted without objection, shows that Coughran proposed to issue execution before the undertaking under consideration was given, and was prevailed upon to forbear by repeated assurances that an appeal to this court would be taken, and a sufficient stay-bond furnished. Consequently no steps were taken to enforce the judgment prior to the giving of the undertaking, in which the sureties justified in the sum of two thousand dollars for the evident purpose of securing payment, upon default, of the amount found to be the value of the property, together with costs and disbursements. That such was the import of the undertaking, and that a stay had been effected, was the view that governed all subsequent conduct, and no execution issued pending the appeal. By the employment of familiar rules for the construction of contracts, and their application to these circumstances appearing of record, the intention of the parties to provide an undertaking that would operate as valid security — as a stay of all proceedings — is clearly gatherable from the writing; and parties having enjoyed the benefit of the stay contemplated ought to be held amenable, provided the instrument is good as a common-law obligation, although the amount was not fixed by the court, nor the conditions in accordance with the requirements of the statute. When execution has been actually stayed by an undertaking treated as entirely regular, though insufficient to accomplish such purpose, and the departure from the state does not tend to defeat its object, the fact that nothing is done to enforce the judgment has generally been regarded a sufficient consideration for a common-law obligation, from which sureties cannot escape liability, and such is our conclusion."

54. Expense of disposing of void appeal a consideration.— In Matter of Kennedy, 129 Cal. 384, 385, 62 Pac. 64, it was said: "The dismissal, under such circumstances, did not operate as an affirmance of the judgment. . . . And, moreover, since the appeal was absolutely void, it did not deprive the lower court of jurisdiction, and no stay of proceedings was effected. . . . The fact that an appeal was not secured did not operate to render void the undertaking given as required by law to make the appeal effectual. The sureties on such an undertaking agree to be liable if the appeal be dismissed, and, since the respondent must be at some expense to have even a void appeal disposed of, there is a consideration for the undertaking."

55. Supersedeas where appeal bond supersedes judgment.— Lyon *v.* Lancaster, 17 Ky. L. Rep. 1169, 33 S. W. 838, asserting the rule prior to Kentucky act of March 24, 1888.

A stay-bond where appeal bond operates as stay, is without consideration because it is unnecessary (Matter of Kennedy, 129 Cal. 384, 62 Pac. 64; Central Lumber, etc., Co. *v.* Center, 107 Cal. 193, 40 Pac. 334; McCallion *v.* Hibernia Sav., etc., Soc., 98 Cal. 442, 33 Pac. 329; Barnes *v.* Buffalo Pitts Co.,

that required by the statute is without consideration as to such excess, and so far unenforceable.[56] And so, also, in the case of a bond conditioned to perform something in addition to the requirements of the statute;[57] but not unless the excessive portion be severable from the other.[58]

(II) *Exacted as Condition of Appeal.* Where the statute does not allow

(Ida. 1899) 57 Pac. 267); even though relied on by the obligee to his prejudice (Powers *v.* Chabot, 93 Cal. 266, 28 Pac. 1070, this case assigning the reasons upon which the rule is based).

Appeal bond given where no bond required is ordinarily void (Halsey *v.* Flint, 15 Abb. Pr. (N. Y.) 367; Robert *v.* Donnell, 10 Abb. Pr. (N. Y.) 454), as in cases of appeals by personal representatives exempted by statute from giving appeal bonds (Buttlar *v.* Davis, 52 Tex. 74; Battle *v.* Howard, 13 Tex. 345; Tucker *v.* Anderson, 25 Tex. Suppl. 155; and *supra*, VII, D, 1, c). But an executor, appealing in his individual capacity, though in relation to property under his control as executor, has no right to claim the exemption. Guest *v.* Guest, 48 Tex. 210. Where, though the executor was not permitted by statute to appeal without bond, it was conceded that the bond might have been dispensed with or limited because the assets in his hands were less than the amount of the judgment, yet, after an unsuccessful appeal, the obligors have been held liable for the full amount of the judgment regardless of the amount of the assets. Le Blanc *v.* Massien, 27 La. Ann. 324; Schmucker *v.* Steidemann, 8 Mo. App. 302; Yates *v.* Burch, 87 N. Y. 409; Knapp *v.* Anderson, 71 N. Y. 466.

Courts of chancery exercising powers over trustees may, independently of any statute, require a bond, on appeal from a judgment in relation to trust property, which will be valid and binding. Fullerton *v.* Miller, 22 Md. 1. But such power does not apply to an appeal by an executor, though he be in control of trust property. Com. *v.* Wistar, 142 Pa. St. 373, 21 Atl. 871.

A bond conditioned to pay rent, where appellant is entitled to possession, on appeal from a judgment in unlawful detainer, is void. This situation arose under a statute permitting the successful plaintiff to have possession of the property upon executing a bond to cover rent in case of reversal, and he afterward demanded and procured from appellant the bond held void. Hawkins *v.* Alexander, 91 Tenn. 359, 18 S. W. 882.

A stay-bond, after time allowed within which it could operate as a stay under the statute, was held void, though the execution was actually stayed. Patrick *v.* Driskill, 7 Yerg. (Tenn.) 140. *Contra*, Schmucker *v.* Steidemann, 8 Mo. App. 302; Hostler *v.* Smith, 5 N. C. 103.

56. Excessive bond void as to excess, but not in toto.— Bentley *v.* Dorcas, 11 Ohio St. 398; Powers *v.* Crane, 67 Cal. 65, 66, 7 Pac. 135, where the court, by Ross, J., said: "The pretended consideration therefore was a stay of execution of the decree appealed from. And if the law itself operated a stay upon the giving of the three hundred dollar bond, it would seem that the point is well taken. That the statute did so operate was held by this court in the case of Snow *v.* Holmes, 64 Cal. 232, 30 Pac. 806. As the statute itself wrought the stay, there was no consideration for the sureties' promise."

57. Unnecessary portion of condition void. — *Alabama.*—Sanders *v.* Rives, 3 Stew. (Ala.) 109.

Illinois.— Tomlin *v.* Green, 39 Ill. 225.

Mississippi.— Conger *v.* Robinson, 4 Sm. & M. (Miss.) 210.

Tennessee.— Mason *v.* Metcalf, 4 Baxt. (Tenn.) 440; Hutchinson *v.* Fulghum, 4 Heisk. (Tenn.) 550; Banks *v.* McDowel, 1 Coldw. (Tenn.) 84; Patterson *v.* Gordon, 3 Tenn. Ch. 18.

Texas.— Landa *v.* Heermann, 85 Tex. 1, 19 S. W. 885; Janes *v.* Langham, 29 Tex. 413.

Vermont.— Court of Insolvency *v.* Meldon, 69 Vt. 510, 38 Atl. 167.

Not necessary as to damages, so far invalid.— In Post *v.* Doremus, 60 N. Y. 371 [*distinguishing* Thompson *v.* Blanchard, 3 N. Y. 335], the court held invalid for want of consideration that portion of an appeal bond conditioned to pay damages in addition to the statutory condition of paying costs.

Partial consideration—Appeal without stay. — Where a bond is conditioned to satisfy the judgment and also to pay costs, and the former condition is without consideration because insufficient to stay the execution on the judgment, but the latter is sufficient for the purposes of a simple appeal, the obligation for costs may be enforced though that to satisfy the judgment be held nugatory. Byrne *v.* Riddell, 4 La. Ann. 3; Halsey *v.* Flint, 15 Abb. Pr. (N. Y.) 367; Onderdonk *v.* Emmons, 9 Abb. Pr. (N. Y.) 187, 2 Hill (N. Y.) 504, 17 How. Pr. (N. Y.) 545.

Recital of stay.— Where one part of a bond recited that the principal had obtained a writ of error, and the condition was to satisfy the judgment, "proceedings on which are stayed," it was held that the bond was sufficient to sustain a judgment thereon for the amount of the affirmed judgment, upon the theory that it had been superseded by the appeal bond. State *v.* Dotts, 31 W. Va. 819, 8 S. E. 391.

58. Excessive portion must be severable, else the bond is wholly void. Com. *v.* Wistar, 142 Pa. St. 373, 21 Atl. 871, 872; Haines *v.* Levin, 51 Pa. St. 412; Court of Insolvency *v.* Meldon, 69 Vt. 510, 38 Atl. 167. Where by statute the obligor might have made a good bond conditional to pay the judgment or surrender himself into custody, a bond was nevertheless held valid wherein the condition was simply to pay the judgment on affirmance. Pevey *v.* Sleight, 1 Wend. (N. Y.) 518.

an appeal as of course upon the performance of certain requirements, but requires, also, an order of court as a preliminary to the granting of the order, the exaction of a more onerous condition than the law requires renders the bond void,[59] and where some portions only of the conditions exceed the statute the bond is nevertheless void *in toto*.[60] And some authorities hold that it is only in cases of exactions of this kind that an unnecessary bond is void, and that if the bond be voluntary it may be upheld.[61]

c. No Appeal Prosecuted—(I) *No Right of Appeal*—(A) *Bond Void.* Where no appeal can lawfully be taken in a given case, it would seem to be clear that a bond given for no other purpose than the taking of such an appeal is wholly without consideration, and therefore void; and it is so held by the best authorities.[62]

59. **More onerous terms** than statute requires avoids bond. Com. *v.* Wistar, 142 Pa. St. 373, 21 Atl. 871, 872.

Bonds of fiduciaries.— Fiduciaries are directly under the supervision of certain courts, and the exaction of a condition of appeal not required by statute, for the purpose of protecting the trust property, has been held a valid exercise of power, not invalidating the bond. Haines *v.* Levin, 51 Pa. St. 412; Com. *v.* Judges, 10 Pa. St. 37; Chew's Appeal, 9 Watts & S. (Pa.) 151.

60. **Bond void in toto, though only a portion unauthorized,** where the bond as a whole was exacted as a condition precedent to the allowance of an appeal. Newcomb *v.* Worster, 7 Allen (Mass.) 198; Harrington *v.* Brown, 7 Pick. (Mass.) 232; Dennison *v.* Mason, 36 Me. 431. To the same effect see Jordan *v.* McKenney, 45 Me. 306; French *v.* Snell, 37 Me. 100; Com. *v.* Wistar, 142 Pa. St. 373, 21 Atl. 871, 872.

61. Schmucker *v.* Steideman, 8 Mo. App. 302.

62. Ashley *v.* Brasil, 1 Ark. 144; Memmler *v.* Roberts, 81 Ga. 351, 8 S. E. 525; Henry *v.* Great Northern R. Co., 16 Wash. 417, 47 Pac. 895. In Ward *v.* Syme, 8 N. Y. Leg. Obs. 95, 100, Ulshoeffer, J., concurring, said: "Where a proceeding is void from the beginning, no steps can be founded upon it or taken afterward. The plaintiff in error was only acting in that assumed character, and was not such plaintiff in fact, and could not prosecute this writ, nor do anything with or upon it. The defendant in error was not such defendant in fact, as there was no valid process in error. The judge had no authority in the premises, because he had no jurisdiction, and the supposed writ of error was a nullity — not voidable, but void. A bond given without consideration, upon a mistaken step in a court having no jurisdiction of the subject-matter, is void, and cannot be treated as valid by either party, and the total want of consideration and jurisdiction may be shown by the obligors in defense to the action. I think that the weight of authority and principle sustains Judge Daly's opinion."

Appeal from interlocutory order — Discretionary jurisdiction.— In a case of a bond given upon an appeal from an interlocutory order, it was held that if the appellate court could not have taken jurisdiction of the appeal, the bond would have been void; but, inasmuch as the assumption of jurisdiction was discretionary with the appellate court, and that court had in fact assumed jurisdiction of the appeal, the bond was valid. Fulton *v.* Fletcher, 12 App. Cas. (D. C.) 1.

Appealable order.— An assignor having appealed from a judgment confirming a sale of land, the court, upon application of the assignee for advice, ordered him to rent the land for one year, from which order the assignor also appealed, superseding the order with the usual appeal bond. The judgment of confirmation was reversed, and the appeal from the order was dismissed for failure to prosecute. In an action on the bond given on appeal from the order, the order was held to be valid and appealable, and the dismissal a breach upon which the jury were warranted in returning damages for the rental value during the term of the order. Vanmeter *v.* Parker, 19 Ky. L. Rep. 1229, 43 S. W. 200.

Order not appealable.— An appeal from an order refusing to vacate the dismissal of an appeal from a justice court was dismissed because the order was not appealable. In an action on the appeal bond conditioned for the satisfaction of the judgment, if affirmed, it was held that there was no liability because the dismissal of the appeal did not affirm the judgment of the justice. Travelers' Ins. Co. *v.* Weber, 4 N. D. 135, 59 N. W. 529.

Mere findings of fact, without judgment thereon, have been held to afford no basis for an appeal, and such appeal no consideration for an appeal bond, in Brounty *v.* Daniels, 23 Nebr. 162, 36 N. W. 463, where the previous case of Gudtner *v.* Kilpatrick, 14 Nebr. 347, 15 N. W. 708, which sustained an appeal bond where no right of appeal existed, and the case of Adams *v.* Thompson, 18 Nebr. 541, 26 N. W. 316, which sustained an appeal bond though no appeal had been taken, were distinguished.

Appeal from an Indian Territory court to the circuit court for the district of Kansas, not being authorized by law, was held to invalidate an appeal bond given for that purpose, although the appellee forbore to issue execution pending the appeal, the judge saying: "The plaintiffs in the case in the territorial court could have sued out an execution." Steele *v.* Crider, 61 Fed. 484, 486.

(B) *Bond Valid — Estoppel.* It has, however, in many instances, been held that the fact that no legal right of appeal existed did not prevent a recovery on a bond given for the sole purpose of effecting such appeal, on the ground of estoppel to plead absence of consideration or want of jurisdiction.[63] And in some instances this doctrine of estoppel to plead want of jurisdiction has been applied though the court expressly recognized the fact that the bond was void except for the application of this doctrine.[64]

(II) *No Judgment in Lower Court* — (A) *In General.* In case of a bond where the only consideration is an appeal, and there existed no judgment from which to appeal, there is clearly no consideration for the bond, because there could be no appeal.[65] But it has been held that the obligors may be estopped to show this fact by the recital of a judgment,[66] and by the receipt of benefits which have

63. Estoppel to show want of jurisdiction. — Ray *v.* Ray, 1 Ida. 705; Brown County Coöperative Assoc., etc., *v.* Rohl, 32 Kan. 663, 5 Pac. 1; Kellar *v.* Beeler, 4 J. J. Marsh. (Ky.) 655; Stephens *v.* Miller, 3 Ky. L. Rep. 523; Gudtner *v.* Kilpatrick, 14 Nebr. 347, 15 N. W. 708; Chase *v.* Smith, 4 Cranch C. C. (U. S.) 90, 5 Fed. Cas. No. 2,629.

64. Barratt *v.* Grimes, (Kan. App. 1901) 63 Pac. 272 [*citing* Grimes *v.* Barratt, 60 Kan. 259, 56 Pac. 472]. In Love *v.* Rockwell, 1 Wis. 382 [*quoted* with approval in Gudtner *v.* Kilpatrick, 14 Nebr. 347, 15 N. W. 708], the court, by Whiton, C. J., said: "The recognizance on which the suit was brought was entered into by the defendant, and the defense sought to be interposed to the action is, that the recognizance is void, because the justice before whom it was taken had no authority to take it, as no appeal lay from his decision. The plea admits that the recognizance was entered into for the purpose of perfecting an appeal of the case to the county court; but the defendant insists that no appeal lay from the decision, and that the proceedings before the justice, subsequent to the rendition of the judgment, are consequently void. We suppose there can be no doubt of the correctness of these positions of the defendant. The statute did not authorize an appeal of the case to the county court; and when, by law, no appeal can be had, we do not see how any legal consequences can follow from proceedings taken to perfect it. But this does not meet the difficulty. The recognizance was entered into by the defendant, together with Abbott, and recites the fact of the recovery of the judgment, and that an appeal had been taken to the county court. To allow the defendant to set up and prove these facts, to contradict his own recognizance, would be to allow him to obtain a delay in the issuing of the execution upon the judgment rendered by the justice, and then, when the delay has been obtained, insist that the recognizance which procured it created no legal obligation. While we think this is a case where it would be gross injustice to allow the defendant to avail himself of the defense set up in his plea, we are equally well satisfied, that it is a case where the doctrine of estoppel applies, as laid down in the authorities. 1 Rolle Abr. 872, 873; Lainson *v.* Tremere, 1 A. & E. 792, 28 E. C. L. 367; Bowman *v.* Taylor, 2 A. & E. 278, 29 E. C. L. 142." The case of Gudtner *v.* Kilpatrick, 14 Nebr. 347, 15 N. W. 708, is approved in Adams *v.* Thompson, 18 Nebr. 541, 26 N. W. 316, and both cases are distinguished in Brounty *v.* Daniels, 23 Nebr. 162, 36 N. W. 463, a case where no judgment had been entered in the trial court.

65. Appeal from order denying a new trial has been held not to furnish any consideration for a condition that, "if the judgment, or any part thereof, be affirmed, appellant will pay the amount directed to be paid," etc., no liability arising under that condition, there being no judgment appealed from. Post *v.* Doremus, 60 N. Y. 371 [*modifying* 1 Hun (N. Y.) 521, 3 Thomps. & C. (N. Y.) 626]. Such a bond cannot operate as a stay without an order, and, being ineffectual for any purpose, is invalid. Carter *v.* Hodge, 150 N. Y. 532, 44 N. E. 1101.

Appeal from order on motion to set aside verdict, no judgment having been entered, has been held no consideration for an appeal bond, because not appealable. Galloway *v.* Yates, 10 Minn. 75.

Judgment admitted.— The existence of the judgment appealed from is admitted by a plea of general performance, thus dispensing with the necessity of proving such judgment. Frantz *v.* Smith, 5 Gill (Md.) 280.

Judgment not formally entered.— The fact that the judgment appealed from was not formally entered at the time of the execution of the bond was held no defense for want of consideration, there being at the time a rule absolute for judgment. Mechling *v.* Merchants' Bank, 3 Walk. (Pa.) 466. But where the rule absolute was afterward stricken off, and the appeal for that reason discontinued, there was held to be no liability on the appeal bond. Com. *v.* Krause, 23 Pa. Co. Ct. 511.

Recital of a judgment in the bond, which is set out in the declaration, is a sufficient allegation of its existence. Harding *v.* Kuessner, 172 Ill. 125, 49 N. E. 1001.

Transcript of the judgment need not be filed with the complaint in an action on an appeal bond. Buchanan *v.* Milligan, 68 Ind. 118; Blair *v.* Kilpatrick, 40 Ind. 312; Butler *v.* Wadley, 15 Ind. 502.

66. *Colorado.*— Thalheimer *v.* Crow, 13 Colo. 397, 22 Pac. 779.

Illinois.— Courson *v.* Browning, 78 Ill. 208.

accrued to them as a result of the bond that has been given by them to effectuate an appeal.[67]

(B) *Void Judgment* — (1) General Rule. A void judgment is the same as no judgment; and, therefore, where the judgment appealed from is a nullity, an appeal therefrom, as a general proposition, would also be a nullity and constitute no consideration for an appeal bond.[68] On the ground of estoppel, however, the reverse of this proposition has also been held.[69] Mere defects and irregularities,

Michigan.— Healy *v.* Newton, 96 Mich. 228, 55 N. W. 666.

Montana.— Parrott *v.* Kane, 14 Mont. 23, 35 Pac. 243.

Oklahoma.— Richardson *v.* Penny, (Okla. 1900) 61 Pac. 584.

Plea of no judgment is demurrable, execution of bond being admitted. In Smith *v.* Whitaker, 11 Ill. 417, 418, the court, by Treat, C. J., said: "The plea alleges, in substance, that there was no such judgment before the justice, as is recited in the condition of the bond sued on. The defendant was estopped by the record from making such an allegation. The bond is set out in the declaration, and it distinctly states that a judgment had been rendered by the justice. The very object of the parties in executing the bond was to prevent the collection of the judgment, and have the case re-heard in the circuit court; and the bond was expressly conditioned for the payment of the judgment, in the event it should be affirmed. It was, therefore, a solemn admission by the defendant that there was such a judgment. He voluntarily entered into an engagement, under his hand and seal, for the payment of the judgment; and he could not afterward deny what he asserted to be true — the existence of the judgment. The principle of estoppel is clearly applicable."

Plea of nul tiel record not good.— In Kellar *v.* Beeler, 4 J. J. Marsh. (Ky.) 655, 656, the court, by Buckner, J., said: "The demurrer to the plea of *nul tiel record*, as to the decree of the circuit court, ought to have been sustained. The appellees, by the appeal bond executed under their hands and seals, have acknowledged the existence of such a decree; and were legally estopped to deny it." See also Herrick *v.* Swartwout, 72 Ill. 340.

67. Misrecital of judgment cured by receipt of benefits.— Where a bond, given on appeal from a judgment to pay fifty dollars cash and fifty dollars per month as alimony, recited the judgment appealed from as one for one hundred and fifty dollars, it was held that the bond conditioned for the payment of said judgment, was not only valid, but also binding, as to the entire judgment, because the entire judgment was in fact superseded and incapable of enforcement pending the appeal. Dye *v.* Dye, 12 Colo. App. 206, 55 Pac. 205.

68. Judgment against a non-resident, without personal service upon him, would be void and form no consideration for an appeal bond where the judgment is *in personam;* but otherwise where the judgment is *in rem* on attachment. Dexter *v.* Sayward, 84 Fed. 296.

Judgment void for want of jurisdiction.— Hessey *v.* Heitkamp, 9 Mo. App. 36 [*citing* Garnet *v.* Rodgers, 52 Mo. 145; Adams *v.* Wilson, 10 Mo. 341; Moore *v.* Damon, 4 Mo. App. 111].

Void judgment as to principal not void as to sureties.— In West *v.* Carter, 129 Ill. 249, 21 N. E. 782 [*reversing* 25 Ill. App. 245], it was held that a surety on an appeal bond could not maintain an action to set aside an affirmed judgment "void," not "voidable," because founded on an illegal contract, though the principal obligor might have maintained such an action as a party to the judgment. It is interesting to observe that, by the decisions of the same court, a surety in such a cause has no recourse but to pay the judgment, since, in an action on the bond, he is estopped by the recitals thereof to plead invalidity of the judgment. See notes immediately *supra* and *infra.*

Pleading.— Jurisdiction of the trial court has been held to be a necessary allegation in an action on an appeal bond. Tarbell *v.* Gray, 4 Gray (Mass.) 444.

An affidavit of defense which sets up only that the judgment appealed from was void, may be disregarded, if this defense is not sustained and judgment rendered as for want of an affidavit of defense. Brimmer *v.* Mayer, 15 Pa. Super. Ct. 454, 18 Lanc. L. Rev. 52.

69. Gross *v.* Weary, 90 Ill. 256; Butler *v.* Wadley, 15 Ind. 502. In Mueller *v.* Kelly, 8 Colo. App. 527, 47 Pac. 72, 73, the court, by Thomson, J., said: "While it is true that a judgment which is absolutely void is open to collateral attack, and its character may be shown in any proceeding in which it is offered in evidence, yet it is also true that a party against whom a judgment is rendered which he regards as void may, if he so desires, seek to relieve himself of it by appeal, and its validity may be tested in the appellate court. To affect the appeal, he must give an appeal bond; and, to protect his sureties from liability upon the bond, he must prosecute his appeal with effect, or pay the judgment appealed from. The validity of the bond does not depend upon the validity of the judgment."

Judgment void as to one of several appellants, bond valid as to all.— Where a judgment appealed from by several persons was held void as to one of them, it was nevertheless held that the joint and several appeal bond was valid as to all, and that the person as to whom the judgment was void had not on that account any defense, though having signed as principal only and not as surety. Gille *v.* Emmons, 61 Kan. 217, 59 Pac. 338.

short of a failure of jurisdiction, will not avoid the judgment appealed from;[70] and the merits of a valid judgment cannot be reopened by the obligors in the appeal bond.[71]

(2) Trial De Novo. Where the result of an appeal is a trial *de novo* in the appellate court, and such trial is within the jurisdiction of such court and actually had, the question of the validity of the judgment below cannot be raised, because a proceeding *de novo* wipes out the former proceedings and the parties thereto submit themselves to the jurisdiction of the appellate court as for an original action.[72]

(iii) *Appeal Dismissed for Defects* — (a) *In General.* When an appeal is dismissed on account of failure to comply with some statutory or judicial requirement necessary to its perfection, the question of whether or not any liability arises on the appeal bond depends upon the terms of the condition of the bond. If the condition by its recitals presupposes the perfecting of an appeal, the greater weight of the authorities hold that there is no liability on the bond, because of its invalidity for want of consideration.[73]

70. Defects and irregularities must amount to a failure of jurisdiction in order to permit the validity of the judgment appealed from to be questioned. Knight *v.* Waters, 18 Iowa 345; Morris *v.* Hunken, 40 N. Y. App. Div. 129, 57 N. Y. Suppl. 712; Miller *v.* McLuer, Gilm. (Va.) 338.

71. Valid judgment conclusive. — *Colorado.* — Steinhauer *v.* Colmar, 11 Colo. App. 494, 55 Pac. 291.

Illinois. — Mann *v.* Warde, 64 Ill. App. 108.

Indiana. — Supreme Council, etc. *v.* Boyle, 15 Ind. App. 342, 44 N. E. 56, 42 N. E. 827; Pierce *v.* Banta, 9 Ind. App. 376, 31 N. E. 812.

Kentucky. — Thixton *v.* Goff, 5 Ky. L. Rep. 764.

Louisiana. — Murison *v.* Butler, 20 La. Ann. 512.

Missouri. — Hydraulic Press Brick Co. *v.* Neumeister, 15 Mo. App. 592.

New York. — Seymour *v.* Smith, 114 N. Y. 481, 21 N. E. 1042, 11 Am. St. Rep. 683, 24 N. Y. St. 77; Kent *v.* Sibley, 15 Daly (N. Y.) 298, 5 N. Y. Suppl. 44, 25 N. Y. St. 741.

Wisconsin. — Ingersoll *v.* Seatoft, 102 Wis. 476, 78 N. W. 576, 27 Am. St. Rep. 892; Krall *v.* Libbey, 53 Wis. 292, 10 N. W. 386.

72. Reasons. — In Butler *v.* Wadley, 15 Ind. 502, 504, the court, by Perkins, J., said: "But we do not think that the fact that the award, the entry of record of which was appealed from, was void, rendered the appeal bond invalid for want of consideration. The party knew, when he appealed from the award, that it was void, if it was so; yet he desired to appeal from the entry of it of record. He wished to remove the case it involved from the record of the secretary, a *pro hac vice* justice of the peace, to the Circuit Court. This removal, an appeal would effect, and would be a good consideration for the required bond. The cause would stand for trial *de novo* in the appellate court. Gaston *v.* Marion County, 3 Ind. 497; Lake Erie, etc., R. Co. *v.* Heath, 9 Ind. 558. The appeal would have vacated, while it stood, any award." To the same effect see Knight *v.* Waters, 18 Iowa 345.

73. Appeal a condition of validity. — In Gregory *v.* Obrian, 13 N. J. L. 11, 12, the court, by Ewing, C. J., said: "The terms of the bond are predicated of an appeal and of jurisdiction in the Court of Common Pleas to sustain it. They suppose an appeal in existence, duly taken, and relate to matters subsequent thereto. They provide for, and require the due prosecution of the appeal by the appellant after it has been granted. They do not relate either in letter or spirit to acts antecedent to the appeal, which are required to be performed in order to obtain it, and without which it could not have legal existence. No security to perform such acts could be requisite, because they are to be done prior to the appeal, and without them, the appeal ought not to be granted by the justice. An omission to perform such acts, is not, therefore, within the condition of the bond. . . . If the appeal is dismissed for want of prosecution in the Court of Common Pleas, if, after the appeal is granted, the appellant neglects to pursue such measures as the due prosecution of the appeal requires, the bond is forfeited. If the appeal is dismissed for want of jurisdiction in the court, or for failure or omission or defect of matters antecedent to the appeal, the appellee must seek redress, not upon the bond, but in such other modes as the law has provided for him."

Conditional upon dismissal. — Where the obligation of a bond was conditioned to satisfy "if the appeal be dismissed," and the appeal was dismissed for failure to serve the printed case and exceptions, and, the time not having elapsed within which an appeal might be taken, leave was granted to make service within fifteen days, which was not done, the obligors were held liable. Wheeler *v.* McCabe, 47 How. Pr. (N. Y.) 283.

Consent of obligee to the appeal perfected after the time allowed by law, together with the receipt of benefits of the appeal by the obligor, will estop the latter to show the defect in an action on the appeal bond. Carroll *v.* McGee, 25 N. C. 13.

Failure to give a new bond when required, in consequence of which the appeal is dismissed, under a statute providing that in such cases "the appeal must be dismissed . . . as

(B) *Recital of Appeal.* In some jurisdictions, however, it has been held that even where an appeal is so defective as to require its dismissal for want of jurisdiction, the obligors in a bond reciting that an appeal has been taken will be estopped by the recital to deny the fact of the appeal.[74]

(C) *Receipt of Benefits.* Again, independently of any recital in the bond, and without reference either to whether or not the appeal was a condition of the bond or the bond a condition of the appeal, it has been held that the obligor may receive benefits from a bond where there has been no appeal, and the receipt of such benefits estops him to deny that there was an appeal.[75] And where the appeal is not dismissed because of the defect there is no failure of consideration.[76]

(IV) *No Attempt to Appeal.* In case it appears that no attempt has been made to appeal, it would seem to be clear that a bond given because of an appeal is without consideration, and such a bond is therefore held to impose no liability.[77]

if the original undertaking had not been given," has been held to release the obligors from liability for satisfaction of the judgment, though not for the costs in the appellate court. Galinger *v.* Engelhardt, 26 Misc. (N. Y.) 49, 55 N. Y. Suppl. 334.

Failure to grant order allowing appeal within time.— Adams *v.* Wilson, 10 Mo. 341 [*quoted* with approval in Garnet *v.* Rodgers, 52 Mo. 145, which holds that a bond executed to procure an appeal from a default judgment before a justice of the peace, where no motion was made to set aside the default, was without authority of law, and therefore void]. But see, *contra,* Rodman *v.* Moody, 14 Ky. L. Rep. 202.

Failure to perfect appeal by entering statutory notice.— In Estado Land, etc., Co. *v.* Ansley, 6 Tex. Civ. App. 185, 24 S. W. 933 [*citing* Trent *v.* Rhomberg, 66 Tex. 249, 18 S. W. 510; Perez *v.* Garza, 52 Tex. 571], the court, by James, C. J., said: "The appeal with reference to which the bond sued on was given was not perfected, owing to the fact that the notice of appeal was not entered of record. Rev. Stat., art. 1387; Messner *v.* Lewis, 17 Tex. 519. In view of this, was the bond an obligation upon which a recovery could be had? . . . So far as we have been able to find, there can be no breach of the condition of an appeal bond where no appeal has ever existed, and where, therefore, the appellate court referred to in the bond has had no jurisdiction." To the same effect see Probate Ct. *v.* Gleed, 35 Vt. 24.

Mistake of surety as to existence of order. — In Louisiana, the fact that there was no legal order granting an appeal at the time of the making of the bond is held to be good defense to an action on the bond; and the fact that the obligors at the time supposed such order had been made is an additional reason for absolving the sureties from liability. Sears *v.* Bearsh, 7 La. Ann. 539, where the court, by Post, J., said: "It is said that, under the view which we take of the law, debtors, by obtaining informal orders of appeal, may delay the pursuit of their creditors without endangering their sureties. The order of appeal is under the direction of the judge, and it is not to be presumed that he will connive with litigants to frustrate the ends of justice."

74. Thalheimer *v.* Crow, 13 Colo. 397, 22 Pac. 779; Meserve *v.* Clark, 115 Ill. 580, 4 N. E. 770; Mix *v.* People, 86 Ill. 329; Walton *v.* Develing, 61 Ill. 201; Terre Haute, etc., R. Co. *v.* Peoria, etc., R. Co., 81 Ill. App. 435; Fearons *v.* Wright, 6 Ky. L. Rep. 747.

75. *California.*— Matter of Kennedy, 129 Cal. 384, 62 Pac. 64; Hathaway *v.* Davis, 33 Cal. 161.

Colorado.— Creswell *v.* Herr, 9 Colo. App. 185, 48 Pac. 155.

Kentucky.— Rodman *v.* Moody, 14 Ky. L. Rep. 202.

Nebraska.— Flannagan *v.* Cleveland, 44 Nebr. 58, 62 N. W. 297; Adams *v.* Thompson, 18 Nebr. 541, 26 N. W. 316.

Utah.— Pratt *v.* Gilbert, 8 Utah 54, 29 Pac. 965.

United States.— Dexter *v.* Sayward, 84 Fed. 296.

76. **Appeal not dismissed — Defect of parties appellant.**— Where one of several defendants alone appealed, without making his co-defendants parties to the appeal, and the defect of parties was not insisted on, and the appeal was decided on its merits, resulting in an affirmance of the judgment, it was held that an action would lie upon the supersedeas bond given by defendant in error. Bulkley *v.* Stephens, 29 Ohio St. 620.

77. **Failure to allege that appeal was granted** held subject to demurrer in an action on a supersedeas bond. Jones *v.* Green, 12 Bush (Ky.) 127.

Trial court abolished the day after judgment appealed from is not sufficient to invalidate a bond given on appeal therefrom. Colquitt *v.* Oliver, 49 Ga. 284.

Where appellant failed to file a transcript of the case in the appellate court within the time prescribed by law, the court held that "the appeal never had any existence," that "the parties to the judgment were left to enforce it as if no appeal had ever been attempted," and that, consequently, there was no consideration for, and no liability on, the appeal bond. Gimperling *v.* Hanes, 40 Ohio St. 114. To the same effect see Lutkenhoff *v.* Lutkenhoff, 12 Ky. L. Rep. 90. But see, to the contrary, in California, Ellis *v.* Hull, 23 Cal. 160 [*approved* in Chase *v.* Beraud, 29 Cal. 138].

Wrong appellate court named.— A bond

Nevertheless, it has been held in such case, as in the case of an appeal dismissed for defects, that a recital of an appeal,[78] or the receipt of benefits by the principal obligor,[79] estops the principal and sureties to show the fact of no appeal.

B. Breach of the Condition — 1. Condition to Prosecute to Effect — a. Meaning of Terms. A condition to prosecute to effect the appeal with reference to which the bond is given means that appellant binds himself not only to prosecute his appeal,[80] but to secure a reversal of the judgment appealed from,[81] or such a modification of the judgment as amounts to a successful issue of the appeal.[82] But a condition merely to prosecute will be broken only in the event of dismissal for failure to prosecute.[83]

b. Judgment of Affirmance — (I) *Necessity for Final Affirmance.* Before a breach of the condition to prosecute to effect can be maintained there must have been a final judgment of the appellate court, dismissing the appeal or affirming the judgment appealed from,[84] which judgment must be alleged and

given on an appeal to the supreme court of Missouri recited that the appeal was taken to the court of appeals of St. Louis, and on a petition for judgment on the bond, it appearing that no appeal had been taken to the court named in the bond and that an appeal had been taken to the supreme court by means of the bond, the bond was held void, and the doctrine of estoppel not applicable. Keaton *v.* Boughton, 83 Mo. App. 158.

Evidence of appeal.— A remittitur from the appellate court is conclusive evidence of an appeal and that all of the preliminary statutory steps necessary to perfect an appeal were taken. Hill *v.* Burke, 62 N. Y. 111.

78. Reynolds *v.* Rogers, 5 Ohio 169; Carver *v.* Jackson, 4 Pet. (U. S.) 1, 7 L. ed. 761.

Recital authorizing amendment of record. — Where the record did not show that an appeal had been prayed and granted, it was held that the defect might be supplied by amendment to conform to a recital to that effect in the appeal bond, though the recital would not of itself have been sufficient to give jurisdiction. Cooly *v.* Julin, 5 Yerg. (Tenn.) 438.

79. Reliance of obligee on bond.— In Healy *v.* Newton, 96 Mich. 228, 231, 55 N. W. 666, the court, by McGrath, J., said: "The bond is in the form prescribed by How. Anno. Stat. Mich., § 8679. An order staying proceedings for 60 days had been entered at the instance of the principal obligor, conditioned upon the execution within 20 days of a bond. The bond was filed and acquiesced in by plaintiff, who relied upon Newton's expressed intention to take out a writ of error. For six months thereafter Newton pursued a course indicating an intention to take the case to this court. . . . Plaintiff, after the execution and delivery of the bond, had one of two courses open to him: to wit, move to have the order staying proceedings set aside, or acquiesce and rely upon the bond. Under the facts found in the present case, he will be presumed to have elected to take the latter course. The breach complained of is the failure to take out and prosecute the writ to effect."

80. A condition merely to prosecute, without the use of the words "to effect" or "with effect," is fully performed by an unsuccessful prosecution which results in an affirmance of the judgment appealed from. Albertson *v.* McGee, 7 Yerg. (Tenn.) 106.

81. Meaning of "prosecute with effect." — In Karthaus *v.* Owings, 6 Harr. & J. (Md.) 134, 138, the court, by Dorsey, J., said: "On the part of the appellant, it was contended that the words 'prosecute with effect' mean that the party praying the appeal shall prosecute it to final judgment, while the other side insisted that these words imposed on the appellant the necessity of prosecuting the appeal to a successful termination, or a reversal of the judgment. This Court are of the opinion that the construction adopted by the appellee's counsel is the correct one."

"With effect" means "with success."— "An appeal cannot be said to be prosecuted at all, which is dismissed for want of prosecution, nor can it be said, with reference to the accepted meaning of the words, that the appeal is prosecuted with effect if the judgment remains, after the appeal is disposed of, the same as it was before." Trent *v.* Rhomberg, 66 Tex. 249, 254, 18 S. W. 510; Bailey *v.* James, 64 Tex. 546; Robinson *v.* Brinson, 20 Tex. 438.

Where a nonsuit of appellee was set aside by agreement of parties, and the judgment appealed from was afterward affirmed, it was held that there had been no performance of condition, nor were the sureties discharged by the nonsuit. McGimpse *v.* Vail, 5 N. C. 408.

Where intention is only to pay costs.— Where the condition was that the appellant "shall prosecute his appeal with effect, and pay all costs that may be adjudged against him," there was held to be no liability except for costs upon dismissal of the appeal. Com. *v.* Wistar, 142 Pa. St. 373, 21 Atl. 871, 872. To the same effect see Hobart *v.* Hilliard, 11 Pick. (Mass.) 143. *Contra*, under same condition, Philbrick *v.* Buxton, 40 N. H. 384.

82. Partial success sufficient.— "We think that an appeal can be said to have been 'prosecuted with effect' only when it results successfully as to part, at least, of the judgment appealed from." Blair *v.* Sanborn, 82 Tex. 686, 689, 18 S. W. 159.

83. Young *v.* Mason, 8 Ill. 55.

84. Admission in pleading of final determination was held to have been sufficiently

proved.[85] When once shown to exist, neither the judgment affirmed nor the judgment of affirmance are subject to question except for absolute invalidity of the judgment,[86] or fraudulent collusion between the principal obligor and the obligee in procuring the affirmance.[87]

(II) *What Constitutes Affirmance*—(A) *In General.* A final judgment of affirmance in the appellate court is such a judgment as precludes appellant from further delaying the execution of the judgment appealed from.[88] The judgment of affirmance is not, therefore, final until it is made final in the lower court, when the appellant becomes absolutely liable to pay it.[89] Such a judgment

effected by an allegation of the payment of the costs in the case in which the appeal was taken. Jayne *v.* Herring, (Tex. Civ. App. 1896) 33 S. W. 1090.

An affirmance is not sufficiently alleged by alleging the rendition of a judgment in the appellate court between the same parties named in the petition and in the bond. The judgment must be sufficiently identified. North *v.* Merchant, 2 Ohio Dec. 69.

Judgment on trial de novo.— The legal effect of the words in an appeal bond that the obligor will pay the amount of "judgment, costs, interest, and damages rendered and to be rendered against him," is that he shall pay the judgment already rendered against him, and such judgment as shall be rendered against him by the supreme court in case the judgment appealed from shall be affirmed. Such words do not include a judgment thereafter rendered upon new evidence, on a hearing *de novo* as to the subject of such judgment. Huntington *v.* Aurand, 67 Ill. App. 260.

Suit prematurely brought.— In Heath *v.* Hunter, 72 Me. 259, 260, the court, by Walton, J., said: "The condition is as follows: 'Now if the said Hunter shall prosecute his said suit with effect, and satisfy the judgment rendered therein, then this obligation to be void, otherwise to remain in full force.' It appears from the docket entries and the certificate of the clerk that, although the defendants in error prevailed in the suit, and were entitled to a judgment for costs . . . and, perhaps, to an affirmance of the judgment sought to be reversed, . . . still they have never taxed their costs, . . . have never obtained from the court an order affirming their former judgment, and have never had any determination or hearing as to the amount of the damages they shall recover for the delay. Under these circumstances, we think the action must be regarded as prematurely commenced."

85. **Must be allegation of affirmance.**— Where the breach assigned, in an action on an appeal bond, was in effect that the defendant did not prosecute his appeal according to the condition of said bond, but therein wholly failed, the declaration was held bad on demurrer. Malone *v.* McClain, 3 Ind. 532. So, also, where the allegation was that the appellant "did not prosecute her said appeal with effect, and that said suit was finally terminated by order of said circuit court." Daggitt *v.* Mensch, 141 Ill. 395, 31 N. E. 153.

One allegation for several breaches.— One allegation of affirmance, in a count alleging two breaches, is sufficient. Sanger *v.* Nadlehoffer, 34 Ill. App. 252.

Original judgment instead of affirmance.— Where, on appeal, instead of an affirmance an original judgment is entered against the appellant, a declaration that the judgment appealed from was affirmed is not sufficient. O'Neil *v.* Nelson, 22 Ill. App. 531.

Insufficient averment cured.— An averment of a breach of a condition to prosecute to effect, insufficient as stating a conclusion, will be cured by verdict upon failure to demur. Fulton *v.* Fletcher, 12 App. Cas. (D. C.) 1.

Proof — The clerk's docket, containing entries of the proceedings during the progress of the suit till final judgment, "is the record of the Court until the record is fully extended." Pierce *v.* Goodrich, 47 Me. 173.

An allegation of affirmance is admitted by a plea of payment, since such plea is one of confession and avoidance. Smith *v.* Lozano, 1 Ill. App. 171.

Partial proof.— Where the appeal was from an order denying a new trial, and also from the judgment, and the bond was conditioned to satisfy "if the said judgment or any part thereof be affirmed," proof that only the order denying a new trial was affirmed was held insufficient. McCallion *v.* Hibernia Sav., etc., Soc., 83 Cal. 571, 23 Pac. 798.

86. See *supra*, IX, A, 2, c, (II), (B).

87. See *infra*, IX, B, 1, c, (IV), (B).

88. **Final decree.**— Where a bond was conditional for the payment of the "final decree" in the case, a decree of a United States circuit court pursuant to a decree of affirmance of the United States supreme court was held such "final decree" within the meaning of the bond. Jordan *v.* Agawam Woolen Co., 106 Mass. 571.

Affirmance, with leave to answer, in a case of an appeal from a ruling on a demurrer to the complaint, is not such a final judgment. Poppenhusen *v.* Seeley, 3 Keyes (N. Y.) 150.

Quashing the writ of error has been held not to impose liability to pay the judgment where the liability was conditioned upon dismissal of the writ, because the writ was quashed for mere formal defects, after which a new writ might be allowed, whereas a dismissal meant a termination of the proceeding. Bosley *v.* Bruner, 24 Miss. 457.

89. **Affirmance must be final in lower court.**— "Unless the case be in such a condition as that the plaintiff might have issued

or decree as would be appealable has been held to be such a final judgment as will effect a breach of the condition.[90]

(B) *Substantial Affirmance.* A substantial affirmance of the judgment appealed from will be sufficient to accomplish a breach. It has been so held where, besides affirming, the case was remanded for liquidation of items recognized in the original judgment;[91] where a decree for payment to one person was changed by decreeing payment to another;[92] where the judgment was against two instead of one in the judgment appealed from;[93] where the judgment was reversed and a corrected judgment entered;[94] where affirmance was only after a new trial in the appellate court;[95] where the judgment on appeal was for a greater amount;[96] and where there were immaterial omissions.[97] But it has been held that there was no affirmance where a different form of judgment was rendered by the appellate court,[98] or where the cause was referred back

an execution against the principal, had he desired to do so, he cannot proceed against the sureties on the appeal. To hold that he could, would be to place the sureties in a position apparently less favorable than that occupied by their principal." Parnell *v.* Hancock, 48 Cal. 452, 455.

Contra.— It has been held that suit upon the bond may be instituted immediately upon affirmance in the appellate court (Daintry *v.* Johnston, 3 Yeates (Pa.) 148), without the filing of a certified copy of the order of affirmance (Perkins *v.* Klein, 62 Ill. App. 585).

Filing remittitur — Order for judgment.— In Seacord *v.* Morgan, 17 How. Pr. (N. Y.) 394, it was held that no recovery could be had upon an appeal bond for condition broken by affirmance until the judgment of the court of appeals be "brought formally to the notice of the court below, and be made one of its judgments," though the remittitur had been received and filed.

Order for execution held not necessary to maintain a breach of condition, the mandate having been sent down and filed in lower court. Davis *v.* Patrick, 57 Fed. 909, 12 U. S. App. 629, 6 C. C. A. 632.

Presumption by lapse of time.— After the lapse of ten years from the time of affirmance it was presumed that a certified copy of the judgment of affirmance had been filed in the lower court. Buchanan *v.* Milligan, 125 Ind. 382, 25 N. E. 349.

An allegation of filing order of affirmance in lower court has been held to be essential. A simple averment that the order was sent to the lower court has been held insufficient. Railsback *v.* Greve, 49 Ind. 271.

90. Fulton *v.* Fletcher, 12 App. Cas. (D. C.) 1.

91. Hivert *v.* Lacaz, 7 Rob. (La.) 470.

92. Decree of payment to different person — for example, to a receiver instead of to a member of a firm whose accounts were in process of settlement — has been held a substantial affirmance. Knight *v.* Waters, 15 Iowa 420.

93. Judgment against two, instead of one, joint makers of a promissory note was held a substantial affirmance of the judgment against the one, though of course it could not operate upon the other for want of jurisdiction. Helt *v.* Whittier, 31 Ohio St. 475.

94. Sanders *v.* Rives, 3 Stew. (Ala.) 109.

95. Affirmance after new trial.— Where a defendant appealed, obtained a new trial in the appellate court, was defeated, again appealed, upon which appeal the judgment was affirmed, it was held that the condition of a bond given on the first appeal "that if judgment be rendered against the appellant on said appeal, and execution be returned unsatisfied, in whole or in part," he would pay the amount unsatisfied, was held to have been broken. Lowry *v.* Tew, 25 Hun (N. Y.) 257.

96. Judgment for greater amount.— Statutory damages of five per cent. added by the appellate court, by authority of a statute passed after the execution of the bond, was held not to discharge the obligors in the appeal bond. Horner *v.* Lyman, 4 Keyes (N. Y.) 237.

Sureties not liable for increase.— But in case of an increase of the judgment of the lower court the sureties cannot be held for the increase unless the condition of the bond be to satisfy the judgment of the appellate court. Mitchell *v.* Shuert, 17 Mich. 65.

97. Immaterial omissions.— An omission to state that the damages were due for wages as "laborer and servant," in affirming a judgment for such damages, was held immaterial. Foster *v.* Epps, 27 Ill. App. 235. So, also, where the condition was, "if, on said appeal, said ruling is affirmed, and said lien declared and held valid," and the ruling was affirmed, but the lien not in terms held valid. Oakley *v.* Van Noppen, 100 N. C. 287, 5 S. E. 1. So, too, where the appellate court omitted to award damages. Gilpin *v.* Hord, 85 Ky. 213, 8 Ky. L. Rep. 904, 3 S. W. 143.

98. Judgment de bonis testatoris against an executor is not an affirmance of a judgment against him *de bonis propriis.* Bowman *v.* Green, 6 T. B. Mon. (Ky.) 339.

Judgment different in effect, entered, by consent of the parties, after a reversal of the judgment appealed from, is not a breach of the condition. Miller *v.* Ryan, 13 Ohio Cir. Ct. 278. *Contra*, where the condition was that the sureties will "satisfy any judgment or order which the Court of Appeals may render,

for settlement before a master,[99] or for the purpose of definitely fixing the amount.[1]

(c) *Partial Affirmance* — (1) As to Parties — (a) Several Success on Joint Appeal. In the case of a joint appeal by several appellants from a judgment against all, a reversal as to one or more, and affirmance as to others, will be a breach of condition affecting those as to whom the affirmance was rendered,[2] unless liability on such a contingency is contrary to the terms of the bond,[3] in which case, all of co-principals are individually bound for the judgment affirmed if, by the terms of the bond, they can be regarded as co-sureties[4] — otherwise not.[5]

(b) Several Appeals from Joint Judgment. Where one of several defendants

or order to be rendered by the inferior court." Hobbs *v.* King, 3 Metc. (Ky.) 249.

Judgment different in form, though not in effect, held no affirmance. Kibble *v.* Butler, 27 Miss. 586. See also Chase *v.* Ries, 10 Cal. 517.

Substituting money for property.— Where a judgment in a divorce case was rendered for a portion of defendant's real estate and two hundred dollars, and on appeal it was ordered that a money judgment for three thousand two hundred dollars be substituted, it was held that this did not constitute an affirmance of the judgment appealed from sufficient to establish a breach of condition. Rice *v.* Rice, 13 Ind. 562.

99. Smith *v.* Huesman, 30 Ohio St. 662.

1. **Remandment for definite amount** held not a final judgment of affirmance, though appellee's right to recover was recognized. Wilson *v.* Churchman, 6 La. Ann. 468.

2. **Affirmance as to some and reversal as to others** accomplishes a breach *pro tanto* as against the former.

Arkansas.— Porter *v.* Singleton, 28 Ark. 483.

California.— Wood *v.* Oxford, 56 Cal. 157.

Georgia.— Lewis *v.* Maulden, 93 Ga. 758, 21 S. E. 147.

Illinois.— Ives *v.* Hulce, 17 Ill. App. 35.

Kansas.— Lutt *v.* Sterrett, 26 Kan. 561.

Kentucky.— Gilpin *v.* Hord, 85 Ky. 213, 8 Ky. L. Rep. 904, 3 S. W. 143, 7 Ky. L. Rep. 608; Bridgford *v.* Fogg, 12 Ky. L. Rep. 570, 14 S. W. 600.

Louisiana.— Culver *v.* Leovy, 27 La. Ann. 58.

Missouri.— Hood *v.* Mathis, 21 Mo. 308.

Nebraska.— Johnson *v.* Reed, 47 Nebr. 322, 66 N. W. 405.

New York.— Seacord *v.* Morgan, 3 Keyes (N. Y.) 636, 35 How. Pr. (N. Y.) 487, 17 How. Pr. (N. Y.) 394; Fritchie *v.* Holden, 57 Hun (N. Y.) 585, 11 N. Y. Suppl. 171, 32 N. Y. St. 276; Johnstone *v.* Conner, 13 N. Y. Civ. Proc. 19; Burrall *v.* Vanderbilt, 6 Abb. Pr. (N. Y.) 70, 1 Bosw. (N. Y.) 637; Ford *v.* Townsend, 1 Abb. Pr. N. S. (N. Y.) 159, 1 Rob. (N. Y.) 39.

North Carolina.—Brown *v.* Conner, 32 N. C. 75.

Ohio.— Alber *v.* Froehlich, 39 Ohio St. 245; Bentley *v.* Dorcas, 11 Ohio St. 398; Macneale, *v.* Fackler, 3 Cinc. L. Bul. 11.

Texas.— McFarlane *v.* Howell, 91 Tex. 218, 42 S. W. 853; Blair *v.* Sanborn, 82 Tex. 686, 18 S. W. 159; Landa *v.* Moody, (Tex. Civ. App. 1900), 57 S. W. 51; Missouri, etc., R. Co. *v.* Lacy, 13 Tex. Civ. App. 39, 35 S. W. 505; Dignowity *v.* Staacke, (Tex. Civ. App. 1894) 25 S. W. 824.

Wisconsin.— Vandyke *v.* Weil, 18 Wis. 277.

Insolvency of one of several appellants, against whom, alone, a judgment of affirmance has been rendered, does not alter the rule. Gilpin *v.* Hord, 85 Ky. 213, 8 Ky. L. Rep. 904, 3 S. W. 143, 7 Ky. L. Rep. 608.

Suit on note — Breach in favor of payee; performance as to surety.— The payee of a note obtained judgment against both the maker and surety, and in the same suit the surety was given judgment against the maker. On appeal, the judgment of the payee was affirmed and that of the surety reversed; and it was held that the condition of the appeal bond was broken in favor of the payee, and performed as to the surety. Dignowity *v.* Staacke, (Tex. Civ. App. 1894) 25 S. W. 824.

3. **Terms of bond — Liability only for affirmance as to all.**— Where the condition of the bond was that if the judgment should be affirmed against "them," the obligors would satisfy "such" judgment, the use of these words was held to mean that the obligors had not contracted to satisfy a judgment affirmed against only a part of appellants, and it was held that there had been no breach upon an affirmance as to only a part of appellants. Marsh *v.* Byrnes, 7 Cinc. L. Bul. 345.

Judgment against partnership — Affirmance as to one partner.— Upon an appeal by a partnership, the appeal bond being conditioned that the partners, by firm-name, "shall prosecute their appeal, and shall satisfy whatever judgment may be rendered against them," etc., it was held that an affirmance as to only one partner, for the entire amount, was not a breach of condition. Grieff *v.* Kirk, 17 La. Ann. 25.

4. **Co-principals held as co-sureties.**— Lewis *v.* Maulden, 93 Ga. 758, 21 S. E. 147; Young *v.* Ditto , 2 J. J. Marsh. (Ky.) 72.

5. Landa *v.* Moody, (Tex. Civ. App. 1900) 57 S. W. 51.

Appeal only to protect separate interest.— Where one of the principals in a bond given on appeal in a chancery suit had an interest distinct from that of the other appellants, and joined only to protect such separate interest, and the appellate court reversed the judgment

appeals from a joint and several judgment, the appeal bond is security for the entire judgment upon affirmance.[6]

(2) As to Subject-Matter. Whether or not a particular affirmance as to the subject-matter will work a breach depends upon whether or not the matter affirmed and the matter reversed were separate and distinct, and also upon whether or not the condition of the bond covered the partial affirmance. Thus, there is generally no breach where the appellate court finds due the appellee a sum less than the judgment appealed from,[7] unless the bond contained a condition to satisfy whatever judgment may be rendered;[8] or where, in an appeal by an administrator, he has judgment for costs, though appellee take a judgment *quando*;[9] or where, on appeal from a judgment decreeing a mechanic's lien, a part of the land is released from the lien.[10] And a breach occurs upon affirmance of the principal judgment, though an order sustaining an attachment in the same case is reversed.[11] And the same has been held where an administrative order as to personal property was affirmed, and another about realty was reversed;[12] as well as where a judgment against an executor, in his individual capacity, was reversed, and, as against him in his representative capacity, was affirmed.[13]

(3) Conditional Affirmance. Where the affirmance is upon condition that something be done by appellee, there is no breach of condition, because it may be that the matter to be performed as a condition of affirmance was the only ground of the appeal.[14] But the contrary has been held where the only ground of the appeal was that there was no evidence to sustain the judgment to any extent;[15] and where, by statute, the judgment on appeal goes against the sure-

as to her, she was held not liable on the bond as a surety for the other appellants as to whom judgment was affirmed. Warner *v.* Cameron, 64 Mich. 185, 31 N. W. 42.

6. One appellant is liable for the entire judgment, in case it is a joint and several judgment, and therefore his appeal bond assumes the same obligation. Drake *v.* Smythe, 44 Iowa 410; Young *v.* Ditto, 2 J. J. Marsh. (Ky.) 72; Brown *v.* Hancock, 13 Tex. 21.

7. No breach where judgment reduced; though appellee files *remittitur* for amount of reduction, and judgment of affirmance is thereupon entered. Heinlen *v.* Beans, 71 Cal. 295, 12 Pac. 167; Feemster *v.* Anderson, 6 T. B. Mon. (Ky.) 537; Seymour *v.* Gregory, 10 Biss. (U. S.) 13, 21 Fed. Cas. No. 12,686.

Contra, Harding *v.* Kuessner, 172 Ill. 125, 49 N. E. 1001 [*affirming* 70 Ill. App. 355]; Hopkins *v.* Orr, 124 U. S. 510, 8 S. Ct. 590, 31 L. ed. 523 [*affirming* 3 N. M. 142, 3 Pac. 61]; Butt *v.* Stinger, 4 Cranch C. C. (U. S.) 252, 4 Fed. Cas. No. 2,246 (where it is said that "the condition of an appeal bond is broken unless the judgment be reversed *in toto*"); Brooks *v.* Page, 1 D. Chipm. (Vt.) 340 (where the court said: "If the appellee again recover on the appeal, it is an affirmance of the former judgment, fully as to the right, and partially as to the *quantum* of damages").

8. Condition to satisfy any judgment to be rendered will of course be broken by any partial affirmance. Holmes *v.* Steamer Belle Air, 5 La. Ann. 523; Diamond *v.* Petit, 3 La. Ann. 37; Harding *v.* Kuessner, 172 Ill. 125, 49 N. E. 1001 [*affirming* 70 Ill. App. 355]; Huntington *v.* Aurand, 70 Ill. App. 28; Bem *v.* Shoemaker, 7 S. D. 510, 64 N. W. 544.

9. Piercy *v.* Piercy, 36 N. C. 214; Terry *v.* Vest, 33 N. C. 65.

10. Releasing part of land from mechanic's lien, though decree of lien be affirmed as to remainder, works no breach. Deatherage *v.* Sheidley, 50 Mo. App. 490.

11. Reversal of attachment does not prevent a breach by affirmance of the principal judgment. Krone *v.* Cooper, 43 Ark. 547.

12. Bem *v.* Shoemaker, 7 S. D. 510, 64 N. W. 544.

13. Reversed as to individual, affirmed as to representative.— Where a bond was conditioned to prosecute to effect an appeal from a judgment against an executor, both in his individual and in his representative capacity, and the judgment was reversed as to the individual portion and affirmed as to the representative portion, the two being distinct and severable, the condition was held to have been broken *pro tanto*, because the executor had not prosecuted the entire judgment to effect. Cook *v.* Ligon, 54 Miss. 625.

14. Remittitur.— Where a judgment is reversed with directions that the reversal be set aside on the filing of a *remittitur* in a special amount, and an affirmance thereupon entered, there was held to have been no breach. Heinlen *v.* Beans, 71 Cal. 295, 12 Pac. 167; Seymour *v.* Gregory, 10 Biss. (U. S.) 13, 21 Fed. Cas. No. 12,686. *Contra*, Harding *v.* Kuessner, 70 Ill. App. 355 [*affirmed* in 172 Ill. 125, 49 N. E. 1001].

15. Orr *v.* Hopkins, 3 N. M. 142, 3 Pac. 61 [*affirmed* in 124 U. S. 510, 8 S. Ct. 590, 31 L. ed. 523].

Assignment of another judgment.— Where the condition of the affirmance was that the assignment of another judgment be made to appellant, it was held that the obligee could not maintain an action on the bond until the prescribed condition was performed. Parnell *v.* Hancock, 48 Cal. 452.

ties on the bond, this judgment may be for a less sum than the judgment appealed from.[16]

(D) *Intermediate Affirmance.* Further proceedings after affirmance in the affirming court or a higher court do not prevent an action for breach of the condition,[17] except in respect to such bonds as are conditioned to satisfy the judgment upon affirmance, and then only in case a stay of execution is effected by, or in connection with, such further proceedings, in which event liability is suspended to abide the ultimate decision,[18] and, in case of ultimate reversal of the original judgment, liability ceases.[19]

(E) *Intermediate Reversal.* A reversal in the appellate court is a fulfilment of the condition, though a new trial result in another judgment,[20] and though the reversal be in turn reversed on further appeal,[21] unless the bond extended, by

16. **Summary judgment, authorized by statute, against sureties** in the case wherein the bond is given, permits the entering of judgment against them for a sum less than the judgment after *remittitur* filed by appellee. Hopkins *v.* Orr, 124 U. S. 510, 8 S. Ct. 590, 31 L. ed. 523 [*affirming* 3 N. M. 142, 3 Pac. 61].

17. **Where the affirmed judgment is not stayed** by further proceedings there is no bar for that reason to a suit on the bond. So held in case of a further appeal or proceeding in error.

Kentucky.—Boaz *v.* Milliken, 4 Ky. L. Rep. 700.

Montana.— Parrott *v.* Kane, 14 Mont. 23, 35 Pac. 243; Bullard *v.* Gilette, 1 Mont. 509.

Ohio.— Bulkley *v.* Stephens, 29 Ohio St. 620.

New York.— Burrall *v.* Vanderbilt, 6 Abb. Pr. (N. Y.) 70, 1 Bosw. (N. Y.) 637.

Texas.— Hurley *v.* Lester, (Tex. Civ. App. 1895) 32 S. W. 555.

Also where a remittitur was remanded to the appellate court after entry of judgment thereupon in the lower court. Murray *v.* Jones, 2 N. Y. Suppl. 486, 18 N. Y. St. 916.

Further appeal a matter of defense.— In order to maintain an action on a bond, given on appeal to an intermediate court, it is not necessary to allege or prove that the judgment of affirmance is not appealed from or has not been stayed. Green *v.* Raftes, 67 Ind. 49.

18. **A stay or supersedeas bond, on further appeal,** suspends the liability of the appellant on the affirmed judgment, and, where the principal is not liable, the sureties cannot be held liable pending the determination of further proceedings. Winston *v.* Rives, 4 Stew. & P. (Ala.) 269; Shannon *v.* Dodge, 18 Colo. 164, 32 Pac. 61; Young *v.* Spencer, 2 Ohio Cir. Ct. 459, 1 Ohio Cir. Dec. 587; Adams *v.* Mortland, 13 Wkly. Notes Cas. (Pa.) 221; Howell *v.* Sevier, 1 Lea (Tenn.) 95; Gillette *v.* Bullard, 20 Wall. (U. S.) 571, 22 L. ed. 387. But see Perkins *v.* Klein, 62 Ill. App. 585.

Appeal not perfected is no bar to an action on the bond. Ferris *v.* Tannebaum, 27 Abb. N. Cas. (N. Y.) 136, 15 N. Y. Suppl. 295, 39 N. Y. St. 71.

Further appeal pending — Allegation.— Where an answer, which sought to avoid because of a further appeal, with supersedeas from a territorial court to the United States supreme court, failed to allege that the appeal was pending at the time of the commencement of the action, it was held insufficient. Gilette *v.* Bullard, 20 Wall. (U. S.) 571, 22 L. ed. 387.

The giving of a restitution bond to appellants on the second appeal enables appellee to enforce the affirmed judgment by execution; but, in case of a return *nulla bona*, enforcement cannot be had by suit on the first bond because "the plaintiff proposes to enforce the judgment against the sureties, and to make restitution in case of refusal to the principal." Young *v.* Spencer, 2 Ohio Cir. Ct. 459, 461.

19. Kleiner *v.* Maryland Fidelity, etc., Co., 33 Misc. (N. Y.) 188, 67 N. Y. Suppl. 216.

Action on bond before reversal.— In a case where the action on the bond was commenced before the reversal, and the reversal was pleaded in bar, it was held that plaintiff was entitled to nominal damages. Cook *v.* King, 7 Ill. App. 549.

Nominal damages are allowed in Illinois where, upon further appeal, judgment of affirmance is reversed. Cook *v.* King, 7 Ill. App. 549.

20. **Judgment on new trial after reversal** is not covered by the obligation to satisfy judgment in case of affirmance. The judgment secured is the one appealed from, and this being vacated by a reversal, the bond is discharged. Janeway *v.* Haft, 22 N. Y. Civ. Proc. 290, 19 N. Y. Suppl. 844, 46 N. Y. St. 917.

Second trial in ejectment as matter of right.— The payment of damages and costs, and the consequent vacating of the judgment appealed from, in an ejectment case, in accordance with a statute, releases a bond conditioned to satisfy that particular judgment; except, it was held, that an additional condition for use and occupation of the premises would be enforced upon a second judgment. Clason *v.* Kehoe, 87 Hun (N. Y.) 368, 34 N. Y. Suppl. 431, 68 N. Y. St. 336.

Withdrawal of deposit in lieu of bond.— In case of a reversal, and new trial ordered, the appellant is entitled to withdraw a deposit made by him in court in lieu of an appeal bond, although he has become insolvent. Jordan *v.* Volkening, 14 Hun (N. Y.) 118.

21. Stoll *v.* Padley, 100 Mich. 404, 59 N. W. 176; Nofsinger *v.* Hartnett, 84 Mo. 549 [*affirming* 12 Mo. App. 598].

express terms and conditions contained within it, to the subsequent proceedings on the appeal.[22]

(F) *Dismissal for Abandonment.* The abandonment of an appeal after it has been perfected is a breach of condition to prosecute when the abandonment results in a dismissal of the appeal.[23] A dismissal for failure to prosecute the appeal is a final judgment amounting to an affirmance,[24] unless it is otherwise provided by statute,[25] or by rule of court,[26] or by the express terms of the bond itself,[27]

Reversal and affirmance by same court without rehearing.— A judgment having been reversed in the supreme court of California, the case was taken to the supreme court of the United States, which reversed, the state supreme court, with directions to affirm the original judgment. In an action on the first appeal bond, conditioned to satisfy the judgment if affirmed by the state supreme court, the condition was held broken and the obligors liable. Crane *v.* Weymouth, 54 Cal. 476.

22. Crane *v.* Weymouth, 54 Cal. 476; Freeman *v.* Hill, 45 Kan. 435, 25 Pac. 870; Robinson *v.* Plimpton, 25 N. Y. 484; Gardner *v.* Barney, 24 How. Pr. (N. Y.) 467; Richardson *v.* Kropf, 5 Daly (N. Y.) 385, 47 How. Pr. (N. Y.) 286; Carroll *v.* McGee, 25 N. C. 13.

Affirmance on rehearing — Plea of reversal.— Where, on rehearing, a reversal was set aside and the original judgment affirmed, it was held that a plea of reversal was bad, since it did not traverse the plaintiff's allegation of affirmance. Walker *v.* Bank of North America, 2 Ill. App. 304.

Breach by affirmance after reversal.— A motion to discharge a levy, pending appeal from an order denying a motion to vacate a judgment, was granted on condition of giving a bond, which was given, following the terms of the order, as follows: "That ———, in case said order appealed from shall be affirmed by said general term, and, if an appeal be taken from the determination of the general term upon such appeal to the court of appeals, in case said order be finally affirmed by said court of appeals, the defendant —— shall well and truly pay," etc. On appeal to the general term the order was reversed, and, on appeal to the court of appeals, the judgment of the general term was reversed and the order affirmed. In suit on the bond it was held to have continued in full force until the decision by the court of appeals, when the condition was broken, according to its terms. Osborn *v.* Rogers, 9 N. Y. Suppl. 736 [*affirmed* in 132 N. Y. 579, 30 N. E. 867, 43 N. Y. St. 965].

Separate proceedings about same matter. — In a United States district court an order for seizure and sale for satisfaction of an instalment of the purchase-money was made and appealed from, and, subsequently, a similar order was obtained in another district court involving the same land for the satisfaction of a subsequent instalment of the same purchase-money. Both orders having been appealed from and affirmed, it was held that the payment of one of the appeal bonds would not discharge the other. Marchand *v.* Frellsen, 105 U. S. 423, 26 L. ed. 1057.

23. Seabrook *v.* State, 28 Ark. 396. *Contra*, Michael *v.* Ball, 8 Tex. Civ. App. 406, 27 S. W. 948.

24. Dismissal for failure to prosecute is substantially a judgment of affirmance.

California.— Chase *v.* Beraud, 29 Cal. 138; Ellis *v.* Hull, 23 Cal. 160.

Colorado.— Long *v.* Sullivan, 21 Colo. 109, 40 Pac. 359.

Illinois.— Sutherland *v.* Phelps, 22 Ill. 92; McConnel *v.* Swailes, 3 Ill. 571.

Iowa.— Coon *v.* McCormack, 69 Iowa 539, 29 N. W. 455.

Kentucky.— Harrison *v.* State Bank, 3 J. J. Marsh. (Ky.) 375; Harris *v.* West, 13 Ky. L. Rep. 334; Fearons *v.* Wright, 6 Ky. L. Rep. 747.

Louisiana.— Simonds *v.* Heinn, 22 La. Ann. 296; Champomier *v.* Washington, 2 La. Ann. 1013; Denis *v.* Veazey, 12 Mart. (La.) 79.

Massachusetts.— Com. *v.* Green, 138 Mass. 200.

Minnesota.— But see, *contra*, L. Kimball Printing Co. *v.* Southern Land Imp. Co., 57 Minn. 37, 58 N. W. 868.

Nebraska.— Flannagan *v.* Cleveland, 44 Nebr. 58, 62 N. W. 297; Dunterman *v.* Storey, 40 Nebr. 447, 58 N. W. 949.

New Jersey.— Teel *v.* Tice, 14 N. J. L. 444; Gregory *v.* Obrian, 13 N. J. L. 11.

Texas.— Blair *v.* Sanborn, 82 Tex. 686, 18 S. W. 159; Trent *v.* Rhombery, 66 Tex. 249, 18 S. W. 510; Clancey *v.* Johnson, (Tex. Civ. App. 1894) 27 S. W. 315; Estado Land, etc., Co. *v.* Ansley, 6 Tex. Civ. App. 185, 24 S. W. 933.

25. Dismissal not final, by statute.— Where, by the statute, another appeal may be taken or allowed within thirty days after a dismissal, there is no breach of condition to prosecute until the expiration of that time without appeal. But in a suit brought after that time, it is not necessary to allege that no second appeal had been taken within the time, as that is purely a matter of defense. Long *v.* Sullivan, 21 Colo. 109, 40 Pac. 359.

26. Affirmance by appellee.—Where a rule of practice required appellee to file a transcript in the appellate court upon failure of appellant to prosecute, in order to obtain an affirmance, it was held that this was a prerequisite to liability on the appeal bond. Seabrook *v.* State, 28 Ark. 396. *Contra*, Lobdell *v.* Lake, 32 Conn. 16.

27. Condition only for affirmance.— Where the condition, in the language of the statute, was to satisfy the judgment "if the judgment appealed from or any part thereof

or by the judgment of dismissal,[28] or where the dismissal is for lack of jurisdiction to entertain the appeal.[29]

c. Non-Performance Excused — (I) *Performance Made Impossible.* Where the performance of the condition has been made impossible, otherwise than by the fault of the appellant, performance will be excused, and no liability for non-performance will attach to either principal or surety — as where (in some jurisdictions) the principal appellant is discharged of all his debts by the bankrupt law;[30] where a court, by injunction, has prevented a trial of the case as to the appellant;[31] where the cause is transferred to another appellate court,[32] or by the abolition of imprisonment for debt.[33]

(II) *Changes and Delays in Proceedings.* Change of status of the parties on appeal, and delays of proceedings which do not render performance impossible, have been generally, though not always, held not to constitute grounds for

be affirmed," and the statute had been changed so as to eliminate words making liability upon dismissal specific, it was held that there was no liability upon the obligors to pay the judgment in case of dismissal. Drummond *v.* Husson, 14 N. Y. 60. See also L. Kimball Printing Co. *v.* Southern Land Imp. Co., 57 Minn. 37, 58 N. W. 868.

28. Dismissal without prejudice to the prosecution of a further appeal is not a final judgment nor equivalent to an affirmance. Fearons *v.* Wright, 6 Ky. L. Rep. 747. But after the lapse of the time allowed for the second appeal, the dismissal operates as an affirmance. Long *v.* Sullivan, 21 Colo. 109, 40 Pac. 359.

29. Dismissal for lack of jurisdiction has been held to place the parties in the same situation as if no appeal had been taken, and that appellee could have sustained no injury, and appellant have received no benefits by a non-compliance with the condition. Ashley *v.* Brasil, 1 Ark. 144; Grunewald *v.* West Coast Grocery Co., 11 Wash. 478, 39 Pac. 964.

Reasons.— In Blair *v.* Reading, 103 Ill. 375, 377, the court, by Scott, C. J., said: "It was dismissed for want of jurisdiction in the court to hear the writ at all. There was in no sense an affirmance of the original decree. A dismissal of a writ of error for want of prosecution, when the court has jurisdiction of the case, has always been treated as an affirmance of the decree or judgment, within the meaning of the usual conditions of such bonds. But the rule must be different where the court has no jurisdiction in the premises. It is for the obvious reason that the court has no jurisdiction to pronounce a judgment of affirmance, and it would be a *non sequitur* to say a court may affirm a decree when it has no jurisdiction to hear the case for any purpose."

30. Bankruptcy of principal before affirmance discharges bond.

Georgia.— Odell *v.* Wootten, 38 Ga. 224.

Kentucky.— Payne *v.* Able, 7 Bush (Ky.) 344, 3 Am. Rep. 316.

Massachusetts.— Carpenter *v.* Turrell, 100 Mass. 450.

Ohio.— Sigler *v.* Shehy, 15 Ohio 471, stating reasons for the rule at length.

Pennsylvania.— Kenly *v.* Hughes, 1 Browne (Pa.) 258.

Tennessee.— Martin *v.* Kilbourn, 12 Heisk. (Tenn.) 331; Thomas *v.* Cole, 10 Heisk. (Tenn.) 411.

Texas.— Williams *v.* Atkinson, 36 Tex. 16.

But see, *contra,* Fisse *v.* Einstein, 5 Mo. App. 78; Field *v.* Zalle, 5 Mo. App. 596; Knapp *v.* Anderson, 7 Hun (N. Y.) 295 (stating reasons for this contrary view); Holyoke *v.* Adams, 1 Hun (N. Y.) 223; Farrell *v.* Finch, 40 Ohio St. 337; Hickcock *v.* Bell, 46 Tex. 610.

After the liability has become fixed, subsequent bankruptcy of the principal does not release the sureties nor diminish their liability. Dowlin *v.* Standifer, Hempst. (U. S.) 290, 7 Fed. Cas. No. 4,041*a*.

Judgment against a bankrupt, rendered merely for the purpose of ascertaining the amount of his indebtedness to plaintiff, will not charge the sureties on his appeal bond. Fontaine *v.* Westbrooks, 65 N. C. 528.

31. Planters', etc., Bank *v.* Hudgins, 84 Ga. 108, 10 S. E. 501.

32. Transfer from one appellate court to another, of the cause on appeal, though made pursuant to a constitutional statute providing therefor, is an excuse for non-performance of the condition of the appeal bond, where the condition is to prosecute the appeal in a designated court, performance being made impossible. Schuster *v.* Weiss, 114 Mo. 158, 21 S. W. 438, 19 L. R. A. 182; Cranor *v.* Reardon, 39 Mo. App. 306; Trader *v.* Sale, 18 Ohio Cir. Ct. 814.

Transfer to another court, by agreement of appellant and appellee, without the knowledge and consent of the sureties, was held to release the sureties from liability on a bond conditioned to prosecute in a particularly designated court. Anderson *v.* Hays, 9 Ky. L. Rep. 334.

The rule is different, and the bond is not discharged, by a transfer of the appeal to another court in pursuance of a provision of the constitution in force at the time of the execution and delivery of the bond. Haldeman *v.* Powers, 20 Ky. L. Rep. 215, 45 S. W. 662.

33. Abolition of imprisonment for debt discharges the sureties on an appeal bond conditioned to surrender up the debtor for imprisonment in the event of affirmance. Bunting *v.* Wright, 61 N. C. 295.

excuse of non-performance — as, the change of parties plaintiff,[34] discontinuance as to one of several defendants,[35] the striking out of a co-plaintiff,[36] a mere continuance of the cause,[37] the correction of an error in the amount of the judgment,[38] the death of appellant, together with revival against his representatives,[39] or failure to so revive,[40] the dissolution of a corporate appellant,[41] or the marriage of a *feme sole* appellant.[42]

(III) *Appeal Compromised.* No breach can occur when appellee has excused non-performance of the condition by the obligor — as where the case has been disposed of by compromise before a decision of the appeal.[43] But it seems that

34. Substitution of plaintiff does not discharge obligors.— Where a suit was brought on promissory notes pledged as collateral, judgment obtained, and appeal for a trial *de novo* effected, and, pending the appeal, the original debt was paid, and another person, to whom the notes had also been pledged, was, by leave of court, substituted as plaintiff, it was held that the case could legally proceed to a finality, and the obligors were not discharged. Howell *v.* Alma Milling Co., 36 Nebr. 80, 54 N. W. 126, 38 Am. St. Rep. 694.

Contra, upon addition of new plaintiffs (Fullerton *v.* Campbell, 25 Pa. St. 345), even where the added plaintiff sued for the use of the former plaintiff (Morse *v.* Goetz, 51 Ill. App. 485).

35. Discontinuance as to one defendant, because of his infancy, has been held not to affect the liability of the obligors on the bond as to the other defendants. Taylor *v.* Dansby, 42 Mich. 82, 3 N. W. 267.

36. Striking out co-plaintiff.— Where one of several plaintiffs in error, who had been erroneously joined, was, on motion, stricken out of the proceedings in error, it was held that the liability of the obligors on a bond, given to stay proceedings upon a judgment in ejectment pending the proceedings in error, was not affected. Sherry *v.* State Bank, 6 Ind. 397. *Contra,* Tarver *v.* Nance, 5 Ala. 712.

37. Continuance does not affect bond. Johnson *v.* Reed, 47 Nebr. 322, 66 N. W. 405; Howell *v.* Alma Milling Co., 36 Nebr. 80, 54 N. W. 126, 38 Am. St. Rep. 694. *Contra,* where the continuance was entered by consent of the obligee and principal obligor, without the consent of the sureties, though, after the expiration of the period of postponement, the appeal might have been prosecuted, and the agreement was without consideration. Michael *v.* Ball, (Tex. Civ. App. 1895) 32 S. W. 238.

38. Correction of error in judgment, as to the amount thereof, by a *nunc pro tunc* entry, without notice to plaintiff in error, brought to appellate court by a supplemental transcript, has been held to have no effect upon the liability of a surety. Marx *v.* Brown, 42 Tex. 111.

39. A revival, against appellant's representatives, of the judgment appealed from does not change the obligation of the appeal bond (Cox *v.* Mulhollan, 1 Mart. N. S. (La.) 564; Butterworth *v.* Brown, 7 Yerg. (Tenn.) 467), notwithstanding, in case of the death of one of two appellants, the appellee was compelled to pursue them separately, one through the representative and the other in person. Sanger *v.* Nadlehoffer, 34 Ill. App. 252.

40. Failure to revive against representatives does not discharge sureties; the condition to prosecute is broken by abatement of appeal upon the death of appellant. Legate *v.* Marr, 8 Blackf. (Ind.) 404; Bell *v.* Walker, 54 Nebr. 222, 75 N. W. 617; Manning *v.* Gould, 1 N. Y. Civ. Proc. 216.

Death before issuance of writ of error.— And this rule has been applied although the death of the judgment debtor occurred between the return of the verdict and entry of judgment, the death not being known when the writ of error issued. Chase *v.* Hodges, 2 Pa. St. 48. *Contra,* where, upon suggestion of the death, no personal representative appeared, and the suit was thereupon abated. English *v.* Andrews, 4 Port. (Ala.) 319; Nelson *v.* Anderson, 2 Call (Va.) 286. And again, where no proceeding were had for two terms after the death. Jeffers *v.* Forrest, 5 Cranch C. C. (U. S.) 674, 13 Fed. Cas. No. 7,251. And the liability of the sureties was held to have been discharged *pro tanto* by a failure of appellee to have all the proper parties representative substituted. Saulet *v.* Trepagnier, 2 La. Ann. 427.

41. The dissolution of a corporate appellant, whereby it ceased to exist before the suing out of the writ of error, in consequence of which it became necessary to set aside the judgment of affirmance against it, the court nevertheless held, in the absence of fraud, that the sureties were liable. Texas Trunk R. Co. *v.* Jackson, 85 Tex. 605, 22 S. W. 1030.

42. Marriage of appellant is not a release. Burnham *v.* Bass, 5 Vt. 463.

43. Disposition of cause by compromise, as the result of which the appeal is withdrawn or dismissed by agreement of the parties, excuses non-performance of the condition to prosecute. Johnson *v.* Flint, 34 Ala. 673; Osborn *v.* Hendrickson, 6 Cal. 175; Leonard *v.* Gibson, 6 Ill. App. 503; Tournillon *v.* Ratliff, 20 La. Ann. 179.

Affirmance by consent, pursuant to a compromise agreement, has the same effect. Johnson *v.* Flint, 34 Ala. 673. See also *infra,* IX, B, 1, c, (IV).

Judgment, by consent, for costs.— Where a judgment on appeal was, by consent of the parties, for a part of the costs in favor of appellant, but the judgment appealed from was not affirmed, it was held that there was no condition broken to cover the unpaid costs. Perkins *v.* Spalding, 3 T. B. Mon. (Ky.) 11.

an agreement for dismissal of the appeal may be without consideration, in which case, upon dismissal, there is a breach of condition to prosecute.[44] However, the failure to perform a compromise agreement is not a failure of such consideration.[45]

(IV) *AFFIRMANCE BY CONSENT* — (A) *When in Good Faith.* An affirmance of the judgment appealed from, pursuant to an agreement between appellant and appellee, does not excuse non-performance of the condition to prosecute, since such an agreement may be made in good faith and is not necessarily inconsistent with a reasonable conduct of the appellate proceedings.[46] The same reason prevails where appellant, in good faith, consents to a reinstatement of the appellee who has been nonsuited.[47] But the contrary view is maintained by a number of courts, which hold that the question of good or bad faith is immaterial.[48]

(B) *Fraudulent Agreements for Affirmance.* Fraudulent collusion between the parties to an appeal, for the purpose of allowing appellee to collect the judgment from appellant's sureties through an improper affirmance by consent, will excuse non-performance and discharge the sureties.[49] Except for fraudulent col-

44. No consideration for dismissal agreement.— Where, however, the dismissal agreement was not based upon a compromise, but was substantially the act of appellant and without consideration, a dismissal pursuant thereto was held to be a breach of the conditions, like an affirmance, which would charge the sureties, unless it appeared that appellee had acted fraudulently or collusively with appellant, which question was one of fact for the jury and could not be reviewed on appeal. Chase *v.* Beraud, 29 Cal. 138; Share *v.* Hunt, 9 Serg. & R. (Pa.) 404. And the same was held where, instead of a dismissal, judgment in the appellate court was entered by consent. Howell *v.* Alma Milling Co., 36 Nebr. 80, 54 N. W. 126, 38 Am. St. Rep. 694.

45. Failure to perform the compromise agreement works no alteration of the rule after the appeal has been disposed of. It was so held where appellant promised to pay, in lieu of the judgment, a certain sum, in instalments, and failed to do so. Comegys *v.* Cox, 1 Stew. (Ala.) 262, 18 Am. Dec. 45; Leonard *v.* Gibson, 6 Ill. App. 503.

46. Agreements for affirmance, if in good faith, do not excuse non-performance of the condition to prosecute, or discharge the sureties, since such an agreement may save time and costs and may be the best thing for appellant to do under the circumstances, especially if any concession as to delay of the execution be gained by it. Drake *v.* Smythe, 44 Iowa 410; Hershler *v.* Reynolds, 22 Iowa 152; Ammons *v.* Whitehead, 31 Miss. 99 [*approved* in Quillen *v.* Quigley, 14 Nev. 215], stating at length the reasons for this rule; Seawell *v.* Cohn, 2 Nev. 308.

Agreement to abide result of test case, in order to save costs, where the case in which agreement is made is the same as the case to be tested, is binding, and the judgment following the test-case judgment is a breach of condition. Simonds' Succession, 26 La. Ann. 319.

47. Reinstatement of appellee after nonsuit, after which appellee secures an affirmance, is not inconsistent with a due prosecution of the appeal, since appellee might have procured the nonsuit to be set aside on motion. McGimpse *v.* Vail, 5 N. C. 408.

48. Contrary view — Good or bad faith immaterial.— Kendall *v.* Grice, 1 Mackey (D. C.) 279, 47 Am. Rep. 243 (where the fact that the principal confessed judgment upon consideration that plaintiff would delay execution for thirty days was held to discharge the sureties); Shimer *v.* Hightshue, 7 Blackf. (Ind.) 238; Ross *v.* Ferris, 18 Hun (N. Y.) 210 (stating reasons for this view); Smith *v.* Shidler, 3 Pittsb. (Pa.) 550.

Agreement to set aside intermediate judgment in favor of insolvent appellant.— In Foo Long *v.* American Surety Co., 146 N. Y. 251, 255, 40 N. E. 730, 66 N. Y. St. 730 [*affirming* 76 Hun (N. Y.) 264, 27 N. Y. Suppl. 743, 59 N. Y. St. 98], the court, by Andrews, C. J., said: "The defendant's undertaking was executed in view of the situation of the parties to the action at the time. The undertaking was to pay the judgment if it should be affirmed, or the appeal should be dismissed, and this under the circumstances, referred to an affirmance or dismissal in the ordinary course of judicial procedure, and not an affirmance or dismissal by consent of the parties. The plaintiff was entitled to proceed on the appeal according to the usual practice. He could take an affirmance of the judgment by default if the practice of the court permitted that to be done. But to construe the undertaking as permitting the parties to agree upon the judgment to be rendered would subject a surety to a hazard which could not, we think, have been contemplated. The present case is an apt illustration of the danger of such a construction. After the general term had reversed the judgment Chu Fong, the principal, being insolvent, without the knowledge or consent of the surety, agreed with his adversary that he should prevail on his appeal from the order of the General Term, and they together procured a reversal of the order and an affirmance of the original judgment. It would sacrifice substance to form to hold that an affirmance obtained in this manner was an affirmance within the true meaning of the undertaking. It was an affirmance by act of the parties, and not in any true or real sense an affirmance by judgment of the court."

49. Collusive affirmance imposes no liability. Way *v.* Lewis, 115 Mass. 26; Piercy *v.*

lusion, a judgment of affirmance is valid and cannot be questioned,[50] if the appellate court had jurisdiction of the subject-matter.[51]

d. Breach Waived — (I) *Waiver by Obligee.* The appellee may waive a breach of condition after it has occurred. Thus, a waiver might be accomplished by a binding agreement to permit appellant to further prosecute his appeal after he has become in default.[52] Practically, however, such waiver could seldom occur, since the appellate courts generally refuse to recognize such agreements.[53] A waiver is not accomplished by the release of an obligee's attachment on appellant's property,[54] the release of the judgment lien on appellant's land,[55] or an agreement, without consideration, with the principal not to sue on the bond.[56]

(II) *None But Obligee May Waive.* Unless the obligee consents thereto the principal cannot, by any act of his own, discharge a surety by waiver of a breach;[57]

Piercy, 36 N. C. 214; Krall *v.* Libbey, 53 Wis. 292, 10 N. W. 386. *Compare* Ingersoll *v.* Seatoft, 102 Wis. 476, 78 N. W. 576, 72 Am. St. Rep. 892, where, under the circumstances, there was no collusion or fraud.

Insolvency of appellant is evidence of collusion. Foo Long *v.* American Surety Co., 61 Hun (N. Y.) 595, 16 N. Y. Suppl. 424, 41 N. Y. St. 873.

Equity will relieve against a final judgment which has been obtained by consent and collusion between plaintiff and defendant at law for the mere purpose of charging the surety, the principal not being really chargeable by reason of his insolvency. Piercy *v.* Piercy, 36 N. C. 214.

50. Valid affirmance conclusive, in the absence of allegation and proof of fraudulent collusion.

California.— Hathaway *v.* Davis, 33 Cal. 161.

Indiana.— Supreme Council, etc. *v.* Boyle, 15 Ind. App. 342, 44 N. E. 56, 42 N. E. 827.

Louisiana.— Alley *v.* Hawthorn, 1 La. Ann. 122; Denis *v.* Veazey, 12 Mart. (La.) 79.

New York.— Tabor *v.* Gilfillan, 58 Hun (N. Y.) 608, 12 N. Y. Suppl. 147, 34 N. Y. St. 628.

Wisconsin.— Ingersoll *v.* Seatoft, 102 Wis. 476, 78 N. W. 576, 72 Am. St. Rep. 892.

51. See *supra*, IX, A, 2, c.

52. Agreement to reinstate appeal, if binding, would be such a waiver of the breach occasioned by the default as would discharge sureties. McAuley *v.* McKinney, 23 Tex. Civ. App. 500, 57 S. W. 309. But in Bailey *v.* Rosenthal, 56 Mo. 385, the sureties were held liable, though, after a nonsuit in the appellate court, there was a reinstatement by agreement, the court, by Adams, J., saying: "It has never been held in this state that sureties in an appeal bond are parties to the suit in the sense that they must be consulted in regard to any step taken in the case before final judgment."

53. McAuley *v.* McKinney, 23 Tex. Civ. App. 500, 57 S. W. 309.

54. Curtice *v.* Bothamly, 8 Allen (Mass.) 336.

55. Burrall *v.* Vanderbilt, 6 Abb. Pr. (N. Y.) 70. *Contra*, Wells *v.* Kelsey, 16 Abb. Pr. (N. Y.) 221 note, 25 How. Pr. (N. Y.) 384. And also, where, because of the discharge of the judgment lien, the appellant was enabled to remove his property from the state, in an endeavor to prevent the surety from exonerating himself from liability. Dills *v.* Cecil, 4 Bush (Ky.) 579. So, too, where, because of the principal's death, the property was taken by the heirs, it being held that the sureties would be released according to the value of the property released, and that the actual value was to be determined aside from the price for which it was sold and bought in by the heirs. Lewis *v.* Hill, 87 Ga. 466, 13 S. E. 588.

Agreement not to sue on bond, between appellant and appellee, in order to be binding must be based upon a consideration; and, unless so binding, it is no reason for holding the sureties discharged.

California.— Williams *v.* Covillaud, 10 Cal. 419.

Indiana.— Coman *v.* State, 4 Blackf. (Ind.) 241.

Kentucky.— Brinagar *v.* Phillips, 1 B. Mon. (Ky.) 283, 36 Am. Dec. 575.

Maryland.— Hayes *v.* Wells, 34 Md. 512; Oberndorff *v.* Union Bank, 31 Md. 126, 1 Am. Rep. 31.

Mississippi.— Newell *v.* Hamer, 4 How. (Miss.) 684, 35 Am. Dec. 415.

Nevada.— Quillen *v.* Quigley, 14 Nev. 215.

New Hampshire.— Bailey *v.* Adams, 10 N. H. 162.

Ohio.— Farmers' Bank *v.* Raynolds, 13 Ohio 84.

56. Partial payment of judgment no consideration.— "The mere payment of a part of the amount of the judgment in monthly instalments is not a binding legal consideration for the extension of time. There is no legal obligation varying the contract which previously existed between the creditor and the principal debtor. The sureties were not deprived of the right of subrogation. The proposed extension of time did not deprive the sureties of any right which existed at the time of the rendition of the judgment." Hawley, J., in Quillen *v.* Quigley, 14 Nev. 215, 217.

57. Surety's security released upon misrepresentations.— Where a principal in a bond for costs on a probate appeal misrepresented to his surety that no costs would be taxed on the appeal, and thereby induced the surety to return to him security taken as indemnity, the obligee not having consented to the transaction, the obligation of the surety was held to have in nowise diminished. Probate Ct. *v.* St. Clair, 52 Vt. 24.

nor can the clerk of a court do so,[58] or the obligee's attorney, contrary to the authority of such obligee.[59]

2. Condition to Satisfy Judgment — a. Existence of Condition. After there has been a breach of condition to prosecute to effect by an affirmance of the judgment, the obligors are then obliged to satisfy the judgment affirmed, if the bond contains a condition to that effect.[60]

b. Prerequisites to Breach — (I) *Resort Against Principal* — (A) *Issuance of Execution* — (1) Effect on Bond. Execution of the judgment against the principal may be resorted to, by the obligee, immediately upon affirmance, and such action has no effect upon the obligation of the bond except in so far as the judgment may be satisfied by the proceeds of the execution.[61] But, since there

58. **Clerk of court cannot discharge surety** by receiving the amount for which the sureties of appellant are liable, because, without the consent of the obligee, he has no authority to so do. Windham *v.* Coats, 8 Ala. 285.

59. **An unauthorized execution,** issued by appellee's attorney against authority and in violation of the stay, is not a waiver of the obligation of the bond given to stay execution on appeal. Lyons *v.* Cahill, 20 Abb. N. Cas. (N. Y.) 42, 13 N. Y. Civ. Proc. 314.

60. **Condition to pay or satisfy judgment** must be contained in the terms of the bond; otherwise the measure of liability cannot extend to its payment or satisfaction. It was held no condition to satisfy where the language was: "To pay (or answer) all damages and costs" (La Tourette *v.* Baird, Minor (Ala.) 325; Mason *v.* Smith, 11 Lea (Tenn.) 67; Banks *v.* Brown, 4 Yerg. (Tenn.) 198; Jones *v.* Parsons, 2 Yerg. (Tenn.) 321; Brace *v.* Squire, 2 D. Chipm. (Vt.) 49; Bank of Metropolis *v.* Swann, 4 Cranch C. C. (U. S.) 139, 2 Fed. Cas. No. 902). *Aliter,* where the condition to pay damages was accompanied by a stay of execution or supersedeas (Wood *v.* Brown, 104 Fed. 203, 43 C. C. A. 474; Tarr *v.* Rosenstein, 53 Fed. 112, 5 U. S. App. 197, 3 C. C. A. 466; Rosenstein *v.* Tarr, 51 Fed. 368).

Condition to satisfy appellate judgment has been held to oblige the satisfaction of the judgment appealed from. Fowler *v.* Thorn, 4 Ark. 208; Erickson *v.* Elder, 34 Minn. 370, 25 N. W. 804. *Contra,* Brown *v.* Jacobi, 12 Heisk. (Tenn.) 89; Sharp *v.* Pickens, 4 Coldw. (Tenn.) 268.

Condition enlarging recital.— A bond recited that a judgment had been rendered in favor of plaintiff, and a stay of proceedings ordered to enable defendant to settle his bill of exceptions, or move for a new trial, on condition that he execute bond with surety. The condition of the bond was that defendant should pay the judgment, costs, and interest if the same should not be appealed from, or, if appealed from, should pay the judgment, costs, and interest in case of affirmance. In an action on the bond it was held that the object of the bond, and the liability of the obligors under it, were not to be determined by the recital merely, but by the condition as well, and the defendant and his sureties were not discharged by defendant's filing his bill and moving for a new trial as provided in the recital, but remained liable under the condition until the judgment affirmed on appeal was satisfied. Miner *v.* Rodgers, 65 Mich. 225, 31 N. W. 845.

No condition to satisfy.— Insolvency of the appellant pending the appeal will render the sureties liable to pay the judgment appealed from, on affirmance, though there be no condition to pay the judgment, but only one to pay damages caused by the appeal, because, where the judgment could have been collected but for the appeal, the damage by an appeal which prevents its collection until the insolvency of appellant is the amount of the judgment. Estes *v.* Roberts, 63 Minn. 265, 65 N. W. 445; Friesenhahn *v.* Merrill, 52 Minn. 55, 53 N. W. 1024; Heitan *v.* Goebel, 35 Minn. 384, 29 N. W. 6.

To prosecute to (or with) effect has been held to impose the obligation to pay the judgment if unsuccessful. Tarr *v.* Rosenstein, 53 Fed. 112, 5 U. S. App. 197, 3 C. C. A. 466; Rosenstein *v.* Tarr, 51 Fed. 368. See *supra,* IX, B, 1, a.

Undertaking not specific.— Where the undertaking described the judgment and was given to procure a stay thereof, which could not be done without becoming liable for the satisfaction of the judgment upon affirmance, and the judgment was actually stayed, it was held that the intention of the obligors was clear to bind themselves to satisfy the judgment, even though they did not so bind themselves in terms, and that they would be so bound. McElroy *v.* Mumford, 128 N. Y. 303, 28 N. E. 502, 40 N. Y. St. 270; Markoe *v.* American Surety Co., 25 Misc. (N. Y.) 127, 54 N. Y. Suppl. 828.

Where there is no condition but the condition to prosecute, upon an affirmance of the judgment, the only liability on the bond is for nominal damages. Young *v.* Mason, 8 Ill. 55. *Contra,* where the condition was for "due prosecution of the appeal." Foarquar *v.* Collins, 4 T. B. Mon. (Ky.) 447.

A bond on second appeal, conditioned to abide the judgment of the second appellate court, does not relate to the original judgment so as to be security for its payment. Bauer *v.* Cabanne, 105 Mo. 110, 16 S. W. 521.

61. **Issuance of execution is no satisfaction** of the obligation of the bond where nothing is derived under it for the benefit of the judgment creditor.

Louisiana.— Clements *v.* Cassily, 23 La. Ann. 358.

can be but one satisfaction of the judgment, a pending levy of execution on personalty of the principal sufficient to satisfy the bond has been held to be a bar to an action on the bond,[62] as is also imprisonment of the debtor by execution.[63] This is not so, however, in case of a levy on real estate.[64]

Massachusetts.— Many *v.* Sizer, 6 Gray (Mass.) 141.

Ohio.— Chillicothe Bank *v.* Pierce, 6 Ohio 535.

Pennsylvania.— Clayton *v.* Neff, 1 Wkly. Notes Cas. (Pa.) 430.

United States.— Dowlin *v.* Standifer, Hempst. (U. S.) 290, 7 Fed. Cas. No. 4,041*a*.

Void execution sale.— Where the execution was satisfied by a sale of property belonging to one other than the judgment debtor, and the proceeds for that reason had to be returned, this was held, in an action on an appeal bond, to be no satisfaction of the judgment. Johnson *v.* Gennison, 22 La. Ann. 397. So, also, where the sale was held void because made pending the appeal, and after the filing of a proper supersedeas bond and petition in error. Riegel *v.* Fields, (Kan. App. 1900) 59 Pac. 1088.

Abandonment of property by officer, after levy, because of the non-payment of fees, will not avail sureties on an appeal bond as a defense. Poll *v.* Murr, 3 Cinc. L. Bul. 1141.

Disposal of property by appellant, pending the appeal, which property had been levied upon and left by agreement with appellant at the time of the appeal when a stay bond was given, was held not to affect liability on the bond. Bennett *v.* McGrade, 15 Minn. 132.

Restitution bond by appellee — Failure to enforce judgment.— Where a supersedeas bond is given on appeal, and appellee gives a counter-restitution bond to enable him to satisfy the judgment pending the appeal, and he fails to get satisfaction of the judgment — upon affirmance, his right of action upon the supersedeas bond is not affected. Ah Lep *v.* Gong Choy, 13 Oreg. 429, 11 Pac. 72.

62. **Levy on personalty bars action on bond** while the levy is in force, and provided it be upon sufficient property to satisfy the judgment. Therefore, an answer alleging these facts states a defense to the action. Smith *v.* Hughes, 24 Ill. 270; Pearl *v.* Wellman, 8 Ill. 311; Gregory *v.* Stark, 4 Ill. 611; Treasurer *v.* Hall, 3 Ohio 225; Cass *v.* Adams, 3 Ohio 223; Bosbyshell *v.* Evans, 1 Pa. L. J. Rep. 315. In Hastings First Nat. Bank *v.* Rogers, 15 Minn. 381, the court said: "The defendants contend that the levy upon the flour operates as a satisfaction of the judgment and execution. It is true that a valid levy upon sufficient personal property is *prima facie* a satisfaction of an execution; but the presumption arising from such a levy may be rebutted. . . . This presumption arises from the fact that the debtor has been deprived of his property in regular course of execution, and that therefore he ought to be exonerated from further liability, and the judgment creditor be compelled to look to the sheriff. But if the debtor has not been deprived of his property by reason of the levy; if it has been left in his possession, and eloigned or abandoned, and returned to him, or released from the levy, and delivered up to a third person upon the debtor's request — the reason of the presumption and the presumption itself ceases. Peck *v.* Tiffany, 2 N. Y. 451; People *v.* Hopson, 1 Den. (N. Y.) 574; Green *v.* Burke, 23 Wend. (N. Y.) 490." See also, to the same effect, Ambrose *v.* Weed, 11 Ill. 488.

63. **Imprisonment of the debtor** is a satisfaction of a bond conditioned to surrender him up or satisfy the judgment in case of affirmance during the continuance of the imprisonment. Koenig *v.* Steckel, 58 N. Y. 475; Mitchell *v.* Thorp, 5 Wend. (N. Y.) 287; Sunderland *v.* Loder, 5 Wend. (N. Y.) 58; Jackson *v.* Benedict, 13 Johns. (N. Y.) 533; Mears *v.* Speight, 49 N. C. 420; Wilkings *v.* Baughan, 25 N. C. 86; Shaw *v.* Clopp, 1 Ashm. (Pa.) 163.

Discharge of the debtor, in the manner provided by law, will restore the remedy on the bond. Norridgewock *v.* Sawtelle, 72 Me. 484; Prusia *v.* Brown, 45 Hun (N. Y.) 80; Cooke *v.* Little, 2 N. C. 193.

No condition to surrender.— Where the bond is to stay the judgment and not for the liberty of the debtor, neither the imprisonment of the debtor on execution nor his surrender by the sureties will discharge the bond. It will be held liable for the judgment. Mitchell *v.* Thorp, 5 Wend. (N. Y.) 287; Williams *v.* Floyd, 27 N. C. 649; Cooke *v.* Little, 2 N. C. 193.

Imprisonment for a fine, after affirmance, is no satisfaction of the obligation of an appeal bond to pay the amount of the judgment if affirmed. Sheffield *v.* O'Day, 7 Ill. App. 339.

64. **Levy on real estate** does not bar action on bond.

Illinois.— Robinson *v.* Brown, 82 Ill. 279; Herrick *v.* Swartwout, 72 Ill. 340; Gold *v.* Johnson, 59 Ill. 62; Gregory *v.* Stark, 4 Ill. 611.

Indiana.— But see, *contra*, McIntosh *v.* Chew, 1 Blackf. (Ind.) 280.

Massachusetts.— Ladd *v.* Blunt, 4 Mass. 402.

New York.— Shepard *v.* Rowe, 14 Wend. (N. Y.) 260.

Ohio.— Mayo *v.* Williams, 17 Ohio 244; Reynolds *v.* Rogers, 5 Ohio 169.

Pennsylvania.— Patterson *v.* Swan, 9 Serg. & R. (Pa.) 16.

England.— Clerk *v.* Withers, 2 Ld. Raym. 1072, 1 Salk. 322.

Reasons for different rule respecting real estate.— "The plea alleges that the plaintiffs caused an execution to be issued on that judgment, and levied on the lands of Gregory, of value sufficient to satisfy the debt, and

(2) Necessity to Establish Breach — (a) General Rule. To establish a breach of the condition to satisfy the affirmed judgment it is only necessary to show that, after affirmance, the judgment has not been satisfied.[65] To show this it is not necessary that an execution should have issued on the judgment and returned unsatisfied,[66] in the absence of a statute requiring it,[67] or conditions of the bond to that effect,[68] or in the terms of the judgment which make execution necessary.[69]

(b) Execution Required by Statute. In some states statutes require the issuance and unsatisfied return of execution against the judgment debtor in order to establish a breach of the condition to satisfy the affirmed judgment.[70] In such

that the levy still continues, and the lands remain unsold. That such a levy on personal property would be such a satisfaction of the debt as would be a bar to another suit on that judgment, or any attempt to enforce the judgment in any other way, while the levy still subsisted, and before the result of a sale should prove the insufficiency of the property levied upon, would seem to be settled by the authorities. But the same rule does not obtain where the levy is made on real estate. In this case the effect of the levy is not to deprive the debtor of the title, possession, or use of the estate. After the levy, as before, the judgment creditor has only a lien on the land; nor is the owner divested of his title until after the expiration of the time allowed for redemption; but as the creditor realizes his money upon the sale, the judgment is thereby satisfied. The judgment against Gregory was no more satisfied after than before the levy." Gregory *v.* Stark, 4 Ill. 611.

Insufficient averment — Duplicity.— In an answer to a declaration on an appeal bond an averment that an execution under the affirmed judgment was "levied upon the lands, tenements, goods, and chattels of the said Edward Herrick, of sufficient value to satisfy said judgment," was held no defense, for the reason that: "From the averment we must conclude that the goods and chattels, of themselves, are not of sufficient value to satisfy the execution. The levy of an execution upon real estate of sufficient value to satisfy it, does not, like the levy of an execution on personal property, operate, while the levy is undisposed of, as such a satisfaction of the judgment as will bar an attempt to enforce its collection in any other manner." Herrick *v.* Swartwout, 72 Ill. 340, 342.

65. Immediate payment necessary to avoid breach.— "The moment judgment was rendered in the appeal cause, unless the money was paid immediately, the condition of the bond was forfeited, and action could be brought upon it at any time before that judgment was actually satisfied." Gregory *v.* Stark, 4 Ill. 611, 612.

66. Issuance and unsatisfied return of execution are not necessary to show a failure of satisfaction of the judgment, and need not be alleged or proved. The allegation and proof of non-payment is enough.

California.— Murdock *v.* Brooks, 38 Cal. 596; Tissot *v.* Darling, 9 Cal. 278.

Colorado.— Anderson *v.* Sloan, 1 Colo. 484; Steinhauer *v.* Colmar, 11 Colo. App. 494, 55 Pac. 291.

Illinois.— Trogdon *v.* Cleveland Stone Co., 53 Ill. App. 206.

Indiana.— Railsback *v.* Greve, 58 Ind. 72.

Kentucky — Farmer *v.* Edwards, 9 Ky. L. Rep. 816; Fowler *v.* Gordon, 5 Ky. L. Rep. 332.

Louisiana.— Rawlings *v.* Barham, 12 La. Ann. 630, Bryan *v.* Cox, 3 Mart. N. S. (La.) 574.

Missouri.— Staley *v.* Howard, 7 Mo. App. 377.

Montana.— Bullard *v.* Gilette, 1 Mont. 509.

Nebraska.— Ayres *v.* Duggan, 57 Nebr. 750, 78 N. W. 296; Bell *v.* Walker, 54 Nebr. 222, 74 N. W. 617; Johnson *v.* Reed, 47 Nebr. 322, 66 N. W. 405; Flannagan *v.* Cleveland, 44 Nebr. 58, 62 N. W. 297.

New York.— Wood *v.* Derrickson, 1 Hilt. (N. Y.) 410; Slack *v.* Heath, 4 E. D. Smith (N. Y.) 95; Wallerstein *v.* American Surety Co., 15 N. Y. Suppl. 954, 40 N. Y. St. 508.

North Dakota.— Bingham *v.* Mears, 4 N. D. 437, 61 N. W. 808, 27 L. R. A. 257.

Ohio.— Reynolds *v.* Rogers, 5 Ohio 169; Means *v.* Goodenow, Tappan (Ohio) 255.

Pennsylvania.— Smith *v.* Ramsay, 6 Serg. & R. (Pa.) 573.

United States.— Babbitt *v.* Shields, 101 U. S. 7, 25 L. ed. 820; Fuller *v.* Aylesworth, 75 Fed. 694, 43 U. S. App. 657, 21 C. C. A. 505; Davis *v.* Patrick, 57 Fed. 909, 12 U. S. App. 629, 6 C. C. A. 632.

Subrogation of sureties.— Sureties are in no way prevented from exercising the right of subrogation against the principal by the failure of the obligee to issue execution; for, if they desire to act promptly against the principal, it is their privilege to pay off the judgment and at once proceed in the place of the judgment creditors. Rawlings *v.* Barham, 12 La. Ann. 630.

67. See *infra*, IX, B, 2, b, (I), (B), (2).

68. See *infra*, IX, B, 2, b, (I), (B), (3).

69. See *infra*, IX, B, 2, b, (I), (B), (4).

70. Pradat *v.* Legare, 28 La. Ann. 337; Murison *v.* Butler, 20 La. Ann. 512; Wells *v.* Roach, 10 La. Ann. 543; Teall *v.* Van Wyck, 10 Barb. (N. Y.) 376; Fox *v.* Ames, 6 Barb. (N. Y.) 256; Mayo *v.* Williams, 17 Ohio 244; Hodge *v.* Plott, Hempst. (U. S.) 14, 12 Fed. Cas. No. 6,561*a*.

Statute repealed.— Though the statute requiring an execution and return *nulla bona* was repealed before the action on an appeal

case a compliance with the statute must be alleged and proved,[71] and the officer's return of "No property found" is not conclusive.[72] But, even where execution is required by statute, it will not be necessary in the case of a bond which is not conditioned to satisfy the judgment.[73]

(c) Execution Required by Bond. When, by the condition of the bond, execution unsatisfied against the principal is contemplated as a prerequisite to the liability of the sureties to satisfy the judgment, an action upon the bond cannot be maintained until the proper issuance and return of such execution.[74]

(d) Execution Required by Judgment. In certain cases the judgment appealed from and as affirmed is for the doing of something other than the payment of money. In such cases it is necessary, before the sureties are liable to satisfy the judgment by payment of damages, to show that performance cannot be had of the principal. Such is the case of a judgment for the recovery of specific property.[75]

(B) *Demand on Principal.* Since all of the obligors become absolutely

bond, such statute was held still in force as to bonds executed prior to the repeal. Goshorn *v.* Alexander, 2 Ohio Dec. 597.

71. Execution out of appellate court, and the return of such execution unsatisfied, was held sufficient to establish a breach where the statute provided for the necessity of an unsatisfied return when an appeal is dismissed for failure to prosecute. Hallam *v.* Stiles, 61 Wis. 270, 21 N. W. 42.

Must issue within thirty days from the judgment in the appellate court, in appeals from justice courts and when the judgment is against appellants only, without the sureties. Learson *v.* Hamlin, 7 Wis. 196. *Compare* Lipe *v.* Becker, 1 Den. (N. Y.) 568, 6 Barb. (N. Y.) 256. See also Sperling *v.* Levy, 1 Daly (N. Y.) 95; Onderdonk *v.* Emmons, 9 Abb. Pr. (N. Y.) 187, 17 How. Pr. (N. Y.) 545; Beach *v.* Springer, 4 Wend. (N. Y.) 519.

When the affirmed judgment has been allowed to become dormant, execution cannot be executed thereon in compliance with the statute requiring an execution returned unsatisfied before the accrual of an action on an appeal bond. Goshorn *v.* Alexander, 2 Ohio Dec. 597. See also Mayo *v.* Williams, 17 Ohio 244, which holds that the failure to allege an unsatisfied execution is not ground of general demurrer, and may be cured by verdict.

What facts excuse execution.— Death of the principal and insolvency of his estate (Murison *v.* Butler, 20 La. Ann. 512); principal not found (Cooper *v.* Rhodes, 30 La. Ann. 533); execution prevented during liquidation of estate (Wells *v.* Roach, 10 La. Ann. 543; Flower *v.* Dubois, 10 Rob. (La.) 191); only available property heavily encumbered (Folger *v.* Palmer, 35 La. Ann. 814; White *v.* Gaines, 28 La. Ann. 532); property not within reach of execution (Whan *v.* Irwin, 27 La. Ann. 706; Wogan *v.* Thompson, 10 La. Ann. 284); execution enjoined (New Orleans, etc., R. Co. *v.* Dugan, 27 La. Ann. 465).

Return before limit of time allowed for return of execution will yet be a sufficient compliance with the statute, unless return was at the instance of the obligee for the purpose of favoring the principal (Gale *v.* Doll, 28 La. Ann. 718; Sperling *v.* Levy, 1 Daly (N. Y.) 95); and the statute was held to be complied with where the execution was made returnable at the earliest possible day (Holmes *v.* Steamer Belle Air, 5 La. Ann. 523). *Aliter*, where the execution was returned before the return-day (Lynch *v.* Burr, 10 Rob. (La.) 136).

72. Return of nulla bona not conclusive.— The sureties may show that there really is property of the principal obligor subject to execution, though the sheriff has returned the execution *nulla bona*, and thus defeat the action. Green *v.* Shurtliff, 19 Vt. 592.

Informing officer of property, belonging to the principal obligor, by sureties, alleged in plea in an action on appeal bond, held demurrable because the plea "does not show that the plaintiff was advised of the property, or that in fact there was any; but only relies on the fact that the defendant said to the officer that there was property." Stanley *v.* Lucas, Wright (Ohio) 34.

73. No condition to satisfy.— In case of a condition to surrender the body of appellee in execution of the judgment, if affirmed, there must have been an execution to enable appellant so to do: but, no such condition being in the bond, it was held that the execution was not a prerequisite, and that the obligee could recover as on a voluntary common-law bond, entirely aside from the statute. Pevey *v.* Sleight, 1 Wend. (N. Y.) 518.

74. Hunt *v.* Hopkins, 83 Mo. 13.

Condition for liability only on failure of principal.— Where the condition of the bond was that "unless his principals satisfied any judgment that might be rendered against them by the appellate court, he would be liable," etc., it was held that the liability of the surety did not become fixed until every reasonable step, including execution, to exact payment from the principals, had been taken by the obligee. Cooper *v.* Rhodes, 30 La. Ann. 533. In such case, as to what steps are reasonable, see Pinard *v.* George, 30 La. Ann. 384; Perkins *v.* Bard, 16 La. Ann. 443; Chalaron *v.* McFarlane, 9 La. 227.

75. Judgment for specific property.— Pieper *v.* Peers, (Cal. 1892) 31 Pac. 562; Shoning *v.* Coburn, 36 Nebr. 76, 54 N. W. 84.

liable upon a breach of the condition to satisfy an affirmed judgment, there is no necessity for the obligee to first make a demand on the principal before suing on the bond.[76] But such demand must be made in order to establish a breach, where it is required by the terms of the condition.[77]

(II) *Resort to Another Security.* The obligee need not first resort to and exhaust another available security before suing on the appeal bond — as, for instance, a mortgage from the principal — unless taken in satisfaction of the judgment,[78] or promissory notes assigned to him by the principal, unless the sureties are thereby prejudiced;[79] or another bond required by order of court,[80] or to effect another purpose,[81] or on further appeal to a higher court,[82] unless the second

76. No demand on principal necessary, or any averment or proof of such demand.

California.— Murdock *v.* Brooks, 38 Cal. 596.

Colorado.— Bolles *v.* Bird, 12 Colo. App. 78, 54 Pac. 403.

District of Columbia.— Atwood *v.* Latney, 4 Mackey (D. C.) 186.

Kentucky.— Fowler *v.* Gordon, 5 Ky. L. Rep. 332.

Louisiana.— Bryan *v.* Cox, 3 Mart. N. S. (La.) 574.

Massachusetts.— Hobart *v.* Hilliard, 11 Pick. (Mass.) 143.

Montana.— Nelson *v.* Donovan, 16 Mont. 85, 40 Pac. 72.

Nebraska.— Bell *v.* Walker, 54 Nebr. 222, 74 N. W. 617.

New Jersey.— Teel *v.* Tice, 14 N. J. L. 444.

New York.— Heebner *v.* Townsend, 8 Abb. Pr. (N. Y.) 234.

77. Demand required by terms of condition.— Cooper *v.* Rhodes, 30 La. Ann. 533; Levois *v.* Thibodaux, 13 La. Ann. 264; Heebner *v.* Townsend, 8 Abb. Pr. (N. Y.) 234.

78. Need not first resort to mortgage given by the principal as additional security for the satisfaction of a judgment appealed from. But it would be otherwise were the mortgage taken in satisfaction of the judgment or of the bond. Cox *v.* Mulhollan, 1 Mart. N. S. (La.) 564.

79. Promissory notes as collateral.— Bingham *v.* Mears, 4 N. D. 437, 439, 61 N. W. 808, 27 L. R. A. 257, wherein the court, in a very elaborate and learned opinion by Corliss, J., said: "The right of the sureties with respect to this collateral security is to resort to it themselves on paying the debt, and not to compel the creditor to resort to it."

80. A further bond required by order of court, and given pursuant thereto, will affect the liability on the first bond only in that the sureties on the two bonds are jointly liable in one action, where given for the same purpose (Hargis *v.* Mayes, 20 Ky. L. Rep. 1965, 50 S. W. 844), but not where given for a different purpose (O'Beirne *v.* Cary, 34 N. Y. App. Div. 328, 54 N. Y. Suppl. 337).

81. An appeal bond does not supersede a redelivery bond, given to effect a dissolution of an attachment in the same action, and the same person having executed both, he is liable to the full extent of both. State *v.* McGlothlin, 61 Iowa 312, 16 N. W. 137.

A bond to secure clerk's costs, in addition to the appeal bond, has no effect upon the latter. Thalheimer *v.* Crow, 13 Colo. 397, 22 Pac. 779.

A replevin bond covering costs of appeal, upon which appellee recovers judgment without the costs of appeal, does not affect the right to recover the costs on the appeal bond. Pearson *v.* Bunker, 30 Ill. App. 524.

82. Successive appeal bonds are cumulative.— Liability on the first bond is fixed first by the intermediate judgment of affirmance, which in turn is superseded by the second bond, and the final judgment of affirmance fixes the liability on both.

Colorado.—Shannon *v.* Dodge, 18 Colo. 164, 32 Pac. 61; Rockwell *v.* Lake County, 17 Colo. 118, 29 Pac. 454, 31 Am. St. Rep. 265.

Illinois.— Becker *v.* People, 164 Ill. 267, 45 N. E. 500; Aurand *v.* Aurand, 87 Ill. App. 29.

Kansas.— Coonradt *v.* Campbell, 29 Kan. 391.

Michigan.— Marquette County *v.* Ward, 50 Mich. 174, 15 N. W. 70; Evers *v.* Sager, 28 Mich. 47.

New York.— Mackellar *v.* Farrell, 134 N. Y. 597, 31 N. E. 629, 45 N. Y. St. 935; Chester *v.* Broderick, 131 N. Y. 549, 30 N. E. 507, 43 N. Y. St. 933; Church *v.* Simmons, 83 N. Y. 261; Humerton *v.* Hay, 65 N. Y. 380; Hinckley *v.* Kreitz, 58 N. Y. 583; Robinson *v.* Plimpton, 25 N. Y. 484.

North Carolina.— State *v.* Bradshaw, 32 N. C. 229; Dolby *v.* Jones, 13 N. C. 109.

Ohio.— Hayes *v.* Weaver, 61 Ohio St. 55, 55 N. E. 172.

Tennessee.— Moore *v.* Lassiter, 16 Lea (Tenn.) 630.

United States.— Babbitt *v.* Shields, 101 U. S. 7, 25 L. ed. 820; Howard Ins. Co. *v.* Silverberg, 89 Fed. 168.

Greater liability by delay of further appeal.— Where the first appeal bond was conditioned to pay amount of deficiency on foreclosure, and during the delay caused by a further appeal the property depreciated so that the deficiency was larger than when the second appeal was taken, and the second appeal was against the wishes of the sureties on the first, they were nevertheless held liable according to the terms of the bond. Mackellar *v.* Farrell, 134 N. Y. 597, 31 N. E. 629, 45 N. Y. St. 935.

Second bond is primarily liable.— Hinckley *v.* Kreitz, 58 N. Y. 583. The first sureties "became, on the giving of the second undertaking to pay the judgments, sureties for the second sureties, and when the second sureties paid or discharged their obligation to the

bond was given to supersede the first;[83] or an attachment lien upon the principal's property or a bond given to release such lien, unless from the obligee's forbearance the sureties will suffer loss;[84] or an action against an officer for negligent loss of attached property.[85] And an obligor cannot delay proceedings against him to enable him first to resort to security held by him.[86] But a bond given on appeal from a judgment subjecting property to sale is only for the deficiency after sale; hence, the property must in such case be exhausted before resort to the bond.[87]

(III) *Statutory Notice to Sureties.* In New York, by statute, it is provided that, before suit can be maintained upon an appeal bond, written notice of the entry of the judgment of affirmance or dismissal must be served upon the attorney for appellant, and ten days' failure to satisfy the judgment thereafter must have elapsed.[88]

owner of such judgments and took an assignment of them, they could not enforce such judgments against the first sureties" (Wronkow *v.* Oakley, 133 N. Y. 505, 511, 31 N. E. 521, 45 N. Y. St. 882, 28 Am. St. Rep. 661, 16 L. R. A. 209), and, after the second bond is exhausted, the first will be liable for any remaining deficiency (Chester *v.* Broderick, 131 N. Y. 549, 30 N. E. 507, 43 N. Y. St. 933).

83. International Bank *v.* Poppers, 105 Ill. 491.

Where the first bond is by the order expressly vacated, there can be no question. O'Beirne *v.* Cary, 34 N. Y. App. Div. 328, 54 N. Y. Suppl. 337.

Supersedeas on second appeal, under the provisions of the law requiring it, has been held to supersede and discharge first supersedeas. Winston *v.* Rives, 4 Stew. & P. (Ala) 269.

84. Bond to discharge attachment.— Stillwell *v.* Bertrand, 22 Ark. 379, 380, where it is said: "If the causes in action in both cases were the same, founded upon different securities, Bertrand could prosecute them both to judgment, contenting himself with one satisfaction."

Attachment lien on principal's property.— Davis *v.* Patrick, 57 Fed. 909, 912, 12 U. S. App. 629, 6 C. C. A. 632, where the court said: "If the sureties desired to avail themselves of the attachment lien, it was their plain duty to pay the judgment debt, and by so doing become subrogated to whatever lien the judgment creditor had acquired on the lands in question."

85. Holmes *v.* Woodruff, 20 Vt. 97.

86. Security held by surety affords no ground upon which to delay summary proceedings after his liability has become fixed by an execution returned *nulla bona* against the principal. De Greck *v.* Murphy, 28 La. Ann. 297.

The right of one judgment debtor against others, to compel the latter to satisfy a judgment from which he alone appealed, is of no avail as a defense in an action on the appeal bond after affirmance. Hutchins *v.* Wick, 4 Ohio Dec. 170, 1 Cleve. L. Rep. 89.

87. Property must first be exhausted.— See *infra*, IX, B, 2, d, (II).

Condition only for deficiency.— Although the condition provided, in the language of the statute, for the payment "of the sums recovered or directed to be paid by the judgment," it was held that the liability was only for the deficiency, if any, which could not be ascertained until after a sale. Concordia Sav., etc., Assoc. *v.* Read, 124 N. Y. 189, 26 N. E. 347, 35 N. Y. St. 222.

Condition to pay judgment.— Where, on an appeal from a tax judgment against land, the bond was conditioned to pay whatever judgment might be awarded against the land in case of affirmance, it was held that the liability was absolute for the entire judgment, and did not require that the land be first exhausted. Mix *v.* People, 86 Ill. 329.

88. N. Y. Code Civ. Proc. § 1309; N. Y. Code Proc. § 348; Hill *v.* Warner, 39 N. Y. App. Div. 424, 57 N. Y. Suppl. 355; Loweree *v.* Tallman, 30 N. Y. App. Div. 225, 52 N. Y. Suppl. 431.

Court of appeals.— The provision does not apply to bonds given on appeal to the court of appeals. Johnstone *v.* Conner, 13 N. Y. Civ. Proc. 19; Sterne *v.* Talbott, 89 Hun (N. Y.) 368, 35 N. Y. Suppl. 412, 69 N. Y. St. 824; Galinger *v.* Engelhardt, 26 Misc. (N. Y.) 49, 55 N. Y. Suppl. 334.

Surrogate courts.— Nor to appeals from surrogates' courts. Hildreth *v.* Lerche, 23 Abb. N. Cas. (N. Y.) 428, 10 N. Y. Suppl. 238.

Common pleas.—Nor to appeals to the common pleas of New York city and county, from the city court of New York. Barber *v.* Rutherford, 12 Misc. (N. Y.) 33, 33 N. Y. Suppl. 89, 66 N. Y. St. 690; Weil *v.* Kempf, 12 N. Y. Civ. Proc. 379.

Service held sufficient.— Delivery of a copy of the order of dismissal, containing an indorsement by the clerk of the date of its entry and the name of appellee's attorney. Milligan *v.* Cottle, 92 Hun (N. Y.) 323, 36 N. Y. Suppl. 904, 72 N. Y. St. 239. Where costs were retaxed and reduced after notice. Yates *v.* Burch, 87 N. Y. 409. Where the notice did not specifically state that judgment of affirmance had been entered, but stated judgment had been entered on remittitur. Rogers *v.* Schmersahl, 4 Hun (N. Y.) 623.

Service held insufficient.— Delivery of copy of order of affirmance, without a statement that it had been filed or entered, and that

c. Release from Necessity to Satisfy — (I) *By Act of the Obligee.* The sureties on an appeal bond will be released, from the necessity to satisfy an affirmed judgment, by any act of the obligee which is done with the fraudulent intention of preventing them from exonerating themselves from the property of the principal judgment debtor,[89] or by any act of the obligee which has that effect.[90]

(II) *By Legislative Act.* Upon the ground that a judgment founded on a tort is not a contract, it has been held that, by statute, a valid judgment upon a particular tort could be declared a nullity, and that a bond conditioned for its satisfaction would thereupon become null and void.[91] A release of the judgment by limitation of the action thereon will release an appeal bond given for its performance.[92]

(III) *By Injunction.* An injunction, preventing execution of the affirmed judgment, will release the obligors on the appeal bond.[93]

(IV) *Insolvency of Principal.* The occurrence of the insolvency of the principal obligor, pending the appeal, preventing exoneration of the sureties over against him for satisfaction of the judgment, does not diminish the sureties' lia-

judgment accordingly had been entered. Rae *v.* Beach, 76 N. Y. 164.

Laches — Death of appellant's attorney.— Failure to make service for several months after affirmance, during which time the appellant's attorney died, is not such negligence as will prejudice obligee. In such case, where another attorney is not appointed, the statutory service is not indispensable. Chilson *v.* Howe, 54 Hun (N. Y.) 635, 8 N. Y. Suppl. 945, 26 N. Y. St. 985.

Pleading and proof.— Compliance with the statute must be alleged and proved, or else no cause of action is shown. Porter *v.* Kingsbury, 71 N. Y. 588; Heebner *v.* Townsend, 8 Abb. Pr. (N. Y.) 234. An answer which alleges want of information or knowledge sufficient to form a belief as to whether plaintiff served the required notice cannot be regarded as frivolous. Hill *v.* Warner, 39 N. Y. App. Div. 424, 57 N. Y. Suppl. 355.

Judgment-roll.— The judgment-roll may be entered up at any time before or at the trial. Proof of the judgment and statutory notice thereof is sufficient. Concordia Sav., etc., Assoc. *v.* Read, 14 N. Y. St. 8.

Waiver of notice.— Proceedings for further appeal before expiration of time of notice is no waiver of notice, and want of notice need not be alleged by defendant. Rae *v.* Harteau, 7 Daly (N. Y.) 95, 53 How. Pr. (N. Y.) 25.

89. Collusive transfer of principal's property.— Evidence that the principal judgment debtor had sufficient property wherewith to satisfy the affirmed judgment, but fraudulently transferred it to the obligee for a normal sum for the purpose of compelling payment by the sureties, was offered by the sureties in an action on an appeal bond and excluded by the trial court; on appeal, this was held reversible error, since the facts sought to be shown would have discharged the sureties. Lafayette F. Ins. Co. *v.* Remmers, 30 La. Ann. 1347.

Agreement to delay suit on bond.— In order that an agreement, between the obligee and principal obligor, to delay suit on the bond may operate to relieve the sureties of liability, the agreement must be such as will prevent the obligee from bringing suit, and thus render nugatory the right of the sureties to be subrogated upon satisfaction of the judgment to the obligee's right of action; hence, where such agreement is not binding for want of consideration, the sureties are not relieved. Quillen *v.* Quigley, 14 Nev. 215.

Negligence of officer, by reason of which property levied upon is destroyed by fire, does not release the sureties on appeal bond to any extent (Grieff *v.* Steamboat D. S. Stacy, 12 La. Ann. 8); or negligence in failing to make a levy or to take possession of property which the affirmed judgment gave to the obligee, unless the latter was responsible for the neglect of the officer (Atkinson *v.* Fitzpatrick, (Ky. 1901) 60 S. W. 516).

90. Release of collateral security, held by the obligee, to which the sureties would have had the right of subrogation, releases the sureties. Bingham *v.* Mears, 4 N. D. 437, 61 N. W. 808, 27 L. R. A. 257.

Release of second appeal bond, the sureties being different from those on the first, releases the sureties on the first bond, since those on the second are primarily liable. Hinckley *v.* Kreitz, 58 N. Y. 583.

91. White *v.* Crump, 19 W. Va. 583 [*citing* Peerce *v.* Kintzmiller, 19 W. Va. 564], construing W. Va. Const. art. 8, § 35, and U. S. Const. art. 1, § 10.

92. Byrne *v.* Garrett, 23 La. Ann. 587.

93. Conflict of federal and state courts.— In a suit on an appeal bond in a case of an affirmance of a decree of divorce and alimony, as a defense the obligors introduced the decree of the United States circuit court, rendered after the affirmance of the decree, in a suit instituted prior to the institution of the divorce proceedings, holding the contract of marriage upon which the decree of divorce and alimony was based to be null and void, and enjoining the use of such instrument, or the claiming of any rights or property interests thereunder, and it was held that there was no liability either upon the divorce and alimony decree or the appeal bond. Sharon *v.* Sharon, 84 Cal. 433, 23 Pac. 1102.

bility,[94] not even when the judgment is released by the bankruptcy act, if such release occurs after the affirmance, and, perhaps, not even when it occurs before affirmance.[95] On the other hand, where it is held that sureties are only secondarily liable, insolvency of appellant pending appeal will affect the liability of the sureties by way of damages to appellee caused by the appeal.[96]

d. Amount Necessary to Satisfy — (I) *Amount of the Judgment* — (A) *The Judgment Appealed From.* The amount necessary to be paid in performance of the condition to satisfy is the amount of the judgment appealed from,[97] with interest[98] and costs.[99] If the appellate court adjudge a greater amount, the bond is not security for the excess,[1] unless performance of the appellate court judgment is provided for by the terms of the bond,[2] or by a statute which is held to be a part of it.[3]

94. Phillips *v.* Wade, 66 Ala. 53; Trimble *v.* Brichta, 11 La. Ann. 271; Baldwin *v.* Gordon, 12 Mart. (La.) 378.

95. See *supra*, IX, B, 2, a.

96. **Insolvency of appellant damages appellee** in the amount of the judgment, appellee having been prevented by the appeal from collecting it while appellant was solvent. Keitzinger *v.* Reynolds, 11 Ind. 545; Estes *v.* Roberts, 63 Minn. 265, 65 N. W. 445. See also Friesenhahn *v.* Merrill, 52 Minn. 55, 53 N. W. 1024; Reitan *v.* Goebel, 35 Minn. 384, 29 N. W. 6.

97. **Not merely damages** resulting from stay of execution will discharge the condition to satisfy a judgment. It can be discharged only upon payment of the full amount of the judgment. Rodman *v.* Moody, 14 Ky. L. Rep. 202.

Judgment for costs.— Where the judgment in an action of interpleader to try title to property in the hands of an officer was and could be only for costs, a condition to pay the "costs and condemnation money" was held fulfilled upon payment of costs. Guyer *v.* Spotts, 85 Pa. St. 51.

Recitals of amount.— The bond on appeal from an intermediate appellate court recited the amount of the original judgment to be less than the amount as stated in such intermediate judgment, and, on affirmance by the court of last resort and suit on the bond, it was held that the amount recited in the intermediate judgment would prevail, the condition being to "pay the amount directed to be paid by the said judgment," notwithstanding the recital of the larger amount in the judgment was irregular and unnecessary. Hill *v.* Burke, 62 N. Y. 111.

Omission to allege amount.— In a suit on an appeal bond an omission to allege the amount of the judgment appealed from is fatal to the assignment of a breach of condition to satisfy the judgment upon affirmance. Malone *v.* McClain, 3 Ind. 532.

An immaterial variance, between the judgment proved and the declaration, will not defeat the action. So held where the total amounts agreed, but the declaration failed to specify, but what the judgment showed — that a portion of the amount was for damages. Pearl *v.* Wellman, 11 Ill. 352. Also where the declaration does not, while the judgment does, include interest. Frantz *v.* Smith, 5 Gill (Md.) 280.

A fatal variance is established by an allegation that the judgment was for six hundred and fifty dollars, when it was one thousand two hundred and fifty dollars, with *remittitur* of six hundred dollars. Rothgerber *v.* Wonderly, 66 Ill. 390. Also by an allegation of a judgment against two and proof of a judgment only against one. Dupuie *v.* McCausland, 1 Ill. App. 395.

98. Brigham *v.* Vanbuskirk, 6 B. Mon. (Ky.) 197; Missouri, etc., R. Co. *v.* Lacy, 13 Tex. Civ. App. 391, 35 S. W. 505; Whereatt *v.* Ellis, 103 Wis. 348, 79 N. W. 416, 74 Am. St. Rep. 865.

Judgment not secured by the bond.— Interest cannot be allowed as damages or costs. Halsey *v.* Flint, 15 Abb. Pr. (N. Y.) 367.

Interest may exceed penalty of a bond, though the penalty can be exceeded in no other way, the interest to run from the time of demand. Crane *v.* Andrews, 10 Colo. 265, 15 Pac. 331 (which also seems to hold that the penalty may be exceeded by the costs and damages); Ives *v.* Merchants' Bank, 12 How. (U. S.) 159, 13 L. ed. 936.

Double interest, provided for by statute as a penalty for an unsuccessful appeal, extends only over the time of the appeal; after affirmance single interest only may be allowed. Bacon *v.* Otis, 11 Mass. 407.

99. **A failure to take default as to costs,** in a suit for judgment, interest, and costs, and plea of payment of judgment and interest, deprives plaintiff of the right to recover anything where the defense of payment of the judgment and interest was successful. Very *v.* Watkins, 18 Ark. 546. See also, *supra*, IX, B, 3.

1. **Extra damages, awarded in appellate court** under a statute authorizing an award of ten per cent. on the amount of the judgment in case of affirmance, are not included in a condition to "pay said damages so recovered by said Baron against him, and costs, in case the judgment of the said court shall be affirmed." Raney *v.* Baron, 1 Fla. 327.

2. **Condition to perform appellate judgment** carries obligation to satisfy amount adjudged in excess of judgment below. Cooper *v.* Rhodes, 30 La. Ann. 533.

3. **Statute a part of bond.**— Where a statute required a condition to perform the judgment of the appellate court, but was not inserted, and the bond was allowed to serve the same purpose as if in accordance with

(B) *Collateral Judgments.* The judgment appealed from is often one rendered in a proceeding instituted to affect, in some way, a preëxisting judgment.[4] In such case a condition to satisfy the judgment appealed from does not oblige the satisfaction of the preëxisting judgment, unless the effect of the appeal is to question the provisions of the preëxisting judgment.[5] If, however, such obligation be assumed by the terms of the bond, it has been held that it may be enforced.[6]

(II) *Amount of Deficiency* — (A) *Judgment in Rem.* If the action be wholly *in rem*, to subject a specific property or fund to the satisfaction of a claim, and no personal judgment for a deficiency be entered, an appeal bond conditioned to satisfy the judgment is not security for such deficiency,[7] and not even for the

statute, it has been held that the condition was supplied by statute and an appellate judgment in excess of the one appealed from would be secured in full. Chandler *v.* Thornton, 4 B. Mon. (Ky.) 360.

4. Appeals from judgments denying motions and applications.— Motion to modify decree of divorce and alimony. Henderson *v.* Henderson, (Oreg. 1900) 61 Pac. 136. Motion to vacate or application to enjoin a judgment. Halsey *v.* Murray, 112 Ala. 185, 20 So. 575; Steele *v.* Wilson, 9 Bush (Ky.) 699; Hanley *v.* Wallace, 3 B. Mon. (Ky.) 184; Duncan *v.* Rule, 7 Ky. L. Rep. 439; Greiner *v.* Prendergast, 3 La. Ann. 389.

In a suit to collect alimony awarded in a former decree, by subjecting the income from certain trust funds to its payment, the appeal bond, conditioned, upon affirmance, to pay the amount directed by the judgment to be paid, is not security for the payment of the alimony decree. Markoe *v.* American Surety Co., 44 N. Y. App. Div. 285, 60 N. Y. Suppl. 674 [*reversing* 25 Misc. (N. Y.) 127, 54 N. Y. Suppl. 828].

5. Appeal from judgment of revivor.— Where, on appeal from a judgment of revivor of a dormant judgment, the appellants sought to question the validity of the revived judgment, which objections were considered on their merits, a bond to satisfy was held to secure payment of the revived judgment, upon affirmance. Reynolds *v.* Rogers, 5 Ohio 169.

6. Condition to pay preëxisting judgment.— Where the condition in a bond, on appeal from an order confirming a sale under a judgment of foreclosure by the purchaser, was conditioned to pay the amount of the purchase-price, the obligors of the bond were held according to its terms. Andrews *v.* Scotton, 2 Bland (Md.) 629. *Contra*, where the condition was to pay a judgment in a bond on appeal from an order dissolving an injunction of proceedings under it. Halsey *v.* Murray, 112 Ala. 185, 20 So. 575 [*overruling* McCalley *v.* Wilburn, 77 Ala. 549]; Hanley *v.* Wallace, 3 B. Mon. (Ky.) 184.

Collateral stipulation.— A stipulation between the parties, to an appeal from an order denying a motion to modify a decree of divorce and alimony, whereby appellant agreed to pay to appellee, pending the appeal, a specified sum in consideration that appellee, pending the appeal, would forbear to enforce the decree for alimony, was held not to enlarge the terms of the appeal bond so as to charge the obligors with the satisfaction of the decree for alimony. Henderson *v.* Henderson, (Oreg. 1900) 61 Pac. 136.

7. Absence of personal judgment prevents action on bond for deficiency. So held in cases of mortgage foreclosure.

Indiana.— Hinkle *v.* Holmes, 85 Ind. 405; Willson *v.* Glenn, 77 Ind. 585.

Iowa.— Berryhill *v.* Keilmeyer, 33 Iowa 20.

Kentucky.— Talbot *v.* Morton, 5 Litt. (Ky.) 326.

Maryland.— Andrews *v.* Scotton, 2 Bland (Md.) 629.

New York.— Knapp *v.* Van Etten, 55 Hun (N. Y.) 428, 8 N. Y. Suppl. 415, 28 N. Y. St. 573.

United States.— Omaha Hotel Co. *v.* Kountze, 107 U. S. 378, 2 S. Ct. 911, 27 L. ed. 609 (involving the lands of a county, against which no personal judgment could be given); Wayne County *v.* Kennicott, 103 U. S. 554, 26 L. ed. 486. So held, also, in case of vendor's lien foreclosure (Wardlow *v.* Steele, 7 Coldw. (Tenn.) 573); also in interpleader cases (Oliver *v.* State, 66 Ga. 602).

Reasons — Attachment with personal judgment.— In Neilson *v.* Jarvis, 17 Ky. L. Rep. 694, 32 S. W. 400, the court, by Paynter, J., said: "It appears from this record that there was no personal judgment against the principals in the appeal bond — not even a judgment for costs in the common pleas court to which the appeal was prosecuted. The proceeds of the sale of the attached property was in the hands of the officer of the court, and he was ordered to pay it to the appellant. A similar order was made in the common pleas court. So far as the judgment shows, there was nothing in the controversy except as to the fund in court. The court's officer having possession of that, it was within control of the court. It was a judgment *in rem*. To hold that the sureties in the appeal bond made themselves liable for the amount of money in the hands of the receiver of the court is to make them pay something for which the principal is not liable." See also, to the same effect, Graham *v.* Swigert, 12 B. Mon. (Ky.) 522; Worth *v.* Smith, 5 B. Mon. (Ky.) 504; Dexter *v.* Sayward, 79 Fed. 237.

Allegation of personal judgment, in an action on a bond given on appeal from a foreclosure judgment, has been held essential in order to entitle plaintiff to recover for the deficiency. Scott *v.* Marchant, 88 Ind. 349.

Contrary view — Subsequent personal judg-

rents and profits of such property or fund;[8] but only for deterioration or loss thereof because of the appeal.[9]

(B) *Judgment In Personam*—(1) Appeal by Judgment Debtor. If, however, the judgment be also *in personam* for a balance due the plaintiff after exhaustion of the property or fund, upon an affirmance and sale,[10] the obligors on a bond conditioned to pay the judgment[11] are bound to satisfy such deficiency,[12] in which event it is immaterial that the property or fund has deteriorated, or even suffered total loss.[13]

(2) Appeal by Other than Judgment Debtor. Although a deficiency judgment be rendered against the judgment debtor, a bond on appeal, conditioned to perform the judgment, by a party to the proceeding who is such merely as a fiduciary or because of an interest claimed by him in the property involved, will not be held for such deficiency.[14]

ment.—In Louisiana, in the case of Landry *v.* Victor, 30 La. Ann. 1041, it was held that the appeal bond, conditioned to perform the judgment in a mortgage foreclosure case, should be holden for the whole debt, though the deficiency judgment was not rendered until after affirmance and sale. The dissenting opinion of Marr, J., shows even more clearly than the majority opinion this case to apply principles contrary to the general rule. Followed, as binding on the United States supreme court, in a case coming from Louisiana. Marchand *v.* Frellsen, 105 U. S. 423, 26 L. ed. 1057.

8. Rents and profits on appeal from judgment *in rem*, see Omaha Hotel Co. *v.* Kountze, 107 U. S. 378, 2 S. Ct. 911, 27 L. ed. 609 [*followed* in Dexter *v.* Sayward, 79 Fed. 237]. To preserve the rents and profits, a receiver may be appointed, by the lower court, notwithstanding a supersedeas. Hutton *v.* Lockridge, 27 W. Va. 428. See *infra*, IX, B, 4.

9. Deterioration pending appeal of mortgaged property, the sale of which is prevented by the appeal, is within the condition to pay damages. Omaha Hotel Co. *v.* Kountze, 107 U. S. 378, 2 S. Ct. 911, 27 L. ed. 609. *Contra*, Watkins *v.* Suter, 11 Ky. L. Rep. 762. See *infra*, IX, B, 4.

Loss of fund—Insolvency of garnishee.—Where two creditors were attempting in the same action to satisfy their claims out of the indebtedness of one to their debtor, and one of the creditors recovered a judgment of priority for his claim, from which the other appealed with a bond conditioned to satisfy the judgment, and the garnishee became insolvent pending the appeal preventing collection of the affirmance, it was held that the obligors were liable for the full amount of the judgment which had been lost by the stay of execution on the appeal. Mahlman *v.* Williams, 89 Ky. 282, 11 Ky. L. Rep. 503, 12 S. W. 335.

10. Before a sale, it cannot be ascertained what the deficiency might be, if any, and therefore an action on a bond to enforce a satisfaction thereof at such time would be premature. Buckner *v.* Bogard, 8 Ky. L. Rep. 701.

Completion of sale.—Though the auditor's account distributing the proceeds of a sale had not been finally ratified, it was held that an action on the appeal bond could be maintained, after affirmance, sale, and confirmation of sale. Jenkins *v.* Hay, 28 Md. 547.

11. No condition to perform judgment.—In case the condition is only to pay costs and damages by reason of the appeal, there is no liability for the deficiency. Kennedy *v.* Nims, 52 Mich. 153, 17 N. W. 735.

12. Deficiency judgment in personam.—Ogden *v.* Davis, 116 Cal. 32, 47 Pac. 772; Graham *v.* Swigert, 12 B. Mon. (Ky.) 522; Portland Trust Co. *v.* Havely, 36 Oreg. 234, 59 Pac. 466, 61 Pac. 346; Harnsberger *v.* Yancey, 33 Gratt. (Va.) 527.

One sale under two liens, each being of equal dignity, calls for a *pro rata* division of the deficiency where only one of the judgments are superseded on appeal, so that, on affirmance, the obligors in the appeal bond will be held for a *pro rata* portion, and no more. Laughlin *v.* Coakley, 19 Ky. L. Rep. 1107, 40 S. W. 248.

Application of lien proceeds.—After affirmance of a judgment for the purchase-price of land and decree of a vendor's lien thereon, the land was sold and found insufficient to pay the judgment. In an action on the appeal bond for the deficiency it was held that the sureties were not entitled to a distribution of the proceeds *pro rata* to the judgment and the penalty of the bond, but that they were liable for the entire deficiency up to the maximum penalty of the bond. Sessions *v.* Pintard, 18 How. (U. S.) 106, 15 L. ed. 298.

Execution prior to bond does not affect the liability of the obligors, where the condition is to pay the deficiency. German Sav., etc., Soc. *v.* Kern, (Oreg. 1901) 63 Pac. 1052. Nor where the condition is to pay only costs. Douglass *v.* Skipwith, (Tenn. Ch. 1896) 38 S. W. 450.

13. Total loss of attached property pending the appeal will have no effect to diminish the obligation to pay the balance of the personal judgment. It was so held where, under a vendor's lien, the entire property was swept away. Brown *v.* Jacobi, 12 Heisk. (Tenn.) 89.

14. Appeal by one not personally liable.—Where a personal judgment ran against two and judgment of foreclosure against the same two and a third, and the third party alone appealed, the obligors on the bond were held for all damages of deterioration of the property, but not for the deficiency occurring on such. Hinkle *v.* Holmes, 85 Ind. 405.

Appeal by owner from mechanic's lien

3. Condition to Pay Costs — a. Existence of Condition — (1) *Embraced in Other Conditions* — (A) *Costs of Lower Court.* The obligation to pay costs of the lower court, though such obligation be not specifically mentioned,[15] is usually embraced in the condition to satisfy the judgment appealed from, since the judgment is usually for costs.[16] And it may be embraced in a condition to satisfy the judgment of the appellate court,[17] if the appellate judgment includes the costs of the lower court[18] — otherwise not.[19]

judgment.— Where the owner alone appealed from a judgment foreclosing a mechanic's lien, in an action by a subcontractor against the original contractor and the owner, it was held that, inasmuch as the owner's liability could not extend beyond his property involved, there was no liability on his appeal bond to satisfy a deficiency. Sosman *v.* Conklin, 65 Mo. App. 319.

Appeal by intervener in attachment.— An intervener in attachment cannot be adjudged to pay the value of attached property; and, upon appeal by him from a judgment denying his claim, his appeal bond is not liable therefor, although he was erroneously awarded possession pending the appeal. Edwards *v.* Ellis, 27 Kan. 344.

Appeal by assignee of mortgage.— Upon appeal by an assignee of a mortgage from that part of a judgment of foreclosure holding his assignment fraudulent and void, summary judgment upon affirmance cannot be entered in the appellate court against his sureties for the amount of personal judgment against the obligor. Titlow *v.* Cascade Oatmeal Co., 16 Wash. 676, 48 Pac. 406.

Appeal by junior mortgagee.— Where, in addition to the decree of foreclosure, another mortgage was held to be a junior mortgage, and the junior mortgagee, against whom no personal judgment could be rendered, alone appealed, upon affirmance, the appeal bond was held not liable for the deficiency. Willson *v.* Glenn, 77 Ind. 585; Kephart *v.* Farmers. etc., Bank, 4 Mich. 602.

Appeal by subsequent lienors.—In the case of an appeal by judgment creditors from a judgment enforcing prior liens, the rule is the same respecting liability of obligors in the bond as in the case of appeal by junior mortgagees (Worth *v.* Smith, 5 B. Mon. (Ky.) 504; Sumrall *v.* Reid, 2 Dana (Ky.) 65); so also in case of appeal by a subsequent attaching creditor from a judgment sustaining a prior attachment (Friedman *v.* Lemle, 38 La. Ann. 654), notwithstanding the execution of the prior lien was superseded and a condition existed to satisfy and perform said judgment in case it should be affirmed (Gilbert *v.* Bamberger, 19 Ky. L. Rep. 1833, 44 S. W. 421).

Insolvent estates — Appeals by fiduciaries. — The available assets, in the hands of a trustee, executor, administrator, or other fiduciary, who, in his official capacity, appeals from a judgment against the estate, is the limit of liability on the appeal bond. There is no personal liability on the appellant, whatever, and no official liability beyond the assets. Lunsford *v.* Baskins, 6 Ala. 512; Evans *v.* Adams, 4 Blackf. (Ind.) 54; Fitzpatrick *v.* Todd, 79 Ky. 524; Banks *v.* McDowel, 1 Coldw. (Tenn.) 84. *Contra*, that the bond is liable for the entire amount regardless of assets. Schmucker *v.* Steidemann, 8 Mo. App. 302; Yates *v.* Burch, 13 Hun (N. Y.) 622, 87 N. Y. 409.

Revival and suit against appellant's executor.— And the rule does not apply to a case where the suit is merely revived pending appeal, in the name of the executor or administrator of a deceased appellant. Trimble *v.* Brichta, 11 La. Ann. 271; Piercy *v.* Piercy, 36 N. C. 214. Nor where appellee died after affirmance, and a *pro rata* share of the assets of his estate were applied to the bond without wholly paying it. Phillips *v.* Wade, 66 Ala. 53 [*overruling* Lunsford *v.* Baskins, 6 Ala. 512].

15. Daily *v.* Litchfield, 11 Mich. 497.

16. **Condition to satisfy judgment embraces costs,** though the condition is not specifically mentioned in the bond. Johnson *v.* Ward, 21 Ky. L. Rep. 783, 53 S. W. 21; Many *v.* Sizer, 6 Gray (Mass.) 141; Shankland *v.* Hamilton, 1 Thomps. & C. (N. Y.) 239.

17. **Costs not taxed.**— Where, at the time of giving the bond, the judgment contained only a blank for costs, and costs were not taxed until after affirmance, it was nevertheless held that the judgment covered the costs, and that a condition to satisfy the judgment imposed a liability to pay such costs. Many *v.* Sizer, 6 Gray (Mass.) 141. But where the costs have not been taxed before suit on the bond, the suit cannot be maintained. Hobart *v.* Hilliard, 11 Pick. (Mass.) 143.

A condition to satisfy appellate judgment does not include a condition to pay costs of the lower court, where the language is: "If the appellant shall perform and satisfy the decree or final order of the supreme court, and pay all costs of said appellee in the matter of appeal that may be awarded against said appellee, it shall be void." Michie *v.* Ellair, 60 Mich. 73, 26 N. W. 837. *Aliter*, where the condition was "to pay the judgment of the court that may be rendered." Denton *v.* Woods, 11 Lea (Tenn.) 505, 509.

18. Seaman *v.* McReynolds, 50 How. Pr. (N. Y.) 421; Akes *v.* Sanford, 19 Tex. Civ. App. 601, 47 S. W. 671.

Costs before and after appeal may both be properly included in the judgment of the appellate court where the condition was to pay all such costs as the obligee might recover. Great Falls Mfg. Co. *v.* Worster, 45 N. H. 110.

19. Bauer *v.* Cabanne, 105 Mo. 110, 16 S. W. 521.

(B) *Costs of Appellate Court.* Since the judgment appealed from can cover no other costs than those of the court which rendered it, the omission to insert a specific provision for the costs of appeal cannot be supplied by the condition to satisfy the judgment appealed from; but may be supplied by a condition to perform the judgment of the appellate court.[20]

(C) *Costs on Further Appeal.* The costs of a further appeal, upon affirmance, to a higher court are not included in the condition of the first appeal bond to pay the costs of said appeal,[21] and the costs of the first appeal are not included by inference in a second appeal bond.[22]

(II) *Supplied by Statute.* Bonds not containing specific conditions to pay certain costs have been held to secure such costs by force of the statute under which they were given;[23] but not where the particular costs were not specifically required.[24] The courts, unsupported by a statute as a part of the bond, cannot add to the conditions thereof.[25]

b. Satisfaction of Condition — (I) *By Successful Appeal.* A successful termination of the appeal in favor of appellant discharges the condition to pay costs,[26] unless the bond is also given to secure the costs of appellant in case of success,[27] or in view of a statute making the bond security for such costs.[28]

(II) *Amount Payable.* The liability for costs in any case is only for legal costs,[29]

20. A dismissal of the appeal has been held not different from a judgment of affirmance in respect of liability for costs in the appellate court. McSpedon *v.* Bouton, 5 Daly (N. Y.) 30; Galinger *v.* Engelhardt, 26 Misc. (N. Y.) 49, 55 N. Y. Suppl. 334.

21. *In re* John, 30 Oreg. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242; Hinckley *v.* Kreitz, 58 N. Y. 583; Babbitt *v.* Shields, 101 U. S. 7, 25 L. ed. 820. *Contra,* Dolby *v.* Jones, 13 N. C. 109.

22. Burdett *v.* Lowe, 85 N. Y. 241.

23. Statute a part of bond.— Where the statute provides for an appeal bond conditioned to pay all costs, both of appellate and lower courts, and also a provision making the statute a part of all bonds given under it, an omission to provide in the bond for costs of the lower court will be supplied by the statute. Ogg *v.* Leinart, 1 Heisk. (Tenn.) 40 [*criticized* in Denton *v.* Woods, 11 Lea (Tenn.) 505]. *Contra,* Spear *v.* Lomox, 42 Ala. 576.

24. Statute not followed.— Where a statute provided for a bond to secure costs both in the lower and appellate courts, and the word "appeal" was used in the bond twice instead of "judgment" once, so as to limit liability to costs of the appeal, the bond was nevertheless held for all costs. Serfass *v.* Dreisbach, 12 Pa. Co. Ct. 60, 2 Pa. Dist. 56.

25. Appellant's own costs held not secured by bond in the usual form, under the statute. Wilson *v.* Murchison, 13 N. C. 491.

Courts cannot add conditions.—"Nothing can be added, otherwise men would be bound — not by contracts they have entered into, but what the court might presume they intended to enter into." Nichol *v.* McCombs, 2 Yerg. (Tenn.) 82 [*quoted* with approval in Denton *v.* Woods, 11 Lea (Tenn.) 505].

A defective cost bond on appeal which would not have been sufficient to perfect appeal, and though held good as a voluntary common-law bond, was held no security for costs taxed against the relator appellant, the condition of the bond being that the "people" would pay all costs taxed against them; the court saying: "The obligee in such a case will recover substantial damages, or only nominal ones, or none at all, according to the terms of the bond. The question, at last, is upon the bond that was given, and not upon a bond that might have been given, or that ought to have been given, or that was ordered to be given." Weigley *v.* Moses, 78 Ill. App. 471, 473.

26. Judgment reduced — Costs as set-off. — Where a judgment was reduced on appeal, with costs against the appellees, but the appeal bond was held for the judgment by its terms, it was held a matter of defense for the obligors to show the amount of costs, as a set-off, even if it could be the subject of a set-off, which, it was intimated, could not. Harding *v.* Kuessner, 172 Ill. 125, 49 N. E. 1001 [*affirming* 70 Ill. App. 355].

27. Clerk as obligee.— Though a bond was taken, under a statute, by the clerk as obligee, to secure the costs of appeal, it was held that, by implication, it was made with the appellee to secure him only in case of an affirmance; and so, where the clerk could not make appellant's costs either of him outside the bond or of the appellee, the sureties were held not liable on the bond. Morris *v.* Morris, 92 N. C. 142; Clerk's Office *v.* Huffsteller, 67 N. C. 449.

28. Where, by statute, the successful appellant may be made liable on motion for his own costs, if he cannot collect them, from his adversary, it was held that this did not make a bond for costs security therefor, so as to charge the sureties. Deaton *v.* Mulvaney, 1 Lea (Tenn.) 73.

29. Legal costs.— Though the condition of the bond is to pay such costs as may be taxed by the court, this obligation cannot be extended beyond the amount legally taxable. Swan *v.* Picquet, 4 Pick. (Mass.) 465.

and this cannot be extended by a penalty for a larger sum,[30] nor reduced by the fact that they have not all been paid by the obligee.[31] The amount may only be reduced by payment.[32]

4. CONDITION TO PAY DAMAGES. The liability to pay damages under an appeal bond containing such a condition[33] does not accrue until the amount of damage to the obligee because of the appeal has been assessed in a proper proceeding,[34] wherein the amount of damages must be alleged and proved,[35] for the

Expenses of partition are not properly taxable as costs so as to be charged upon a bond given on appeal from the order of partition. Anonymous, 31 Me. 592.

Expenses of executors, which are not taxable, though caused by the appeal, are not covered by a bond given on appeal from a decree of the probate court approving a will, conditioned to pay all intervening damages and costs occasioned by the appeal. Sargeant *v.* Sargeant, 20 Vt. 297.

Cost of recording affirmance — Variance.— Where the charge of recording in the lower court the judgment of affirmance was held a proper item of costs of appeal for which the bond was security, it was held no variance that the certificate of costs from the appellate court did not, while the declaration did, embrace such charge, the amount being shown, by indorsement by the clerk of the lower court, on the back of the record. Friend *v.* Woods, 9 Gratt. (Va.) 37.

A recital of the amount of costs in the appeal bond has been held conclusive upon the parties who executed it. Ferguson *v.* Allen, 91 Ill. App. 591.

30. Excessive penalty.— Where the condition is merely to pay a judgment for costs, and the penalty of the bond exceeds that sum, the excess cannot be recovered. Robinson *v.* Masterson, 136 Mass. 560.

31. Costs not paid by obligee does not interfere with his right to recover the full amount in case of a breach. Hamilton *v.* Baltimore, etc., R. Co., 7 Ohio N. P. 566, 9 Ohio Dec. 724.

32. Unauthorized payment from proceeds of execution.— Where a sheriff applied the proceeds of a sale, insufficient to satisfy the judgment, to the payment of costs, the obligors on a bond for costs were nevertheless held liable for the entire amount, because they had no right to have such proceeds applied to their benefit while the judgment remained unsatisfied. Akes *v.* Sanford, 19 Tex. Civ. App. 601, 47 S. W. 671. To the same effect see Leopold *v.* Epstein, 54 N. Y. App. Div. 133, 66 N. Y. Suppl. 414, which holds that the mortgagee is entitled to the full amount of his judgment in foreclosure sale before payment of costs and expenses for which bond was liable.

33. Maximum penalty.— Liability to pay damages cannot be extended beyond the penalty of the bond, where a penal sum is mentioned, this being regarded as a contract of maximum liability. Graeter *v.* De Wolf, 112 Ind. 1, 13 N. E. 111.

No condition for rents and profits.— The rents and profits of land in controversy pending the appeal have been held not to be covered by the terms of a condition that appellant will "prosecute his appeal to effect, and without delay, and pay such judgment as shall be rendered against him on said appeal" (Bush *v.* Fetrow, Wilson (Ind.) 387. To the same effect see Malone *v.* McClain, 3 Ind. 532); "prosecute his said appeal with effect and pay and satisfy the condemnation money and costs" (Doe *v.* Daniels, 6 Blackf. (Ind.) 8); pay "damages and costs that may be awarded upon such writ of error" (Johnson *v.* Hessel, 134 Pa. St. 315, 19 Atl. 700); or, generally, where there is no condition to pay damages (McWilliams *v.* Morgan, 70 Ill. 62), even though given to supersede a judgment in a possessory action, which could not be done without a condition to pay all damages, rents, and profits, and all parties had supposed that a legal supersedeas had been effected (Gill *v.* Sullivan, 62 Iowa 529, 17 N. W. 758).

34. Penalty.— At common law, where the bond contained a penalty to be forfeited on breach of condition, the liability to pay the amount of the penalty was absolute after affirmance, and no assessment was necessary (Welch *v.* Chesley, 22 Me. 398; Paul *v.* Nowell, 6 Me. 239; Unterrein *v.* McLane, 10 Mo. 343); but in equity, relief could be had according to the condition of the bond (Cockrill *v.* Owen, 10 Mo. 287). Under the reformed procedure, it is error to render judgment for the amount of the penalty where it is greater than the damages (Crane *v.* Andrews, 10 Colo. 265, 15 Pac. 331; Cooper *v.* De Mainville, 1 Colo. App. 16, 27 Pac. 86; Paul *v.* Nowell, 6 Me. 239); and the proper prayer is for judgment for the amount assessed as damages, and not for the full penalty of the bond (Allen *v.* King, 4 Colo. App. 319, 35 Pac. 1061).

35. Sanger *v.* Nadlehoffer, 34 Ill. App. 252; Scott *v.* Marchant, 88 Ind. 349; Friesenhahn *v.* Merrill, 52 Minn. 55, 53 N. W. 1024; Bank of Metropolis *v.* Swann, 4 Cranch C. C. (U. S.) 139, 2 Fed. Cas. No. 902.

Use and occupation.—That appellant in unlawful detainer or ejectment used and occupied the premises pending appeal need not be alleged or proved. It is enough to show that appellee was deprived of the possession by the appeal. Higgins *v.* Parker, 48 Ill. 445; Sherry *v.* State Bank, 6 Ind. 397; Grashaw *v.* Wilson, 123 Mich. 364, 82 N. W. 73.

Evidence of rental value.— A lease of the premises for the previous year is admissible to show damages by reception of rents. Vincent *v.* Defield, 105 Mich. 315, 63 N. W. 302. In computing such value taxes paid by the unsuccessful appellant should be deducted, and interest computed on the balance from the first of the year. Turner *v.* Johnson, 20 Ky. L. Rep. 2009, 50 S. W. 675.

amount of damages suffered is a question of fact,[36] governed by rules of law as to what in the particular case may constitute damages,[37] or provisions of

The record of appraisement of goods in a replevin suit is a proper means of identification, and *prima facie* evidence of their value. Karthaus *v.* Owings, 2 Gill & J. (Md.) 430.

Issue of supersedeas is presumed, in the absence of evidence to the contrary, where an appeal bond necessary for that purpose has been filed. Lindon *v.* Sewell, 5 Ky. L. Rep. 304; State *v.* Dotts, 31 W. Va. 819, 8 S. E. 391.

A plea of non damnificatus, where breaches are assigned, is bad. Terre Haute, etc., R. Co. *v.* Peoria, etc., R. Co., 182 Ill. 501, 55 N. E. 377; Jenkins *v.* Hay, 28 Md. 547.

36. Double value of use and occupation.—Where, by statute, the obligee could recover double the value of the use and occupation of premises pending an appeal in a forcible entry and detainer case, it was held improper for the court to double the amount found by the jury for use and occupation, and refuse to permit the jury to return the full amount or liability, including unpaid costs and damages for waste. Henrie *v.* Buck, 39 Kan. 381, 18 Pac. 228.

37. As to the effect of a stay of execution —*Generally.*—A stay of execution entitles the obligee to recover damages for any losses sustained by reason of having been prevented from executing the judgment (Ray *v.* Ray, 1 Ida. 705; Keen *v.* Whittington, 40 Md. 489), as for deterioration of property, which, but for the stay, would have been sold for the obligee's benefit, in which case the jury should be instructed to find for plaintiff the amount of the deterioration in value (Cook *v.* Marsh, 44 Ill. 178; Hinkle *v.* Holmes, 85 Ind. 405; Welch *v.* Welch, (Ky. 1901) 60 S. W. 409; Buckner *v.* Bogard, 8 Ky. L. Rep. 701; Jenkins *v.* Hay, 28 Md. 547; Omaha Hotel Co. *v.* Kountze, 107 U. S. 378, 2 S. Ct. 911, 27 L. ed. 609; Wayne County *v.* Kennicott, 103 U. S. 554, 26 L. ed. 486; Dexter *v.* Sayward, 79 Fed. 237); but where the deterioration was due to the prevention of the appointment of a receiver by the appeal and stay, and not to an unusual delay of appellee in having the receiver appointed after affirmance, about which latter fact it was held the judge might properly state to the jury what would not be unusual delay (Fulton *v.* Fletcher, 12 App. Cas. (D. C.) 1).

Rents and profits are losses within the rule stated; as rents and profits in ejectment, for the time the successful party is kept out of possession by the bond (Cahall *v.* Citizens Mut. Bldg. Assoc., 74 Ala. 539; Hays *v.* Wilstach, 101 Ind. 100; Adams *v.* Gilchrist, 63 Mo. App. 639; Clason *v.* Kehoe, 49 N. Y. App. Div. 631, 63 N. Y. Suppl. 300; Gleeson's Estate, 192 Pa. St. 279, 43 Atl. 1032, 73 Am. St. Rep. 808; Norton *v.* Davis, 13 Tex. Civ. App. 90, 35 S. W. 181; Tarpey *v.* Sharp, 12 Utah 383, 43 Pac. 104; St. Louis Smelting, etc., Co. *v.* Wyman, 22 Fed. 184), without deducting value of appellant's improvements (Sherry *v.* State Bank, 6 Ind. 397; Gleeson's Estate, 192 Pa. St. 279, 43 Atl. 1032, 73 Am. St. Rep. 808), except in case of special statute allowing improvements to occupants (Hentig *v.* Collins, 1 Kan. App. 173, 41 Pac. 1057; Norton *v.* Davis, 13 Tex. Civ. App. 90, 35 S. W. 181), though the bond was insufficient under the statute to operate as a supersedeas, if possession be retained (Miller *v.* Vaughan, 78 Ala. 323; Shumway *v.* Harmon, 6 Thomps. & C. (N. Y.) 626); the rents and profits were not received by appellant (Sherry *v.* State Bank, 6 Ind. 397), or, pending the appeal, appellee alienated a portion of the land (De Castro *v.* Clarke, 29 Cal. 11); in partition, from the date of the bond (Armstrong *v.* Bryant, (Ky. 1891) 16 S. W. 463); but where appellee might have had possession by ejectment, no rents and profits were allowed (Stockwell *v.* Sargent, 37 Vt. 16); in unlawful detainer, during the appellate proceedings (Keegan *v.* Kinnare, 123 Ill. 280, 14 N. E. 14; Higgins *v.* Parker, 48 Ill. 445; Neagle *v.* Kelly, 44 Ill. App. 234; Craig *v.* Encey, 78 Ind. 141; Pray *v.* Wasdell, 146 Mass. 324, 16 N. E. 266; Grashaw *v.* Wilson, 123 Mich. 364, 82 N. W. 73; Bernecker *v.* Miller, 44 Mo. 126; Green *v.* Sternberg, 15 Mo. App. 32; Morris *v.* Hunken, 40 N. Y. App. Div. 129, 57 N. Y. Suppl. 712; Union Co. *v.* Whitely, 15 R. I. 27, 22 Atl. 34, and see 3 Cent. Dig. tit. "Appeal and Error," § 4768), including taxes paid, where appellant was a tenant under an agreement to pay taxes as part of rent (Neagle *v.* Kelly, 146 Ill. 460, 34 N. E. 947 [*affirming* 44 Ill. App. 234]; but rents and profits are not included in the term "intervening damages" (Drew *v.* Chamberlin, 19 Vt. 573); on appeal from decree setting aside conveyance, the sureties being liable from date of bond; the principal from the time of wrongful possession (Killfoil *v.* Moore, (Tex. Civ. App. 1898) 45 S. W. 1024); or on judgment of possession under execution, from the time of the appeal up to the termination of appellee's title under foreclosure of a mortgage given by appellant (Estey Mfg. Co. *v.* Runnels, 67 Mich. 310, 34 N. W. 581); but both parties appealing, in an action to subject property to plaintiff's debt, prevents any liability for rent (Lyon *v.* Lancaster, 17 Ky. L. Rep. 1169, 33 S. W. 838). In mortgage foreclosure, rents and profits pending the appeal are not recoverable (Wood *v.* Fulton, 2 Harr. & G. (Md.) 71; Hutton *v.* Lockridge, 27 W. Va. 428), unless required by the court, the court having that power in an equity case (Lowe *v.* Riley, 57 Nebr. 252, 77 N. W. 758; Omaha Hotel Co. *v.* Kountze, 107 U. S. 378, 2 S. Ct. 911, 27 L. ed. 609), or unless expressly stipulated for and required by statute (Gerald *v.* Gerald, 30 S. C. 348, 9 S. E. 274); but not where merely stipulated for without being required by statute (Whitney *v.* Allen, 21 Cal. 233); and in suits between tenants in common, no damages for rents and profits are recoverable, because appellee could not have gotten possession under the judg-

a statute designating the amount to be assessed in case of an affirmance,[38]

ment appealed from if it had not been stayed (Carver *v.* Carver, 115 Ind. 539, 18 N. E. 37).

Waste, in probate proceedings, where the possession was retained by an executor pending appeal from the vacation of a will. Interest on the waste, and shrinkage other than physical depreciation not allowed (Hughan *v.* Grimes, (Kan. 1900) 62 Pac. 326), and on further appeal, not included in obligation of first appeal bond (Church *v.* Simmons, 19 Hun (N. Y.) 220).

Value of property adjudged to appellee, and of which appellant retained possession by virtue of the appeal bond and thereafter disposed of (Jenkins *v.* Hay, 28 Md. 547; Karthaus *v.* Owings, 2 Gill & J. (Md.) 430), and the insolvency of appellant, pending appeal, whereby the collection of the judgment is prevented by the appeal, calls for the application of the same rule, provided it appears that satisfaction, notwithstanding the insolvency, cannot be had (Keitzinger *v.* Reynolds, 11 Ind. 545; Vent *v.* Duluth Trust Co., 77 Minn. 523, 80 N. W. 640; Estes *v.* Roberts, 63 Minn. 265, 65 N. W. 445; Friesenhahn *v.* Merrill, 52 Minn. 55, 53 N. W. 1024).

No supersedeas.— Where no supersedeas is sought and none is necessary to obtain a writ of error, there is no liability upon affirmance, except for costs (Knoxville, etc., R. Co. *v.* Leabow, 97 Tenn. 449, 37 S. W. 197). So held in case of a bond given on appeal from an order discharging a minor claimed as an apprentice by appellee (Shows *v.* Pendry, 93 Ala. 248, 9 So. 462), and where, because of noncompliance with the statute, no supersedeas was effected (Steele *v.* Tutwiler, 63 Ala. 368).

Partial stay of execution.— Where, on appeal from the judgment of a circuit court affirming the judgment of a county court, circuit court judgment was stayed but the county court still had power to collect the judgment, there was held to be no liability for damages because of the partial stay of execution. Roberts *v.* Jenkins, 80 Ky. 666.

Failure to allege supersedeas.— Damages because of supersedeas cannot be recovered without alleging it (Wharton *v.* Porter, 10 Sm. & M. (Miss.) 305); but the allegation is not necessary where no such damages are sought and the appeal could be effected without a supersedeas (Reynolds *v.* Rogers, 5 Ohio 169), or where there is no stay of execution (Scott *v.* Marchant, 88 Ind. 349).

Application of execution or attachment proceeds must be first to the payment of the judgment, and, if insufficient to pay the judgment, the obligors, in an appeal bond liable only for damages and costs, are not entitled to a *pro rata* application so as to partially relieve their obligations. Leopold *v.* Epstein, 54 N. Y. App. Div. 133, 66 N. Y. Suppl. 414; Akes *v.* Sanford, 19 Tex. Civ. App. 601, 47 S. W. 671; Ives *v.* Merchants' Bank, 12 How. (U. S.) 159, 13 L. ed. 936.

Injunction bond — Appeal from judgment of dissolution.— Where the damages suffered by an injunction are covered by the bond required and given in order to obtain the injunction, it has been held that a bond on appeal from a judgment dissolving the same, conditioned to pay damages because of the appeal, was not security for the damages caused by the injunction. Parham *v.* Cobb, 9 La. Ann. 423.

Special assessment.— The damages by reason of an appeal from a special assessment is the amount of the assessment and costs. Kilgour *v.* Drainage Com'rs, 111 Ill. 342.

Emoluments of office.— The amount of the salary during the period the relator is kept out of office by appeal of usurper in quo warranto proceedings is the measure of damages in an action on the bond (U. S. *v.* Addison, 6 Wall. (U. S.) 291, 18 L. ed. 919); but in an election contest, where the appeal did not prevent induction into office, and emoluments were not sufficiently mentioned in the bond or judgment, no emoluments were allowed (Jayne *v.* Drorbaugh, 63 Iowa 711, 17 N. W. 433).

Money judgment — Interest.—The amount of damages suffered by an unsuccessful appeal from a money judgment is the amount of interest at the legal rate from the date of the judgment to the date of the affirmance. Mason *v.* Smith, 11 Lea (Tenn.) 67.

Interest as damages will be allowed, at the legal rate, upon money which is the subject of the litigation and tied up by the appeal. National Bank *v.* Baker, 58 Ill. App. 343; De Vol *v.* Dye, 6 Ind. App. 257, 33 N. E. 253; Jenkins *v.* Hay, 28 Md. 547; Hargis *v.* Mayes, 20 Ky. L. Rep. 1965, 50 S. W. 844; Vanmeter *v.* Parker, 19 Ky. L. Rep. 1229, 43 S. W. 200. *Contra*, unless provision for interest is made in the decree (Tarr *v.* Rosenstein, 53 Fed. 112, 5 U. S. App. 197, 3 C. C. A. 466; Rosenstein *v.* Tarr, 51 Fed. 368), or unless the appellant had the use of the money (Stearns *v.* Brown, 1 Pick. (Mass.) 530).

Attorney's fees, expended in resisting an unsuccessful appeal, cannot be recovered as damages in an action on the appeal bond. Kellogg *v.* Howes, 93 Cal. 586, 29 Pac. 230; Noll *v.* Smith, 68 Ind. 188; Deisher *v.* Gehre, 45 Kan. 583, 26 Pac. 3; Hughan *v.* Grimes, (Kan. 1900) 62 Pac. 326; Barratt *v.* Grimes, (Kan. App. 1901) 63 Pac. 272; Welch *v.* Welch, 20 Ky. L. Rep. 1990, 50 S. W. 687 (unless covered by a provision of the bond); Buckner *v.* Bogard, 8 Ky. L. Rep. 701. *Contra*, Shows *v.* Pendry, 93 Ala. 248, 9 So. 462; Drake *v.* Webb, 63 Ala. 596.

Speculative damages — Liquor license.— On a bond for appeal from the granting of a liquor license, upon affirmance, the obligors are not liable for the supposed profits which would have accrued to the licensee during the pendency of the appeal and consequent suspension of the license if the appeal had not been taken. Blair *v.* Kilpatrick, 40 Ind. 312.

38. Statutory damages of a certain per cent., to be allowed upon affirmance, is covered by a condition to perform the judgment even though not awarded in the judgment of

or an order of court[39] under which the bond is given, or the terms of the bond,[40]

affirmance. Gilpin *v.* Hord, 85 Ky. 213, 8 Ky. L. Rep. 904, 3 S. W. 143. *Contra,* Raney *v.* Baron, 1 Fla. 327. See also Chase *v.* Dearborn, 23 Wis. 443, holding that where a statute allowed treble damages, it was held not to be covered by the term "other damages justly accruing to the plaintiff," bond for treble damages not being required.

Liability supplied by statute.— Where liability for certain damages is required by statute as a condition of appeal bonds, and the statute in terms declares that no omission will relieve the obligors from liability, it was held that an omission to provide in a bond for mesne profits was supplied by the statute. Stults *v.* Zahn, 117 Ind. 297, 20 N. E. 154 (so holding to supply a condition to pay rents pending appeal); Opp *v.* Ten Eyck, 99 Ind. 345. So, too, a statute providing that appeal bonds should be conditioned to satisfy the judgment and costs, together with another provision that the obligors in such appeal bond should be liable upon a summary judgment in the appellate court for the debt, damages, and costs, has been held to impose the liability for all damages suffered because of the appeal. Conger *v.* Robinson, 4 Sm. & M. (Miss.) 210.

"Intervening damages," payment of which is prescribed by statute as the condition of an appeal bond, allows the estimation of damages by considering the property the judgment debtor had when the appeal was taken, and all that he acquired when it was pending, the judgment creditor being entitled to recover the value of his chance of collecting his judgment during the time his right to an execution was suspended. McGregor *v.* Balch, 17 Vt. 562.

In debt upon a recognizance to prosecute writ of error, under the Vt. statute of 1791, where, upon nonsuit and complaint, execution has issued, and been returned satisfied for twelve per cent. interest and costs, according to the statute, the court will, under the statute for that purpose, reduce the amount of the penalty of the bond for "intervening damages" to a merely nominal sum, unless actual damage be shown. James *v.* Smith, 1 Tyler (Vt.) 128.

Costs of a special administration beyond the amount of expenses which would have been necessary if the estate had been settled by the executors without the intervention of the appeal have been held to constitute intervening damages. Sargeant *v.* Sargeant, 20 Vt. 297.

"Damages" as used in the N. Y. Code Proc. § 334, relative to appeal bonds, means only such damages as are awarded on the appeal, not damages thereafter to be recovered or already adjudged in the lower court. Post *v.* Doremus, 60 N. Y. 371.

United States statute — Rents and profits. —A bond given on appeal to the supreme court of the United States in a suit to recover land, conditioned, according to U. S. Rev. Stat. § 1000, to "answer all damages and costs, if they fail to make their plea good," has been held not to include rents and profits pending the appeal, though the bond operated to stay execution of the judgment, unless they are recovered in the judgment of affirmance (Burgess *v.* Doble, 149 Mass. 256, 21 N. E. 438; Omaha Hotel Co. *v.* Kountze, 107 U. S. 378, 2 S. Ct. 911, 27 L. ed. 609), and the same has been held with reference to damages generally under the same statute (Coolidge *v.* Inglee, 15 Mass. 66).

Retrospective statute.— A statute authorizing damages on affirmance of a decree in chancery does not allow the recovery of such damages upon a bond dated before its passage. Woodson *v.* Johns, 3 Munf. (Va.) 230.

No condition for rent.— Where a statute required that the condition of the bond on appeal in an unlawful detainer action should be "to prosecute such appeal with effect, and pay all rent then due," the omission of the rent clause was held not to be supplied by the statute, and, there being no other words from which an obligation to pay rent could be implied, the obligors were not charged therewith. Pitt *v.* Swearingen, 76 Ill. 250.

Provision for separate action for the recovery of damages, in case of the wrongful detention of real estate, so that only the land itself and costs can be recovered, prevents the recovery of damages because of the loss of possession on appeal, though the bond is conditioned under statute to pay "intervening damages." Drew *v.* Chamberlin, 19 Vt. 573.

39. Maximum fixed by order.— Where an appeal bond is given pursuant to an order of court, and the order fixes a maximum liability, the amount recoverable on the bond cannot exceed the amount so fixed. Hoag *v.* Prime, 52 Hun (N. Y.) 615, 5 N. Y. Suppl. 502, 24 N. Y. St. 476; Curry *v.* Homer, 62 Ohio St. 233, 56 N. E. 870.

Damages before execution of the bond are allowed where the bond is given to replace another under order of court, and the first bond released, such bond being held to relate back to date of the appeal. Wilson *v.* King, 59 Ark. 32, 26 S. W. 18, 23 L. R. A. 802. *Contra,* unless the new bond by its terms is retrospective, Henrie *v.* Buck, 39 Kan. 381, 18 Pac. 228.

Several beneficiaries of a bond, whose aggregate claims exceed the amount fixed by the court for liability of the bond, will be compelled to accept *pro rata* sums. Curry *v.* Homer, 62 Ohio St. 233, 56 N. E. 870.

40. Designated penalty should not be exceeded.— *Alabama.*— Witherington *v.* Brantley, 18 Ala. 197; Windham *v.* Coats, 8 Ala. 285.

Illinois.— Parisher *v.* Waldo, 72 Ill. 71; Fournier *v.* Faggott, 4 Ill. 347.

Indiana.— Sharpe *v.* Harding, 21 Ind. 334; King *v.* Brewer, 19 Ind. 267; Ward *v.* Buell, 18 Ind. 104, 31 Am. Dec. 349.

Iowa.— Perry *v.* Denson, 1 Greene (Iowa) 467.

Kansas.— Guess *v.* Letson, 9 Kan. App. 106, 57 Pac. 1053.

or the judgment of the appellate court rendered on the determination of the appeal.[41]

C. Payment of the Obligation. Non-payment of the obligation must be alleged and proved.[42] The defense of payment raises questions of fact: First, if there be no claim of accord and satisfaction, as to the manner of payment[43] and

Michigan.— Zeigler *v.* Henry, 77 Mich. 480, 43 N. W. 1018.

New York.—Culver *v.* Green, 4 Hill (N. Y.) 570; Pevey *v.* Sleight, 1 Wend. (N. Y.) 518.

Texas.— Hendrick *v.* Cannon, 5 Tex. 248; Sears *v.* Seattle Consol. St. R. Co., 7 Wash. 286, 34 Pac. 918 (though the penalty is smaller than required by statute to effect the appeal).

A clause in addition to the penalty — that is, "in the sum of four hundred dollars and the rental value of the land in controversy"— was regarded as surplusage, having no place in the penalty of the bond, and the rule of maximum liability was enforced. Guess *v.* Letson, 9 Kan. App. 106, 57 Pac. 1053.

Liabilities in different amounts.—Where the bond states that each surety is bound in the amount set opposite his name, the amounts following their respective names, in each case, is the limit of liability. Hanna *v.* Savage, 7 Wash. 414, 35 Pac. 127, 8 Wash. 432, 36 Pac. 269. See People *v.* Slocum, 1 Ida. 62.

Maximum statutory amount, when named in the bond as a penalty, does not create an absolute liability for the amount, but is only a limitation on the amount of damages which may be recovered. German Sav., etc., Soc. *v.* Kern, (Oreg. 1901) 63 Pac. 1052.

Damages prior to bond.— On appeal from an order dissolving an injunction, a bond conditioned to pay "all damages caused by wrongfully suing out said injunction," was considered only as an additional injunction bond, embracing only such damages as have been caused prior to giving the appeal bond, and not those caused by keeping the injunction in force by the appeal. Mix *v.* Singleton, 86 Ill. 194; Bardill *v.* School Trustees, 4 Ill. App. 94.

A bond, prospective in terms as to damages, cannot be made retrospective by interpretation. "The law will not create a liability against sureties which they did not intend to bring on themselves, and which is not within the express conditions of the bond." Henrie *v.* Buck, 39 Kan. 381, 18 Pac. 228; Hays *v.* Closon, 20 Kan. 120.

41. Damages to be awarded on appeal.— Sanger *v.* Nadlehoffer, 34 Ill. App. 252; Fullerton *v.* Miller, 22 Md. 1.

Competitive damages.— Where a bond, on appeal from a decree enjoining further professional practice, was conditioned to pay "all costs and damages that shall be adjudged against said appellant in this appeal," a failure of the appellate court to adjudge damages on affirmance was held to prevent any recovery on the bond for damages suffered by reason of competitive professional practice in violation of the decree pending the appeal. Cole *v.* Edwards, 104 Iowa 373, 73 N. W. 863.

Rents and profits.— The same rule was applied to prevent a recovery of damages where none were awarded by the appellate court, the condition for damages being only such "as may be allowed upon such writ of error." Johnson *v.* Hessel, 134 Pa. St. 315, 19 Atl. 700.

42. Thalheimer *v.* Crow, 13 Colo. 397, 22 Pac. 779; Ullery *v.* Kokott, (Colo. App. 1900) 61 Pac. 189; Wilson *v.* Welch, 8 Colo. App. 210, 46 Pac. 106; Mayo *v.* Williams, 17 Ohio 244; Page *v.* Johnson, 1 D. Chipm. (Vt.) 338; Tucker *v.* Lee, 3 Cranch C. C. (U. S.) 684, 24 Fed. Cas. No. 14,221. *Contra*, Way *v.* Swift, 12 Vt. 390, holding that payment is a matter of defense, and that non-payment need not be alleged.

Sufficient evidence of non-payment.— Where there is no plea of payment, the introduction of the uncanceled judgment which was affirmed, and testimony of a witness for plaintiff, not cross-examined, that the amount named in the judgment is due and unpaid, is sufficient evidence. Sterne *v.* Talbott, 89 Hun (N. Y.) 368, 35 N. Y. Suppl. 412, 69 N. Y. St. 824.

Under a general denial it cannot be shown that the judgment has been satisfied since joinder of issue. Souvais *v.* Leavitt, 53 Mich. 577, 19 N. W. 261.

Nil debet is not a good plea in an action on an appeal bond. Anderson *v.* Sloan, 1 Colo. 484; Kilgour *v.* Drainage Com'rs, 111 Ill. 342.

43. Payment as garnishee, by the unsuccessful appellant, of the judgment debt, in a suit against appellee, discharges the obligation of the appeal bond to satisfy the judgment. Noble *v.* Thompson Oil Co., 69 Pa. St. 409.

Payment of bid by surety.— The payment of part of a bid by a surety on the bond given on appeal from a judgment under which a foreclosure sale was made, which sale was afterward not completed without any blame to the obligee, was held not to relieve the surety's liability. Black River Bank *v.* Page, 44 N. Y. 453; Leopold *v.* Epstein, 54 N. Y. App. Div. 133, 66 N. Y. Suppl. 414.

A replevin bond, after execution, does not operate as payment of the judgment under which the execution was issued, although the amount of the levy be amply sufficient for the purpose. It is merely additional security with the appeal bond. Morrow *v.* Mason, 7 J. J. Marsh. (Ky.) 370.

Bond enjoining execution is governed by the same rule. Hodges *v.* Gewin, 6 Ala. 478.

Tender of performance — Alternative judgment.— A judgment being for the transfer of certain stock within sixty days or payment of two hundred dollars, and the appeal not having been decided within sixty days, a tender of the transfer within sixty days after certifi-

amount paid[44] to the obligees;[45] and, secondly, if accord and satisfaction be claimed, as to whether or not the necessary elements of accord and satisfaction existed.[46]

D. Summary Proceedings Against Sureties — 1. Nature and Effect.[47] By

cation of the affirmance, but not within sixty days from the original judgment, was held not sufficient. Ross *v.* Swiggett, 16 Ind. 433.

Wrongful appropriation of deceased obligor's property by obligee, who was the divorced wife of the obligor, cannot operate as a payment, though the value of the property appropriated be more than sufficient, because payment was not intended, and the remedy being to recover the property by proceedings in the probate court. Shuster *v.* Weiss, 114 Mo. 158, 21 S. W. 438, 19 L. R. A. 182.

Draft in payment, returned without presentment, with the consent of appellant, does not discharge the bond, though good and for proper amount. Hastings First Nat. Bank *v.* Rogers, 15 Minn. 381.

Tender of specific personal property — Replevin judgment.— Where, under the law, it was held not reversible error to render a judgment in replevin for the value of the property instead of in the alternative for its value in case delivery cannot be had, an appeal bond superseding the judgment was held not released by a tender of the specific property after affirmance. Fowler *v.* Gordon, 5 Ky. L. Rep. 332.

Satisfaction of judgment under execution. — In an action on an appeal bond, an answer stating that such bond was given to stay all proceedings on plaintiff's part to enforce the judgment appealed from, and alleging that, notwithstanding this, plaintiff had substantially enforced that judgment, but not alleging that he had attempted to collect the judgment for costs, does not state a defense, where the effect of an appeal bond was only to stay the collection of the judgment for costs; and the intention with which defendant gave the bond is immaterial. Steinback *v.* Diepenbrock, 52 N. Y. App. Div. 437, 65 N. Y. Suppl. 118.

Levy of execution, presumptive evidence of payment. See *supra*, IX, B, 2, b, (I), (A).

44. Application of partial payment — Unsecured interest first.— Partial payments by the judgment debtor to the creditor, not specifically applied, will be first applied to the satisfaction of interest on the judgment, where the appeal bond is security only for damages and costs. Mason *v.* Smith, 11 Lea (Tenn.) 67.

Misapplication by sheriff of execution proceeds.— On a foreclosure sale the proceeds should be first applied to the satisfaction of the judgment and interest, where the amount realized is insufficient to also pay costs and damages, which alone are secured by the appeal bond; and, where such proceeds were misapplied to the payment of costs first by direction in the judgment, it was held that the judgment would be amended in that respect, and that perhaps a reapplication could be made without amendment. Leopold *v.* Epstein, 54 N. Y. App. Div. 133, 66 N. Y. Suppl. 414.

Proof of tender of the full amount payable upon the bond to the proper parties will relieve the obligors from liability. Sharp *v.* Miller, 57 Cal. 415.

Penalty and costs, paid into court by a surety, should be sufficient to stay proceedings on the bond. Oshiel *v.* De Graw, 6 Cow. (N. Y.) 63.

Nominal damages.— It has been held that, although an unsuccessful appellant may have paid the affirmed judgment and all the damages and all costs in both courts, he is yet liable for nominal damages, in failing to prosecute his appeal to effect, in an action on the bond. George *v.* Bischoff, 68 Ill. 236. See also, *supra*, IX, B, 2, f; IX, B, 3, b, (II); IX, B, 4.

45. Payment to some of obligees.— Payment of the entire amount, including costs, to defendant in error or appellee, will not relieve the obligors from the necessity of paying costs to others entitled thereto under the bond. Curry *v.* Homer, 62 Ohio St. 233, 56 N. E. 870.

Payment to execution officer, after unsatisfied return by him of the execution, is no evidence of payment of the obligation, and is inadmissible without further evidence of his authority from the obligee to receive it. Pierce *v.* Gray, 11 Gray (Mass.) 377.

Payment to the clerk does not satisfy the obligation, not even as to amount of his fees, where the judgment is for costs on appeal to be paid to appellee. Menage *v.* Newcomb, 33 Minn. 143, 22 N. W. 182.

46. Judgment of record and satisfaction with principal.— In a suit on a bond a plea that the plaintiff had sued the principal to foreclose a mortgage given as security for the debt for which the appeal bond was security, and that in that suit the plaintiff was compelled to accept satisfaction of the debt in goods, according to an agreement, was held a good defense. Very *v.* Watkins, 18 Ark. 546.

Acceptance of bonds upon condition that their market value should advance to par within a year, and failure of such advance, whereupon they were tendered back, was held not a satisfaction. Jacksonville, etc., R., etc., Co. *v.* Hooper, 85 Fed. 620, 52 U. S. App. 579, 29 C. C. A. 382.

Part payment — Release of principal — Joint and several bond.— Where part payment of the affirmed judgment is accepted by appellee from appellant in full satisfaction of appellant's share of liability, the bond is discharged, since appellant's share of liability is the entire obligation. Brown *v.* Ayer, 24 Ga. 288. See also Accord and Satisfaction.

47. Actions generally.— Wherever, in an action on an appeal bond, the question of the sufficiency of a pleading or the propriety of a proceeding has turned upon a question of sub-

statute, in many of the states, separate actions on appeal bonds need not be instituted, the bond becoming a part of the record of proceedings on appeal,[48] and the sureties parties thereto,[49] so that the appellate court, upon affirmance of the appealed judgment,[50] may enter judgment against the sureties as well as against the principal appellant, as of course,[51] and thereon issue execution,[52] or remand the case for such judgment and execution in the trial court.[53]

2. STATUTORY JURISDICTION. The remedy by summary proceedings against sureties in the appellate court may be authorized as an exercise of appellate jurisdiction;[54] but it cannot be resorted to in the absence of special statutory authority.[55]

stantive law, it has been treated in this article (see *supra*, IX), as have also all special rules of procedure relating particularly to appeal bonds (see *supra*, IX, D, 1); but all general rules of procedure applicable to actions on appeal bonds merely as bonds will be found treated under BONDS; PRINCIPAL AND SURETY.

48. Hydraulic Press-Brick Co. *v.* Zeppenfeld, 9 Mo. App. 595; Clerk's Office *v.* Huffsteller, 67 N. C. 449; Whitehead *v.* Smith, 53 N. C. 351; Holbrook *v.* Investment Co., 32 Oreg. 104, 51 Pac. 451; Sullivan *v.* Skagit County, 2 Wash. 681, 28 Pac. 1039.

49. Surety a party to the proceeding.— A surety, by signing an appeal bond, and by force of the statute, submits himself to the jurisdiction of the court, and becomes liable to judgment for the original cause of action against his principal.

Arkansas.— Callahan *v.* Saleski, 29 Ark. 216; White *v.* Prigmore, 29 Ark. 208.

California.— Hawley *v.* Gray Brothers' Artificial Stone Paving Co., 127 Cal. 560, 60 Pac. 437.

Colorado.— Shannon *v.* Dodge, 18 Colo. 164, 32 Pac. 61.

Iowa.— Phelan *v.* Johnson, 80 Iowa 727, 46 N. W. 68.

Kansas.— Greer *v.* McCarter, 5 Kan. 17.

Minnesota.— Davidson *v.* Farrell, 8 Minn. 258.

Mississippi.— Kiernan *v.* Cameron, 66 Miss. 442, 6 So. 206.

Nebraska.— Lowe *v.* Riley, 57 Nebr. 252, 77 N. W. 758; Selby *v.* McQuillan, 45 Nebr. 512, 63 N. W. 855.

Oregon.— Holbrook *v.* Investment Co., 32 Oreg. 104, 51 Pac. 451.

Tennessee.— *Ex p.* Miller, 1 Yerg. (Tenn.) 435.

Texas.— Hickcock *v.* Bell, 46 Tex. 610.

United States.— Beall *v.* New Mexico, 16 Wall. (U. S.) 535, 21 L. ed. 292.

50. Reversal in part, necessitating a remand of the case for further proceedings, will not authorize a summary judgment as to any part in the lower court, as upon an affirmance. Crawford *v.* Kirksey, 55 Ala. 282, 28 Am. Rep. 704.

51. Rogers *v.* Brooks, 31 Ark. 194; White *v.* Prigmore, 29 Ark. 208; Clerk's Office *v.* Huffsteller, 67 N. C. 449; Yarborough *v.* Giles, 2 N. C. 521; Cooke *v.* Little, 2 N. C. 193; Charman *v.* McLane, 1 Oreg. 339; Whiteside *v.* Hickman, 2 Yerg. (Tenn.) 357.

In Texas the judgment of the supreme court, affirming the judgment of the district court, works a forfeiture of the writ-of-error bond, and gives it the force and effect of a judgment against the sureties. Hickcock *v.* Bell, 46 Tex. 610.

52. Execution not permitted against principal.— The fact that the execution cannot be had against the principal appellant because it is a municipal corporation will not prevent summary judgment and execution against the sureties. Brauer *v.* Portland, 35 Oreg. 471, 58 Pac. 861, 59 Pac. 117, 60 Pac. 378.

53. Mowry *v.* Heney, (Cal. 1890) 24 Pac. 301; Meredith *v.* Santa Clara Min. Assoc., 60 Cal. 617.

54. An appellate court, without original jurisdiction under the constitution, may yet be empowered to enter summary judgments, because such is not necessarily an exercise of original jurisdiction. White *v.* Prigmore, 29 Ark. 208; Hawley *v.* Gray Brothers' Artificial Stone Paving Co., 127 Cal. 560, 60 Pac. 437.

55. Special statutory authority necessary, else the summary judgment is void for want of jurisdiction, and execution thereunder a nullity.

Alabama.—Halsey *v.* Murray, 112 Ala. 185, 20 So. 575.

Georgia.— Offerman, etc., R. Co. *v.* Waycross Air-Line R. Co., 112 Ga. 610, 37 S. E. 871.

Kansas.— Waysman *v.* Updegraff, 1 Kan. 516.

Kentucky.— Stephens *v.* Miller, 3 Ky. L. Rep. 523.

Michigan.—Booth *v.* Radford, 57 Mich. 357, 24 N. W. 102; Willard *v.* Fralick, 31 Mich. 431.

Nebraska.— Miller *v.* Hogeboom, 56 Nebr. 434, 76 N. W. 888.

Tennessee.— *Ex p.* Miller, 1 Yerg. (Tenn.) 435.

Texas.— Blair *v.* Sanborn, 82 Tex. 686, 18 S. W. 159.

In the United States courts, under U. S. Rev. Stat. (1878), § 914, conforming the mode of proceeding in federal courts as nearly as may be to that of the state courts, in cases arising under state laws, summary judgment may be entered against sureties if authorized by statute of the state in which the cause is heard. Smith *v.* Gaines, 93 U. S. 341, 23 L. ed. 901; Moore *v.* Huntington, 17 Wall. (U. S.) 417, 21 L. ed. 642; Hiriart *v.* Ballon, 9 Pet. (U. S.) 156, 9 L. ed. 85; Gordon *v.* Chattanooga Third Nat. Bank, 56 Fed. 790, 13 U. S. App. 554, 6 C. C. A. 125.

"Appeal" includes "error."— A statute, providing that on appeal summary judgment

Hence, summary proceedings cannot be based upon an invalid bond;[56] upon a bond which, though valid, is not a statutory bond;[57] upon an improper transcript on appeal, though it be sufficient, without objection, for an affirmance;[58] upon a record which does not disclose the amount of liability,[59] unless adequate proceedings are also provided for such ascertainment;[60] upon a statute which does not give the remedy in specific terms,[61] nor where the appeal has not been perfected,[62] unless some other special method is provided for getting the bond before the appellate court.[63] When jurisdiction exists, the proceedings cannot be collaterally

may be entered against the sureties of an unsuccessful appellant, has been held to apply to proceedings in error and plaintiffs in error. Dold *v.* Robertson, 3 N. M. 313, 9 Pac. 302.

Summary judgment on restitution bond — Authority implied.— The power to enter judgment against the sureties of appellee on a restitution bond has been implied from the express authority to enter summary judgment against the sureties of appellant. Holbrook *v.* Investment Co., 32 Oreg. 104, 51 Pac. 451.

56. An invalid bond will not support a summary judgment. Hydraulic Press-Brick Co. *v.* Zeppenfeld, 9 Mo. App. 595; Brown *v.* McLaughlin, 8 Humphr. (Tenn.) 140. See *supra*, IX, A.

57. A bond not required by statute cannot be proceeded against summarily, though such proceedings are authorized in case of statutory bonds, and though the bond is good at common law. Halsey *v.* Murray, 112 Ala. 185, 20 So. 575 [*overruling* McCalley *v.* Wilburn, 77 Ala. 549]; Reynolds *v.* Cox, 108 Ala. 276, 19 So. 395; Powers *v.* Chabot, 93 Cal. 266, 28 Pac. 1070; Lewis *v.* Mull, 3 Greene (Iowa) 437; Hymens *v.* Brown, 15 Tex. 302.

Contra, Triplet *v.* Gray, 7 Yerg. (Tenn.) 15; Banks *v.* Brown, 4 Yerg. (Tenn.) 198; Nichol *v.* McCombs, 2 Yerg. (Tenn.) 82. See, however, Jones *v.* Parsons, 2 Yerg. (Tenn.) 321.

See 3 Cent. Dig. tit. "Appeal and Error," § 4779.

A defective bond, having only one surety, where the law required two, was held to authorize a summary judgment. McDowell *v.* Bradley, 30 N. C. 92.

58. Burton *v.* Pettibone, 5 Yerg. (Tenn.) 443.

59. Amount of liability not apparent.— In such case appellee will be left to his action on the bond.

Alabama.—Hughes *v.* Hatchett, 55 Ala. 539.

Arkansas.— Stephens *v.* Shannon, 44 Ark. 178.

California.— Reay *v.* Butler, 118 Cal. 113, 50 Pac. 375.

Georgia.— Offerman, etc., R. Co. *v.* Waycross Air-Line R. Co., 112 Ga. 610, 37 S. E. 871.

Iowa.— Berryhill *v.* Keilmeyer, 33 Iowa 20.

Oregon.— German Sav., etc., Soc. *v.* Kern, (Oreg. 1901) 63 Pac. 1052.

Texas.— Burck *v.* Burroughs, 64 Tex. 445; Taylor *v.* St. Louis Type Foundry, 21 Tex. Civ. App. 69, 51 S. W. 304.

Washington.— Blair *v.* Cassin, 19 Wash. 127, 52 Pac. 1011; Northwestern, etc., Hypotheek Bank *v.* Griffitts, 18 Wash. 69, 50 Pac. 591; Titlow *v.* Cascade Oatmeal Co., 16 Wash. 676, 48 Pac. 406; Tompkinson *v.* Muzzy, 2 Wash. 616, 27 Pac. 456, 28 Pac. 652.

60. Kiernan *v.* Cameron, 66 Miss. 442, 6 So. 206.

61. Statute applicable to special appeals. — A statute providing for summary judgment, which, by its terms, applies to appeals from certain courts in particular cases, cannot be extended so as to authorize such judgment in appeals from other courts or in other cases. Powell *v.* Camp, 60 Mo. 569; Gunn *v.* Sinclair, 52 Mo. 327; Keary *v.* Baker, 33 Mo. 603; Harrington *v.* Evans, 49 Mo. App. 372; Gruenewald *v.* Schaales, 17 Mo. App. 324.

Statute not specific.— The remedy by summary judgment against sureties cannot be left to inference. So where a statute merely said that, upon affirmance, the sureties would "be liable to the appellee for the whole amount of the debt, costs, and damages," it was held not to authorize a summary judgment. Sebly *v.* McQuillan, 45 Nebr. 512, 63 N. W. 855 [*overruling* Banghart *v.* Lamb, 34 Nebr. 535, 52 N. W. 399; and *followed* in Miller *v.* Hogeboom, 56 Nebr. 434, 76 N. W. 888].

62. Yesler *v.* Barker, 3 Wash. Terr. 245, 13 Pac. 759.

A dismissal by appellant will authorize the entry of summary judgment the same as a dismissal for failure to prosecute. "By thus dismissing his appeal he could not place the respondents in a worse situation than they would have been in if, upon his neglect to prosecute the same, they had appeared, and, upon filing a short record, procured a dismissal or affirmance." Allen *v.* Catlin, 9 Wash. 603, 604, 38 Pac. 79.

Dismissal as affirmance.— However, in case the dismissal operates as a substantial affirmance, the rule in respect of summary judgments is the same as in the case of an actual affirmance. Shannon *v.* Dodge, 18 Colo. 164, 32 Pac. 61. So, where appellant moved to dismiss "without prejudice," the dismissal was allowed, but jurisdiction was retained in order to allow appellee to move for an affirmance, and summary judgment on the bond, after the expiration of the time for appeal. Agassiz *v.* Kelleher, 9 Wash. 656, 38 Pac. 221.

63. Bond brought to appellate court by appellee.— A provision of the statute whereby, on dismissal for failure to perfect an appeal, the appellee may bring a transcript of the record to the appellate court in order to obtain an affirmance, has been held not to au-

attacked,[64] nor, even in proceedings for summary judgment, can mere irregularities in the original action be drawn in question.[65] Meritorious defenses alone may avail the surety.[66]

3. Compliance With Statutory Requirements. Since the power to enter judgment summarily against sureties in the appellate court is essentially a creature of statute, all of the requirements of the statute authorizing it must be substantially complied with; as that, upon affirmance,[67] judgment against the sureties[68] be entered[69] immediately[70] or instanter,[71] after return of execution *nulla bona*;[72] upon

thorize a summary judgment on the bond, though liability thereon becomes thereby fixed (Yesler *v.* Barker, 3 Wash. Terr. 245, 13 Pac. 759), unless the bond is before the court (O'Hare *v.* Wilson, 3 Wash. Terr. 251, 14 Pac. 595).

64. Collateral attack upon a summary judgment, on account of fraud or collusion of the parties, is unwarranted, though there be ground for setting aside the judgment in a direct proceeding in the court which rendered it. Phelan *v.* Johnson, 80 Iowa 727, 46 N. W. 68.

65. Whitehead *v.* Smith, 53 N. C. 351; Wilkings *v.* Baughan, 25 N. C. 86; Rogers *v.* Newman, 5 Lea (Tenn.) 255.

66. Meritorious defenses to summary judgment.— A surety may plead to a rule that the affirmed judgment has been extinguished by compensation through the obtaining of a judgment by the unsuccessful appellant against appellee (Ellis *v.* Fisher, 10 La. Ann. 479); and fraud and collusion between appellant and appellee in procuring an affirmance will enable the sureties subsequently to set aside the summary judgment on motion (Dennard *v.* Mayo, 25 Ga. 681).

Mistake in execution — Issue to lower court.— Upon affirmance, appellee having moved for summary judgment upon the terms of the bond, and the sureties having resisted by affidavits that a mutual mistake had been made by inserting a condition to pay the judgment when the intention was to secure only the costs, and appellant having denied the mistake and its mutuality, judgment was entered for the costs and issues as to the alleged mistake were sent down to the lower court for trial by jury and recertification. Burnett *v.* Nicholson, 86 N. C. 728.

67. Dismissal for lack of jurisdiction is not an affirmance and will not authorize the entry of a summary judgment in the appellate court against sureties. So held where the appeal was not perfected because of failure to file the appeal bond within the prescribed time. Grunewald *v.* West Coast Grocery Co., 11 Wash. 478, 39 Pac. 964.

68. Death of the principal does not prevent jurisdiction of summary proceedings against sureties. Trimble *v.* Brichta, 11 La. Ann. 271.

Judgment against representatives of a surety is not authorized by La. Code Proc. art. 596, as amended by the act of March 20, 1839, § 20. Saulet *v.* Trepagnier, 7 Rob. (La.) 227.

69. Unauthorized entries of judgment.— Omitting the name of one or more of the sureties (Hansen *v.* Martin, 63 Cal. 282); entering judgment against sureties separately each for a share (Faust *v.* Glynn, 28 La. Ann. 676); or computing interest to time of entry, with interest on the whole, instead of for the amount of the original judgment with simple interest (Gordon *v.* Chattanooga Third Nat. Bank, 56 Fed. 790, 13 U. S. App. 554, 6 C. C. A. 125); or entering judgment for costs of lower court (Williams *v.* McCurdy, 22 Ala. 696) are fatal defects.

Authorized entries of judgment.— A *nunc pro tunc* entry at a term subsequent to the affirmance against appellant (Bancroft *v.* Stanton, 7 Ala. 351; Mayo *v.* Kersey, 24 Ga. 167); judgment against the sureties separately from the principal, a judgment against the latter having been entered (Woolard *v.* Woolard, 30 N. C. 322), or against all of the sureties in several cases *in solido*, upon a consolidation (Wetumpka, etc., R. Co. *v.* Bingham, 5 Ala. 657) are authorized.

Execution without judgment.—In some jurisdictions the judgment of affirmance operates to charge the sureties without formal entry of judgment against them, so that execution may issue upon the bond as upon a judgment. Gwyer *v.* Kennedy, 61 Ga. 255; Munroe *v.* Dumas, 42 Ga. 238; Hickcock *v.* Bell, 46 Tex. 610.

70. Entering judgment immediately is substantially done if entered on motion in court, when the successful party moves for judgment, though the clerk, in entering the judgment, failed to notice that there were any sureties. Gay *v.* Hults, 56 Mich. 153, 22 N. W. 271.

71. Kinchen *v.* Brickell, 3 N. C. 209; Yarborough *v.* Giles, 2 N. C. 521; Cooke *v.* Little, 2 N. C. 193.

72. De Greck *v.* Murphy, 28 La. Ann. 297; Saulet *v.* Trepagnier, 7 Rob. (La.) 227; Smith *v.* Gaines, 93 U. S. 341, 23 L. ed. 901.

Insufficient return.— A sheriff's return as follows: "And after making diligent search and inquiry, and demand of said defendant for other property to satisfy said writ, and the plaintiff named in said writ failing to point out other property to satisfy the same, and said writ having expired by limitation of law, is hereby returned credited as above," is insufficient to enter a judgment against the surety on an appeal bond condemning him to pay the unsatisfied balance of the judgment against the defendant. The return should state that no property could be found notwithstanding a demand on the parties. Sheppard *v.* Stewart, 20 La. Ann. 191.

Execution not necessary where the principal is dead. Trimble *v.* Brichta, 11 La. Ann. 271.

the filing of a copy of the bond in the appellate court;[73] upon the expiration of the time for appeal to a higher court;[74] upon motion and notice thereof to the sureties,[75] supported by affidavit;[76] that judgment shall be entered in the trial court upon receipt of a mandate from the appellate court, and non-payment after thirty days, upon motion of the appellee,[77] or that sureties shall be entitled to a hearing and opportunity to show cause.[78]

d. Summary Remedy Not Exclusive. The statutory right to a summary judgment against sureties is not an exclusive remedy, but it is merely cumulative to the common-law remedy of debt, or the ordinary code action upon the bond.[79]

X. EFFECT OF TRANSFER OF CAUSE.

A. As to Jurisdiction in General — 1. Dependent Upon Perfecting Proceedings For Review — a. In General. Jurisdiction of the cause is not transferred to the appellate tribunal until, under the particular laws prevailing, the appeal is perfected.[80] Generally, appellant has, when he has filed a satisfactory bond, done

73. Sullivan *v.* Skagit County, 2 Wash. 681, 28 Pac. 1039.

74. *Ex p.* Sawyer, 21 Wall. (U. S.) 235, 22 L. ed. 617.

Where no right of appeal exists judgment may be entered at once. The Blanche Page, 17 Blatchf. (U. S.) 221, 3 Fed. Cas. No. 1,525.

75. Ground for substantial relief has been held to be necessary to be shown in order to entitle sureties to have a judgment, entered without proper notice of motion, set aside. Sears *v.* Seattle Consol. St. R. Co., 7 Wash. 286, 34 Pac. 918.

76. Motion upon affidavit.— Where the judgment against sureties recites a motion and that it was made upon affidavit that the bond had not been satisfied, though the record does not contain the affidavit, it will be presumed that the affidavit contained the necessary statements of fact to support the judgment. Santa Monica First Nat. Bank *v.* Kowalsky, (Cal. 1893) 31 Pac. 1133.

77. Mowry *v.* Heney, (Cal. 1890) 24 Pac. 301; Meredith *v.* Santa Clara Min. Assoc., 60 Cal. 617.

Premature motion.— A motion for summary judgment against sureties cannot be sustained where a certificate of the affirmance was filed after notice of the motion, and only four days before the hearing, though the certificate be deemed a statutory remittitur. Thirty days must have elapsed, and this must be shown. McCallion *v.* Hibernia Sav., etc., Soc., 83 Cal. 571, 23 Pac. 798.

78. Sureties entitled to hearing.—Upon affirmance of a judgment in admiralty from a district court by a circuit court it was ordered that judgment be entered against the sureties unless an appeal should be taken to the supreme court within a specified time. The appeal was taken and judgment affirmed with directions "that such execution and proceedings be had . . . as according to right and justice, and the laws of the United States, ought to be had," and thereafter, upon motion, the circuit court refused to give judgment and execution against the sureties. Upon mandamus in the supreme court to compel the circuit court to give such judgment and execution as in compliance with the supreme court mandate, it was held that the remedy was by appeal or error from the action on the motion, wherein the sureties would have an opportunity to be heard. *Ex p.* Sawyer, 21 Wall. (U. S.) 235, 22 L. ed. 617, 618.

Scire facias against sureties, to show cause why execution should not issue upon judgment against them after affirmance, must be issued subsequently to the rendition of an absolute judgment against sureties as well as principal. Gutheil Suburban Invest. Co. *v.* Fahey, 12 Colo. App. 487, 55 Pac. 946.

79. Charleston Bank *v.* Moore, 6 Ga. 416; State *v.* Boies, 41 Me. 344; Wilcox *v.* Daniels, 22 Mo. 493; Cockrill *v.* Owen, 10 Mo. 287; Trent *v.* Rhomberg, 66 Tex. 249, 18 S. W. 510.

80. *Arkansas.*— Clay *v.* Notrebe, 11 Ark. 631.

Colorado.— De Guile *v.* Alexander, 4 Colo. App. 516, 36 Pac. 620.

Illinois.— John F. Alles Plumbing Co. *v.* Alles, 67 Ill. App. 252.

Iowa.— Loomis *v.* McKenzie, 57 Iowa 77, 8 N. W. 779, 10 N. W. 298.

Kentucky.— Moore *v.* Jessamine, Litt. Sel. Cas. (Ky.) 104.

North Carolina.— Coates *v.* Wilkes, 94 N. C. 174; Wilson *v.* Seagle, 84 N. C. 110; McRae *v.* New Hanover County, 74 N. C. 415.

Texas.— Churchill *v.* Martin, 65 Tex. 367.

United States.—Interstate Commerce Commission *v.* Louisville, etc., R. Co., 101 Fed. 146.

See also 2 Cent. Dig. tit. "Appeal and Error," § 2212.

Vacation of allowance of appeal during term.— In Aspen Min., etc., Co. *v.* Billings, 150 U. S. 31, 14 S. Ct. 4, 37 L. ed. 986, the circuit court of the United States, at the same term at which it had allowed an appeal to the supreme court, vacated the order and granted an appeal to the circuit court of appeals. See also State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566.

An adjourned term, held under authority of statute, is a part of the regular term, and during such term the proceedings are *in fieri*, and the records under the control of the court. Smith *v.* Smith, 17 Ind. 75.

substantially all that is required of him to give the appellate court jurisdiction.[81] But the statutes of the various jurisdictions are different in their requirements, and as the question under discussion depends in the main upon such statutes, they must be consulted in all cases.[82]

b. Power Over Perfecting and Transmission of Record. The lower court does not, by reason of the appeal, lose its jurisdiction to do anything for the presentation of the case in the appellate court.[83] During the time within which, by law, a party may file his statement upon appeal and have it settled, the court retains jurisdiction for that purpose, and a settlement and filing of the bill of exceptions after judgment and appeal taken is a matter embraced in the action.[84]

Pending application for writ of error.— While, upon an application for a writ of error, the appellate court has jurisdiction to determine whether or not the writ shall issue, it has no jurisdiction over the case until the writ is granted. New York Fidelity, etc., Co. *v.* Allibone, 90 Tex. 660, 40 S. W. 399.

81. *District of Columbia.*— Chisholm *v.* Cissell, 12 App. Cas. (D. C.) 180.

Illinois.— Reynolds *v.* Perry, 11 Ill. 534 (where it was held that, the appeal having been improvidently granted, appellee might, on filing a copy of the record and giving reasonable notice to appellant, move to dismiss the appeal); Blackerby *v.* People, 10 Ill. 266; Simpson *v.* Alexander, 10 Ill. 260; John F. Alles Plumbing Co. *v.* Alles, 67 Ill. App. 252; Elgin Lumber Co. *v.* Langman, 23 Ill. App. 250.

Louisiana.— Cary *v.* Richardson, 32 La. Ann. 1168; Phelps *v.* Boughton, 28 La. Ann. 826; State *v.* Judge, 22 La. Ann. 37; State *v.* Judge, 11 La. Ann. 728; Bridge *v.* Merle, 7 La. 446.

Ohio.— State *v.* Meacham, 6 Ohio Cir. Ct. 31, holding that the appellate court might award a mandamus to compel the clerk of the lower court to enter upon his journal the action of that court fixing amount of the bond.

New York.—Adams *v.* Fox, 27 N. Y. 640.

United States.— Keyser *v.* Farr, 105 U. S. 265, 26 L. ed. 1025 (wherein there was not only the acceptance of a bond, but an actual entry of the case in the supreme court, and a motion to dismiss, on account of an order of the court below vacating its allowance of appeal, was denied); Draper *v.* Davis, 102 U. S. 370, 26 L. ed. 121.

82. *Iowa.*— Requirement of service of notice on party and clerk and payment or securing of clerk's fees for transcript. Loomis *v.* McKenzie, 57 Iowa 77, 8 N. W. 779, 10 N. W. 298.

Kentucky.— Stone *v.* Cromie, 87 Ky. 173, 10 Ky. L. Rep. 19, 7 S. W. 920.

Maine.— Entry of the action in the supreme court confers jurisdiction. Hunter *v.* Cole, 49 Me. 556.

Missouri.— The appeal is pending in the appellate court from the time it is taken, and not from the time the transcript is filed. Foster *v.* Rucker, 26 Mo. 494.

Nebraska.— Jurisdiction on petition in error does not attach until transcript is filed. Slobodisky *v.* Curtis, 58 Nebr. 211, 78 N. W. 522.

North Carolina.—Where, after appeal taken and bond filed, appellant neglects to have a transcript docketed in the supreme court, the superior court may, upon proper notice, at next term adjudge that the appeal has been abandoned and proceed as if no appeal had been taken. Bailey *v.* Brown, 105 N. C. 127, 10 S. E. 1054; Avery *v.* Pritchard, 93 N. C. 266; Wilson *v.* Seagle, 84 N. C. 110.

Oregon.— Elwert *v.* Norton, 34 Oreg. 567, 51 Pac. 1097, 59 Pac. 1118, under a statute permitting appellant to cure an omission, holding that it gave the lower court power to cure the omission only at the instance of appellant, and not on attack by appellee.

South Carolina.— Upon filing of return. Pelzer Mfg. Co. *v.* Cely, 40 S. C. 430, 18 S. E. 790; Pickens *v.* Quillian, 31 S. C. 602, 9 S. E. 743.

South Dakota.— Upon service of notice of appeal and execution of undertaking. Sands *v.* Cruickshank, 12 S. D. 1, 80 N. W. 173; Mather *v.* Darst, 11 S. D. 480, 78 N. W. 954.

Texas.— Garza *v.* Baker, 58 Tex. 483, as to jurisdiction of lower court pending the term, and the duty of appellant to file a transcript within the return-time.

Wisconsin.— Service of notice and execution of undertaking perfects the appeal, and the trial court cannot strike the notice of undertaking from the files for failure to pay clerk's fees for transmitting the record. Congregation of Immaculate Conception *v.* Hellstern, 105 Wis. 632, 81 N. W. 988.

United States.— Filing of transcript during term succeeding allowance of appeal. Evans *v.* State Nat. Bank, 134 U. S. 330, 10 S. Ct. 493, 33 L. ed. 917. Jurisdiction acquired by filing a writ of error in the office of the clerk is not defeated by irregularity in the transcript or in its certification. Burnham *v.* North Chicago St. R. Co., 87 Fed. 168, 59 U. S. App. 274, 30 C. C. A. 594.

83. Goff *v.* Hawkeye Pump, etc., Co., 62 Iowa 691, 18 N. W. 307 (where the record was not certified till after the appeal); State *v.* Clark, 33 La. Ann. 422 (holding that the jurisdiction of the lower court over its clerk continues, and that it may compel him to prepare and deliver the transcript of appeal); State *v.* Judge, 11 La. Ann. 728; Bridge *v.* Merle, 7 La. 446; Pemberton *v.* Zacharie, 4 La. 205; Fink *v.* Martin, 10 Rob. (La.) 147; Lamburth *v.* Dalton, 9 Nev. 64; Caples *v.* Central Pac. R. Co., 6 Nev. 265. See also 2 Cent. Dig. tit "Appeal and Error," § 2202.

84. *California.*—Colbert *v.* Rankin, 72 Cal. 197, 13 Pac. 491. But a bill of exceptions,

c. Irregular or Ineffectual Proceedings For Review. A judgment not appealable remains in full force notwithstanding an attempted appeal; and, though an appeal is attempted, if no appeal is given by law or it is irregularly taken, the appellate court does not acquire jurisdiction, but the lower court retains jurisdiction of the case and may review its judgment before rendering a proper one.[85] But, on the other hand, it is held that appeals, though ill taken — as where an appeal is taken on an order not involving the merits or affecting the judgment, which, under statutes, is improper — are not mere nullities, and are operative until dismissed.[86] An appeal is not affected by a law adding new requirements, which law was passed after such appeal had been perfected.[87]

2. Extent of Powers of the Respective Courts in General. As a general rule, when an appeal is perfected the cause becomes one for the cognizance of the appellate court; the authority of the lower court is terminated, and it cannot proceed in the cause, at least as to the subject-matter of the appeal, until the appeal is heard and determined.[88] So, pending an appeal from a decree in chan-

settled for the purpose of use in support of a motion for a new trial, cannot be changed after denial of the motion and appeal from such denial, because the appeal deprives the court of jurisdiction to set aside the order denying the new trial or to change the record upon which it was based. Baker *v.* Borello, 131 Cal. 615, 63 Pac. 914.

Iowa.— Tiffany *v.* Henderson, 57 Iowa 490, 10 N. W. 884, where time for signing the bill had been extended.

Minnesota.— Pratt *v.* Pioneer Press Co., 32 Minn. 217, 18 N. W. 836, 20 N. W. 87.

Missouri.— Shaw *v.* Shaw, 86 Mo. 594 [*citing* State *v.* Lewis, 71 Mo. 170]; Paretti *v.* Rebenack, 81 Mo. App. 494.

Montana.— William Mercantile Co. *v.* Fussy, 13 Mont. 401, 34 Pac. 189, construing the statutory provision that an appeal stays the proceedings of the trial court. See also *infra*, note 95.

Nevada.— Patchen *v.* Keeley, 19 Nev. 404, 14 Pac. 347; James *v.* Lepert, (Nev. 1884) 2 Pac. 753. But in Thomas *v.* Sullivan, 11 Nev. 280, the appellate court disregarded a settled statement made after the appeal was taken.

85. *California.*— Gregory *v.* Gregory, 102 Cal. 50, 36 Pac. 364.

Colorado.— Morrell Hardware Co. *v.* Princess Gold-Min. Co., (Colo. App. 1901) 63 Pac. 807; De Guile *v.* Alexander, 4 Colo. App. 516, 36 Pac. 620.

Connecticut.— Calhoun *v.* Terry Porter, 21 Conn. 526.

Minnesota.— Fay *v.* Davidson, 13 Minn. 523.

New York.— Guarantee Trust, etc., Co. *v.* Philadelphia, etc., R. Co., 160 N. Y. 1, 54 N. E. 575, holding that where an appeal from an order, not appealable as of right, is improperly taken to the court of appeals, the appellate division cannot, by an order *nunc pro tunc* after the expiration of the statutory time to appeal, make the appeal effective.

Pennsylvania.— McCarter's Appeal, 78 Pa. St. 401; Robinson *v.* Glancy, 69 Pa. St. 89.

United States.— Riddle *v.* Hudgins, 58 Fed. 490, 19 U. S. App. 144, 7 C. C. A. 335.

Execution may be sued out or action of debt maintained. Campbell *v.* Howard, 5 Mass. 376; Latham *v.* Edgerton, 9 Cow. (N. Y.) 227; Loveland *v.* Burton, 2 Vt. 521.

86. American Button-Hole, etc., Mach. Co. *v.* Gurnee, 38 Wis. 533. And see Baasen *v.* Eilers, 11 Wis. 277; Pemberton *v.* Zacharie, 5 La. 310, in which cases it was held that proceedings in the lower court were unauthorized, though the appeal was improperly allowed. The question whether an appeal is regular or valid can be determined only by the appellate tribunal in which the case, as to the judgment, order, or decree appealed from, is properly pending, so that the lower court cannot carry its judgment or decree into execution (Dunbar *v.* Dunbar, 5 W. Va. 567); though the lower court may permit a second appeal when the first was irregularly perfected (Bates *v.* Weathersby, 2 La. Ann. 484).

Appellate court having no jurisdiction.— An appeal, when perfected, even though granted to a tribunal that has no jurisdiction to entertain it, suspends action on the judgment until the appeal is dismissed by the appellate tribunal. Smith *v.* Chytraus, 152 Ill. 664, 38 N. E. 911. See also *supra*, VIII.

87. And the court, in such a case, cannot make new orders looking to an appeal under the new enactment. Eichholtz *v.* Wilbur, 4 Colo. 434.

88. *Alabama.*— Southern R. Co. *v.* Birmingham, etc., R. Co., (Ala. 1900) 29 So. 191.

California.—Barnhart *v.* Edwards, 128 Cal. 572, 61 Pac. 176, 57 Pac. 1004; Stewart *v.* Taylor, 68 Cal. 5, 8 Pac. 605; Livermore *v.* Campbell, 52 Cal. 75. But see Auzerais *v.* Superior Ct., 101 Cal. 542, 36 Pac. 6, for a limitation of this rule.

Delaware.— Woolaston *v.* Mendenhall, 1 Del. Ch. 23.

District of Columbia.— Whitney *v.* Frisby, 6 D. C. 262.

Indiana.— Indianapolis, etc., R. Co. *v.* Kibby, 28 Ind. 479.

Iowa.— Stillman *v.* Rosenberg, 111 Iowa 369, 82 N. W. 768; Levi *v.* Karrick, 15 Iowa 444; McGlaughlin *v.* O'Rourke, 12 Iowa 459. See also Turner *v.* Keokuk First Nat. Bank, 30 Iowa 191.

Kentucky.—Boaz *v.* Milliken, 4 Ky. L. Rep. 700 (as to want of authority of the lower

cery, the chancellor has no power to render any further decree affecting the rights and equities of the parties.[89] The appellate court acquires jurisdiction in all matters pertaining to the subject-matter of the appeal itself and to the proper hearing thereof, and also in regard to all applications which, by statute, may, after the taking of the appeal, be made to such court,[90] and the lower court cannot proceed in any manner so as to affect the jurisdiction acquired by the appellate court,[91]

court to direct a rule against its clerk to compel him to issue a certified copy of the opinion and mandate); Helm *v.* Boone, 6 J. J. Marsh. (Ky.) 351, 22 Am. Dec. 75.

Louisiana.— State *v.* Duffel, 41 La. Ann. 958, 8 So. 541; Lottspeich *v.* Diboll, 28 La. Ann. 772; Pemberton *v.* Erwin, 5 La. 22; Williams *v.* Chew, 6 Mart. N. S. (La.) 463. See also, for distinction between suspensive and devolutive appeals, Garland's Rev. Code Prac. La. (1901), §§ 575–578.

Michigan.— Beal *v.* Chase, 31 Mich. 490, as to want of authority in the lower court pending an appeal to make a second decree, the statute providing for a stay of proceedings unless otherwise ordered by the supreme court.

Missouri.— State *v.* Gates, 143 Mo. 63, 44 S. W. 739 [*citing* Macklin *v.* Allenberg, 100 Mo. 337, 13 S. W. 350; Burgess *v.* O'Donoghue, 90 Mo. 299, 2 S. W. 303; Exchange Nat. Bank *v.* Allen, 68 Mo. 474; Lewis *v.* St. Louis, etc., R. Co., 59 Mo. 495, 21 Am. Rep. 385], holding that, under statutory provisions allowing an appeal from an order granting a new trial, and declaring that the recognizance provided for should have the effect to stay execution pending an appeal, an order granting such appeal suspended all further exercise of judicial functions by the lower court until the termination of the appeal, notwithstanding such recognizance was not given, as the recognizance could operate only upon a judgment to the extent of suspending its execution.

North Carolina.— Pasour *v.* Lineberger, 90 N. C. 159 (holding that pending an appeal from an order refusing to discharge an attachment the lower court cannot dismiss the attachment); State Bank *v.* Twitty, 13 N. C. 386; Murry *v.* Smith, 8 N. C. 41.

Ohio.— Bradford *v.* Watts, Wright (Ohio) 495.

South Carolina.— Elliott *v.* Pollitzer, 24 S. C. 81 (pending an appeal from an order overruling a demurrer); Frazee *v.* Cardozo, 6 S. C. 315 (holding that a party cannot be attached for contempt by the supreme court of the state for not conforming to a judgment which had been superseded by the allowance of a writ of error from the supreme court of the United States).

Tennessee.— Suggs *v.* Suggs, 1 Overt. (Tenn.) 2.

West Virginia.— Crawford *v.* Fickey, 41 W. Va. 544, 23 S. E. 662.

United States.— Morrin *v.* Lawler, 91 Fed. 693.

See also 2 Cent. Dig. tit. "Appeal and Error," § 2191; and *supra*, VIII.

Waiver by participation in trial.— Where one has a right to appeal from an order granting a new trial, but, instead of standing on his appeal, by which further proceedings should have been arrested until the appeal was disposed of, participated in the new trial awarded, he loses his right to complain of the errors which occurred during the first trial. Trundle *v.* Providence-Washington Ins. Co., 54 Mo. App. 188.

89. Allen *v.* Allen, 80 Ala. 154; Moore *v.* Randolph, 52 Ala. 530. So, after an appeal is taken, no step in the cause can be taken which by any possible contingency can prejudice appellant when the act of assembly regulating writs of error and appeal directs, by plain implication, that when the prescribed bond is given the judgment or decree appealed from shall be stayed and delayed. Ohio L. Ins., etc., Co. *v.* Winn, 4 Md. Ch. 253 [*followed in* Hall *v.* Jack, 32 Md. 253].

Appeal from order overruling demurrer removes the whole cause into the appellate court. Graham *v.* Merrill, 5 Coldw. (Tenn.) 622.

90. People *v.* Board of Education, 141 N. Y. 86, 35 N. E. 1087, 56 Am. St. Rep. 560. To the same effect see Woodbury *v.* Nevada Southern R. Co., 120 Cal. 367, 52 Pac. 650; Planters' Bank *v.* Neely, 7 How. (Miss.) 80, 40 Am. Dec. 51; Com. *v.* O'Donnell, 7 Pa. Super. Ct. 49; Waterman *v.* Raymond, 5 Wis. 185; Morgan's Louisiana, etc., R., etc., Co. *v.* Texas Cent. R. Co., 32 Fed. 525.

Jurisdiction limited to the record.— McGregor *v.* Gardner, 16 Iowa 538; Bradbury *v.* Andrews, 37 Me. 199; Veeder *v.* Baker, 83 N. Y. 163; South Royalton Bank *v.* Colt, 31 Vt. 415.

Removal of record.— For the purpose of jurisdiction of the appellate court, the record itself is supposed to be removed even though only a transcript is sent. Judson *v.* Gray, 17 How. Pr. (N. Y.) 289.

Intermediate rulings brought up.— An appeal from final judgment brings up for review all intermediate rulings to which exceptions were taken. Smith *v.* Cooper, 21 Ga. 359; Palmer *v.* Rogers, 70 Iowa 381, 30 N. W. 645 [*citing* Montgomery County *v.* American Emigrant Co., 47 Iowa 91; Cohol *v.* Allen, 37 Iowa 449; Jones *v.* Chicago, etc., R. Co., 36 Iowa 68]; Clair *v.* Terhune, 35 N. J. Eq. 336.

91. Barnard *v.* Dettenmaier, 89 Ill. App. 241; Mechanics, etc., Sav., etc., Assoc. *v.* People, 72 Ill. App. 160; Elwert *v.* Norton, 34 Oreg. 567, 51 Pac. 1097, 59 Pac. 1118; Hinchman *v.* Point Defiance R. Co., 17 Wash. 399, 49 Pac. 1061.

Competency of judges of appellate court.— At the time when an appeal is taken the lower court has no authority to inquire into the competency of the members of the upper

or defeat the right of appellant to prosecute his appeal.[92] Proceedings in the lower court under the original judgment are held to be void;[93] though, on the other hand, it has been held that even a stay does not affect the jurisdiction of the lower court, and that proceedings in violation of the stay are merely erroneous or irregular;[94] and sometimes, by the terms of the statute, the appeal arrests further proceedings only as to matter embraced in the judgment appealed from.[95]

B. Partial Removal or Appeal Affecting Particular Matters — 1. In General. An appeal does not always necessarily stay further proceedings in the cause, in reference to rights not passed upon or affected by the order or decree appealed from, but only the execution or operation of such order or decree.[96] Where only a part of a judgment or decree is appealed from the remainder is unaffected and may be enforced,[97] and if the appeal from the particular order or judgment does

court; and, after appeal, the former court cannot resume jurisdiction on the ground that certain members of the upper court are disqualified to sit in the cause because they had been of counsel. Walker *v.* Rogan, 1 Wis. 597.

Effect of agreement.— When the case is transferred to the upper court upon an agreed statement of facts, subject to a stipulation that, upon judgment being ordered upon the facts as agreed, either party may have the right to controvert any of such facts before a jury, the order for judgment is made subject to the condition for which the parties have stipulated, and after such order the case may be discharged, and the cause stand for trial without leave obtained from the upper court. Perkins *v.* Langmaid, 36 N. H. 501.

92. Chisholm *v.* Cissell, 12 App. Cas. (D. C.) 180.

Dismissal of case.—The lower court cannot, by dismissing the case at the instance of respondent, dismiss the appeal. An entry of such order of dismissal is a nullity. Cloud *v.* Wiley, 29 Ark. 80; Holland *v.* State, 15 Fla. 549; Freeman *v.* Henderson, 5 Coldw. (Tenn.) 647.

93. Southern R. Co. *v.* Birmingham, etc., R. Co., (Ala. 1900) 29 So. 191; State *v.* Johnson, 29 La. Ann. 399 (holding that, upon the removal of a cause by a writ of error with supersedeas to the supreme court of the United States, the state court is divested of all jurisdiction, and that any proceeding thereafter in the state court is *coram non judice* and absolutely void); Thompson *v.* Thompson, 1 N. J. L. 184 (holding that, pending an appeal, every proceeding under the original judgment is void — because no judgment exists, as on a removal by writ of error, but the judgment is that which the court of appeals pronounces *de novo*).

After removal of cause.— In Massachusetts it was held that where an action was removed from the common pleas to the supreme judicial court, conformably with Mass. Stat. (1840), c. 87, § 3, the common pleas had no further jurisdiction, and a judgment entered in that court was *coram non judice* and void, and no writ of error was necessary to reverse it. Boynton *v.* Foster, 7 Metc. (Mass.) 415.

94. Briggs *v.* Shea, 48 Minn. 218, 50 N. W. 1037; State *v.* Young, 44 Minn. 76, 46 N. W. 204; Bowman *v.* Tallman, 28 How. Pr. (N. Y.) 482. See also Fidelity Trust, etc., Co. *v.* Mobile St. R. Co., 54 Fed. 26; and *supra*, VIII.

95. In North Carolina the perfecting of an appeal arrests "all further proceedings in the court below upon the judgment appealed from or upon the matter embraced therein," but does not withdraw from it authority to make orders in the cause for investment of the fund, and the like, or any other orders not affected by the judgment appealed from. Herring *v.* Pugh, 126 N. C. 852, 36 S. E. 287; Hinson *v.* Adrian, 91 N. C. 372. Similar provisions are found in the statutes of other states. See Cal. Code Civ. Proc. (1899), § 946; Baughman *v.* Superior Ct., 72 Cal. 572, 14 Pac. 207; Mont. Code Civ. Proc. (1895), § 1730; State *v.* Second Judicial Dist. Ct., 22 Mont. 241, 56 Pac. 281; N. Y. Code Civ. Proc. § 1310; Ireland *v.* Nichols, 40 How. Pr. (N. Y.) 85, 86, 9 Abb. Pr. N. S. (N. Y.) 71, holding the proceedings stayed by the appeal under such a provision to be such "as may be instituted by the respondent for the purpose of enforcing the provisions of the judgment." See also Henry *v.* Henry, 4 Dem. Surr. (N. Y.) 253; and *infra*, X, B.

96. Barnum *v.* Barnum, 42 Md. 251.

Particular questions reserved or certified. — But where, under authority of statute, important and difficult questions arising in a cause are reserved by the trial court for the decision of the higher court, the questions, and not the cause, are before the upper court, and the trial court still has jurisdiction to dismiss the case. Foote *v.* Smith, 8 Wyo. 510, 58 Pac. 898; Veazie *v.* Wadleigh, 11 Pet. (U. S.) 55, 9 L. ed. 630.

97. Early *v.* Mannix, 15 Cal. 149 (on appeal from a judgment awarding damages, for the purpose of compelling the court to allow a motion for treble damages); Waring *v.* Fletcher, 152 Ind. 620, 52 N. E. 203 (on appeal from a judgment sustaining an attachment in part only); Genet *v.* Delaware, etc., Canal Co., 136 N. Y. 217, 32 N. E. 851, 49 N. Y. St. 201 (holding that if an exception to costs is not presented on appeal the trial court may modify its judgment as to costs); Matter of Witmark, 15 N. Y. St. 745; Atlantic Ins. Co. *v.* Lemar, 10 Paige (N. Y.) 505. See also N. Y. Code Civ. Proc. §§ 1310, 2584.

not bring the entire cause into the appellate court, but only sufficient of the record to present the question as to the propriety of the particular order, further proceedings in the conduct of the cause are properly had in the lower court.[98] An appeal from an order upon a motion brings up the motion only, as well as copies of papers on which it is founded, and does not bring up the action.[99] But the trial court, in its discretion, may decide to await the determination of the appeal.[1]

2. Incidental or Interlocutory Appeals. An appeal on an incidental matter does not divest jurisdiction, but the trial court or parties may proceed in matters not involved in the appeal, and which are entirely collateral to the part of the case taken up;[2] and, as nothing is in the upper court but the order, a motion for an order in the cause cannot be entertained in that court.[3] The lower court cannot proceed, however, in such manner as to lead to a decision, pending the appeal, of the very question involved on the appeal.[4]

98. Keough *v.* McNitt, 7 Minn. 29, holding that an appeal from an order setting aside the report of a referee and judgment based thereon, and granting a new trial, and an appeal from an order overruling a demurrer to a supplemental answer, bring up only sufficient of the record to present the question of the propriety of the particular order, and, pending such appeal, the lower court has jurisdiction of a motion for the substitution of parties.

Decree against equity of answer.— So, in Buckner *v.* Mear, 26 Ohio St. 514, it was held that where a defendant sets up an equitable defense and asks for equitable relief in an action, if the equitable case is established the decree will end the controversy and settle the rights of the parties; but if defendant fails in his equitable case the issue raised on the petition must be disposed of before the case can pass to final judgment; that where the decree is against the equity set up by defendant his right to appeal will not operate to delay the final disposition of the case.

99. Barker *v.* Wing, 58 Barb. (N. Y.) 73.

But if the motion goes to the jurisdiction — as on a motion to set aside service of process — an adjudication that the movant was properly made a party is vital to the jurisdiction of the court over his person, and, where the order is appealable, pending an appeal the lower court cannot adjudge the rights of such movant. National Exch. Bank *v.* Stelling, 32 S. C. 102, 10 S. E. 766.

1. Smith *v.* Fleischman, 23 N. Y. App. Div. 355, 48 N. Y. Suppl. 234, where defendant appealed from an order denying his motion, made under N. Y. Code Civ. Proc. § 570.

2. *Illinois.*— Gorham *v.* Farson, 18 Ill. App. 520, holding that where an order discharging a receiver and awarding possession of the mortgaged premises *pendente lite* was removed by writ of error, such possession being in no way material to a final hearing and the entry of a decree of foreclosure, the court may proceed with the hearing, reserving the question of the disposition of the assets until the writ of error is disposed of.

Louisiana.— State *v.* Judge, 27 La. Ann. 702; Wright *v.* Rousselle, 6 La. Ann. 73; State *v.* Judge, 17 La. 511.

Maryland.—Rice *v.* West, 42 Md. 614; Barnum *v.* Barnum, 42 Md. 251.

Massachusetts.— Cheney *v.* Gleason, 125 Mass. 166 (right of master to proceed with reference under interlocutory decree); Forbes *v.* Tuckerman, 115 Mass. 115.

New York.— Henry *v.* Henry, 4 Dem. Surr. (N. Y.) 253, as to the effect of an appeal from an order denying a commission to take testimony, to operate as a suspension of the hearing, construing the code provisions by which an appeal operates as a stay except as to matter not affected by or embraced in the judgment appealed from. See also *supra*, X, A, 2.

Pennsylvania.— Sheaffer's Appeal, 100 Pa. St. 379; Gyger's Appeal, 15 Wkly. Notes Cas. (Pa.) 513 — relating to preliminary injunctions. See also *supra*, VIII, J, 5, c.

Wisconsin.— Noonan *v.* Orton, 30 Wis. 356.

United States.— Fidelity Trust, etc., Co. *v.* Mobile St. R. Co., 54 Fed. 26.

Appeal from order striking one of several defenses.— Where an answer contains several defenses and an appeal is taken from an order striking out one of them, this brings before the appellate tribunal the question whether the answer shall stand, and the lower court cannot proceed to a trial on the remaining issues until the appeal is disposed of. Penn Yan *v.* Forbes, 8 How. Pr. (N. Y.) 285.

3. Perry *v.* Tupper, 71 N. C. 380; Ward *v.* Ward, 17 N. C. 553.

4. Fowler *v.* Lewis, 36 W. Va. 112, 14 S. E. 447, holding that, where a stranger to the record comes in with new matter, asking, in effect, a decree against a defendant, or to be substituted to his right, and the answer of defendant is stricken out and a petition subsequently filed by defendant against the stranger is dismissed, pending an appeal from the order of dismissal the court cannot adjudicate as between such intervening stranger and said defendant upon the former's petition.

Dissolution of preliminary injunction.— Thus, though an appeal from judgment dissolving a preliminary injunction on rule does not ordinarily prevent the cause from proceeding to determination on the merits, and this is held to be so though the injunction is the sole relief sought (State *v.* Judge, 33 La.

3. PROCEEDINGS FOR REVIEW BY ONE OR MORE CO-PARTIES. Where the proceeding for review is instituted by a party whose rights or interest alone are affected by the judgment or decree appealed from, the lower court is not deprived of jurisdiction as to others who do not appeal.[5] The appeal operates only as to appellant and appellee,[6] in some cases, even where the judgment or decree is against other defendants who do not appeal,[7] and does not divest jurisdiction of the lower court over issues between appellees.[8]

C. Force and Effect of Judgment or Order Appealed From[9] — 1. IN GENERAL. As to the force and effect of a judgment pending proceedings for review, aside from controlling influence of positive statute, this distinction is to be observed: where the proceeding is one in which the cause is retried as upon original process, the judgment is vacated, but if the proceeding is in the nature of

Ann. 436); where the appeal requires the appellate court to examine the question whether there is equity in the bill, the lower court cannot hear and determine a demurrer to the bill for want of equity. *Ex p.* Montgomery, 114 Ala. 115, 14 So. 365. See also *supra*, VIII, J, 5, c.

5. Howard *v.* Lowell Mach. Co., 75 Ga. 325; Sosman *v.* Conklin, 65 Mo. App. 319, holding that an appeal by a mortgagee from a judgment fixing upon the property a mechanic's lien for the personal indebtedness of a contractor does not affect the personal judgment against the contractor nor suspend issuance of execution thereon.

As to defendants not served.— An appeal by defendants against whom judgment is rendered, which, under N. Y. Code Civ. Proc. § 1310, stays proceedings to enforce the judgment, does not prevent the bringing of an action against joint debtors not served, under section 1937, since such action is not one to enforce the judgment. Morey *v.* Tracey, 92 N. Y. 581.

As to defendant not appearing.— Day *v.* Gelston, 22 Ill. 103, holding that an appeal by a defendant who alone appeared, and against whom judgment was rendered, will not deprive the lower court of jurisdiction as to other defendants who did not appear, to proceed against them either by defaulting them or trying such pleas as they should present, and that scire facias was not necessary to bring in such parties, as they were still before the court.

Separate trial.— Where a cause is tried as to one defendant only, upon an order granting him a separate trial his appeal from an adverse judgment cannot deprive the lower court of jurisdiction as to the other defendants. The fact that the original pleadings are in the appellate court is not an insuperable objection, as such pleadings may be supplied by copies for use on the trial. Hayes *v.* Frey, 54 Wis. 503, 11 N. W. 695.

Plaintiff's appeal from judgment for intervener.— An appeal by a plaintiff from a judgment deciding that the property in a promissory note sued on is in an intervener does not disturb the judgment against defendants, the maker and indorser of such note. Lynch *v.* Williams, 6 La. Ann. 79.

Parties coming in after appeal.— James River, etc., Co. *v.* Littlejohn, 18 Gratt. (Va.) 53, holding that the statute which permitted a non-resident defendant to appear and file his answer after a decree against a resident defendant made no exception of cases in which an appeal had been taken from the decree against the resident defendant. But in Texas, recognizing the right of one interested in the subject-matter of litigation to be made a party, even after judgment, and to move for a new trial, it is held that an appeal from a dismissal of such a motion does not affect the right of the successful party in the action to enforce the collection of his judgment against the property of the party to the cause who did not appeal. Streeper *v.* Ferris, 64 Tex. 12.

6. Glass *v.* Greathouse, 20 Ohio 503, holding that where a complainant is successful as against one defendant, but his bill is dismissed as to another defendant, an appeal by the unsuccessful defendant does not affect the dismissal as to the other defendant.

7. Decree in equity.— Subject to statutory provisions permitting an appeal by any party aggrieved by a judgment or decree, where one of two defendants against whom the decree is entered is satisfied, and the other is not, an appeal by the latter removes the cause as to the former where there is such intimate connection between the parties that the rights of one cannot be adjudicated without also adjudicating the rights of the other, but, where no such intimate connection of rights exists, the appeal by one vacates the decree against him alone. Glass *v.* Greathouse, 20 Ohio 503. See also Todd *v.* Daniel, 16 Pet. (U. S.) 521, 10 L. ed. 1054. And as to separate proceedings by co-parties see *supra*, VI; and 2 Cent. Dig. tit. "Appeal and Error," § 1798 *et seq.*

But in Kelly *v.* Brooks, 57 Miss. 225, it was held that an appeal by one of several defendants, from an order overruling a demurrer filed by all the defendants, prevented any further steps in the lower court as to any of the defendants without summons and severance.

Appeal by one of several tort-feasors.— A judgment against several persons in an action of tort is severable, and an appeal by one tort-feasor vacates the judgment as to himself alone. Chapin *v.* Babcock, 67 Conn. 255, 34 Atl. 1039. See also Puckett *v.* Ainsworth, 1 Yerg. (Tenn.) 254.

8. Levy *v.* Collins, 32 La. Ann. 1003.

9. For new suit pending appeal or error see ABATEMENT AND REVIVAL, II, E.

an ancient writ of error, merely requiring a review of errors and an affirmance of the judgment, or a reversal and remanding for further trial, the judgment of the lower court is not vacated.[10] The subject is now generally regulated by statute, however, and, owing largely to diversity of their provisions in the respective states, the cases are not in harmony upon the force and effect of the judgment pending appellate proceedings. On the one hand it is held that the judgment itself is not annulled by an appeal. It is at most merely suspended;[11] and is binding upon the parties as to every question directly decided.[12] If affirmed by the appellate court, it does not become thereby the judgment of such court, but dates from the time of its original entry.[13] In other states, however, by an appeal the judgment appealed from is vacated and annulled and the litigants are, in respect of their legal rights, where they were at the commencement of the suit.[14] The action of the supreme court commences at the stage of the proceedings immediately prior to the judgment of the court below, and leaves the case with all its incidents, pleadings, and evidence unaffected.[15]

2. Lien of Judgment. The lien of the judgment is not impaired by an appeal. The right of the judgment creditor to realize by a sale of defendant's property is merely suspended,[16] and, by statute in some states, the lien remains unimpaired

10. Bank of North America *v.* Wheeler, 28 Conn. 433, 73 Am. Dec. 683 [*quoted* in Randles *v.* Randles, 67 Ind. 434; Missouri Pac. R. Co. *v.* Atkison, 17 Mo. App. 484; Cain *v.* Williams, 16 Nev. 426; Rogers *v.* Hatch, 8 Nev. 35; Freeman on Judgments, § 328]. See also Tabor *v.* Miles, 5 Colo. App. 127, 38 Pac. 64; Allen *v.* Savannah, 9 Ga. 286; Snelling *v.* Parker, 8 Ga. 121; Gay *v.* Smith, 38 N. H. 171; Maskall *v.* Maskall, 3 Sneed (Tenn.) 207; Tarbell *v.* Downer, 29 Vt. 339. And an appeal in the nature of a writ of error does not vacate, but merely suspends, the judgment. Lewis *v.* St. Louis, etc., R. Co., 59 Mo. 495, 21 Am. Rep. 385; Akers *v.* Akers, 16 Lea (Tenn.) 7, 57 Am. Rep. 207. See also 2 Cent. Dig. tit. "Appeal and Error," § 2193. It was held in Tennessee, however, that the distinction between the effect of a simple appeal as vacating the decree and of an appeal in the nature of a writ of error was difficult to justify, because the bond and proceedings were the same in both classes of appeal. Smith *v.* Holmes, 12 Heisk. (Tenn.) 466.

11. *Arkansas.*—Cloud *v.* Wiley, 29 Ark. 80; Fowler *v.* Scott, 11 Ark. 675.

Colorado.— Steinhauer *v.* Colmar, 11 Colo. App. 494, 55 Pac. 291.

Indiana.— State *v.* Krug, 94 Ind. 366; Hayes *v.* Hayes, 75 Ind. 395.

Nevada.— Brooks *v.* Nevada Nickel Syndicate, 24 Nev. 311, 53 Pac. 597.

North Carolina.— State *v.* Mizell, 32 N. C. 279. By N. C. Stat. (1887), c. 192, a judgment, civil or criminal, is not vacated, but is merely suspended, by perfecting an appeal. Black *v.* Black, 111 N. C. 300, 16 S. E. 412. A judgment granting, refusing, or dissolving an injunction is not vacated or suspended by appeal. James *v.* Markham, 125 N. C. 145, 34 S. E. 241; Green *v.* Griffin, 95 N. C. 50. See *supra*, VIII, J, 5, c.

Tennessee.— Covington *v.* Bass, 88 Tenn. 496, 12 S. W. 1033, as to appeal to the supreme court from a judgment at law. The reporter indicates that since the Tennessee act of 1885, c. on appeal from the chancery court has the same effect as an appeal from a judgment at law.

See also *supra*, VIII.

12. Cole *v.* Conolly, 16 Ala. 271; Burton *v.* Burton, 28 Ind. 342; Nill *v.* Comparet, 16 Ind. 107, 79 Am. Dec. 411.

13. Steinhauer *v.* Colmar, 11 Colo. App. 494, 55 Pac. 291. But it is also held that the taking of an appeal suspends the force of the judgment until the appeal is determined when the law substitutes the judgment of the appellate court for that of the court below. Archer *v.* Hart, 5 Fla. 234.

14. *Massachusetts.*— Davis *v.* Cowdin, 20 Pick. (Mass.) 510; Paine *v.* Cowdin, 17 Pick. (Mass.) 142.

Nebraska.— Jenkins *v.* State, 60 Nebr. 205, 82 N. W. 622.

New Hampshire.— Stalbird *v.* Beattie, 36 N. H. 455, 72 Am. Dec. 317.

North Carolina.— Isler *v.* Brown, 69 N. C. 125. The rule, however, was changed in this state by the North Carolina act of 1887, c. 192. Black *v.* Black, 111 N. C. 300, 16 S. C. 412.

Ohio.— Bell *v.* Crawford, 25 Ohio St. 402; Lawson *v.* Bissell, 7 Ohio St. 129; Kay *v.* Watson, 17 Ohio 27.

Rhode Island.— Estes *v.* Cook, 2 R. I. 98.

Vermont.— Gale *v.* Butler, 35 Vt. 449. An appeal from the decree of a chancellor vacates and annuls the decree both as to the merits and costs.

15. Stalbird *v.* Beattie, 36 N. H. 455, 72 Am. Dec. 317.

16. *California.*— Low *v.* Adams, 6 Cal. 277.

Illinois.— Shirk *v.* Metropolis, etc., Gravel Road Co., 110 Ill. 661; Walker *v.* Doane, 108 Ill. 236; Oakes *v.* Williams, 107 Ill. 154; Curtis *v.* Root, 28 Ill. 367.

New York.— Matter of Berry, 26 Barb. (N. Y.) 55.

Ohio.— Moore *v.* Rittenhouse, 15 Ohio St. 310; Stuble *v.* Walpole, Wright (Ohio) 447.

Tennessee.— Covington *v.* Bass, 88 Tenn. 496, 12 S. W. 1033; Smith *v.* Holmes, 12 Heisk. (Tenn.) 466.

until the judgment is reversed or modified by the appellate court.[17] And though the appellate court enters a new judgment of its own which is in effect a mere affirmance of the judgment in the lower court, the latter is not thereby merged or extinguished, nor is its lien impaired.[18] But the time during which, under statute, the lien of the judgment endures is not extended by an appeal.[19] In other states, when an undertaking has been given to effect a stay, the court may, after appeal, in its discretion, exempt from the lien all or a portion of the property subject thereto.[20]

3. ENFORCEMENT OF JUDGMENT — a. In General. The judgment cannot be enforced while the appeal remains undisposed of;[21] and, notwithstanding the lower court may not be deprived of jurisdiction to the extent that it cannot proceed in collateral matters, or for the preservation of the fruits of the litigation,[22] at the same time, it cannot take such action as will be in effect an execution of its judgment or will place the funds where they will be beyond the control of the ultimate judgment or decree.[23]

b. Action on Judgment — (I) *In General.* In those states where it is held that after an appeal the judgment is no longer in force, such judgment cannot be the foundation of a new action.[24] But where the appeal is in the nature of a writ

Texas.— Woodson *v.* Collins, 56 Tex. 168; Thulemeyer *v.* Jones, 37 Tex. 560; Smith *v.* Kale, 32 Tex. 290; Semple *v.* Eubanks, 13 Tex. Civ. App. 418, 35 S. W. 509.

But the lien is discharged by reversal of the judgment, and rights acquired by a subsequent *bona fide* purchaser are not prejudiced by a reversal thereafter of such reversing judgment by a higher court. Foot *v.* Dillaye, 65 Barb. (N. Y.) 521.

17. Black *v.* Black, 111 N. C. 300, 16 S. E. 412; Stephens *v.* Koonce, 106 N. C. 222, 11 S. E. 996. But where the appeal vacates the judgment, the lien cannot attach until entry of judgment in the appellate court. Snelling *v.* Parker, 8 Ga. 121.

On error sued out, under statute declaring that the lien of the judgment shall not be lost if the judgment is affirmed, the judgment is binding until reversed, and if affirmed it is binding *ab initio.* Allen *v.* Savannah, 9 Ga. 286.

18. Kilpatrick *v.* Dye, 4 Sm. & M. (Miss.) 289; Planters Bank *v.* Calvit, 3 Sm. & M. (Miss.) 143, 41 Am. Dec. 616.

Supersedeas.— In the absence of statute, it has been held in Alabama that the lien of the judgment is discharged by a writ of error and supersedeas. Campbell *v.* Spence, 4 Ala. 543, 39 Am. Dec. 301; McRae *v.* McLean, 3 Port. (Ala.) 138. But see *supra,* VIII, J.

19. Christy *v.* Flanagan, 87 Mo. 670; Chouteau *v.* Nuckolls, 20 Mo. 442.

20. N. Y. Code Civ. Proc. §§ 1256–1258. Minn. Gen. Stat. (1894), § 5426, is similar in its provisions.

Restoration of lien.— N. Y. Code Civ. Proc. § 1259, provides the manner in which the lien may be restored after the judgment is affirmed or the appeal therefrom dismissed. Valid equities which arise in the meantime have priority over the lien. Union Dime Sav. Inst. *v.* Duryea, 3 Hun (N. Y.) 210.

21. McCreary *v.* Rogers, 35 Ark. 298; Strickland *v.* Maddox, 9 Ga. 196; Johnson *v.* Williams, 82 Ky. 45; Thompson *v.* Thompson, 1 N. J. L. 184. See also Haynes *v.* Hayes, 68 Ill. 203. But where one of several defendants appeals, he may be summoned as garnishee on execution against the others. Baker *v.* New Orleans, etc., R. Co., 10 La. Ann. 110.

But one may estop himself by his conduct from setting up the pendency of his appeal from an order of sale, in order to affect the validity of the sale. Fairfax *v.* Muse, 4 Munf. (Va.) 124, where appellant had moved the court to amend the order of sale, and had induced others to bid at such sale.

Appeal after sale.— And an appeal interposed after a decree of sale has been essentially executed will not be permitted to supersede the completion of the purchase. Brasher *v.* Cortlandt, 2 Johns. Ch. (N. Y.) 505.

Appellant put to election.— In Vail *v.* Remsen, 7 Paige (N. Y.) 206, where complainant was seeking to carry into effect a decretal order from which he had appealed at the same time that he was proceeding on the appeal to reverse the order, the chancellor intimated that the vice-chancellor might compel appellant to elect whether he would abandon the proceedings under the order or dismiss the appeal.

See also *supra,* VIII.

22. See *infra,* X, G.

23. State *v.* Duffel, 41 La. Ann. 958, 8 So. 541; Stewart *v.* Love, 3 Lea (Tenn.) 374; Goddard *v.* Ordway, 94 U. S. 672, 24 L. ed. 237; Bronson *v.* La Crosse, etc., R. Co., 1 Wall. (U. S.) 405, 17 L. ed. 616. See also Edwards *v.* Ellis, 27 Kan. 344; Dawson *v.* Parsons, 16 Misc. (N. Y.) 190, 38 N. Y. Suppl. 1000, 74 N. Y. St. 810.

Discovery pending appeal from order on demurrer.— Where a defendant appeals from an order overruling his demurrer a motion by plaintiff for the discovery of defendant's books, in order to enable plaintiff to prepare for trial, such motion being made pending the appeal, is premature. Palen *v.* Johnson, 18 Abb. Pr. (N. Y.) 304.

24. Paine *v.* Cowdin, 17 Pick. (Mass.) 142; Campbell *v.* Howard, 5 Mass. 376.

A plea in abatement will be sustained to

of error, or the judgment appealed from is not vacated, parties are not precluded by the appeal from suing on the judgment, or from prosecuting collateral or independent proceedings.[25]

(II) *Foreign Judgment.* The pendency of an appeal in the state of judgment is no bar to an action on the judgment in another state if, in the state of judgment, the appeal does not vacate the judgment or stay execution.[26] But that an appeal is pending in a foreign state, which operates as a stay, is a matter to be proven as a defense to, or in suspension of, the action,[27] and must be pleaded.[28]

(III) *Execution on New Judgment Pending First Writ of Error.* If judgment be obtained in an action of debt on a judgment while the writ of error is pending, execution will not be permitted, generally, till the writ of error has been determined. While there are two judgments, only one can be satisfied.[29] It is in the discretion of the court in which the action upon a judgment is brought, pending a writ of error, to stay the proceedings or not.[30]

4. Availability as Set-Off. A judgment, in order to be available as a set-off, must be a valid, subsisting obligation and final in its nature; and, hence, a judgment from which an appeal has been taken cannot be set off pending the appeal against a final judgment, rendered in another action, in favor of the defendant. An appeal suspends the right to a set-off.[31]

such an action. Hutchcraft *v.* Gentry, 2 J. J. Marsh. (Ky.) 499; Atkins *v.* Wyman, 45 Me. 399; Jenkins *v.* Pepoon, 2 Johns. Cas. (N. Y.) 312.

25. *Indiana.*— Line *v.* State, 131 Ind. 468, 30 N. E. 703; Central Union Telephone Co. *v.* State, 110 Ind. 203, 10 N. E. 922, 12 N. E. 136; State *v.* Krug, 94 Ind. 366; Burton *v.* Reeds, 20 Ind. 87; Nill *v.* Comparet, 16 Ind. 107, 79 Am. Dec. 411; Hammond *v.* Evans, 23 Ind. App. 501, 55 N. E. 784.

Nevada.— Cain *v.* Williams, 16 Nev. 426 [*citing* Rogers *v.* Hatch, 8 Nev. 35; Bank of North America *v.* Wheeler, 28 Conn. 433, 73 Am. Dec. 683].

New Jersey.— Suydam *v.* Hoyt, 25 N. J. L. 230, where it was held that the pendency of a writ of error does not enable defendant to plead *nul tiel record.*

Pennsylvania.— Woodward *v.* Carson, 86 Pa. St. 176; Merchants' Ins. Co. *v.* De Wolf, 33 Pa. St. 45, 75 Am. Dec. 577.

Texas.— Brooke *v.* Clark, 57 Tex. 105.

Virginia.—Newcomb *v.* Drummond, 4 Leigh (Va.) 57, wherein, after the recovery of the judgment and the taking of an appeal, but before the appeal could be prosecuted, the records of the court were destroyed by fire. But the action on the judgment was allowed.

Necessity of stay.— Sometimes, whether or not the action can be maintained depends upon whether there has been a stay of execution. Tarbell *v.* Downer, 29 Vt. 339. See also *supra,* VIII.

26. *California.*— Taylor *v.* Shew, 39 Cal. 536, 2 Am. Rep. 478.

Illinois.— Dow *v.* Blake, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156 [*affirming* 46 Ill. App. 329].

Massachusetts.— Clark *v.* Child, 136 Mass. 344; Faber *v.* Hovey, 117 Mass. 107, 19 Am. Rep. 398.

Pennsylvania.— Merchants' Ins. Co. *v.* De Wolf, 33 Pa. St. 45, 75 Am. Dec. 577.

United States.— Woodbridge, etc., Engineering Co. *v.* Ritter, 70 Fed. 677; Union Trust Co. *v.* Rochester, etc., R. Co., 29 Fed. 609.

27. Dow *v.* Blake, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156.

Presumption in absence of proof.— And, in the absence of proof to the contrary, the presumption is that the effect of an appeal by the laws of a foreign state is the same as in the state where the action is being prosecuted. Taylor *v.* Shew, 39 Cal. 536, 2 Am. Rep. 478; Piedmont, etc., L. Ins. Co. *v.* Ray, 75 Va. 821.

Proof by record.— The pendency of an appeal cannot be proved by parol evidence, but by the record only. Blodget *v.* Jordan, 6 Vt. 580.

28. Taylor *v.* Shew, 39 Cal. 536, 2 Am. Rep. 478; Merchants' Ins. Co. *v.* De Wolf, 33 Pa. St. 45, 75 Am. Dec. 577.

Legal conclusion.— An affidavit asserting as a defense to such action that the judgment operates as a supersedeas must not aver this fact simply, for that is the averment of a legal conclusion, but must set out the facts upon which the correctness of the conclusion depends. Woodbridge, etc., Engineering Co. *v.* Ritter, 70 Fed. 677.

29. Woodward *v.* Carson, 86 Pa. St. 176; Newcomb *v.* Drummond, 4 Leigh (Va.) 57; Bishop *v.* Best, 3 B. & Ald. 275, 5 E. C. L. 165; Benwell *v.* Black, 3 T. R. 643.

30. Suydam *v.* Hoyt, 25 N. J. L. 230 [*citing* Bicknell *v.* Longstaffe, 6 T. R. 455; Smith *v.* Shepherd, 5 T. R. 9; Cristie *v.* Richardson, 3 T. R. 78; Abraham *v.* Pugh, 5 B. & Ald. 903, 7 E. C. L. 490]. See also *supra,* note 29.

31. Sandel *v.* George, 18 La. Ann. 526 (wherein the rule is confined to suspensive appeals and not applied to devolutive appeals); Kernion *v.* Hills, 12 Rob. (La.) 376; De Camp *v.* Thomson, 159 N. Y. 444, 54 N. E. 11, 70 Am. St. Rep. 570 [*affirming* 54 N. Y. Suppl. 1098]; Hardt *v.* Schulting, 24 Hun (N. Y.) 345 (where it was held that a judgment recovered by plaintiff could not be set off pending appeal against costs awarded defendant in the same action); De Figaniere *v.*

D. New Trial or Rehearing. In some states an appeal does not divest the trial court of jurisdiction to hear and determine a motion for a new trial,[32] and the right of the party to apply for a new trial, and the power of the court to entertain jurisdiction of the application, during the time limited in the statute, are absolute and unconditional, and not affected by the pendency of an appeal.[33] But, in other states, after the cause has been removed by appeal the trial court has no jurisdiction to entertain and no power to grant such a motion,[34] and a petition for a rehearing on the ground of newly-discovered evidence must be made in the court below before such court loses jurisdiction by an appeal.[35]

E. Opening or Vacating Judgment or Order. So, after the appeal is

Young, 2 Rob. (N. Y.) 670; Pierce *v.* Tuttle, 51 How. Pr. (N. Y.) 193; Terry *v.* Roberts, 15 How. Pr. (N. Y.) 65; Weatherred *v.* Mays, 1 Tex. 472. But an appeal from an order overruling an application to allow an appeal from a judgment after the expiration of the time limited for the appeal will not prevent the judgment from being satisfied by setting off another judgment against it, in the absence of a stay of proceedings on the appeal from the above order. Brooks *v.* Harris, 41 Ind. 390.

32. Naglee *v.* Spencer, 60 Cal. 10; Henry *v.* Allen, 147 N. Y. 346, 41 N. E. 694, 69 N. Y. St. 679; People *v.* Board of Education, 141 N. Y. 86, 35 N. E. 1087, 56 N. Y. St. 560; Vernier *v.* Knauth, 7 N. Y. App. Div. 57, 39 N. Y. Suppl. 784; Nash *v.* Wetmore, 33 Barb. (N. Y.) 155; Schmidt *v.* Cohn, 12 Daly (N. Y.) 134, after appeal from order denying new trial. See also *supra*, I, D; and 2 Cent. Dig. tit. "Appeal and Error," § 2196.

Effect of denial of motion.— If the motion is denied because of the pendency of the appeal, the appeal will be treated as an appeal from such order of dismissal as well as from a judgment. Rayner *v.* Jones, 90 Cal. 78, 27 Pac. 24.

Motion made at a subsequent term.— An order extending the time for presenting a bill of exceptions beyond the term is a step taken toward modifying or correcting the judgment, and jurisdiction of the judgment is thereby retained, and at a succeeding term the judgment may be vacated and a new trial granted. Henrichsen *v.* Smith, 29 Oreg. 475, 42 Pac. 486, 44 Pac. 496.

33. Indiana, etc., R. Co. *v.* McBroom, 103 Ind. 310, 2 N. E. 760 (holding that if the action of the lower court in vacating the judgment is certified to the appellate court the appeal will be stricken from its docket); Cook *v.* Smith, 58 Iowa 607, 12 N. W. 617 (indicating that both proceedings should not be actively prosecuted at the same time, and that upon application this would, no doubt, be controlled by the court).

34. Hudson *v.* Bauer Grocery Co., 105 Ala. 200, 16 So. 693; Elgin Lumber Co. *v.* Langman, 23 Ill. App. 250; McArdle *v.* McArdle, 12 Minn. 122; Skinner *v.* Bland, 87 N. C. 168; Isler *v.* Brown, 69 N. C. 125. But these last two cases do not refer to granting new trials at the term at which judgment was had, but refer to motions to set aside judgments at subsequent terms, as for excusable neglect, and the like. This last could not be done because the case was pending in the appellate court. But, in this state, after final judgment in the appellate court and motion in the lower court for a new trial on the ground of newly-discovered evidence touching a single feature of the case, on the matter coming before the supreme court as a new question it was held to be the proper practice to bring the matter to the attention of the latter court, which would make an issue and direct it to be tried in the lower court. Bledsoe *v.* Nixon, 69 N. C. 81. And, under a later statute (1887–92), if the judgment of the superior court is affirmed and the opinion certified down the motion should be made in the lower court, though, pending the appeal, it should be made in the supreme court, and, upon final judgment in that court, a petition to rehear should be filed there. Black *v.* Black, 111 N. C. 300, 16 S. E. 412.

Time extended by consent.— The fact that an appeal was perfected pending a motion to set aside the verdict, the time for the hearing of which had been extended by consent, did not debar the trial court from hearing such motion. Myers *v.* Stafford, 114 N. C. 231, 19 S. E. 232.

Appellant cannot complain of dismissal of appeal.— In Montevallo Coal Min. Co. *v.* Reynolds, 44 Ala. 252, after an appeal the appellant moved for and obtained a new trial. While the granting of the new trial was erroneous, yet, since appellant had lost his right to complain, the upper court, on motion of appellee, dismissed the appeal. And see Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637 [*citing* Noble *v.* Prescott, 4 E. D. Smith (N. Y.) 139; Peel *v.* Elliott, 16 How. Pr. (N. Y.) 483].

35. Tant *v.* Guess, 37 S. C. 489, 16 S. E. 472. So, in the United States court, it was held, under an equity rule, that the court of appeals could not grant a rehearing after the term at which the final decree was rendered; but that, if the term still continued, the practice was to make an application to the court below for the rehearing, and for that court to send a request to the supreme court of the United States for a return of the record in order that it might proceed further with the cause. Roemer *v.* Simon, 91 U. S. 149, 23 L. ed. 267. In New York it is held that after an appeal to the court of appeals from a judgment affirming an order of the special term, a motion for a reargument of the appeal from the special term cannot be granted. *In re* Citizens' Water-Works Co., 15 N. Y. Suppl. 579, 39 N. Y. St. 747.

taken, the judgment in the court below cannot be vacated and set aside,[36] subject, however, to the power of courts over their own judgments during the term, notwithstanding steps taken to perfect an appeal.[37]

F. Amendment of Proceedings[38] — **1. In General.** It is a rule of general application that, when an appeal is taken, all power of the court appealed from to change its judgment or modify its orders ceases to exist until the cause, or some part of it, is remanded by the appellate court,[39] subject to the rule that during the trial term that court has the right to set aside, vacate, or modify its judgment, and of this power it is not divested by the appeal. A court of record has the inherent power to correct its own record by an order *nunc pro tunc*, even after an appeal — for while it loses jurisdiction of the case it does not of its record[40] — as where, through inadvertence, some matter has been omitted from the record, or some untrue statement inserted, or where the judgment entered contains misrecitals.[41] The power of correction is confined, however, to showing correctly the

36. *Kentucky.*— Davidson *v.* Allan, 5 Ky. L. Rep. 683.

Louisiana.— Morris *v.* Bienvenu, 30 La. Ann. 878.

Missouri.— Burgess *v.* O'Donoghue, 90 Mo. 299, 2 S. W. 303.

Ohio.— Brewster *v.* Anderson, 1 Ohio Cir. Ct. 479.

Pennsylvania.— Baldwin's Appeal, 112 Pa. St. 2, 5 Atl. 732.

South Carolina.— Whaley *v.* Charleston, 8 S. C. 344.

Texas.— But see Churchill *v.* Martin, 65 Tex. 367; Garza *v.* Baker, 58 Tex. 483; Smith *v.* Haynes, 30 Tex. 500.

Washington.— Canada Settlers' L. & T. Co., *v.* Murray, 20 Wash. 656, 56 Pac. 368, holding that after an appeal has been perfected it is too late to cure errors by moving to vacate the judgment.

United States.— Citizens' Bank *v.* Farwell, 56 Fed. 539, 12 U. S. App. 419, 6 C. C. A. 30.

Interlocutory motion.— But in Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637, notwithstanding an appeal a motion was entertained to open an order made at special term to allow the introduction of proofs which could not be produced when the order was made.

37. Sullivan *v.* Woods, (Ariz. 1897) 50 Pac. 113; Churchill *v.* Martin, 65 Tex. 367; Garza *v.* Baker, 58 Tex. 483; Blum *v.* Wettermark, 58 Tex. 125.

38. **For amendments,** generally, see Pleading. See also 2 Cent. Dig. tit. "Appeal and Error," § 2198.

39. Wise *v.* Frey, 9 Nebr. 217, 2 N. W. 375; Stone *v.* Furry, Add. (Pa.) 114; Grubbs *v.* Blum, 62 Tex. 426; Interstate Commerce Commission *v.* Louisville, etc., R. Co., 101 Fed. 146; Hovey *v.* McDonald, 109 U. S. 150, 3 S. Ct. 136, 27 L. ed. 888.

At common law amendments were allowed only while proceedings were in paper, but, by various statutes, which became part of the law of this country, amendments were allowable after the proceedings were entered of record. By the statutes of 8 Hen. VI, cc. 12, 15, a misprision was made amendable at any time, and such things as are amendable before error brought are amendable afterward so long as diminution may be alleged and certiorari awarded. Judson *v.* Blanchard, 3 Conn. 579; Boyle *v.* Connelly, 2 Bibb (Ky.) 7. See also Thatcher *v.* Miller, 11 Mass. 413.

Notice.— Since after appeal the opposite party is not bound to take notice of what may be done in the trial court, he should be served with notice of any motion thereafter made. Eno *v.* Hunt, 8 Iowa 436.

40. Gamble *v.* Daugherty, 71 Mo. 599; Exchange Nat. Bank *v.* Allen, 68 Mo. 474; Jones *v.* St. Joseph F. & M. Ins. Co., 55 Mo. 342; Andresen *v.* Lederer, 53 Nebr, 128, 73 N. W. 664.

Criminal cases embraced in the rule.— The power to make *nunc pro tunc* orders extends to criminal cases. Borrego *v.* Territory, 8 N. M. 446, 46 Pac. 349 [*citing* Benedict *v.* State, 44 Ohio St. 679, 11 N. E. 125]. See also Criminal Law.

There must be record evidence to amend by. — Branger *v.* Chevalier, 9 Cal. 351 (confining the rule to cases in which the term had expired); Boyle *v.* Connelly, 2 Bibb (Ky.) 7; Gamble *v.* Daugherty, 71 Mo. 599; Exchange Nat. Bank *v.* Allen, 68 Mo. 474 (holding that the correction should not be based on the memory of the judge or on facts proved by affidavits apart from the record).

41. *Alabama.*— Birmingham Nat. Bank *v.* Mayer, 104 Ala. 634, 16 So. 520; Montevallo Coal Min. Co. *v.* Reynolds, 44 Ala. 252; Cunningham *v.* Fontaine, 25 Ala. 644; Cullum *v.* Batre, 2 Ala. 415, as to showing of publication of notice to non-resident, after writ of error sued out.

Colorado.— Kindel *v.* Beck, etc., Lithographing Co., 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311.

Illinois.— Leiferman *v.* Osten, 64 Ill. App. 578 (where the complaint was supplied by amendment); Heintz *v.* Pratt, 54 Ill. App. 616.

Indiana.— Doe *v.* Owen, 2 Blackf. (Ind.) 452.

Iowa.— Maxon *v.* Chicago, etc., R. Co., 67 Iowa 226, 25 N. W. 144; Mahaffy *v.* Mahaffy, 63 Iowa 55, 18 N. W. 685; Levi *v.* Karrick, 15 Iowa 444.

Kentucky.— Smith *v.* Todd, 3 J. J. Marsh. (Ky.) 298; Boyle *v.* Connelly, 2 Bibb (Ky.) 7; Williams *v.* Thompson, 4 Ky. L. Rep. 9.

Minnesota.— Under the statute the lower court has power, after judgment and appeal,

history of the proceedings before the appeal, and the lower court has no jurisdiction, pending an appeal, to interfere with the rights of parties under a judgment.[42]

2. PROCESS OR RETURN. As a general rule, an amendment *nunc pro tunc* of the officer's return is allowable after writ of error brought.[43] The application for

but before the return is made to the appellate court, to correct its record so as to conform to the facts and to the decision actually made. State Sash, etc., Mfg. Co. *v.* Adams, 47 Minn. 399, 50 N. W. 360.

Missouri — Exchange Nat. Bank *v.* Allen, 68 Mo. 474; De Kalb County *v.* Hixon, 44 Mo. 341.

Nebraska. — Andresen *v.* Lederer, 53 Nebr. 128, 73 N. W. 664.

New Jersey.— Hood *v.* Spaeth, 51 N. J. L. 129, 16 Atl. 163.

New Mexico.— Borrego *v.* Territory, 8 N. M. 446, 46 Pac. 349.

New York.— National City Bank *v.* New York Gold Exch. Bank, 97 N. Y. 645 [*following* Buckingham *v.* Dickinson, 54 N. Y. 682, and Guernsey *v.* Miller, 80 N. Y. 181]; New York Ice Co. *v.* Northwestern Ins. Co., 21 How. Pr. (N. Y.) 296; Judson *v.* Gray, 17 How. Pr. (N. Y.) 289; Rew *v.* Barker, 2 Cow. (N. Y.) 408, 14 Am. Dec. 515.

Pennsylvania.— Gunn *v.* Bowers, 126 Pa. St. 552, 17 Atl. 893; Payne *v.* Ulmer, 1 Walk. (Pa.) 516.

South Carolina.— Gibson *v.* Gibson, 7 S. C. 356.

Texas.— Chestnutt *v.* Pollard, 77 Tex. 86, 13 S. W. 852; Hurlbut *v.* Lang, 10 Tex. Civ. App. 168, 29 S. W. 1109; Gerard *v.* State, 10 Tex. App. 690. But see Gallagher *v.* Finlay, 2 Tex. App. Civ. Cas. § 623.

Utah.—Wasatch Min. Co. *v.* Jennings, 14 Utah 221; 46 Pac. 1106.

Wisconsin.— Kelly *v.* Chicago, etc., R. Co., 70 Wis. 335, 35 N. W. 538.

United States.— Hovey *v.* McDonald, 109 U. S. 150, 3 S. Ct. 136, 27 L. ed. 888.

England.— Richardson *v.* Mellish, 3 Bing. 346, 11 E. C. L. 173, where the judgment-roll in the common pleas was, after judgment in error, amended so as to conform to the *postea*, which had been amended after argument in the king's bench.

Supplemental transcript.— Corrections of clerical errors after appeal may, by supplemental transcript, be brought into the appellate court, where they will be considered as if part of the original record. Usually they are made upon affidavit and certiorari. Breene *v.* Booth, 3 Colo. App. 470, 33 Pac. 1007; Judson *v.* Blanchard, 3 Conn. 579; Culbertson *v.* Salinger, 111 Iowa 447, 82 N. W. 925; Richardson *v.* Mellish, 3 Bing. 346, 11 E. C. L. 173 [*citing* Frend *v.* Richmond, Hardres 505; Dunbar *v.* Hitchcock, 3 M. & S. 591; Wood *v.* Matthews, Popham 102; Harrison *v.* King, 1 B. & A. 161].

Bill of exceptions at subsequent term.— And a bill of exceptions according with the real facts may be granted at a subsequent term. State *v.* Estes, 34 Oreg. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25.

In some jurisdictions, however, the rule is regularly adhered to that an amendment of a bill of exceptions cannot be allowed by the trial court during the subsequent term. Michigan Ins. Bank *v.* Eldred, 143 U. S. 293, 12 S. Ct. 450, 36 L. ed. 162; Bridges *v.* Kuykendall, 58 Miss. 827.

42. *California.*— *In re* Bullard, (Cal. 1892) 31 Pac. 1119; Shay *v.* Chicago Clock Co., 111 Cal. 549, 44 Pac. 237; San Francisco Sav. Union *v.* Myers, 72 Cal. 161, 13 Pac. 403; Reynolds *v.* Reynolds, 67 Cal. 176, 7 Pac. 480.

Colorado.— Breene *v.* Booth, 3 Colo. App. 470, 33 Pac. 1007.

Illinois.— Illinois Land, etc., Co. *v.* McCormick, 61 Ill. 322.

Iowa.— Carmichael *v.* Vandebur, 51 Iowa 225, 1 N. W. 477.

Louisiana.— Formento *v.* Robert, 27 La. Ann. 445.

Minnesota.—Floberg *v.* Joslin, 75 Minn. 75, 77 N. W. 557.

Nebraska. — Andresen *v.* Lederer, 53 Nebr. 128, 73 N. W. 664.

New York.— Catlin *v.* Cole, 19 How. Pr. (N. Y.) 82, holding that after an appeal to the court of appeals from the general term it is too late to send the case back to the referee for an entire refinding of facts. But see Matter of Plumb, 52 Hun (N. Y.) 119, 4 N. Y. Suppl. 831, 22 N. Y. St. 547, holding that, notwithstanding an appeal from a surrogate's order enjoining action on the part of a guardian, etc., the surrogate has jurisdiction over the proceeding and may alter the order if the exigencies of the case require it.

Refusal to notice an immaterial amendment.— In Parker *v.* Vinson, 11 S. D. 381, 77 N. W. 1023, the supreme court thought that an amendment of judgment, made pending the appeal, was not before it, because there was no appeal from the order of amendment, but, assuming that the amendment was before it, held that the making of the amendment was not reversible error, since no substantial right of the parties had been thereby affected.

43. *Illinois.*— Terry *v.* Eureka College, 70 Ill. 236; Chicago Fuel Gas Appliance Co. *v.* Jewett, 66 Ill. App. 489; World's Columbian Exposition *v.* Scala, 55 Ill. App. 207.

Kentucky.—Irvine *v.* Scobee, 5 Litt. (Ky.) 70.

Massachusetts.— Thatcher *v.* Miller, 11 Mass. 413.

Pennsylvania.— Shamburg *v.* Noble, 80 Pa. St. 158.

Texas.— The record is within the control of the district court until the day for filing the transcript in this court. Thomson *v.* Bishop, 29 Tex. 154. *Compare* Texas State Fair, etc., Exposition *v.* Lyon, 5 Tex. Civ. App. 382, 24 S. W. 328.

Notice.— It has been held that the amendment may be permitted without notice being first given to defendant. Lungren *v.* Harris, 6 Ark. 474. But see Jenkins *v.* Crofton, 10 Ky. L. Rep. 456, 9 S. W. 406, in which an

leave to amend is addressed largely to the discretion of the court, which discretion is liberally exercised when in the furtherance of substantial justice and where the interests of innocent third parties will not be affected.[44]

3. Pleadings. After the case is pending in the appellate tribunal a pleading cannot be amended in matter of substance.[45] A copy of a lost plea may, upon notice and proof, be supplied in place of the original by order of court,[46] but it is held that a new pleading cannot be filed *nunc pro tunc*.[47]

G. Collateral Actions or Proceedings — 1. In General — Preservation of Status in Quo of Parties and Property. An appeal does not always deprive the lower court of all jurisdiction so as to prevent absolutely any action, even though such action be not in execution of the judgment appealed from;[48] but, on the contrary, the case is often regarded as pending in the court of original jurisdiction for the purposes of other proceedings than such as pertain to the subject-matter of the judgment itself, or to the appeal and the proper hearing thereof, and incidental matters necessary for the preservation of the fruits of the ultimate judgment or the *status in quo* of the parties are not placed beyond the interference of the lower court.[49] For the latter purposes the court may make an order providing for renting or leasing of property,[50] or order investment of funds resulting from the sale of property under an order made pending litigation.[51] But it

amendment was held improper where appellant had no opportunity to question its correctness.

44. Hefflin *v.* McMinn, 2 Stew. (Ala.) 492, 20 Am. Dec. 58. To the same effect see Moore *v.* Horn, 5 Ala. 234; Anderson *v.* Sloan, 1 Colo. 33.

45. Johnson *v.* Chaplin, 28 Iowa 570; Western Wheel-Scraper Co. *v.* Drinnen, 79 Fed. 820; Marsteller *v.* McClean, 2 Cranch C. C. (U. S.) 8, 16 Fed. Cas. No. 9,140.

46. Blake *v.* Miller, 118 Ill. 500, 8 N. E. 828; Long *v.* Sutter, 67 Ill. 185.

47. Blake *v.* Miller, 118 Ill. 500, 8 N. E. 828; Ladd *v.* Couzins, 35 Mo. 513 (the principle of which case was afterward discredited). See Gamble *v.* Daugherty, 71 Mo. 599.

48. See *supra*, X, B; and for inherent power of appellate court to grant supersedeas see *supra*, VIII, G.

49. *Alabama.*— Allen *v.* Allen, 80 Ala. 154.

California.— Broder *v.* Conklin, 121 Cal. 289, 53 Pac. 797.

Idaho.— Miller *v.* Pine Min. Co., (Ida. 1893) 32 Pac. 207, authority of lower court to quash execution issued after appeal.

Iowa.— Mitchell *v.* Roland, 95 Iowa 314, 63 N. W. 606.

Louisiana.— State *v.* Houston, 35 La. Ann. 236; Fink *v.* Martin, 10 Rob. (La.) 147. If the security on an appeal bond becomes insolvent after appeal, it is the same as if no security had been given, and the question must be inquired into in the court which granted the appeal. Stanton *v.* Parker, 2 Rob. (La.) 550. See also State *v.* Judge, 23 La. Ann. 31.

Maryland.— Barnum *v.* Barnum, 42 Md. 251.

Massachusetts.— Joannes *v.* Underwood, 6 Allen (Mass.) 240, holding that, under a statutory provision that the entry of questions arising upon appeal, etc., should not transfer the case, but only the questions to be determined, the lower court has authority, pending an appeal from a judgment sustaining a demurrer to a declaration, to order plaintiff to furnish an indorser for costs, and, in case of his failure to do so, to order nonsuit.

New York.— People *v.* Board of Education, 141 N. Y. 86, 35 N. E. 1087, 56 N. Y. St. 560.

North Carolina.— Herring *v.* Pugh, 126 N. C. 852, 36 S. E. 287, placing the authority of the lower court upon the statute which provides that an appeal shall stay further proceedings upon the judgment appealed from, etc., but that the court might proceed upon matter not affected by, or embraced in, the judgment appealed from. But the court may decline to exercise the discretionary power given it under the above statute, and may refuse to dispose of a collateral matter which is not important under the decision. Penniman *v.* Daniel, 91 N. C. 431.

Ohio.— Goode *v.* Wiggins, 12 Ohio St. 341, petition in error.

Pennsylvania.—New Brighton, etc., R. Co.'s Appeal, 105 Pa. St. 13, holding that for the purposes of preserving the *status in quo* of the parties on an appeal from a decree in equity, the court below may, if necessary, issue an attachment.

West Virginia.— Crawford *v.* Fickey, 41 W. Va. 544, 23 S. E. 662.

United States.— Bronson *v.* La Crosse, etc., R. Co., 1 Wall. (U. S.) 405, 17 L. ed. 616; Spring *v.* South Carolina Ins. Co., 6 Wheat. (U. S.) 519, 5 L. ed. 320.

But see also *supra*, VIII, K.

So a scire facias is a new and independent action, and proceedings upon the scire facias are not removed by a writ of error removing the record in the original action. Greenway *v.* Dare, 6 N. J. L. 305.

50. Parrish *v.* Ross, 95 Ky. 318, 15 Ky. L. Rep. 682, 25 S. W. 266; Adkins *v.* Edwards, 83 Va. 316, 2 S. E. 439; Moran *v.* Johnston, 26 Gratt. (Va.) 108.

51. Hinson *v.* Adrian, 91 N. C. 372; Spring *v.* South Carolina Ins. Co., 6. Wheat (U. S.) 519, 5 L. ed. 320.

cannot proceed in such a manner as to execute its judgment or place the funds beyond the control of the ultimate result of the litigation.[52]

2. Appointment of Receiver. Upon such a step becoming necessary for the preservation and conservation of property pending the appeal, a receiver may be appointed,[53] upon proper application being made to the court below.[54] This authority is also exercised under statutory provisions.[55]

3. Restraining Orders. By virtue of its inherent powers, an appellate tribunal may, pending the determination of an appeal upon its merits, issue an order of supersedeas to preserve the *status in quo* of the parties.[56] On the other hand, if the purposes of justice require it, and to avoid irreparable injury or multiplicity of suits, if an injunction has been granted, the lower court may order a continuance of the *status in quo*, or may make any necessary orders to preserve the rights of the parties pending the appeal.[57] But upon the effect of appeals from orders granting, refusing, dissolving, or refusing to dissolve injunctions, the authorities are in conflict,[58] the question, however, often depending at this time upon statutory provisions relating to supersedeas and stay of proceedings pending an appeal,[59] or upon statutes expressly conferring authority to make such injunctive order.[60]

52. See *supra*, X, C, 3; and VIII.

53. Fellows *v.* Heermans, 13 Abb. Pr. N. S. (N. Y.) 1; Adkins *v.* Edwards, 83 Va. 316, 2 S. E. 439; Moran *v.* Johnston, 26 Gratt. (Va.) 108.

54. Matter of Hancock, 27 Hun (N. Y.) 575; Graves *v.* Maguire, 6 Paige (N. Y.) 379; Hart *v.* Albany, 3 Paige (N. Y.) 381.

Application by parties to another suit.— The preservation of the funds being the chief object, the court may entertain a motion for the appointment of a receiver, made by the plaintiff in another suit involving the same property. Lottimer *v.* Lord, 4 E. D. Smith (N. Y.) 183.

55. Eastman *v.* Cain, 45 Nebr. 48, 63 N. W. 123, construing Nebr. Code Civ. Proc. § 256.

Statute authorizing appointment pending action.— A statutory provision authorizing the appointment of a receiver to take charge of property during the pendency of the action authorizes such an appointment after an appeal has been taken. Mitchell *v.* Roland, 95 Iowa 314, 63 N. W. 606.

Statute authorizing collateral action.— Under a statute giving the court power to proceed after appeal on any matter embraced in the action and not affected by the order appealed from see State *v.* Second Judicial Dist. Ct., 22 Mont. 241, 56 Pac. 281, construing Mont. Code Civ. Proc. (1895), § 1730.

Discharge of receiver.— And, in a case where the appointment of a receiver is a matter ancillary to the main proceedings, the court may, after appeal has been taken, hear and determine a motion for the discharge of the receiver. Baughman *v.* Superior Ct., 72 Cal. 572, 14 Pac. 207.

56. State *v.* Board of Education, 19 Wash. 8, 52 Pac. 317, 67 Am. St. Rep. 706, 40 L. R. A. 317. See also *supra*, VIII, G.

If it should be conceded that the appellate court has no power to hear and determine the appeal during the term at which the judgment was rendered, yet it may, to prevent the execution of the judgment below, protect or enforce its jurisdiction by injunction. Ellis *v.* Harrison, (Tex. Civ. App. 1900) 56 S. W. 592.

57. King *v.* Tilford, 100 Ky. 564, 18 Ky. L. Rep. 978, 38 S. W. 888; Davis *v.* Connolly, 20 Ky. L. Rep. 411, 46 S. W. 679 (construing Ky. Civ. Code, § 747); Parker *v.* Judges, 12 Wheat. (U. S.) 561, 6 L. ed. 729 (holding that the circuit court might issue an injunction to stay proceedings on a judgment at law, notwithstanding that judgment was before the supreme court on a writ of error); Interstate Commerce Commission *v.* Louisville, etc., R. Co., 101 Fed. 146.

58. Thus, where a decree may have an intrinsic effect which can only be suspended by an affirmative order (as a decree dismissing an injunction suit and dissolving the injunction), it is held that the lower court may, pending the appeal, make such injunctive order for the purpose of preserving the *status in quo* of the parties. Jewett *v.* Dringer, 29 N. J. Eq. 199; Bullion, etc., Min. Co. *v.* Eureka Hill Min. Co., 5 Utah 182, 12 Pac. 660 assimilating the power of the supreme court of the territory of Utah to make such an order, on appeal to the supreme court of the United States, to the right of a circuit court of the United States on an appeal to the supreme court of the United States. But, on the other hand, it is held that, if a perpetual injunction has been denied, the court is without authority to grant an injunction pending the appeal. Campbell, etc., Co. *v.* Frost, 24 Misc. (N. Y.) 87, 52 N. Y. Suppl. 487: Eureka Consol. Min. Co. *v.* Richmond Min. Co., 5 Sawy. (U. S.) 121, 8 Fed. Cas. No. 4,549. And that the court has no power to revive or continue a temporary injunction obtained by plaintiff after judgment against him in the action, pending his appeal from the judgment see Spears *v.* Mathews, 66 N. Y. 127; Fellows *v.* Heermans, 13 Abb. Pr. N. S. (N. Y.) 1.

59. See *supra*, VIII.

60. Johnson *v.* Young, 13 Colo. 382, 22 Pac. 769, construing Colo. Civ. Code (1887), § 144, as to the right of the lower court to make such order. Statutory provisions also allow

XI. ASSIGNMENT OF ERRORS.[61]

A. Nature and Object. An assignment of errors is in the nature of a pleading, and, in the court of last resort, it performs the same office as a declaration or complaint in a court of original jurisdiction.[62] The object of an assignment of errors is to point out the specific errors claimed to have been committed by the court below, in order to enable the reviewing court and opposing counsel to see on what points plaintiff's counsel intends to ask a reversal of the judgment or decree, and to limit discussion to those points.[63]

B. Necessity—1. Statement and Extent of Rule. It is a rule of very general application, though subject to some exceptions to be noticed hereafter,[64] that a reviewing court will not consider any errors except those assigned.[65] A failure to

a vacation of injunction orders on the execution of an undertaking by the defendant. Williams *v.* Western Union Tel. Co., 65 How. Pr. (N. Y.) 326, construing N. Y. Code Civ. Proc. § 629.

Authority of appellate court, under statute, to issue restraining orders, see Leech *v.* State, 78 Ind. 570; Croll *v.* Franklin, 36 Ohio St. 316. And where, by statute, an injunction can be granted by that court only before which the action is pending, it must be sought, after the appeal, in the appellate court. Hyatt *v.* Clever, 104 Iowa 338, 73 N. W. 831, construing Iowa Code (1873), § 3389.

61. As to the parties entitled to assign error see *infra*, XVII. [3 Cyc.]

62. *Illinois.*— Ditch *v.* Sennott, 116 Ill. 288, 5 N. E. 395; Lang *v.* Max, 50 Ill. App. 465; Anderson *v.* Olin, 44 Ill. App. 294; Wilcox *v.* Moore, 44 Ill. App. 293; Waixel *v.* Harrison, 35 Ill. App. 571.

Indiana.— Williams *v.* Riley, 88 Ind. 290; Deputy *v.* Hill, 85 Ind. 75; Pruitt *v.* Edinburg, etc., Turnpike Co., 71 Ind. 244; Hutts *v.* Hutts, 62 Ind. 214; Hollingsworth *v.* State, 8 Ind. 257.

New Jersey.— Jersey Co. Associates *v.* Davison, 29 N. J. L. 415.

New Mexico.— Lamy *v.* Lamy, 4 N. M. 43, 12 Pac. 650.

New York.— Acker *v.* Ledyard, 1 Den. (N. Y.) 677.

Ohio.— Wells *v.* Martin, 1 Ohio St. 386.

63. Smith *v.* Williams, 36 Miss. 545; Randall *v.* Carlisle, 59 Tex. 69; Clements *v.* Hearne, 45 Tex. 415; Phillips, etc., Constr. Co. *v.* Seymour, 91 U. S. 646, 23 L. ed. 341. See also Squires *v.* Foorman, 10 Cal. 298.

64. See *infra*, XI, B, 3.

65. *Alabama.*— West *v.* Thomas, 97 Ala. 622, 11 So. 768; McNeill *v.* Kyle, 86 Ala. 338, 5 So. 461.

Arizona.— Maricopa County *v.* Jordan, (Ariz. 1900) 60 Pac. 693; Trimble *v.* Long, (Ariz. 1899) 56 Pac. 731.

California.— See Hutton *v.* Reed, 25 Cal. 478.

Colorado.— Barnett *v.* Jaynes, 26 Colo. 279, 57 Pac. 703; Rocky Mountain Nat. Bank *v.* McCaskill, 16 Colo. 408, 25 Pac. 821.

Connecticut.— Ives *v.* Finch, 28 Conn. 112; Tolland *v.* Willington, 26 Conn. 578.

Florida.— Dell *v.* Marvin, 41 Fla. 221, 26 So. 188, 79 Am. St. Rep. 171, 45 L. R. A. 201.

Georgia.— Collins *v.* Carr, 111 Ga. 867, 36 S. E. 959.

Idaho.— Purdy *v.* Steel, 1 Ida. 216.

Illinois.— Watson *v.* Le Grand Skating Rink Co., 177 Ill. 203, 52 N. E. 317; Davis *v.* Lang, 153 Ill. 175, 38 N. E. 635; Knickerbocker *v.* Crosby, 86 Ill. App. 246; Kelley *v.* Heath, etc., Mfg. Co., 66 Ill. App. 528.

Indiana.— Pritchett *v.* McGaughey, 151 Ind. 638, 52 N. E. 397; Starkey *v.* Starkey, 136 Ind. 349, 36 N. E. 287.

Iowa.— Winebrenner *v.* Brunswick-Balke-Collender Co., 82 Iowa 741, 47 N. W. 1089; Wood *v.* Whitton, 66 Iowa 295, 19 N. W. 907, 23 N. W. 675.

Kentucky.— Louisville, etc., R. Co. *v.* Sullivan, 81 Ky. 624, 50 Am. Rep. 186; Com. *v.* Hughes, 13 Bush (Ky.) 349.

Louisiana.— Patterson *v.* Owen, 20 La. Ann. 141; Roumage *v.* Durrive, 20 La. Ann. 21.

Michigan.— Supe *v.* Francis, 49 Mich. 266, 13 N. W. 584; Monroe *v.* Ft. Wayne, etc., R. Co., 28 Mich. 272. See also Burnham *v.* Van Gelder, 32 Mich. 490.

Minnesota.— Rushfeldt *v.* Shave, 37 Minn. 282, 33 N. W. 791; Freeman *v.* Rhodes, 36 Minn. 297, 30 N. W. 891.

Mississippi.— Smith *v.* Williams, 36 Miss. 545.

Missouri.— Gifford *v.* Weber, 38 Mo. App. 595.

Montana.— Murray *v.* Heinze, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714; State *v.* Whaley, 16 Mont. 574, 41 Pac. 852.

Nebraska.— Vix *v.* Whyman, 58 Nebr. 190, 78 N. W. 497; Stuart *v.* Staplehurst Bank, 57 Nebr. 569, 78 N. W. 298.

Nevada.— Boynton *v.* Longley, 19 Nev. 69, 6 Pac. 437, 3 Am. St. Rep. 781; Clarke *v.* Lyon County, 8 Nev. 181.

New Hampshire.—Bean *v.* Burleigh, 4 N. H. 550.

New Jersey.— State *v.* Lewis, 39 N. J. L. 501.

North Carolina.— Durham Fertilizer Co. *v.* Black, 114 N. C. 591, 19 S. E. 642; Thornton *v.* Brady, 100 N. C. 38, 5 S. E. 910.

North Dakota.— Nichols, etc., Co. *v.* Stangler, 7 N. D. 102, 72 N. W. 1089; Schmitz *v.* Heger, 5 N. D. 165, 64 N. W. 943; Devils Lake First Nat. Bank *v.* Merchants Nat. Bank, 5 N. D. 161, 64 N. W. 941.

Ohio.— Pollock *v.* Cohen, 32 Ohio St. 514; Booth *v.* Shepherd, 8 Ohio St. 243.

assign errors is not a mere matter of form that can be waived, but is one of substance,[66] and, as a general rule, errors not assigned are considered to have been waived.[67] The rule applies to appeals on questions of law reserved [68] as well as to where the case has come up on certificate from the trial court.[69] So, too, the rule applies to suits in equity as well as to actions at law.[70]

2. Applications of Rule — a. In General. Applying the rule that errors not assigned will not be noticed, it has been held that objections that the trial court erroneously taxed the costs,[71] denied a motion to direct verdict,[72] denied a motion to dismiss,[73] denied a motion to strike a bill of exceptions from the files,[74] failed to file conclusions of law and fact,[75] failed to sign a statement of facts,[76] failed to sign exceptions until after expiration of time for so signing,[77] granted a nonsuit,[78] remanded a cause to the court from which a change of venue had been taken,[79] overruled a motion for a *venire de novo*,[80] proceeded to hear a cause without neces-

Oklahoma.— Bradford *v.* Territory, 1 Okla. 366, 34 Pac. 66.

Oregon.— Weissman *v.* Russell, 10 Oreg. 73; McKay *v.* Freeman, 6 Oreg. 449.

Pennsylvania.— Fox *v.* Fox, 96 Pa. St. 60; Dorman *v.* Pittsburgh, etc., Turnpike Road Co., 3 Watts (Pa.) 126.

South Carolina.— Fields *v.* Hurst, 20 S. C. 282.

Texas.— San Antonio, etc., R. Co. *v.* Gurley, (Tex. Civ. App. 1898) 45 S. W. 604; Kahler *v.* Carruthers, 18 Tex. Civ. App. 216, 45 S. W. 160; Lynn *v.* McGregor First Nat. Bank, (Tex. Civ. App. 1897) 40 S. W. 228.

Vermont.— See Banfill *v.* Banfill, 27 Vt. 557.

Washington.— Sengfelder *v.* Hill, 21 Wash. 371, 58 Pac. 250; Doran *v.* Brown, 16 Wash. 703, 48 Pac. 251.

Wisconsin.— Grimm *v.* Washburn, 100 Wis. 229, 75 N. W. 984.

United States.— Findlay *v.* Pertz, 74 Fed. 681, 43 U. S. App. 383, 20 C. C. A. 662; Randolph *v.* Allen, 73 Fed. 23, 41 U. S. App. 117, 19 C. C. A. 353.

See 3 Cent. Dig. tit. "Appeal and Error," § 2968 *et seq.*

Reason for the rule.— It has been well said that "to require the appellee or the court to hunt through the record for every conceivable error which the court below may have committed, when none has been pointed out by the party complaining of the judgment, would obviously be unreasonable and oppressive on the party recovering judgment, and most burthensome on this court, unnecessarily impeding the progress of its business; and, by the confusion and uncertainty which it would beget as to the questions on which the case was decided in the court below, destroy its character as an appellate tribunal; and, by the multiplicity of the questions for discussion, tend much more to confusion and error in its own decisions than the correction of errors which may in fact have occurred in the District Court." Clements *v.* Hearne, 45 Tex. 415, 416.

On appeal from an intermediate court.— In Colorado a writ of error to the court of appeals will be dismissed where plaintiff in error does not file a new brief and a new assignment of errors in the supreme court. Munn *v.* Corbin, 24 Colo. 381, 51 Pac. 1002.

In Indiana, on appeal to the supreme court from a judgment of affirmance in the superior court, an assignment that the court below at general term erred in affirming the judgment and finding of the court at special term, presents for review all the questions which were properly presented at the general term. Alexander *v.* North-Western Christian University, 57 Ind. 466; Indianapolis Mfg., etc., Union *v.* Cleveland, etc., R. Co., 45 Ind. 281; Carney *v.* Street, 41 Ind. 396.

In Kentucky it has been held that, on appeal to the court of appeals from the superior court, no assignment of errors different from that used in the superior court will be allowed. Emerson *v.* Dye, 81 Ky. 660, 5 Ky. L. Rep. 734; Boaz *v.* Milliken, 4 Ky. L. Rep. 700.

66. Ditch *v.* Sennott, 116 Ill. 288, 5 N. E. 395; Jesse French Piano, etc., Co. *v.* Meehan, 77 Ill. App. 577; Lang *v.* Max, 50 Ill. App. 465; Conlon *v.* Manning, 43 Ill. App. 363.

67. Lehman *v.* Meyer, 67 Ala. 396; Feagan *v.* Kendall, 43 Ala. 628; Pollock *v.* Cohen, 32 Ohio St. 514; Lewis *v.* Steiner, 84 Tex. 364, 19 S. W. 516.

68. Elder *v.* Sidwell, 66 Ind. 316.

69. Kistner *v.* Conery, 109 Iowa 439, 80 N. W. 522.

70. See cases cited *supra*, note 64 *et seq.*

In one state, however, the rule is limited by special statutory enactment. See *infra*, XI, B, 3, c.

71. Durham *v.* Cantrell, 103 Ga. 166, 29 S. E. 708.

72. Marshalltown First Nat. Bank *v.* Wright, 84 Iowa 728, 48 N. W. 91, 50 N. W. 23.

73. Runnals *v.* Aycock, 78 Ga. 553, 3 S. E. 657.

74. Steele *v.* Grand Trunk Junction R. Co., 125 Ill. 385, 17 N. E. 483.

75. Hess *v.* Dean, 66 Tex. 663, 2 S. W. 727.

76. Ennis Mercantile Co. *v.* Wathen, 93 Tex. 622, 57 S. W. 946; Reagan *v.* Copeland, 78 Tex. 551, 14 S. W. 1031.

77. Landrum *v.* Guerra, (Tex. Civ. App. 1894) 28 S. W. 358.

78. Toulouse *v.* Pare, 103 Cal. 251, 37 Pac. 146; Miller *v.* Wade, 87 Cal. 410, 25 Pac. 487.

79. Davis *v.* Binford, 58 Ind. 457.

80. Windfall Natural Gas, etc., Co. *v.* Terwilliger, 152 Ind. 364, 53 N. E. 284.

sary parties,[81] refused to allow the filing of an answer to a motion,[82] refused to grant a continuance,[83] refused to try causes of action separately,[84] required, on its own motion, the jury to find specially on certain questions;[85] that the amount of recovery is excessive;[86] that the court refused a motion to quash;[87] that there was a non-joinder of the parties;[88] that there was, without consent of defendant, a second trial at the same term;[89] that, in an action to vacate a sale made under a trust deed, the trustee was not present at the sale, are all waived if not assigned as errors.[90] So, objections to the regularity of a call for assessments on corporate stock, which objections have no assignments of error to rest on, will not be considered,[91] and errors and irregularities occurring after the issuance of a tax-deed, as invalidating the deed, such errors and irregularities not being presented by the assignments of error or raised by the pleading, will not be considered.[92]

b. Rulings in Respect to Pleadings.[93] In regard to questions in relation to pleadings it has been held that the following objections will not be considered unless assigned as error: striking out portions of an answer;[94] striking out or refusing to strike out parts of pleas;[95] refusal to strike out amended complaint;[96] a ruling on exceptions to a disclaimer by defendant in trespass to try title;[97] the dismissal of a bill absolutely, instead of without prejudice for want of a necessary party;[98] a ruling on a demurrer to a petition for multifariousness;[99] and variance between the pleadings and proof.[1] So, it has been held that, where it appears that the petition was to have been amended by consent, an objection that the petition was not actually amended must, to be noticed, be assigned as error.[2] And an objection to the lack of a statutory prayer in a complaint will not be entertained on appeal, there being no assignment of error based on the defect.[3] It is also well settled in a number of jurisdictions that objections to rulings on the sufficiency of a complaint or answer to state a cause of action or defense will not, in the absence of proper assignments of error, be noticed,[4] but in other jurisdictions the contrary view obtains.[5]

81. Nichols *v.* Murphy, 36 Ill. App. 205.
82. Atkison *v.* Dixon, 96 Mo. 582, 10 S. W. 163.
83. Meyers *v.* Andrews, 87 Ill. 433.
84. Cobble *v.* Tomlinson, 50 Ind. 550.
85. Wood *v.* Whitton, 66 Iowa 295, 19 N. W. 907, 23 N. W. 675.
86. Wisconsin Cent. R. Co. *v.* Wieczorek, 51 Ill. App. 498; Kenwood Bridge Co. *v.* Dunderdale, 50 Ill. App. 581; Horan *v.* People, 10 Ill. App. 21; Miller *v.* Miller, 4 Ky. L. Rep. 364; Hammond *v.* Edwards, 56 Nebr. 631, 77 N. W. 75; Montgomery *v.* Albion Nat. Bank, 50 Nebr. 652, 70 N. W. 239; Oliver *v.* Chicago, etc., R. Co., 40 Nebr. 845, 59 N. W. 351; Classen *v.* Elmendorf, (Tex. Civ. App. 1898) 47 S. W. 1023; Campbell *v.* Fisher, (Tex. Civ. App. 1893) 24 S. W. 661.
87. Jackson *v.* Warren, 32 Ill. 331; Nafe *v.* Leiter, 103 Ind. 138, 2 N. E. 317; Kratz *v.* Dawson, 3 Wash. Terr. 100, 13 Pac. 663.
88. Hume *v.* Robinson, 23 Colo. 359, 47 Pac. 271.
89. Orr *v.* Bobb, Ky. Dec. 244.
90. Kennedy *v.* Dunn, 58 Cal. 339.
91. Monroe *v.* Ft. Wayne, etc., R. Co., 28 Mich. 272.
92. Barnett *v.* Jaynes, 26 Colo. 279, 57 Pac. 703.
93. See cases cited *infra*, notes 94–99, 1–4; and 3 Cent. Dig. tit. "Appeal and Error," § 2973.
94. New Albany *v.* White, 100 Ind. 206; Aspegren *v.* Kotas, 91 Iowa 497, 50 N. W. 273.
95. Cobble *v.* Tomlinson, 50 Ind. 550.
96. Cleveland Stone Co. *v.* Monroe County Oölitic Stone Co., 11 Ind. App. 423, 39 N. E. 172.
97. Blue *v.* Chandler, 17 Tex. 126.
98. Shockley *v.* Niess, 3 J. J. Marsh. (Ky.) 96.
99. Worden *v.* California Fig Syrup Co., 102 Fed. 334, 42 C. C. A. 383.
1. Slater *v.* Chapman, 67 Mich. 523, 35 N. W. 106, 11 Am. St. Rep. 593; Schoenfeld *v.* Heman, 1 Cinc. Super. Ct. (Ohio) 401; Grimm *v.* Washburn, 100 Wis. 229, 75 N. W. 984.
2. Booth *v.* Shepherd, 8 Ohio St. 243.
3. Smith *v.* Soper, 12 Colo. App. 264, 55 Pac. 195.
4. *Illinois.*— Falkenau *v.* Abrahamson, 66 Ill. App. 352.
Indiana.— Pritchett *v.* McGaughey, 151 Ind. 638, 52 N. E. 397; Louisville, etc., Ferry Co. *v.* Nolan, 135 Ind. 60, 34 N. E. 710.
Michigan.— Nelson *v.* Dutton, 51 Mich. 416, 16 N. W. 791.
Oklahoma.— Bradford *v.* Territory, 1 Okla. 366, 34 Pac. 66.
Pennsylvania.— Hoffer *v.* Wightman, 5 Watts (Pa.) 205.
Texas.— Pendleton *v.* Colville, 49 Tex. 525; Willard *v.* Guttman, (Tex. Civ. App. 1897) 43 S. W. 901.
Wisconsin.— Grimm *v.* Washburn, 100 Wis. 229, 75 N. W. 984.
See also Highland Ave., etc., R. Co. *v.* Miller, 120 Ala. 535, 24 So. 955; Erwin *v.* Reese, 54 Ala. 589.
5. See *infra*, XI, B, 3.

c. Rulings in Respect to Evidence.[6] So, it has also been held that error in the admission[7] or exclusion of evidence,[8] or in refusing to strike out evidence,[9] will not be noticed unless properly assigned.[10] Nor will the court consider whether the evidence is sufficient to support the verdict when no assignment of error is made in respect thereto.[11]

d. Rulings in Respect to Instructions. Error in the giving[12] or refusing of instructions[13] cannot, in the absence of an assignment of error, be corrected, and this is true in respect to the refusal of instructions although the record shows the refusal and an exception taken thereto.[14]

e. Findings. Objections to findings cannot be considered in the absence of assignments of error thereon.[15]

6. See cases cited *infra*, notes 7–11; and 3 Cent. Dig. tit. "Appeal and Error," § 2974.

7. *Indiana.*— Leever *v.* Hamill, 57 Ind. 423.

Iowa.— Bixby *v.* Carskaddon, 70 Iowa 726, 29 N. W. 626.

Michigan.— Noble *v.* St. Joseph, etc., St. R. Co., 98 Mich. 249, 57 N. W. 126.

Nebraska.— Hedrick *v.* Strauss, 42 Nebr. 485, 60 N. W. 928; Wiseman *v.* Ziegler, 41 Nebr. 886, 60 N. W. 320; Kirkendall *v.* Davis, 41 Nebr. 285, 59 N. W. 915.

Texas.— Texas, etc., R. Co. *v.* Berry, 67 Tex. 238, 5 S. W. 817.

United States.— Murray *v.* Louisiana, 163 U. S. 101, 16 S. Ct. 990, 41 L. ed. 87.

8. Kehoe *v.* Allen, 92 Mich. 464, 52 N. W. 740, 31 Am. St. Rep. 608; Andre *v.* Hardin, 32 Mich. 324; Anderson *v.* Anderson, 23 Tex. 639; Swearingen *v.* Reed, 2 Tex. Civ. App. 364, 21 S. W. 383.

9. Sherman *v.* Shaw, 9 Nev. 148.

10. An objection to the admission in evidence of a deposition cannot be considered when such admission was not assigned as error. Stewart *v.* Register, 108 N. C. 588, 13 S. E. 234; Smith *v.* McGregor, 96 N. C. 101, 1 S. E. 695.

Effect of parol evidence on validity of instrument.— When no assignment of error is made as to the effect of certain parol evidence on the validity of an instrument, the appellate court cannot consider such effect. Johnson *v.* Robinson, 68 Tex. 399, 4 S. W. 625.

11. *California.*— Winterburn *v.* Chambers, 91 Cal. 170, 27 Pac. 658; Malone *v.* Del Norte County, 77 Cal. 217, 19 Pac. 422.

Florida.— Jordan *v.* Petty, 5 Fla. 326.

Massachusetts.—Prescott *v.* Tarbell, 1 Mass. 204.

Nebraska.— Wiseman *v.* Ziegler, 41 Nebr. 886, 60 N. W. 320.

North Carolina.— Dunavant *v.* Caldwell, etc., R. Co., 122 N. C. 999, 29 S. E. 837; Collins *v.* Young, 118 N. C. 265, 23 S. E. 1005, holding that findings of fact by the court below are not reviewable when no exception is filed thereto on the ground that there was no evidence to support the finding.

North Dakota.— Colby *v.* McDermont, 6 N. D. 495, 71 N. W. 772.

Texas.— Galveston, etc., R. Co. *v.* Clark, 21 Tex. Civ. App. 167, 51 S. W. 276; Ft. Worth, etc., R. Co. *v.* Osborne, (Tex. Civ. App. 1894) 26 S. W. 274; Campbell *v.* Kone, (Tex. Civ. App. 1894) 26 S. W. 231.

See 3 Cent. Dig. tit. "Appeal and Error," § 2978.

12. *Georgia.*— Malone *v.* Robinson, 77 Ga. 719.

Iowa.— Arnold *v.* Barkalow, 73 Iowa 183, 34 N. W. 807; Montgomery *v.* Des Moines, 55 Iowa 101, 7 N. W. 421.

Michigan.— Dresser *v.* Blair, 28 Mich. 501.

Montana.— Murray *v.* Heinze, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714.

Nebraska.— Richardson, etc., Co. *v.* Winter, 38 Nebr. 288, 56 N. W. 886.

Pennsylvania.— Vandevort *v.* Wheeling Steel, etc., Co., 194 Pa. St. 118, 45 Atl. 86.

Texas.— Smith *v.* Whitfield, 67 Tex. 124, 2 S. W. 822; Norvell *v.* Phillips, 46 Tex. 161. See also Washington *v.* Eastham, (Tex. Civ. App. 1900) 56 S. W. 78, in which it was said that an instruction not constituting fundamental error cannot be reviewed where there is no assignment of error upon that point.

See 3 Cent. Dig. tit. "Appeal and Error," § 2975.

Effect of statute making exceptions unnecessary.— Notwithstanding a statutory provision that if there is error in the instructions of the trial judge they shall be deemed excepted to without the filing of any formal objections, the supreme court will not, without a specific assignment of error, consider a general exception to the charge as given. McKinnon *v.* Morrison, 104 N. C. 354, 10 S. E. 513; Lindsey *v.* Sanderlin, 104 N. C. 331, 10 S. E. 518; Burnett *v.* Wilmington, etc., R. Co., 120 N. C. 517, 26 S. E. 819.

13. Indianapolis, etc., R. Co. *v.* Rhodes, 76 Ill. 285; Gove *v.* Blevins, 61 Ill. App. 591; Richardson, etc., Co. *v.* Winter, 38 Nebr. 288, 56 N. W. 886; Davis *v.* Duval, 112 N. C. 833, 17 S. E. 528; Findlay *v.* Pertz, 74 Fed. 681, 43 U. S. App. 383, 20 C. C. A. 662: and see 3 Cent. Dig. tit. "Appeal and Error," § 2975.

14. Indianapolis, etc., R. Co. *v.* Rhodes, 76 Ill. 285.

15. *California.*— Allstead *v.* Nicol, 123 Cal. 594, 56 Pac. 452; Citizens' Bank *v.* Jones, 121 Cal. 30, 53 Pac. 354.

Indiana.— Brunson *v.* Henry, 152 Ind. 310, 52 N. E. 407; Windfall Natural Gas, etc., Co. *v.* Terwilliger, 152 Ind. 364, 53 N. E. 284.

North Carolina.— Battle *v.* Mayo, 102 N. C. 413, 9 S. E. 384; Green *v.* Castleberry, 77 N. C. 164.

Texas.— Searcy *v.* Grant, 90 Tex. 97, 37 S. W. 320; Campbell *v.* Kone, (Tex. Civ. App.

f. Judgment or Decree. Errors in a judgment or decree of an incidental nature, will not be considered unless properly assigned.[16]

3. Exceptions to Rule — a. In General. There are some exceptions to the general rule that errors not assigned will not be noticed. In many jurisdictions it is well settled that the reviewing court will notice plain errors,[17] or errors which are fundamental or apparent upon the face of the record.[18]

b. What Errors Are Fundamental or Apparent of Record. Want of jurisdiction over the subject-matter is an error which will be noticed even though it is

1894) 26 S. W. 231; Swearingen *v.* Reed, 2 Tex. Civ. App. 364, 21 S. W. 383.

United States.— Metropolitan Nat. Bank *v.* Rogers, 53 Fed. 776, 3 U. S. App. 406, 3 C. C. A. 666.

See 3 Cent. Dig. tit. "Appeal and Error," § 2975.

Sufficiency of findings to support the judgment cannot be considered where no error is assigned in respect thereto. Goulet *v.* Perry, 123 Mich. 264, 81 N. W. 1072.

16. Reynolds *v.* Reynolds, 15 Conn. 83; Harris *v.* Monroe Cattle Co., 84 Tex. 674, 19 S. W. 869; Johnson *v.* Richardson, 52 Tex. 481; Galveston City R. Co. *v.* D. A. Tompkins Co., (Tex. Civ. App. 1894) 26 S. W. 774; and see 3 Cent. Dig. tit. "Appeal and Error," § 2977.

Illustrations.— Thus, the court will not consider error as to costs (Harris *v.* Monroe Cattle Co., 84 Tex. 674, 19 S. W. 869); error in entering judgment against all of the defendants (Patrick Red Sandstone Co. *v.* Skotman, 1 Colo. App. 323, 29 Pac. 21); error in not setting out the full names of the parties for and against whom the judgment is rendered (Johnson *v.* Richardson, 52 Tex. 481); or in not allowing damages on the dissolution of an injunction (Galveston City R. Co. *v.* D. A. Tompkins Co., (Tex. Civ. App. 1894) 26 S. W. 774).

17. Lee *v.* Dozier, 40 Miss. 477; Koontz *v.* Kaufman, 31 Mo. App. 397; Neppach *v.* Jones, 28 Oreg. 286, 39 Pac. 999, 42 Pac. 519; Medynski *v.* Theiss, 36 Oreg. 397, 59 Pac. 871; U. S. *v.* Tennessee, etc., R. Co., 176 U. S. 242, 20 S. Ct. 370, 44 L. ed. 452; U. S. *v.* Pena, 175 U. S. 500, 20 S. Ct. 165, 44 L. ed. 251; Independent School Dist. *v.* Hall, 106 U. S. 428, 1 S. Ct. 417, 27 L. ed. 237; Worden *v.* California Fig Syrup Co., 102 Fed. 334, 42 C. C. A. 383; Western North Carolina Land Co. *v.* Scaife, 80 Fed. 352, 42 U. S. App. 439, 25 C. C. A. 461.

18. *Arizona.*— Maricopa County *v.* Jordan, (Ariz. 1900) 60 Pac. 693; Trimble *v.* Long, (Ariz. 1899) 56 Pac. 731.

Connecticut.— Crandall *v.* State, 10 Conn. 339.

Iowa.— Voorhees *v.* Arnold, 108 Iowa 77, 78 N. W. 795; Marshalltown First Nat. Bank *v.* Wright, 84 Iowa 728, 48 N. W. 91, 50 N. W. 23.

Louisiana.— State *v.* Balize, 38 La. Ann. 542; Bossier *v.* Carradine, 18 La. Ann. 261.

North Carolina.— Huntsman *v.* Linville River Lumber Co., 122 N. C. 583, 29 S. E. 838; Durham Fertilizer Co. *v.* Black, 114 N. C. 591, 19 S. E. 642; Thornton *v.* Brady, 100 N. C. 38, 5 S. E. 910; Allen *v.* Griffin, 98 N. C. 120, 3 S. E. 837 — applying the rule in this state only to errors apparent upon the face of the record proper.

Ohio.— Gittings *v.* Baker, 2 Ohio St. 21.

Pennsylvania.— Arthurs *v.* Smathers, 38 Pa. St. 40; Hutchinson *v.* Campbell, 25 Pa. St. 273; Rodovinsky *v.* Roxford Knitting Co., 5 Pa. Super. Ct. 636.

Tennessee.— Massingale *v.* Jones, 3 Hayw. (Tenn.) 36.

Texas.— Hansen *v.* Yturria, (Tex. Civ. App. 1898) 48 S. W. 795; McCord *v.* Holloman, (Tex. Civ. App. 1898) 46 S. W. 114.

Virginia.— Saunders *v.* Griggs, 81 Va. 506.

See 3 Cent. Dig. tit. "Appeal and Error," § 2968 *et seq.*

In Alabama no error except want of jurisdiction will be considered unless assigned, and this is true even though the error be apparent of record. Tuskaloosa Cotton-Seed Oil Co. *v.* Perry, 85 Ala. 158, 4 So. 635; Lehman *v.* Meyer, 67 Ala. 396.

In Florida it is held that the reviewing court can take notice of an error of law appearing on the face of the record, but not of an error of fact unless it is a matter upon which an appeal or writ of error is based, and regularly assigned for error in the reviewing court. If there is such error in fact existing in the case it must be brought to the notice of the circuit court by writ of error coram vobis, or other proper remedy. Jordan *v.* Petty, 5 Fla. 326.

In Louisiana no assignment of errors is necessary when the case comes up with the certificate of the clerk of the court below that the record contains a true, correct, and complete transcript of all the papers filed, of all the evidence, and all the proceedings had in the suit, but in that state the civil law, and practice based upon it, largely obtain. Harrison *v.* Soulabere, 52 La. Ann. 707, 27 So. 111; Warfield *v.* Hamlet, 28 La. Ann. 814; Bossier *v.* Carradine, 18 La. Ann. 261; Kearny *v.* Nixon, 17 La. Ann. 318; Bouligny *v.* Fortier, 17 La. Ann. 121.

In Michigan it has been held that special assignments of error are not required in certiorari cases which are removed to the supreme court by writ of error, those assignments contained in the affidavit of certiorari being all that are necessary. Chicago, etc., R. Co. *v.* Campbell, 47 Mich. 265, 11 N. W. 152.

In North Carolina it has been held that on appeal from the judgment in a case tried on an agreed statement of facts no particular assignment of error is necessary. Davenport *v.* Leary, 95 N. C. 203; Chamblee *v.* Baker, 95 N. C. 98.

not assigned.[19] In some of the jurisdictions no assignment of error is necessary to present for review the sufficiency of the complaint to state a cause of action, or of the answer to state a defense.[20]

c. Where the Cause Is One in Equity. Under the Iowa code, the only purpose of an assignment of error in an equitable action is to point out the errors of law.[21] But in Vermont the statute authorizing the reversal of the decree on appeals for any error assigned or found does not imply that the party appealing from the decree must make a formal assignment of errors.[22]

C. Contents[23]— **1. Designation of Parties.**[24] Like the declaration or complaint in a court of original jurisdiction, the assignment of errors should state the names

19. Want of jurisdiction of subject-matter. — *Alabama.*— Tuskaloosa Cotton-Seed Oil Co. *v.* Perry, 85 Ala. 158, 4 So. 635; McDaniel *v.* Moody, 3 Stew. (Ala.) 314.

Indiana.— But see, *contra*, in this state, where it is held that, though a want of jurisdiction over the subject-matter is not waived by failure to demur to the complaint, such lack must at least be assigned as error on the appeal or it cannot be raised in the appellate court. McGoldrick *v.* Slevin, 43 Ind. 522; Lane *v.* Taylor, 40 Ind. 495.

Maine.— But see, *contra*, in this state, where it has been held that, on appeal from the probate court and in the absence of fraud, the question of jurisdiction of the cause can be raised only when contained in the reasons assigned for the appeal. Hughes *v.* Decker, 38 Me. 153.

North Carolina.— See also Davis *v.* Council, 92 N. C. 725.

Oregon.— Weissman *v.* Russell, 10 Oreg. 73; State *v.* McKinnon, 8 Oreg. 493.

Texas.— Richardson *v.* Knox, 14 Tex. Civ. App. 402, 37 S. W. 189; Cain *v.* Culbreath, (Tex. Civ. App. 1896) 35 S. W. 809.

20. Shute *v.* Keyser, (Ariz. 1892) 29 Pac. 386; Wood *v.* Henderson, 2 La. Ann. 220; Sneed *v.* Moodie, 24 Tex. 159; Hall *v.* Johnson, (Tex. Civ. App. 1897) 40 S. W. 46. But see Carson *v.* Russell, 26 Tex. 452.

Other illustrations.— The sale of a tract of land worth ten or twelve thousand dollars on execution for seven hundred and thirty-two dollars (Atcheson *v.* Hutchison, 51 Tex. 223), and the rendition of a judgment on improper pleadings (Holloway Seed Co. *v.* City Nat. Bank, 92 Tex. 187, 47 S. W. 95, 516 [*reversing* 47 S. W. 77]), have been held to be fundamental errors.

On the other hand, a defective return upon a scire facias is not a fundamental error. Evans *v.* State, 25 Tex. 80. And it has been held that a mixed question of law and fact, which requires the examination of both the pleading and evidence, is not error of law apparent of record, which the court can consider without being assigned. Neyland *v.* Bendy, 69 Tex. 711, 7 S. W. 497. So, the denial of a motion to set aside a verdict must be assigned as error if appellant desires a review of the ruling. Glass *v.* Meyer, 124 Ala. 332, 26 So. 890.

21. Smith *v.* Wellslager, 105 Iowa 140, 74 N. W. 914, construing Iowa Code (1897), § 3652.

In Iowa the necessity and effect of an assignment of errors is discussed in Smith *v.* Wellslager, 105 Iowa 140, 74 N. W. 914, 916, the court saying: "It [an assignment of errors] is not necessary in event of the erroneous rulings on the admissibility of evidence, for these can only be determined on trial *de novo*; for, if all the evidence is not before the court, the rulings, even if erroneous, may well be deemed to have been without prejudice, owing to the presumption in favor of the correctness of the court's conclusions. Nor where judgment is on pleadings is an assignment of error required. Heidlebaugh *v.* Wagner, 72 Iowa 601, 34 N. W. 439; Early *v.* Burt, 68 Iowa 716, 28 N. W. 35. See also Jordan *v.* Wimer, 45 Iowa 65. But the ruling on a motion or demurrer can only be brought to the attention of this court on error assigned. Marshall *v.* Westrope, 98 Iowa 324, 67 N. W. 257; Exchange Bank *v.* Pottorfe, 96 Iowa 354, 65 N. W. 312; Fink *v.* Mohn, 85 Iowa 739, 52 N. W. 506; Patterson *v.* Jack, 59 Iowa 632, 13 N. W. 724; Powers *v.* O'Brien County, 54 Iowa 501, 6 N. W. 720. The utility of an assignment of error in a case tried in equity seems to be limited to some rulings affecting the pleadings or the decree entered. If the decree, for instance, is contrary to the finding of facts therein contained, it would seem it might be corrected on assignment of errors. And, where the relief granted in the decree is not warranted by the pleadings, might not the remedy be obtained on appeal, through an assignment of error, without the complete record?"

22. Bishop *v.* Day, 13 Vt. 116, 117, wherein it is said: "All that is . . . required is that the court shall look into the whole case, and 'shall examine all errors, that shall be assigned or found,' i. e., all errors which shall be pointed out by the party objecting to the decree, or which in any other way shall come to the knowledge of the court." *Compare*, also, Vt. Stat. (1894), § 981 *et seq.*

23. See *infra*, XI, C, 1–6; and 3 Cent. Dig. tit. "Appeal and Error," § 2990 *et seq.*

Forms of assignments of errors are set out in full, in part, or in substance in Toledo, etc., R. Co. *v.* East Saginaw, etc., R. Co., 72 Mich. 206, 40 N. W. 436; Niles *v.* Rhodes, 7 Mich. 374; Norton *v.* Sherman, 58 Mich. 549, 25 N. W. 510; Healey *v.* Toppan, 45 N. H. 243, 86 Am. Dec. 159; Copp *v.* Copp, 20 N. H. 284; White *v.* Johnson, 27 Oreg. 282, 40 Pac. 511; Fletcher *v.* Rhode Island, 5 How. (U. S.) 540, 11 L. ed. 272.

24. See cases cited *infra*, notes 25–27; and 3 Cent. Dig. tit. "Appeal and Error," § 2992.

of all the parties;[25] but if all the names are given in the body of the assignment it will be sufficient, even though the name of one party is omitted from the title of the cause.[26] The party complaining should place his name before and above that of the party complained of.[27]

2. Specification of Errors — a. In General[28] — (1) *Each Error Must Be Separately Assigned.* It is unambiguously stated in a very large number of decisions that each error relied on must be separately and distinctly specified — that no one assignment shall embrace more than one specification of error — and that on a failure to comply with this requirement the court will, as a general rule, refuse to consider the assignment.[29]

25. Hutts *v.* Martin, 141 Ind. 701, 41 N. E. 329; Rosenbower *v.* Schuetz, 141 Ind. 44, 40 N. E. 256; Ferguson *v.* Despo, 8 Ind. App. 523, 34 N. E. 575; and 3 Cent. Dig. tit. "Appeal and Error," § 2992.

An assignment of error entitled "The Estate of" a person named, deceased, against a certain named defendant, has been held to be insufficient. Peden *v.* Noland, 45 Ind. 354.

Full names of the parties should be given. State *v.* Delano, 34 Ind. 52. Thus, it has been held that an assignment of error giving the names of the parties as "Wm. H. Burke *v.* The State" is insufficient, the full name of the state not being given. Burke *v.* State, 47 Ind. 528. This, however, would seem to be an over-refinement; and, in some jurisdictions, such a designation of the parties would be a sufficient compliance with the statute. See N. C. Code (1883), §§ 1183, 1188.

The mention of one name, with the addition of "et al.," is insufficient. Big Four Bldg., etc., Assoc. *v.* Olcott, 146 Ind. 176, 45 N. E. 64; Snyder *v.* State, 124 Ind. 335, 24 N. E. 891; Todd *v.* Wood, 80 Ind. 429; Lang *v.* Cox, 35 Ind. 470; Brookover *v.* Forst, 31 Ind. 255.

Use of initials for christian names. — Although a designation of parties in an assignment of errors by initials of their christian names will in general be insufficient under Supreme Court Rules, No. 6 [55 N. E. iv], requiring the names of the parties to be given in full, and a ground for dismissal of the appeal, this designation will nevertheless be sufficient where the parties are so designated in the pleadings filed by themselves. Goodrich *v.* Stangland, 155 Ind. 279, 58 N. E. 148.

Where parties do not wish to appeal they may decline to do so, and their names will be considered stricken from the assignment of errors. Snyder *v.* State, 124 Ind. 335, 24 N. E. 891.

Word "appellee" instead of "appellant." — A mere clerical mistake in the use of the word "appellee" instead of the word "appellant" in an assignment of errors will not prevent a consideration of the real question intended to be presented. Landon *v.* White, 101 Ind. 249; O'Bannon *v.* Cord, 3 Ky. L. Rep. 183.

26. Ferguson *v.* Despo, 8 Ind. App. 523, 34 N. E. 575.

27. Fisher *v.* Allison, 46 Ind. 592; Wickham *v.* Hess, 38 Ind. 183.

28. An assignment containing a mere abstract proposition of law will not be considered for any purpose. Davis *v.* Harper, 14 App. Cas. (D. C.) 463.

29. *Alabama.* — National Fertilizer Co. *v.* Holland, 107 Ala. 412, 18 So. 170, 54 Am. St. Rep. 101; Mobile *v.* Murphree, 96 Ala. 141, 11 So. 201.

Colorado. — Bitter *v.* Mouat Lumber, etc., Co., (Colo. 1899) 59 Pac. 403; Hanna *v.* Barker, 6 Colo. 303.

Connecticut. — Norwalk *v.* Ireland, 68 Conn. 1, 35 Atl. 804; Simmonds *v.* Holmes, 61 Conn. 1, 23 Atl. 702, 15 L. R. A. 253.

Dakota. — McCormack *v.* Phillips, 4 Dak. 506, 34 N. W. 39.

Indiana. — Jones *v.* Mayne, 154 Ind. 400, 55 N. E. 956; Hussey *v.* Whiting, 145 Ind. 580, 44 N. E. 639, 57 Am. St. Rep. 220; Saunders *v.* Montgomery, 143 Ind. 185, 41 N. E. 453; Lawrence *v.* Van Buskirk, 140 Ind. 481, 40 N. E. 54; Eddingfield *v.* State, 12 Ind. App. 312, 39 N. E. 1057; McCullough *v.* Martin, 12 Ind. App. 165, 39 N. E. 905.

Iowa. — Dirr *v.* Dusenbery, (Iowa 1898) 76 N. W. 508; Salvador *v.* Feeley, 105 Iowa 478, 75 N. W. 476.

Minnesota. — Mahler *v.* Merchants Nat. Bank, 65 Minn. 37, 67 N. W. 655; Columbia Mill Co. *v.* National Bank of Commerce, 52 Minn. 224, 53 N. W. 1061.

Missouri. — Honeycutt *v.* St. Louis, etc., R. Co., 40 Mo. App. 674; Martin *v.* Fox, 40 Mo. App. 664.

Nebraska. — Phœnix Ins. Co. *v.* King, 54 Nebr. 630, 74 N. W. 1103; Omaha *v.* Richards, 49 Nebr. 244, 68 N. W. 528.

Pennsylvania. — Gallagher's Appeal, 114 Pa. St. 353, 7 Atl. 237, 60 Am. Rep. 350; Sloan *v.* James, 7 Del. Co. (Pa.) 594, 13 Pa. Super. Ct. 399.

South Carolina. — Armour Packing Co. *v.* London, 53 S. C. 539, 31 S. E. 500.

Texas. — Union Cent. L. Ins. Co. *v.* Chowning, 86 Tex. 654, 26 S. W. 982, 24 L. R. A. 504; Mitchell *v.* Mitchell, 84 Tex. 303, 19 S. W. 477; McCreary *v.* Robinson, (Tex. Civ. App. 1900) 57 S. W. 682; House *v.* Brown, 21 Tex. Civ. App. 576, 54 S. W. 396; Drake *v.* State, (Tex. Civ. App. 1893) 23 S. W. 398.

Utah. — Bankhead *v.* Union Pac. R. Co., 2 Utah 507.

United States. — North Chicago St. R. Co. *v.* Burnham, 102 Fed. 669, 42 C. C. A. 584; Chandler *v.* Pomeroy, 96 Fed. 156, 37 C. C. A. 430; U. S. *v.* Indian Grave Drainage Dist., 85 Fed. 928, 57 U. S. App. 416, 29 C. C. A. 578; Clark *v.* Deere, etc., Co., 80 Fed. 534, 53 U. S. App. 166, 25 C. C. A. 619.

(II) *Errors Must Be Definitely Pointed Out.* So, a very large number of decisions broadly lay down the doctrine that an assignment of errors must point out definitely and specifically the errors relied on.[30] In perhaps the majority of these decisions this rule is so generally stated that it cannot be determined whether anything further is intended than that the particular ruling in regard to which error is claimed must be definitely pointed out, or whether, in addition thereto, it

See 3 Cent. Dig. tit. "Appeal and Error," § 2997 *et seq.*

In Florida and Nebraska the rule is limited somewhat in the case of assignment of errors as to instructions. See *infra*, XI, C, 2, b, (III).

Superfluous assignments.— While each error relied on should be separately and distinctly specified, the record should nevertheless not be encumbered with numerous assignments of error when a few would suffice to present in an intelligible manner all of the material questions involved in the case. Farnsworth *v.* Nevada Co., 102 Fed. 578, 42 C. C. A. 509. Where various errors are complained of, presenting a single proposition of law common to all of them, they need not be separately stated as so many distinct propositions. Central Trust Co. *v.* New York Continental Trust Co., 86 Fed. 517, 58 U. S. App. 604, 30 C. C. A. 235.

30. *Alabama.*— Feagan *v.* Kendall, 43 Ala. 628.

Arizona.— Providence Gold-Min. Co. *v.* Marks, (Ariz. 1900) 60 Pac. 938; Daggs *v.* Hoskins, (Ariz. 1898) 52 Pac. 350.

California.— Hall *v.* Susskind, 120 Cal. 559, 53 Pac. 46; Matter of Boyd, 25 Cal. 511; Hutton *v.* Reed, 25 Cal. 478.

Colorado.— Marshall Silver Min. Co. *v.* Kirtley, 12 Colo. 410, 21 Pac. 492; Hanna *v.* Barker, 6 Colo. 303.

Connecticut.— Norwalk *v.* Ireland, 68 Conn. 1, 35 Atl. 804; Simmonds *v.* Holmes, 61 Conn. 1, 23 Atl. 702, 15 L. R. A. 253.

Dakota.—Bill *v.* Klaus, 4 Dak. 328, 30 N. W. 171; Bush *v.* Northern Pac. R. Co., 3 Dak. 444, 22 N. W. 508.

Florida.— St. Johns, etc., R. Co. *v.* Shalley, 33 Fla. 397, 14 So. 890.

Georgia.— Houston *v.* Coachman, 99 Ga. 146, 24 S. E. 940; Brunswick *v.* Moore, 74 Ga. 409.

Illinois.— Railway Pass., etc., Conductors' Mut. Aid, etc., Assoc. *v.* Leonard, 62 Ill. App. 477.

Indiana.— Peters *v.* Banta, 120 Ind. 416, 22 N. E. 95; Clear Creek Tp. *v.* Rittger, 12 Ind. App. 355, 39 N. E. 1052.

Iowa.— Peterson *v.* Walter A. Wood Mowing, etc., Mach. Co., 97 Iowa 148, 66 N. W. 96, 59 Am. St. Rep. 399; Feister *v.* Kent, 92 Iowa 1, 60 N. W. 493.

Kansas.— Fagerberg *v.* Johnson, 48 Kan. 434, 29 Pac. 684; Mutual Ben. L. Ins. Co. *v.* Kasha, 6 Kan. App. 357, 51 Pac. 811.

Kentucky.— O'Reagan *v.* O'Sullivan, 14 Bush (Ky.) 184; Maxwell *v.* Dudley, 13 Bush (Ky.) 403; Newhall *v.* Hulsman, 4 Ky. L. Rep. 262; Harned *v.* Harvey, 3 Ky. L. Rep. 537, defendant excepting "to the whole of the judgment rendered in this case."

Louisiana.— Kræutler *v.* U. S. Bank, 12 Rob. (La.) 456.

Michigan.— Baylis *v.* Stout, 49 Mich. 215, 13 N. W. 521.

Minnesota.— Yellow Medicine County Bank *v.* Wiger, 59 Minn. 384, 61 N. W. 452; *In re* Granstrand, 49 Minn. 438, 52 N. W. 41.

Mississippi.— New Orleans, etc., R. Co. *v.* Moye, 39 Miss. 374; Calvit *v.* Markham, 3 How. (Miss.) 343; Adams *v.* Munson, 3 How. (Miss.) 77.

Missouri.— Isaac *v.* Bohn-Verdin Lumber Co., 47 Mo. App. 30; Honeycutt *v.* St. Louis, etc., R. Co., 40 Mo. App. 674.

Nebraska.— Phœnix Ins. Co. *v.* King, 54 Nebr. 630, 74 N. W. 1103; Quinn *v.* Moss, 45 Nebr. 614, 63 N. W. 931.

Nevada.— Sherman *v.* Shaw, 9 Nev. 148; Caldwell *v.* Greely, 5 Nev. 258; Corbett *v.* Job, 5 Nev. 201.

North Carolina.— Greensboro *v.* McAdoo, 110 N. C. 430, 14 S. E. 974; Brendle *v.* Herren, 98 N. C. 539, 4 S. E. 629.

North Dakota.— Hostetter *v.* Brooks Elevator Co., 4 N. D. 357, 61 N. W. 49.

Ohio.— Armstrong *v.* Clark, 17 Ohio 495; Little Miami R. Co. *v.* Collett, 6 Ohio St. 182.

Oregon.— Herbert *v.* Dufur, 23 Oreg. 462, 32 Pac. 302; Thompson *v.* New York L. Ins. Co., 21 Oreg. 466, 28 Pac. 628.

Pennsylvania.— Fitzpatrick *v.* Engard, 175 Pa. St. 393, 34 Atl. 803; Kramer *v.* Winslow, 154 Pa. St. 637, 25 Atl. 766; Rosenthal *v.* Ehrlicher, 154 Pa. St. 396, 32 Wkly. Notes Cas. (Pa.) 221, 26 Atl. 435; Martin *v.* Jackson, 27 Pa. St. 504, 67 Am. Dec. 489; Thompson *v.* McConnel, 2 Phila. (Pa.) 32, 13 Leg. Int. (Pa.) 20.

South Carolina.— Armour Packing Co. *v.* London, 53 S. C. 539, 31 S. E. 500; Covar *v.* Sallat, 22 S. C. 265.

South Dakota.— Betts *v.* Letcher, 1 S. D. 182, 46 N. W. 193; State *v.* Chapman, 1 S. D. 414, 47 N. W. 411, 10 L. R. A. 432.

Tennessee.— Cheatham *v.* Pearce, 89 Tenn. 668, 15 S. W. 1080; Wood *v.* Frazier, 86 Tenn. 500, 8 S. W. 148; Denton *v.* Woods, 86 Tenn. 37, 5 S. W. 489.

Texas.— Tudor *v.* Hodges, 71 Tex. 392, 9 S. W. 443; Hughes *v.* Galveston, etc., R. Co., 67 Tex. 595, 4 S. W. 219; Texas Midland R. Co. *v.* Tidwell, (Tex. Civ. App. 1899) 49 S. W. 641; Gulf, etc., R. Co. *v.* Warner, (Tex. Civ. App. 1896) 36 S. W. 118.

Washington.—McAlmond *v.* Adams, 1 Wash. Terr. 230.

United States.— Hoge *v.* Magnes, 85 Fed. 355, 56 U. S. App. 500, 29 C. C. A. 564; Florida Cent., etc., R. Co. *v.* Bucki, 68 Fed. 864, 30 U. S. App. 454, 16 C. C. A. 42.

See 3 Cent. Dig. tit. "Appeal and Error," § 2997 *et seq.*

must state the reasons why such ruling is erroneous. In a number of cases in which the question has been directly raised it has been held necessary to state the reasons why the ruling complained of is erroneous,[31] while in other cases the opposite conclusion has been reached.[32]

(III) *ASSIGNMENT OF ONE ERROR AS AFFECTING CONSIDERATION OF ANOTHER.* Assigning error to one ruling or decision raises no question as to the correctness

31. *California.*— Moore *v.* Moore, (Cal. 1893) 34 Pac. 90.

Georgia.— Hall *v.* Huff, 74 Ga. 409; Higgins *v.* Cherokee R. Co., 73 Ga. 149.

Kansas.— Fagerberg *v.* Johnson, 48 Kan. 434, 29 Pac. 684; Eldridge *v.* Deets, 4 Kan. App. 241, 45 Pac. 948.

Michigan.— Bettys *v.* Denver Tp., 115 Mich. 228, 73 N. W. 138.

New Jersey.— Driscoll *v.* Carlin, 50 N. J. L. 28, 11 Atl. 482; Donnelly *v.* State, 26 N. J. L. 463.

North Carolina.— Willey *v.* Norfolk Southern R. Co., 96 N. C. 408, 1 S. E. 446; State *v.* Alston, 94 N. C. 930; Strickland *v.* Draughan, 88 N. C. 315.

Tennessee.— Cheatham *v.* Pearce, 89 Tenn. 668, 15 S. W. 1080; Schoenpflug *v.* Ketcham, (Tenn. Ch. 1898) 52 S. W. 666.

32. Sneer *v.* Stutz, 93 Iowa 62, 61 N. W. 397; Brackenridge *v.* Claridge, 91 Tex. 527, 44 S. W. 819, 43 L. R. A. 593 (the contrary was formerly the rule in Texas. Pearson *v.* Flanagan, 52 Tex. 266); Bonham Cotton Press Co. *v.* McKellar, 86 Tex. 694, 26 S. W. 1056; Clarendon Land, etc., Co. *v.* McClelland, 86 Tex. 179, 23 S. W. 576, 1100, 22 L. R. A. 105; Atchison, etc., R. Co. *v.* Meyers, 76 Fed. 443, 46 U. S. App. 226, 22 C. C. A. 268.

On principle it would seem that the latter view is correct. As shown in a preceding section, the assignment of errors is the declaration or complaint of appellant or plaintiff in error, and there is no more reason for injecting an argument into the assignment of errors than into the pleadings in the court below. See *supra*, XI, A. The proper place for reasons in support of the assignment of errors is in the argument or brief of counsel. See, *infra*, XII.

The following assignments of error have been held insufficient on account of their generality: That the court erred as a matter of law in dismissing the complaint." Swygert *v.* Wingard, 48 S. C. 321, 26 S. E. 653. That "the court erred in deciding the rule" for appellant, and that "the court erred in making absolute the rule" for appellee. Landis *v.* Evans, 113 Pa. St. 332, 6 Atl. 908. "That the court erred in its action in regard to the jury." Harmon *v.* Chandler, 3 Iowa 150. That the court "erred in not holding that plaintiff could not maintain its suit against defendants, appellants." Dendy *v.* Waite, 36 S. C. 569, 15 S. E. 712. That the court "erred in rendering judgment in favor of defendant." Noble *v.* Harter, 6 Kan. App. 823, 49 Pac. 794. That the court "erred in submitting the case to the jury and entertaining judgment on the verdict." Van Stone *v.* Stillwell, etc., Mfg. Co., 142 U. S. 128, 12 S. Ct. 181, 35 L. ed. 961. That the action of the judge was oppressive, illegal, and in violation of all law, and the whole judgment wrong and oppressive. Lawless *v.* Harrington, 75 Ind. 379. That the entire record disputes the theory of the appeal. Brown *v.* Patton, (Tenn. Ch. 1898) 48 S. W. 277. That "there was irregularity in the proceedings on the part of the defendant and its agent, by which, as shown in the bill of exceptions, the plaintiffs were prevented from having a fair trial." Hanlon *v.* Union Pac. R. Co., 40 Nebr. 52, 58 N. W. 590. That "plaintiff could acquire no higher interest in the land than Chapman, and Chapman could not ask that this defendant should pay the notes due to Z. Bartlett." Spencer *v.* Jones, (Tex. Civ. App. 1898) 47 S. W. 29. "That the judgment is for Sloss, when by law, etc., it should have been for Kimball." Kimball *v.* Sloss, 7 Ind. 589. "Because the judge did not hold that the action and proceeding of plaintiff in the premises were without authority of law; second, that the action of the jury was not in accordance with law." Greensboro *v.* McAdoo, 110 N. C. 430, 14 S. E. 974. "Error of law occurring at the trial and excepted to by plaintiff." Ohio Valley R., etc., Co. *v.* Thomas, 9 Ky. L. Rep. 508, 5 S. W. 470; Meaux *v.* Meaux, 5 Ky. L. Rep. 548; Hart *v.* Weber, 57 Nebr. 442, 77 N. W. 1085; Houston *v.* Omaha, 44 Nebr. 63, 62 N. W. 251; Haskell *v.* Valley County, 41 Nebr. 234, 59 N. W. 680. "First, that the court declared the estate of Feagan solvent on the facts stated; second, that the court did not declare such estate insolvent." Feagan *v.* Kendall, 43 Ala. 628. "For sundry errors committed by the court at the trial and excepted to by this appellant in error." American Bonding, etc., Co. *v.* Scott, (Kan. App. 1900) 61 Pac. 873. In refusing to permit plaintiff in error "to read certain authorities to the jury, among them decisions of the supreme court of appeals of Virginia." Blankenship *v.* Chesapeake, etc., R. Co., 94 Va. 449, 27 S. E. 20. "Irregularities in the proceedings of the court and abuse of discretion, by which the appellant was prevented from having a fair trial." Omaha F. Ins. Co. *v.* Dierks, 43 Nebr. 473, 61 N. W. 740. "Misconduct by the jury." Houston *v.* Omaha, 44 Nebr. 63, 62 N. W. 251, in which case it was held that the action of the jury which it is claimed amounted to misconduct should be stated. So, where particular instances of misconduct are not specified, an exception, to the effect that the court erred in not holding that the mortgagor, by improper conduct, had lost his right to object to the sale, will not be considered on appeal. Fishburne *v.* Smith, 34 S. C. 330, 13 S. E. 525.

Where a party assigns errors diametrically opposed, the court will consider neither of them. The appellant may select his ground, but he cannot assume opposite positions, ensuring success whatever may be the decision

of another,[33] and, having assigned one class of errors, the party will not be allowed to argue another.[34]

b. Specific Applications to Particular Rulings — (I) *Pleadings* — (A) *Complaint, Declaration, or Petition.* Assignments attacking the sufficiency of a declaration, petition, or complaint, or the rulings on demurrer or exceptions thereto, must be specific and point out the error complained of.[35]

(B) *Plea or Answer.* Assignments of error directed to the plea or answer, or to rulings on demurrer or exceptions thereto, must be specific. A general assignment of errors to the sustaining or overruling of demurrers or exceptions, will be insufficient.[36]

on the controverted point. Emmons *v.* Oldham, 12 Tex. 18.

33. *Alabama.*— Napier *v.* Jones, 47 Ala. 90.

Georgia.— Wood *v.* Collins, 111 Ga. 32, 36 S. E. 423.

Indiana.— Patterson *v.* State, 91 Ind. 364; Evansville, etc., R. Co. *v.* Lavender, (Ind. App. 1893) 34 N. E. 109.

Nebraska.— Drexel *v.* Daniels, 49 Nebr. 99, 68 N. W. 399.

New Jersey.— Driscoll *v.* Carlin, 50 N. J. L. 28, 11 Atl. 482.

South Carolina.— Forsythe *v.* McCreight, 10 Rich. Eq. (S. C.) 308.

Texas.— Sickles *v.* Missouri, etc., R. Co., 13 Tex. Civ. App. 434, 35 S. W. 493.

Where the writ of error relates to one set of errors, and the assignment of errors to another set, the latter cannot be noticed. Smith *v.* Hornback, 3 A. K. Marsh. (Ky.) 379.

34. Hollingsworth *v.* State, 8 Ind. 257.

35. McKelvy *v.* Wilson, 9 Pa. St. 183; Cannon *v.* Cannon, 66 Tex. 682, 3 S. W. 36; American Well Works *v.* De Aguayo, (Tex. Civ. App. 1899) 53 S. W. 350; Traylor *v.* State, 19 Tex. Civ. App. 86, 46 S. W. 81; Alford *v.* Dallas, (Tex. Civ. App. 1896) 35 S. W. 816. See also Glover *v.* Lyon, 57 Ala. 365; Eslava *v.* Lepretre, 21 Ala. 504, 56 Am. Dec. 266; Brahan *v.* Collins, Minor (Ala.) 169; Rusher *v.* Dallas, 83 Tex. 151, 18 S. W. 333; and see 3 Cent. Dig. tit. "Appeal and Error," § 3002.

Applications of rule.— Thus, it has been held that a general assignment of error to the overruling or sustaining of several demurrers, or grounds of demurrer, or several exceptions to a petition, will not be considered. Anheuser-Busch Brewing Assoc. *v.* Gates, 88 Iowa 700, 53 N. W. 1076; Anheuser-Busch Brewing Assoc. *v.* Oxley, 88 Iowa 699, 53 N. W. 1075; Lauraglenn Mills *v.* Ruff, 52 S. C. 448, 30 S. E. 587; Smith *v.* Russell, 23 Tex. Civ. App. 554, 56 S. W. 687; Marshall *v.* Atascosa County, (Tex. Civ. App. 1898) 47 S. W. 680; and 3 Cent. Dig. tit. "Appeal and Error," § 3002. But in Indiana it is held that, where a pleading is in several paragraphs, an assignment that the court erred in overruling a demurrer to the pleading must fail if any one paragraph is sufficient. Louisville, etc., R. Co. *v.* Heck, 151 Ind. 292, 50 N. E. 988; Superior Oil Co. *v.* Whiteman, 19 Ind. App. 149, 49 N. E. 171. If any paragraph of the complaint is sufficient, the assignment must fail. Center Tp. *v.* Davis, 24 Ind. App. 603, 57 N. E. 283; Hendricks County *v.* Trotter, 19 Ind. App. 626, 49 N. E. 976; Everett *v.* Farrell, 11 Ind. App. 185, 38 N. E. 872.

An assignment of error that no complaint was filed (in an action commenced before a justice of the peace, and in which a complaint had been filed) does not raise any question as to the sufficiency of the complaint. Packard *v.* Mendenhall, 42 Ind. 598. Nor is the question, that the complaint failed to allege that notice had been given of the injury sued for, raised by an assignment that "the verdict is not sustained by sufficient evidence." Reed *v.* Muscatine, 104 Iowa 183, 73 N. W. 579. An assignment that the complaint does not state sufficient facts does not raise the question that there was a defect of parties defendant. Bundy *v.* Pool, 82 Ind. 502. And the sufficiency of a complaint is not called in question by an assignment of error that the trial court erred in sustaining a demurrer to a paragraph of answer. Stockwell *v.* State, 101 Ind. 1; Peters *v.* Banta, (Ind. 1889) 23 N. E. 84. In Fox *v.* Wray, 56 Ind. 423, and Batty *v.* Fout, 54 Ind. 482, the demurrer attacked the whole complaint because not stating facts sufficient to constitute a cause of action, and on the assignment of error for overruling such demurrer raised that point sufficiently on the appeal.

Where the only rulings assigned as error by a plaintiff are the sustaining of defendants' demurrers to the complaint, and, as shown by the record, no such rulings were in fact made, a ruling actually made, but not assigned as error, will not be reviewed. Baldwin *v.* Sutton, 148 Ind. 591, 47 N. E. 629, 1067. And the sufficiency of the complaint to state a cause of action is not raised by an assignment of error that the verdict is contrary to law. Roberts *v.* Keeler, 111 Ga. 181, 36 S. E. 617.

When separate demurrers of two defendants are sustained, an assignment that "the court erred in sustaining the several demurrers of the defendants" is not sufficiently definite. Bradley *v.* Johnson, 67 Iowa 614, 25 N. W. 830.

36. Blocker *v.* Schoff, 83 Iowa 265, 48 N. W. 1079; Gresham *v.* Harcourt, (Tex. Civ. App. 1899) 50 S. W. 1058; Hansen *v.* Yturria, (Tex. Civ. App. 1898) 48 S. W. 795; Evans *v.* Texas Printing, etc., Co., 4 Tex. Civ. App. 326, 23 S. W. 476; North Chicago St. R. Co. *v.* Burnham, 102 Fed. 669, 42 C. C. A. 584; and see 3 Cent. Dig. tit. "Appeal and Error," § 3003.

Thus, an assignment that "the court erred in sustaining exceptions to the two special answers of defendant" is too general to require

(c) *Striking Out, and Amendments.* An assignment of error, that the court erred in failing to strike out from an answer certain parts thereof, should point out the parts of the answer to which the motion was directed.[37] Similarly, an assignment of error, in overruling objections to an amendment of the complaint, is insufficient where it does not show what the amendment was.[38]

(II) *EVIDENCE*—(A) *Admission and Exclusion*—(1) RULE STATED. An assignment of error to the admission[39] or rejection of evidence[40] must specify the

consideration, it appearing that there were two special exceptions and two special answers. (Evans *v.* Texas Printing, etc., Co., 4 Tex. Civ. App. 326, 23 S. W. 476); and an assignment that the court erred in sustaining plaintiff's exceptions to the answer cannot be considered where there were three exceptions, asserting different grounds (Connellee *v.* Eastland County, (Tex. Civ. App. 1895) 31 S. W. 552). An assignment that "the court erred in sustaining the demurrer to the second count of the defendant's answer" is too general to be considered, where the demurrer stated several grounds of demurrer. Blocker *v.* Schoff, 83 Iowa 265, 48 N. W. 1079.

An assignment that an answer was frivolous will not be considered where it fails to specify in what particulars the court erred. Badham *v.* Brabham, 54 S. C. 400, 32 S. E. 444.

In Nebraska, the statutory assignment of "errors of law occurring at the trial, and duly excepted to," is sufficient to present for review the ruling of the court upon a demurrer, *ore tenus.* interposed before the introduction of any evidence. Riverside Coal Co. *v.* Holmes, 36 Nebr. 858, 55 N. W. 255.

Where a demurrer to a reply contains several grounds, a general assignment that the court erred in sustaining the demurrer, and not pointing out any particular grounds as error, is not sufficient. Estey *v.* Magee, 94 Iowa 197, 62 N. W. 673.

37. Smith *v.* Georgia Warehouse Co., 99 Ga. 131, 24 S. E. 875; and see 3 Cent. Dig. tit. "Appeal and Error," § 3005.

Illustrations.— So, under a rule of court requiring each error relied on to be set out separately, an assignment of error to the effect that the court erred in striking out pleas to plaintiff's declarations, was too general. Supreme Council, etc., *v.* New York Fidelity, etc., Co., 63 Fed. 48, 22 U. S. App. 439, 11 C. C. A. 96. An assignment that the court erred in sustaining a motion for default and judgment, and to strike out an amended and substituted petition, is not sufficiently specific. Guyer *v.* Minnesota Thresher Mfg. Co., 97 Iowa 132, 66 N. W. 83.

38. Huntington *v.* McClurg, 22 Ind. App. 261, 53 N. E. 658.

Therefore, an assignment that the court erred in overruling a demurrer and a motion in arrest of judgment does not present for review the action of the court in allowing the complaint to be amended after announcing its ruling. Durham *v.* Fechheimer, 67 Ind. 35. And a ruling on demurrer to an amended complaint filed cannot be considered under an assignment that "the court erred in sustaining the demurrer to appellant's complaint," where a demurrer was sustained to the original complaint also. Dorsett *v.* Greencastle, 141 Ind. 38, 40 N. E. 131.

39. *California.*— Fleming *v.* Albeck, 67 Cal. 226, 7 Pac. 659.

Colorado.— Las Animas County *v.* Stone, 11 Colo. App. 476, 53 Pac. 616; Clifford *v.* L. Wolff Mfg. Co., 8 Colo. App. 334, 46 Pac. 214.

Dakota.— Franz Falk Brewing Co. *v.* Mielenz, 5 Dak. 136, 37 N. W. 728.

Georgia.— Morris *v.* Levering, 98 Ga. 33, 25 S. E. 905.

Iowa.— Blocker *v.* Schoff, 83 Iowa 265, 48 N. W. 1079; Albrosky *v.* Iowa City, 76 Iowa 301, 41 N. W. 23.

Kansas.— Garden City *v.* Heller, 61 Kan. 767, 60 Pac. 1060; Burdge *v.* Kilchner, 7 Kan. App. 812, 53 Pac. 675; Russell First Nat. Bank *v.* Knoll, 7 Kan. App. 352, 52 Pac. 619; Skinner *v.* Mitchell, 5 Kan. App. 366, 48 Pac. 450.

Michigan.— Zimmerman Mfg. Co. *v.* Dolph, 104 Mich. 281, 62 N. W. 339.

Minnesota.— Hall *v.* St. Paul, 56 Minn. 428, 57 N. W. 928; Fredericksen *v.* Singer Mfg. Co., 38 Minn. 356, 37 N. W. 453.

Missouri.—Scarritt Furniture Co. *v.* Moser, 48 Mo. App. 543.

Nebraska.— Churchill *v.* White, 58 Nebr. 22, 78 N. W. 369, 76 Am. St. Rep. 64; Graham *v.* Frazier, 49 Nebr. 90, 68 N. W. 367.

Oregon.— Northern Pacific Terminal Co. *v.* Lowenberg, 11 Oreg. 286, 3 Pac. 683.

Pennsylvania.—Rosenthal *v.* Ehrlicher, 154 Pa. St. 396, 26 Atl. 435; Royse *v.* May, 93 Pa. St. 454.

South Dakota.— Bem *v.* Bem, 4 S. D. 138, 55 N. W. 1102.

Texas.— Ft. Worth, etc., R. Co. *v.* Downie, 82 Tex. 383, 17 S. W. 620; Ellis *v.* McKinley, 33 Tex. 675; Brady *v.* Georgia Home Ins. Co., (Tex. Civ. App. 1900) 59 S. W. 914; West End Dock Co. *v.* Galveston City Co., (Tex. Civ. App. 1900) 55 S. W. 752.

See 3 Cent. Dig. tit. "Appeal and Error," § 3010.

40. *Alabama.*— H. B. Claflin Co. *v.* Rodenberg, 101 Ala. 213, 13 So. 272.

Colorado.— Dingle *v.* Swain, 15 Colo. 120, 24 Pac. 876; Perry *v.* Lynch, 10 Colo. App. 549, 52 Pac. 219.

Dakota.— Franz Falk Brewing Co. *v.* Mielenz, 5 Dak. 136, 37 N. W. 728.

Florida.— Jacksonville, etc., R. Co. *v.* Griffin, 33 Fla. 602, 15 So. 336.

Illinois.— Baltimore, etc., R. Co. *v.* Alsop, 176 Ill. 471, 52 N. E. 253, 752; Patrick *v.* Perryman, 52 Ill. App. 514.

Iowa.— Dungan *v.* Iowa Cent. R. Co., 96 Iowa 161, 64 N. W. 762.

particular evidence the admission or exclusion of which is claimed to be erroneous,[41] or the evidence must be set out in the assignment.[42]

(2) Joinder of Errors in One Assignment. Furthermore, different errors in regard to the admission or exclusion of evidence should not be joined in one assignment, for if any of the rulings complained of are correct the assignment must be overruled.[43]

Kansas.— Burdge *v.* Kilchner, 7 Kan. App. 812, 53 Pac. 675.

Kentucky.— Louisville, etc., R. Co. *v.* Sullivan, 5 Ky. L. Rep. 722.

Nebraska.— Phœnix Ins. Co. *v.* King, 52 Nebr. 562, 72 N. W. 855.

Oregon.— Northern Pac. Terminal Co. *v.* Lowenberg, 11 Oreg. 286, 3 Pac. 683.

Texas.— Blain *v.* Popper, (Tex. Civ. App. 1898) 49 S. W. 129; Bryant *v.* Galbraith, (Tex. Civ. App. 1897) 43 S. W. 833.

See 3 Cent. Dig. tit. "Appeal and Error," § 3010 *et seq.*

41. Sufficiency of assignment.— An assignment of error which states that the court excluded evidence is sufficiently specific and need not show the questions the answers to which were excluded. The law does not require that the questions shall be embodied in the assignment of errors. The error, if any, consists in the exclusion of evidence offered to establish a material fact in issue. Union Bldg. Assoc. *v.* Rockford Ins. Co., 83 Iowa 647, 49 N. W. 1032, 32 Am. St. Rep. 323, 14 L. R. A. 248.

42. *Georgia.*— Reinhart *v.* Blackshear, 105 Ga. 799, 31 S. E. 748; Anderson *v.* Savannah Press Pub. Co., 100 Ga. 454, 28 S. E. 216.

Missouri.— Connoble *v.* Clark, 38 Mo. App. 476.

Pennsylvania.— Myers *v.* Litts, 195 Pa. St. 595, 46 Atl. 131; Van Horne *v.* Dick, 151 Pa. St. 341, 24 Atl. 1078; Keystone Cycle Co. *v.* Jones, 12 Pa. Super. Ct. 134; Coverdill *v.* Heath, 12 Pa. Super. Ct. 15.

Tennessee.— Wood *v.* Frazier, 86 Tenn. 500, 8 S. W. 148.

United States.— Gallot *v.* U. S., 87 Fed. 446, 58 U. S. App. 243, 31 C. C. A. 44; Atlas Distilling Co. *v.* Rheinstrom, 86 Fed. 244, 58 U. S. App. 550, 30 C. C. A. 10; U. S. *v.* Indian Grave Drainage Dist., 85 Fed. 928, 57 U. S. App. 416, 29 C. C. A. 578; Lincoln Sav. Bank, etc., Co. *v.* Allen, 82 Fed. 148, 49 U. S. App. 498, 27 C. C. A. 87; Newman *v.* Virginia, etc., Steel, etc., Co., 80 Fed. 228, 42 U. S. App. 466, 25 C. C. A. 382; American Nat. Bank *v.* National Wall-Paper Co., 77 Fed. 85, 40 U. S. App. 646, 23 C. C. A. 33; Oswego Tp. *v.* Travelers' Ins. Co., 70 Fed. 225, 36 U. S. App. 13, 17 C. C. A. 77.

Insufficient assignments illustrated.—In applying the rules stated in the text, it has been held that the following assignments will not be noticed:

That the court erred in admitting evidence.

Colorado.— Strassheim *v.* Cole, (Colo. App. 1899) 59 Pac. 479; Fleming *v.* Daly, 12 Colo. App. 439, 55 Pac. 946.

Indiana.— Indiana Bond Co. *v.* Shearer, 24 Ind. App. 622, 57 N. E. 276.

Indian Territory.— Purcell Mill, etc., Co. *v.* Kirkland, (Indian Terr. 1898) 47 S. W. 311

Iowa.— Buford *v.* Devoe, 96 Iowa 736, 65 N. W. 413; Burnside *v.* Eston, 94 Iowa 760, 64 N. W. 786.

Maine.— Webber *v.* Dunn, 71 Me. 331.

Missouri.— Honeycutt *v.* St. Louis, etc., R. Co., 40 Mo. App. 674.

Nebraska.— Cortelyou *v.* Maben, 40 Nebr. 512, 59 N. W. 94; Hanlon *v.* Union Pac. R. Co., 40 Nebr. 52, 58 N. W. 590.

Nevada.— Sherman *v.* Shaw, 9 Nev. 148.

New Mexico.— Schofield *v.* Territory, 9 N. M. 526, 56 Pac. 306.

Oregon.—Archbishop *v.* Hack, 23 Oreg. 536, 32 Pac. 402; Johnson *v.* Fanno, 23 Oreg. 514, 32 Pac. 396.

South Dakota.— Northern Grain Co. *v.* Pierce, 13 S. D. 265, 83 N. W. 256; State *v.* Chapman, 1 S. D. 414, 47 N. W. 411, 10 L. R. A. 432.

Texas.— Mitchell *v.* Mitchell, 84 Tex. 303, 19 S. W. 477.

That the court erred in excluding evidence.

Alabama.— Sonneborn *v.* Bernstein, 49 Ala. 168.

Colorado.— Strassheim *v.* Cole, (Colo. App. 1899) 59 Pac. 479; Las Animas County *v.* Stone, 11 Colo. App. 476, 53 Pac. 616.

Iowa.— Burnside *v.* Eston, 94 Iowa 760, 64 N. W. 786; Chandler *v.* Knott, 86 Iowa 113, 53 N. W. 88.

Maine.— Webber *v.* Dunn, 71 Me. 331.

Nebraska.— Coburn *v.* Watson, 48 Nebr. 257, 67 N. W. 171; Cortelyou *v.* Maben, 40 Nebr. 512, 59 N. W. 94.

New Mexico.— Schofield *v.* Territory, 9 N. M. 526, 56 Pac. 306.

Oregon.— Northern Pac. Terminal Co. *v.* Lowenberg, 11 Oreg. 286, 3 Pac. 683.

So, an assignment of "error of law occurring at the trial" is insufficient to present for review rulings of the trial court on the admission or exclusion of testimony. Jaeggi *v.* Galley, 54 Nebr. 800, 75 N. W. 238; Blodgett *v.* McMurtry, 54 Nebr. 69, 74 N. W. 392. Nor can such rulings be reviewed under an assignment of error alleging "irregularity in the proceedings of the court, and abuse of discretion by the court, by which defendant was prevented from having a fair trial." Friedman *v.* Weisz, 8 Okla. 392, 58 Pac. 613. Nor under an assignment that the court erred in finding certain facts. Ellison *v.* Fox, 38 Minn. 454, 38 N. W. 358. Nor under an assignment that the conclusion of law is not justified by the findings of fact. Hewetson *v.* Dossett, 71 Minn. 358, 73 N. W. 1089. Nor under an assignment that "the court erred in overruling the motion for a new trial," if there are several grounds of error set forth in such motion. Allsman *v.* Richmond, 55 Nebr. 540, 75 N. W. 1094.

43. *Illinois.*— Chicago, etc., R. Co. *v.* Moffitt, 75 Ill. 524; Chicago City R. Co. *v.* Van Vleck, 40 Ill. App. 367.

(3) Stating Grounds of Objection. According to a number of decisions, assignments of error to the admission or exclusion of evidence must state the reasons why the rulings complained of are erroneous.[44]

(B) *Sufficiency.* An assignment of error based on the insufficiency of evidence must point out the particulars in which the evidence is insufficient, or it will not be considered.[45] A mere general assignment of error that the evidence was insufficient, or that the judgment was not supported by the evidence, presents no question for review.[46]

(III) *Instructions*— (A) *Rule Stated.* It is a rule of almost universal application that an assignment of error directed against a charge embodying several

Kentucky.— Phillips *v.* Owsley, 4 Ky. L. Rep. 832.

Minnesota.—American Express Co. *v.* Piatt, 51 Minn. 568, 53 N. W. 877.

Missouri.— Honeycutt *v.* St. Louis, etc., R. Co., 40 Mo. App. 674.

Nebraska.— Langdon *v.* Wintersteen, 58 Nebr. 278, 78 N. W. 501; Sigler *v.* McConnell, 45 Nebr. 598, 63 N. W. 870.

Oregon.—Archbishop *v.* Hack, 23 Oreg. 536, 32 Pac. 402.

Texas.— Grinnan *v.* Rousseaux, 20 Tex. Civ. App. 19, 48 S. W. 58, 781; Ft. Worth Compress Co. *v.* Chicago, etc., R. Co., 18 Tex. Civ. App. 622, 45 S. W. 967; Miller *v.* Vernoy, 2 Tex. Civ. App. 675, 22 S. W. 64.

See 3 Cent. Dig. tit. "Appeal and Error," § 3010 *et seq.*

General assignment of error to the admission of the testimony of several witnesses is not well taken if any part of the evidence objected to was proper. Eagle Fire Co. *v.* Globe L. & T. Co., 44 Nebr. 380, 62 N. W. 895.

Where only part of the testimony of a witness is excluded, and the assignment of error is that the court erred in excluding all of the testimony of such witness, no question is presented for review. World Mut. Ben. Assoc. *v.* Worthing, 59 Nebr. 587, 81 N. W. 620; Allsman *v.* Richmond, 55 Nebr. 540, 75 N. W. 1094.

44. *Mississippi.*— New Orleans, etc., R. Co. *v.* Moye, 39 Miss. 374.

New Jersey.—Donnelly *v.* State, 26 N. J. L. 463.

North Carolina.— Watts *v.* Warren, 108 N. C. 514, 13 S. E. 232; Sumner *v.* Candler, 92 N. C. 634.

Oregon.—Archbishop *v.* Hack, 23 Oreg. 536, 32 Pac. 402; Johnson *v.* Fanno, 23 Oreg. 514, 32 Pac. 396.

Texas.— Shilling *v.* Shilling, (Tex. Civ. App. 1896) 35 S. W. 420; Adams *v.* Eddy, (Tex. Civ. App. 1894) 29 S. W. 180. But this is not the rule in Texas now. The proper place for reasons is in the brief. Clarendon Land, etc., Co. *v.* McClelland, 86 Tex. 179, 23 S. W. 576, 1100, 22 L. R. A. 105. See *infra*, XII.

United States.— Van Stone *v.* Stillwell, etc., Mfg. Co., 142 U. S. 128, 12 S. Ct. 181, 35 L. ed. 961.

45. *California.*— *In re* Strock, 128 Cal. 658, 61 Pac. 282; Kyle *v.* Craig, 125 Cal. 107, 57 Pac. 791.

Dakota.— Caulfield *v.* Bogle, 2 Dak. 464, 11 N. W. 511.

Michigan.— Peabody *v.* McAvoy, 23 Mich. 526.

Minnesota.— Butler-Ryan Co. *v.* Silvey, 70 Minn. 507, 73 N. W. 406, 510; Lytle *v.* Prescott, 57 Minn. 129, 58 N. W. 688.

Montana.— Bass *v.* Buker, 6 Mont. 442, 12 Pac. 922.

Nebraska.— Chicago, etc., R. Co. *v.* Oyster, 58 Nebr. 1, 78 N. W. 359; Brunswick *v.* McClay, 7 Nebr. 137.

South Carolina.— Dobson *v.* Cothran, 34 S. C. 518, 13 S. E. 679.

South Dakota.— Brady *v.* Kreuger, 8 S. D. 464, 66 N. W. 1083, 59 Am. St. Rep. 771.

Texas.— Fant *v.* Andrews, (Tex. Civ. App. 1898) 46 S. W. 909; Masterson *v.* Glaze, (Tex. Civ. App. 1898) 46 S. W. 1048; Cullen *v.* Emgard, (Tex. Civ. App. 1898) 44 S. W. 538; Blain *v.* Blain, (Tex. Civ. App. 1897) 43 S. W. 66.

United States.— Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. ed. 485.

46. Garcia *v.* Gray, 67 Tex. 282, 3 S. W. 42; Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. ed. 485.

Illustrations.— So assigning error in entering judgment against defendant on the special findings does not raise the question whether the evidence justified a verdict, or whether the verdict authorized a judgment. Louisville, etc., R. Co. *v.* Collins, 6 Ky. L. Rep. 667. An assignment of error that, by a great preponderance, the evidence shows the existence of a certain fact, does not raise the question that there was no evidence as to the existence of such fact. Gulf, etc., R. Co. *v.* Kizziah, 4 Tex. Civ. App. 356, 22 S. W. 110, 26 S. W. 242. See also Poole *v.* Jackson, 93 Tenn. 62, 23 S. W. 57. An assignment of error that "there is no credible proof to sustain the verdict" is bad in form, because it is the exclusive province of the jury to pass upon the credibility of witnesses. Brown *v.* Odill, 104 Tenn. 250, 56 S. W. 840.

Variance between pleadings and proof.— A specification that the court erred in admitting any testimony under the bill merely challenges the sufficiency of the facts stated in the bill to constitute a cause of action, and, where the ultimate facts pleaded are proved, it does not reach the objection that there was a variance between the evidential facts charged and those established by the findings, so as to authorize the review of such question on appeal. Burt *v.* Gotzian, 102 Fed. 937, 43 C. C. A. 59.

propositions as a whole, or against the giving or refusing of a group of instructions embodying distinct propositions, is insufficient. The portion of the charge complained of, or the instructions the giving or refusing of which is claimed to be error, should be distinctly designated or pointed out.[47]

(B) *Limitations and Exceptions to Rule.* In a few jurisdictions, however, the rule is limited to this extent — namely, that, where errors in giving or refusing instructions are not separately assigned, the assignment will not be considered if any one of the instructions or refusals to instruct to which errors have been assigned in gross was proper.[48] So, in some jurisdictions it is held that a single assignment of error may embrace more than one instruction if the instructions are each designated therein by number; the assignment will be the same in effect as if each instruction objected to were named in a distinct assignment.[49]

(C) *Setting Out or Quoting Instructions.* In a number of jurisdictions the rules of court expressly require the assignment of error to quote or set out in *totidem verbis* the instructions the giving or refusing of which is alleged to be error,[50] and such, it seems, is the general rule, whether or not a rule of court

47. *Connecticut.*— Simmonds *v.* Holmes, 61 Conn. 1, 23 Atl. 902, 15 L. R. A. 253.

Dakota.— Kennedy *v.* Falde, 4 Dak. 319, 29 N. W. 667.

District of Columbia.—District of Columbia *v.* Robinson, 14 App. Cas. (D. C.) 512.

Georgia.— Anderson *v.* Southern R. Co., 107 Ga. 500, 33 S. E. 644; Austell *v.* James, 97 Ga. 334, 22 S. E. 953.

Iowa.— Blair *v.* Madison County, 81 Iowa 313, 46 N. W. 1093; Moffatt *v.* Fisher, 47 Iowa 473.

Kansas.— Sanford *v.* Gates, 38 Kan. 405, 16 Pac. 807.

Kentucky.— Wheeler, etc., Mfg. Co. *v.* Hord, 4 Ky. L. Rep. 240.

Michigan.— Pratt *v.* Burhans, 84 Mich. 487, 47 N. W. 1064, 22 Am. St. Rep. 703; People *v.* Sweeney, 55 Mich. 586, 22 N. W. 50.

Minnesota.— Watts *v.* Howard, 70 Minn. 122, 72 N. W. 840; Carpenter *v.* Eastern R. Co., 67 Minn. 188, 69 N. W. 720.

Nebraska.— McIntyre *v.* Union Pac. R. Co., 56 Nebr. 587, 77 N. W. 57; Flower *v.* Nichols, 55 Nebr. 314, 75 N. W. 864.

North Carolina.—State *v.* Melton, 120 N. C. 591, 26 S. E. 933; McKinnon *v.* Morrison, 104 N. C. 354, 10 S. E. 513; Leak *v.* Covington, 99 N. C. 559, 6 S. E. 241; Suttle *v.* Falls, 98 N. C. 393, 4 S. E. 541, 2 Am. St. Rep. 338.

Oregon.— Jensen *v.* Foss, 24 Oreg. 158, 33 Pac. 535; Johnson *v.* Fanno, 23 Oreg. 514, 32 Pac. 396.

Pennsylvania.—Drenning *v.* Wesley, 189 Pa. St. 160, 42 Atl. 13; Crawford *v.* McKinney, 165 Pa. St. 605, 30 Atl. 1045; Good Intent Co. *v.* Hartzell, 22 Pa. St. 277; Zerbe *v.* Miller, 16 Pa. St. 488; Cobb *v.* Stephens, 2 Phila. (Pa.) 150, 13 Leg. Int. (Pa.) 245.

South Carolina.— Willoughby *v.* North Eastern R. Co., 52 S. C. 166, 29 S. E. 629.

Texas.— Halff *v.* Goldfrank, (Tex. Civ. App. 1899) 49 S. W. 1095; Texas, etc., R. Co. *v.* Echols, 17 Tex. Civ. App. 677, 41 S. W. 488; Sanger *v.* Noonan, (Tex. Civ. App. 1894) 27 S. W. 1056.

Utah.— Bowers *v.* Union Pac. R. Co., 4 Utah 215, 7 Pac. 251.

United States.— Bogk *v.* Gassert, 149 U. S. 17, 13 S. Ct. 738, 37 L. ed. 631; New Orleans, etc., R. Co. *v.* Clements, 100 Fed. 415, 40 C. C. A. 465; Gallot *v.* U. S., 87 Fed. 446, 58 U. S. App. 243, 31 C. C. A. 44; Sutherland *v.* Brace, 71 Fed. 469, 34 U. S. App. 454, 18 C. C. A. 199; Atchison, etc., R. Co. *v.* Mulligan, 67 Fed. 569, 34 U. S. App. 1, 14 C. C. A. 547; Vider *v.* O'Brien, 62 Fed. 326, 18 U. S. App. 711, 10 C. C. A. 385.

See 3 Cent. Dig. tit. "Appeal and Error," § 3013 *et seq.*

Single assignments of error should not embrace more than one proposition, and, on a violation of the rule, the court will usually disregard the assignment. See *supra*, note 47 *et seq.*

48. Lewis *v.* State, (Fla. 1900) 28 So. 397; Green *v.* Sansom, 41 Fla. 94, 25 So. 332; Frenzer *v.* Richards, 60 Nebr. 131, 82 N. W. 317; World Mut. Ben. Assoc. *v.* Worthing, 59 Nebr. 587, 81 N. W. 620; and see 3 Cent. Dig. tit. "Appeal and Error," § 3013 *et seq.*

49. Ellis *v.* Leonard, 107 Iowa 487, 78 N. W. 246; Ludwig *v.* Blackshere, 102 Iowa 366, 71 N. W. 356; Sherwood *v.* Snow, 46 Iowa 481, 26 Am. Rep. 155; Witsell *v.* West Asheville, etc., R. Co., 120 N. C. 557, 27 S. E. 125; and see 3 Cent. Dig. tit. "Appeal and Error," § 3013 *et seq.*

50. *Colorado.*— Ruby Chief Min., etc., Co. *v.* Prentice, 25 Colo. 4, 52 Pac. 210; Martin *v.* Hazzard Powder Co., 2 Colo. 596.

Georgia.— Atlantic Consol. St. R. Co. *v.* Beauchamp, 93 Ga. 6, 19 S. E. 24.

Kansas.— Lancashire Ins. Co. *v.* Murphy, (Kan. App. 1900) 62 Pac. 729; Leavenworth *v.* Duffy, (Kan. App. 1900) 62 Pac. 433.

Michigan.— Baylis *v.* Stout, 49 Mich. 215, 13 N. W. 521.

Pennsylvania.—Crawford *v.* McKinney, 165 Pa. St. 605, 30 Atl. 1045; Irvin *v.* Kutruff, 152 Pa. St. 609, 31 Wkly. Notes Cas. (Pa.) 485, 25 Atl. 796; Genesee-Fork Imp. Co. *v.* Ives, 144 Pa. St. 114, 29 Wkly. Notes Cas. (Pa.) 109, 22 Atl. 887, 13 L. R. A. 427; Fry *v.* Flick, 10 Pa. Super. Ct. 362, 44 Wkly. Notes Cas. (Pa.) 198; May *v.* Troutman, 4 Pa. Super. Ct. 42, 40 Wkly. Notes Cas. (Pa.) 63.

Tennessee.— Chicago Guaranty Fund L. Soc. *v.* Ford, 104 Tenn. 533, 58 S. W. 239.

United States.— Lucas *v.* Brooks, 18 Wall.

expressly so requires,[51] except where, as is the case in some states, it is sufficient to refer to the instruction by number.[52]

(D) *Stating Reasons Why Instructions Are Erroneous.* There is some difference of opinion as to whether, in addition to specifying the instruction the giving or refusing of which is complained of, it is further necessary for the assignment to show in what the error consists. This is due, in a large measure at least, to the difference in the wording of the statutes and rules of court. In a number of jurisdictions it has been held necessary to show why the ruling complained of is erroneous.[53] On the other hand, it has been held in some jurisdictions, where this question has been directly raised, that it is not necessary to state such reasons.[54]

(E) *Illustrations of Defective Assignments* — (1) NOT RELATING TO OBJECTIONS URGED. Objections to instructions given are not raised by an assignment of error that the finding of the jury was contrary to the law and the evidence,[55] or that the verdict is contrary to law.[56] An objection to a failure to instruct upon the law of the case is not raised by an assignment that the court erred in giving such instructions as were given, such instructions, upon the subjects to which they relate, being correct.[57] So, an assignment that the charge was an expression of opinion upon the weight of the evidence does not raise the question as to the duty of employers to adopt improved appliances and methods of operation,[58] and

(U. S.) 436, 21 L. ed. 779; Deitsch *v.* Wiggins, 15 Wall. (U. S.) 539, 21 L. ed. 228; Johnston *v.* Jones, 1 Black (U. S.) 209, 17 L. ed. 117; Prichard *v.* Budd, 76 Fed. 710, 42 U. S. App. 186, 22 C. C. A. 504; Sutherland *v.* Brace, 71 Fed. 469, 34 U. S. App. 454, 18 C. C. A. 199; Haldane *v.* U. S., 69 Fed. 819, 32 U. S. App. 607, 16 C. C. A. 447; Mitchell *v.* Marker, 62 Fed. 139, 22 U. S. App. 325, 10 C. C. A. 306, 25 L. R. A. 33; McClellan *v.* Pyeatt, 50 Fed. 686, 4 U. S. App. 319, 1 C. C. A. 613.

See 3 Cent. Dig. tit. "Appeal and Error," § 3015.

Pointing out questions of fact submitted to jury.— An assignment that the court erred in submitting to the jury a question of fact about which there was no evidence, without specifying what the question was, will not be considered. Sweeney *v.* Ten Mile Oil, etc., Co., 130 Pa. St. 193, 18 Atl. 612.

51. Baylis *v.* Stout, 49 Mich. 215, 13 N. W. 521; Chicago Guaranty Fund L. Soc. *v.* Ford, 104 Tenn. 533, 58 S. W. 239. This, it seems, must be a necessary consequence of the doctrine stated that "the portion of the charge complained of, or the instructions the giving or refusing of which is claimed to be error, should be distinctly designated or pointed out." See *supra*, XI, C, 2, b, (III), (A).

52. See Iowa and North Carolina cases cited *supra*, note 47.

53. Dale *v.* Purvis, 78 Cal. 113, 20 Pac. 296; Enright *v.* Atlanta, 78 Ga. 288; Georgia R. Co. *v.* Olds, 77 Ga. 673; Reardon *v.* Smith, 72 Ill. App. 674; Gregg *v.* Berkshire, (Kan. App. 1900) 62 Pac. 550; Johnson *v.* Fanno, 23 Oreg. 514, 32 Pac. 396; Lucas *v.* Brooks, 18 Wall. (U. S.) 436, 21 L. ed. 779; Union Casualty, etc., Co. *v.* Schwerin, 80 Fed. 638, 42 U. S. App. 514, 26 C. C. A. 45; Newman *v.* Virginia, etc., Steel, etc., Co., 80 Fed. 228, 42 U. S. App. 466, 25 C. C. A. 382.

54. Farmers Sav. Bank *v.* Wilka, 102 Iowa 315, 71 N. W. 200; Hammer *v.* Chicago, etc., R. Co., 70 Iowa 623, 25 N. W. 246; Schaefert *v.* Chicago, etc., R. Co., 62 Iowa 624, 17 N. W. 893; Clark *v.* Ralls, 50 Iowa 275. Although many of the Texas decisions, some of which are of very recent date, seem to hold that it is necessary to show in what respect the ruling complained of is erroneous. Robertson *v.* Coates, 1 Tex. Civ. App. 664, 20 S. W. 875; Schneider *v.* McCoulsky, 6 Tex. Civ. App. 501, 26 S. W. 170; Alamo F. Ins. Co. *v.* Lancaster, 7 Tex. Civ. App. 677, 28 S. W. 126; International, etc., R. Co. *v.* Hinzie, 82 Tex. 623, 18 S. W. 681; Cannon *v.* Cannon, 66 Tex. 682, 3 S. W. 36; Marsalis *v.* Thomas, 13 Tex. Civ. App. 54, 35 S. W. 795, decided subsequent to the decision of the supreme court laying down the opposite doctrine. The rule now seems to be that where an assignment of errors is sufficiently specific to enable the court to see that a particular ruling is complained of, it should be held to be good, although it fail to state the reason why such ruling is complained to be erroneous. Clarendon Land, etc., Co. *v.* McClelland, 86 Tex. 179, 23 S. W. 576, 1100, 22 L. R. A. 105 (in which it is said that the reasons by which allegations of error are sought to be sustained find their proper place); Gulf, etc., R. Co. *v.* Ramey, (Tex. Civ. App. 1894) 24 S. W. 654; Davis *v.* Missouri, etc., R. Co., 17 Tex. Civ. App. 199, 43 S. W. 44 (in which it was held that if appellant has assigned a reason why an instruction complained of is erroneous, he is not confined to that reason in arguing, because the reason assigned is not an essential part of the assignment).

55. Sweeney *v.* Ten Mile Oil Co., 130 Pa. St. 193, 18 Atl. 612; Kilgore *v.* Jordan, 17 Tex. 341.

56. Drexel *v.* Daniels, 49 Nebr. 99, 68 N. W. 399.

57. Davis *v.* Hilbourn, 41 Nebr. 35, 59 N. W. 379.

58. Sickles *v.* Missouri, etc., R. Co., 13 Tex. Civ. App. 434, 35 S. W. 493.

a failure to charge a proposition of law applicable to the case cannot be taken advantage of by assigning error on a charge that is abstractly correct.[59]

(2) Selecting Single Sentence of Charge. An assignment of error is defective which selects a single sentence from the body of the charge and imputes error thereto, and so severs the sentence from the context to which it evidently refers that it is unintelligible.[60]

(3) Too General. The following assignments have been held too general to require consideration: that the court erred in its charge to the jury;[61] that "defendant excepted to the charge as given upon the first and second issues;"[62] "that the charge as a whole was illegal in failing to state all the issues involved in the case;"[63] "that the charge of the court below as a whole was misleading to the jury;"[64] that the court erred in its charge "because it charges the law in the abstract and does not apply it to the facts of the case;"[65] that "the court erred in its charge in giving an incorrect measure of damages;"[66] that "the court erred in refusing to give the special charges assigned by plaintiff;"[67] "that the court failed to charge the jury on the law applicable to the facts and pleadings in this case;"[68] that the instruction was not warranted by the evidence;[69] that the instructions did not fully cover the case made by the declaration and proof;[70] "errors of law occurring at the trial;"[71] or "misdirection in the charge."[72]

(IV) *Findings of Fact.*[73] An assignment of error that the evidence is insufficient to support the findings is too general to be considered.[74] So, also, is an

59. Wood *v.* Collins, 111 Ga. 32, 36 S. E. 423; Lucas *v.* State, 110 Ga. 756, 36 S. E. 87.

60. Irvin *v.* Kutruff, 152 Pa. St. 609, 31 Wkly. Notes Cas. (Pa.) 485, 25 Atl. 796. See also Finch *v.* Karste, 97 Mich. 20, 56 N. W. 123.

61. Ludwig *v.* L. C. Huck Malting Co., 46 Ill. App. 494; Cramer *v.* Carlisle Bank, 2 Grant (Pa.) 267; Low *v.* Tandy, 70 Tex. 745, 8 S. W. 620; Clements *v.* Hearne, 45 Tex. 415; Deware *v.* Wichita Valley Mill, etc., Co., 17 Tex. Civ. App. 394, 43 S. W. 1047.

62. Taylor *v.* Albemarle Steam Nav. Co. 105 N. C. 484, 10 S. E. 897.

63. Carter *v.* Dixon, 69 Ga. 82.

64. Udderzook *v.* Harris, 140 Pa. St. 236, 21 Atl. 395.

65. Holman *v.* Herscher, (Tex. 1891) 16 S. W. 984.

66. Sanger *v.* Craddock, (Tex. 1886) 2 S. W. 196.

67. Sanger *v.* Craddock, (Tex. 1886) 2 S. W. 196.

68. Gross *v.* Hays, 73 Tex. 515, 11 S. W. 523.

69. Sage *v.* Tucker, 51 Mo. App. 336; Giles *v.* Hunter, 103 N. C. 194, 9 S. E. 549.

70. Whelan *v.* Georgia Midland, etc., R. Co., 84 Ga. 506, 10 S. E. 1091.

71. Hastings, etc., R. Co. *v.* Ingalls, 15 Nebr. 123, 16 N. W. 762.

72. Everett *v.* Williamson, 107 N. C. 204, 12 S. E. 187; McKinnon *v.* Morrison, 104 N. C. 354, 10 S. E. 513.

73. Conclusions of law.— In Indiana, if there is a special finding of fact and conclusions of law stated thereon, there must be an assignment of error upon the record that the court erred in its conclusions of law. Nading *v.* Elliott, 137 Ind. 261, 36 N. E. 695; Hartman *v.* Aveline, 63 Ind. 344, 30 Am. Rep. 217; Lewis *v.* Haas, 50 Ind. 246. Errors in conclusions of law cannot be reached by assigning error to the findings of fact (Selking *v.* Jones, 52 Ind. 409); but, where exception has been properly taken to conclusions of law, a general assignment that the trial court erred in its conclusions of law will be sufficient to present to the reviewing court the question whether the lower court so erred (Smith *v.* Davidson, 45 Ind. 396; Cruzan *v.* Smith, 41 Ind. 288. See also Peterson *v.* Struby, 25 Ind. App. 19, 56 N. E. 733, 57 N. E. 599).

Under a Texas statute providing that all grounds of error not distinctly specified shall be considered waived, an assignment of error to the conclusions of law, because, from the facts, the appellee was not entitled to the judgment given, is insufficient. Tudor *v.* Hodges, 71 Tex. 392, 9 S. W. 443.

74. See *supra*, XI, C, 2, b, (II).

The particulars in which the evidence is said to be insufficient to justify the finding should be pointed out in the assignment of error.

California.—Kyle *v.* Craig, 125 Cal. 107, 57 Pac. 791; San Francisco *v.* Pacific Bank, 89 Cal. 23, 26 Pac. 615, 835.

Montana.—Thorp *v.* Freed, 1 Mont. 651.

Nevada.— Lamance *v.* Byrnes, 17 Nev. 197, 30 Pac. 700.

North Carolina.— Green *v.* Castleberry, 77 N. C. 164.

North Dakota.— Brynjolfson *v.* Thingvalla Tp., 8 N. D. 106, 77 N. W. 284.

South Dakota.— But see Brady *v.* Kreuger, 8 S. D. 464, 66 N. W. 1083, 59 Am. St. Rep. 771.

Utah.—Van Pelt *v.* Park, 18 Utah 141, 55 Pac. 381.

See 3 Cent. Dig. tit. "Appeal and Error," § 3018.

This rule applies as well to appeals in equity cases as to appeals in actions at law. Van Pelt *v.* Park, 18 Utah 141, 55 Pac. 381.

When necessity for pointing out evidence

assignment of error that the court erred in its findings,[75] or an assignment "that the findings and judgment of the court are not supported by the pleadings, evidence, and law of the case."[76] A general assignment of error calling in question the correctness of the findings is of no avail when it specifies no particular evidence.[77] And an assignment of error which does not show whether it is taken to the findings of fact or conclusions of law is bad.[78]

(v) *Report of Referee or Master.* A general assignment that the court erred in sustaining or overruling the report of the referee or master, presents no question for consideration.[79]

(vi) *Verdict.* That the verdict is contrary to law, without specifying or indicating in what way and for what reason it is so, is too general and will not be regarded by the court.[80] So, an assignment of error that the verdict is contrary to the evidence,[81] or contrary to the law and the evidence,[82] or contrary to the instructions,[83] is too general. An assignment of error that the court erred in

obviated.— The necessity of pointing out wherein the evidence is insufficient to justify the finding is obviated where there is no evidence to sustain the finding and the various points raised have necessarily called attention to that fact. San Luis Water Co. *v.* Estrada, 117 Cal. 168, 48 Pac. 1075.

75. *Arizona.*— Main *v.* Main, (Ariz. 1900) 60 Pac. 888.

Colorado.— Percy Consol. Min. Co. *v.* Hallam, 22 Colo. 233, 44 Pac. 509.

Indiana.— Peterson *v.* Struby, 25 Ind. App. 19, 56 N. E. 733, 57 N. E. 599.

Iowa.— Carpenter *v.* Chicago, etc., R. Co., (Iowa 1899) 79 N. W. 393; Garrett *v.* Wells, 63 Iowa 256, 18 N. W. 899.

Minnesota.— Cook *v.* Kittson, 68 Minn. 474, 71 N. W. 670. See also Albrecht *v.* St. Paul, 56 Minn. 99, 57 N. W. 330.

Texas.—Falls Land, etc., Co. *v.* Chisholm, 71 Tex. 523, 9 S. W. 479.

Utah.— Mader *v.* Taylor, 15 Utah 161, 49 Pac. 255.

76. Hanover F. Ins. Co. *v.* Shrader, 11 Tex. Civ. App. 255, 31 S. W. 1100, 32 S. W. 344.

77. Dallemand *v.* Swensen, 54 Minn. 32, 55 N. W. 815; Moody *v.* Tschabold, 52 Minn. 51, 53 N. W. 1023; Union Cash Register Co. *v.* John, 49 Minn. 481, 52 N. W. 48; Smith *v.* Kipp, 49 Minn. 119, 51 N. W. 656.

In Indiana an assignment of error "that the court erred in its conclusions of law on the facts found" admits the correctness of the findings of fact. Indianapolis Natural Gas Co. *v.* Pierce, 25 Ind. App. 116, 56 N. E. 137.

78. Brunswick *v.* Moore, 74 Ga. 409; Fidelity, etc., Co. *v.* Anderson, 102 Ga. 551, 28 S. E. 382; Lytle *v.* Prescott, 57 Minn. 129, 58 N. W. 688.

79. Particular errors relied on should be pointed out.

Iowa.— Feister *v.* Kent, 92 Iowa 1, 60 N. W. 493; Hoefer *v.* Burlington, 59 Iowa 281, 13 N. W. 294.

Kentucky.— O'Reagan *v.* O'Sullivan, 14 Bush (Ky.) 184.

Michigan.— Altman *v.* Wheeler, 18 Mich. 240.

North Carolina.— Green *v.* Castlebury, 70 N. C. 20.

Pennsylvania.— Bull's Appeal, 24 Pa. St. 286.

South Carolina.— Smith *v.* Brabham, 48 S. C. 337, 26 S. E. 651; Moorer *v.* Andrews, 39 S. C. 427, 17 S. E. 948.

Tennessee.— Glasgow *v.* Hood, (Tenn. Ch. 1900) 57 S. W. 162.

United States.— Dexter *v.* Arnold, 2 Sumn. (U. S.) 108, 7 Fed. Cas. No. 3,858.

See 3 Cent. Dig. tit. "Appeal and Error," § 3020.

So an objection to an award that the arbitrators failed to file issues submitted to them, and exceeded their powers, cannot be considered unless the assignment of error points out wherein such arbitrators failed to decide issues and exceeded their powers. Fortune *v.* Killebrew, (Tex. Civ. App. 1893) 21 S. W. 986.

80. *Iowa.*— Hamilton Buggy Co. *v.* Iowa Buggy Co., 88 Iowa 364, 55 N. W. 496; Brigham *v.* Retelsdorf, 73 Iowa 712, 36 N. W. 715.

Pennsylvania.— Schofield *v.* Ferrers, 46 Pa. St. 438.

South Dakota.— Bauder *v.* Schamber, 7 S. D. 54, 63 N. W. 227.

Texas.— Utley *v.* Smith, (Tex. Civ. App. 1895) 32 S. W. 906; Sanger *v.* Craddock, (Tex. 1886) 2 S. W. 196.

Utah.— Gilberson *v.* Miller Min., etc., Co., 4 Utah 46, 5 Pac. 699.

See 3 Cent. Dig. tit. "Appeal and Error," § 3017.

An assignment of error that the verdict is contrary to law as given in the instructions, without designation as to what particular branch of the charge was disregarded by the jury, is too general for consideration. Wood *v.* Hallowell, 68 Iowa 377, 27 N. W. 263; Houston, etc., R. Co. *v.* Marcelles, 59 Tex. 334.

81. See *supra*, XI, C, 2, b, (II).

82. Keokuk Stove Works *v.* Hammond, 94 Iowa 694, 63 N. W. 563; State *v.* Floyd, 39 S. C. 23, 17 S. E. 505; International, etc., R. Co. *v.* Hinzie, 82 Tex. 623, 18 S. W. 681; Bonner *v.* Whitcomb, 80 Tex. 178, 15 S. W. 899; Leach *v.* Wilson County, (Tex. 1890) 13 S. W. 613; Blain *v.* Blain, (Tex. Civ. App. 1897) 43 S. W. 66.

83. Ætna Ins. Co. *v.* Simmons, 49 Nebr. 811, 69 N. W. 125; Gulf, etc., R. Co. *v.* Montier, 61 Tex. 122; Utley *v.* Smith, (Tex. Civ. App. 1895) 32 S. W. 906.

directing a verdict for plaintiff or defendant, as the case may be, is also too general;[84] and so is an assignment of error that the verdict should have been for defendant;[85] that "the court erred in refusing to instruct the jury to return a verdict for the defendant;"[86] or that the court erred in sustaining a motion to set aside the verdict, where the motion was based on several grounds.[87] So, an assignment of error that the verdict is excessive, without stating why it is excessive, will not be noticed;[88] nor can the objection that the verdict is excessive be considered under an assignment of error that the verdict is not sustained by the evidence[89] or is contrary to law,[90] or under an assignment that "the court erred in overruling defendant's motion for a new trial."[91]

(VII) *JUDGMENT.* A general assignment of error that the court erred in the judgment rendered is insufficient,[92] except, perhaps, in cases where only a single

84. Jackson Bridge, etc., Co. *v.* Lancashire Ins. Co., 122 Mich. 433, 81 N. W. 265; Alberts *v.* Vernon, 96 Mich. 549, 55 N. W. 1022; Johnson *v.* Ballou, 25 Mich. 460; Supreme Lodge, etc. *v.* Withers, 89 Fed. 160, 59 U. S. App. 177, 32 C. C. A. 182.

85. Alberts *v.* Vernon, 96 Mich. 549, 55 N. W. 1022.

86. Atchison, etc., R. Co. *v.* Todd, 4 Kan. App. 740, 46 Pac. 545; Beck *v.* Baden, 3 Kan. App. 157, 42 Pac. 845.

87. Battin *v.* Marshalltown, (Iowa 1898) 77 N. W. 493.

88. Louisville, etc., R. Co. *v.* Sullivan, 81 Ky. 624, 50 Am. Rep. 186; Galveston *v.* Devlin, 84 Tex. 319, 19 S. W. 395; Sanger *v.* Craddock, (Tex. 1886) 2 S. W. 196; Texas, etc., R. Co. *v.* Scharbauer, (Tex. Civ. App. 1899) 52 S. W. 589.

89. Ray *v.* Thompson, 26 Mo. App. 431; Brosnahan *v.* Philip Best Brewing Co., 26 Mo. App. 386; Nye, etc., Co. *v.* Snyder, 56 Nebr. 754, 77 N. W. 118; Riverside Coal Co. *v.* Holmes, 36 Nebr. 858, 55 N. W. 255.

90. Ray *v.* Thompson, 26 Mo. App. 431.

91. Evans *v.* Delk, (Tex. 1888) 9 S. W. 550.

An assignment of error that "the verdict is contrary to the evidence and is so exceedingly small as to clearly appear to have been given under the influence of passion, prejudice, or undue means," does not raise the question of error in assessment of the amount of recovery by the jury independently, or aside from the consideration of the influence of passion, prejudice, or undue means. Beavers *v.* Missouri Pac. R. Co., 47 Nebr. 761, 66 N. W. 821.

92. *Arizona.*— Newmark *v.* Marks, (Ariz. 1890) 28 Pac. 960.

California.— Shepherd *v.* Jones, 71 Cal. 223, 16 Pac. 711; Wilson *v.* Wilson, 45 Cal. 399.

Georgia.— Brunswick *v.* Moore, 74 Ga. 409; Hall *v.* Huff, 74 Ga. 409.

Indiana.— Seisler *v.* Smith, 150 Ind. 88, 46 N. E. 993; McGinnis *v.* Boyd, 144 Ind. 393, 42 N. E. 678; Indiana Bond Co. *v.* Shearer, 24 Ind. App. 622, 57 N. E. 276.

Iowa.— Guyer *v.* Minnesota Thresher Mfg. Co., 97 Iowa 132, 66 N. W. 83; Keokuk Stove Works *v.* Hammond, 94 Iowa 694, 63 N. W. 563.

Kansas.— Gamble *v.* Hodges, 17 Kan. 24; Beck *v.* Baden, 3 Kan. App. 157, 42 Pac. 845.

Kentucky.— Smith *v.* Williams, 4 Ky. L. Rep. 631; Harned *v.* Harvey, 3 Ky. L. Rep. 537.

Michigan.— Hecock *v.* Van Dusen, 96 Mich. 573, 55 N. W. 1024; Wheeler, etc., Mfg. Co. *v.* Walker, 41 Mich. 239, 1 N. W. 1035.

Minnesota.— Cook *v.* Kittson, 68 Minn. 474, 71 N. W. 670.

Montana.— Thorp *v.* Freed, 1 Mont. 651.

South Dakota.— John A. Tolman Co. *v.* Savage, 5 S. D. 496, 59 N. W. 882.

Texas.— Western Union Tel. Co. *v.* Neel, (Tex. Civ. App. 1896) 35 S. W. 29; Douglass *v.* Duncan, 66 Tex. 122, 18 S. W. 343; Bryant *v.* Galbraith, (Tex. Civ. App. 1897) 43 S. W. 833.

United States.— Louisiana, etc., R. Co. *v.* Board of Levee Com'rs, 87 Fed. 594, 58 U. S. App. 281, 31 C. C. A. 121; Hart *v.* Bowen, 86 Fed. 877, 58 U. S. App. 184, 31 C. C. A. 31; U. S. *v.* Ferguson, 78 Fed. 103, 45 U. S. App. 457, 24 C. C. A. 1.

See 3 Cent. Dig. tit. "Appeal and Error," § 3025 *et seq.*

Thus, it is insufficient to assign for error that "the court erred in rendering judgment for defendant" (Bryant *v.* Galbraith, (Tex. Civ. App. 1897) 43 S. W. 833); that "the judgment ought to have been rendered for the plaintiff" (Wheeler, etc., Mfg. Co. *v.* Walker, 41 Mich. 239, 1 N. W. 1035); "that the court erred in rendering judgment for the plaintiff, because the evidence . . . is not sufficient to sustain a judgment for plaintiff" (Western Union Tel. Co. *v.* Neel, (Tex. Civ. App. 1896) 35 S. W. 29); that the court erred in rendering judgment for one party when it should have been for another (Newmark *v.* Marks, (Ariz. 1890) 28 Pac. 960; Webster *v.* Fisk, 9 Mich. 250); that the court "erred in rendering judgment against the defendant and in not rendering judgment in his favor" (U. S. *v.* Ferguson, 78 Fed. 103, 45 U. S. App. 457, 24 C. C. A. 1); that the court "granted a divorce when it ought not to have been done" (McFarland *v.* McFarland, 40 Ind. 458); that the court erred in ordering judgment on the pleading or findings (Shepherd *v.* Jones, 71 Cal. 223, 16 Pac. 711); that the "court erred in entering judgment against plaintiff for costs" (Tomblin *v.* Ball, 46 Iowa 190); that "the court erred in not rendering a judgment for the plaintiff for the land sued for, costs of this suit, the damage proved, and in not ordering a writ of possession to put defendants out of, and put plaintiff in, possession of such land, under the pleadings of the parties filed

issue is involved.[93] The particular ground on which it is claimed that the judgment is erroneous must be specifically pointed out.[94] So, an assignment that the judgment is contrary to the law;[95] that the judgment is contrary to the evidence;[96] that the judgment is contrary to the law and the evidence;[97] or that the judgment shows on its face illegality, as fully appears from the execution on and by virtue of which the lands were sold,[98] is too general to be considered. The question whether or not the judgment is excessive is not raised by an assignment of error that the court erred in rendering judgment for plaintiff;[99] by an assignment that "the judgment is excessive under the evidence;"[1] by an assignment that "if the plaintiff is entitled to anything, the judgment is for a much greater sum than the pleading and evidence authorized;"[2] or by an assignment that the damage sustained by plaintiff does not equal the amount of the judgment.[3] If the basis of the appeal is error in the judgment in calculation, it must be pointed out in what the error consists.[4]

(VIII) *DECREE.* Assignments of error which merely allege error in the decree, without more particularly pointing out in what the error consists, are insufficient.[5]

in this case and the evidence given on the trial of the case" (Mynders *v.* Ralston, 68 Tex. 498, 4 S. W. 854).

93. Thomasson *v.* Callahan, 5 Ky. L. Rep. 600. See also Austin *v.* Gulf, etc., R. Co., 45 Tex. 234.

94. Tomblin *v.* Ball, 46 Iowa 190; Lowrie *v.* France, 7 Nebr. 191.

95. Howcott *v.* Kilbourn, 44 Ark. 213; Ferguson *v.* Ehrenberg, 39 Ark. 420; Goodwine *v.* Crane, 41 Ind. 335; Davis *v.* Scott, 13 Ind. 506; Barry *v.* Barry, (Kan. App. 1900) 59 Pac. 685; Cevada *v.* Miera, (N. M. 1900) 61 Pac. 125; Pearce *v.* Strickler, 9 N. M. 467, 54 Pac. 748.

In actions where the legal liability of the parties is several as well as joint and plaintiff might maintain his action against any one or against all of the defendants, it cannot be assigned as error that the judgment is erroneous as to one or more of defendants, and therefore bad as to all. Smith *v.* Foster, 3 Coldw. (Tenn.) 139.

96. Macey *v.* Wilson, (Tex. 1889) 12 S. W. 282.

97. Smola *v.* McCaffrey, 83 Iowa 760, 50 N. W. 16; Lee *v.* Schmidt, 1 Hilt. (N. Y.) 537; Connor *v.* Edwards, 36 S. C. 563, 15 S. E. 706; American Legion of Honor *v.* Rowell, 78 Tex. 677, 15 S. W. 217; Anderson *v.* Horn, 75 Tex. 675, 13 S. W. 24; Florsheim Bros. Dry-Goods Co. *v.* Todd, (Tex. Civ. App. 1896) 35 S. W. 51; Day *v.* Dalziel, (Tex. Civ. App. 1895) 32 S. W. 377.

98. Atcheson *v.* Hutchison, 51 Tex. 223.

99. Black *v.* Boyd, 52 Iowa 719, 2 N. W. 1044.

1. Consolidated Kansas City Smelting, etc., Co. *v.* Conring, (Tex. Civ. App. 1895) 33 S. W. 547.

2. Hicks *v.* Bailey, 16 Tex. 229.

3. Southern Pac. Co. *v.* Redding, 17 Tex. Civ. App. 440, 43 S. W. 1061. So, the question whether the inclusion of an item of interest was erroneous is not presented by an assignment that the court erred in finding the defendant indebted in the sum it did, or any other sum. McNulta *v.* West Chicago Park Com'rs, 99 Fed. 900, 40 C. C. A. 155.

4. Lee *v.* Trahan, 20 La. Ann. 202. So an assignment that the judgment is excessive under the evidence is too general to be considered. Consolidated Kansas City Smelting, etc., Co. *v.* Conring, (Tex. Civ. App. 1895) 33 S. W. 547.

5. Rogers *v.* Rogers, 74 Ga. 598; Ward *v.* Tennessee Coal, etc., Co., (Tenn. Ch. 1900) 57 S. W. 193; McFarlane *v.* Golling, 76 Fed. 23, 46 U. S. App. 141, 22 C. C. A. 23; Oswego Tp. *v.* Travelers' Ins. Co., 70 Fed. 225, 36 U. S. App. 13, 17 C. C. A. 77; Florida Cent. R. Co. *v.* Cutting, 68 Fed. 586, 30 U. S. App. 428, 15 C. C. A. 597. See also Fullerton's Estate, 146 Pa. St. 61, 23 Atl. 321; Haag *v.* Good, 7 Pa. Super. Ct. 425, 42 Wkly. Notes Cas. (Pa.) 530; and 3 Cent. Dig. tit. "Appeal and Error," § 3025 *et seq.*

Illustrations.— So, a general assignment of error that the court erred in entering final decree, and that the decree is in every respect erroneous, will not be considered on appeal. Stanley *v.* Chicago Trust, etc., Bank, 61 Ill. App. 257. An objection to a decree that it does not follow the verdict, no particular departure being specified, does not raise the question whether the decree goes beyond the verdict. Searcy *v.* Collins, 94 Ga. 642, 20 S. E. 94. An assignment that the decree is erroneous, because the allegations of the bill are not sufficient to warrant the relief granted, is too general. Simmons *v.* Bailey, 105 Tenn. 152, 58 S. W. 277.

The rule in Alabama in equity cases is somewhat different from that stated in the text. In such cases an assignment of error that "the court below erred in the final decree rendered" is sufficient when the decree, as an entirety, is assailed as erroneous. Robinson *v.* Murphy, 69 Ala. 543. It is otherwise, however, when it is only claimed that the decree is partially erroneous. In that case the specific errors with which it is said to be infected should be assigned with precision. Alexander *v.* Rea, 50 Ala. 450.

(IX) *MOTION FOR NEW TRIAL* — (A) *View That Assignment of Error For Overruling Motion Is Sufficient* — (1) RULE STATED. In a number of jurisdictions it is well settled that a general assignment of error that the court erred in overruling a motion for a new trial brings up for review all the grounds properly made the basis of the motion, it not being necessary to specify the particular ground or grounds in regard to which the action of the court is claimed to be erroneous.[6] It is also held, in some of these jurisdictions, that matters assignable as grounds for new trial cannot be made the subject of an independent assignment of error in the reviewing court, but must be embraced in the motion for a new trial, and the action of the trial court in overruling the motion assigned as error;[7] that all errors which are grounds for new trial and which are not specified in the motion for new trial are waived;[8] and, even though specified in the motion for new trial, such matters cannot be considered unless error is assigned to the action of the court in overruling the motion.[9]

6. *Georgia.*— Gray *v.* Phillips, 88 Ga. 199, 14 S. E. 205.

Illinois.— Ottawa, etc., R. Co. *v.* McMath, 91 Ill. 104; Shaw *v.* People, 81 Ill. 150.

Indiana.— Kernodle *v.* Gibson, 114 Ind. 451, 17 N. E. 99; Hutts *v.* Shoaf, 88 Ind. 395.

Kansas.— Ft. Scott, etc., R. Co. *v.* Jones, 48 Kan. 51, 28 Pac. 978.

Oklahoma.—Logan County *v.* Jones, 4 Okla. 341, 51 Pac. 565; Richardson *v.* Mackay, 4 Okla. 328, 46 Pac. 546; Walter A. Wood Mowing, etc., Co. *v.* Farnham, 1 Okla. 375, 33 Pac. 867.

Wyoming.— School Dist. No. 3 *v.* Western Tube Co., 5 Wyo. 185, 38 Pac. 922; Wolcott *v.* Bachman, 3 Wyo. 335, 23 Pac. 72, 673.

See 3 Cent. Dig. tit. "Appeal and Error," § 3023 *et seq.*

Matters properly alleged as ground for new trial.— Among the causes properly assigned as grounds for new trial, and which do not require a more specific assignment than that of error in overruling the motion for a new trial, are rejection of proper evidence and the admission of improper evidence (Ottawa, etc., R. Co. *v.* McMath, 91 Ill. 104; Shaw *v.* People, 81 Ill. 150; Chicago, etc., R. Co. *v.* Northern Illinois Coal, etc., Co., 36 Ill. 60; Galvin *v.* State, 56 Ind. 51); sufficiency of the evidence to sustain the findings (Indianapolis, etc., R. Co. *v.* Rhodes, 76 Ill. 285; Whitinger *v.* Nelson, 29 Ind. 441; Richardson *v.* Mackay, 4 Okla. 328, 46 Pac. 546; Pierce *v.* Manning, 2 S. D. 517, 51 N. W. 332); or verdict (Ottawa, etc., R. Co. *v.* McMath, 91 Ill. 104; Shaw *v.* People, 81 Ill. 150; Munger *v.* Supancicz, 64 Ill. App. 661; Davis *v.* Montgomery, 123 Ind. 587, 24 N. E. 367; Robbins *v.* Magee, 96 Ind. 174; Marsh *v.* Ferrell, 63 Ind. 363); the giving of improper, and the refusal of proper, instructions (Chicago, etc., R. Co. *v.* Northern Illinois Coal, etc., Co., 36 Ill. 60; Hage *v.* Newsom, 96 Ind. 426; Marsh *v.* Ferrell, 63 Ind. 363; New Albany *v.* Slider, 21 Ind. App. 392, 52 N. E. 628); that the finding is contrary to law (Whitinger *v.* Nelson, 29 Ind. 441); that the damages are excessive (Munger *v.* Supancicz, 64 Ill. App. 661; Firestone *v.* Daniels, 71 Ind. 570; Richardson *v.* Mackay, 4 Okla. 328, 46 Pac. 546); error in ruling upon a motion to suppress a deposition (McMullen *v.* Clark, 49 Ind. 77); ruling on a motion for continuance (Continental L. Ins. Co. *v.* Kessler, 84 Ind. 310; Carr *v.* Eaton, 42 Ind. 385; Hughes *v.* Ainslee, 28 Ind. 346); ruling on a motion for change of venue (Walker *v.* Heller, 73 Ind. 46; Horton *v.* Wilson, 25 Ind. 316; Baner *v.* Ward, 77 Ind. 153); refusal to require the jury to answer more fully and specifically interrogatories (Staser *v.* Hogan, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990); or error in reinstating a cause after a change of venue or refusal of sufficient time for perfecting the change (Wiley *v.* Barclay, 58 Ind. 577).

What is not a general assignment.— An assignment that the court below erred in overruling a motion for a new trial and in rendering judgment, for the reason that the complaint did not state facts sufficient to constitute a cause of action, is not a general allegation that the court erred in overruling the motion for a new trial; and, if it presents any question, it is as to the sufficiency of the complaint. Frazier *v.* Harris, 51 Ind. 156.

7. New Albany *v.* Slider, 21 Ind. App. 392, 52 N. E. 626; Hunt *v.* Listenberger, 14 Ind. App. 320, 42 N. E. 240, 964; Merchants', etc., Bank *v.* Fraze, 9 Ind. App. 161, 36 N. E. 378; Maybin *v.* Webster, 8 Ind. App. 547, 35 N. E. 194, 36 N. E. 373; McCloskey *v.* Davis, 8 Ind. App. 190, 35 N. E. 187; Johnson *v.* Badger Lumber Co., 8 Kan. App. 580, 55 Pac. 517; Wright *v.* Darst, 8 Kan. App. 492, 55 Pac. 516; Walter A. Wood Mowing, etc., Co. *v.* Farnham, 1 Okla. 375, 33 Pac. 867; Wolcott *v.* Bachman, 3 Wyo. 335, 23 Pac. 72, 673; U. S. *v.* Trabing, 3 Wyo. 144, 6 Pac. 721.

8. Allen *v.* State, 74 Ind. 216; McMullen *v.* Clark, 49 Ind. 77; Branham *v.* Record, 42 Ind. 181.

9. Terre Haute *v.* Fagan, 21 Ind. App. 371, 52 N. E. 457; Carson *v.* Funk, 27 Kan. 524; Case *v.* Jacobitz, (Kan. App. 1900) 62 Pac. 115; Chicago, etc., R. Co. *v.* German Ins. Co., 2 Kan. App. 395, 42 Pac. 594. See also Temple *v.* Lasher, 39 Ind. 203, and cases cited *supra*, note 6 *et seq.*

Not showing disposition of motion.—An assignment of error which recites the making of a motion for a new trial, and stating the grounds, but not showing what was done with it, is insufficient. Smith *v.* Frost, 74 Ga. 842.

(2) Limitations of Rule — (a) Matters Not Grounds For New Trial. The rule that a general assignment of errors is sufficient only applies to such matters as are errors upon the face of the record. All other errors in the rulings and decisions of the trial court should be specially assigned as such.[10]

(b) Several Motions For New Trial. Where more than one motion for a new trial is made, an assignment of error to the overruling of the motion is too general to be considered, because it does not show which motion was overruled.[11]

(B) *View That Each Ground Must Be Specified.* In many jurisdictions the rule stated in a preceding section, that a general assignment that the court erred in overruling a motion for new trial brings up for review all grounds properly made the basis of the motion,[12] does not obtain. The particular ground or grounds in regard to which the action of the court is claimed to be erroneous must be distinctly specified, and an assignment that the court erred in overruling a motion for new trial is too general to be available.[13] So, it has been held to be insufficient to assign that the court erred in overruling the motion for a new trial for the grounds therein stated,[14] or that the court erred in overruling the motion on new trial, in which motion the grounds of the motion were referred to by number,[15] unless the grounds stated amount to a single proposition, presented in a different way.[16]

10. Ringgenberg *v.* Hartman, 102 Ind. 537, 26 N. E. 91; New Albany *v.* White, 100 Ind. 206; Wolcott *v.* Bachman, 3 Wyo. 335, 23 Pac. 72, 673; U. S. *v.* Trabing, 3 Wyo. 144, 6 Pac. 721.

The following grounds are not assignable in a motion for a new trial and are not presented by a general assignment that the court erred in overruling the motion for a new trial: An order allowing a supplemental complaint to be filed before issue joined. Ringgenberg *v.* Hartman, 102 Ind. 537, 26 N. E. 91. Refusal to compel a party to answer interrogatories. Cates *v.* Thayer, 93 Ind. 156. Error in the conclusions of law. Montmorency Gravel Road Co. *v.* Rock, 41 Ind. 263. Ruling on a motion to remand a cause to a justice of the peace, to be certified by him to the circuit court. Tibbetts *v.* O'Connell, 66 Ind. 171. That a part of a pleading has been erroneously stricken out. New Albany *v.* White, 100 Ind. 206. Alleged error in refusing to dismiss drainage proceedings for failure of proof that the proposed drain would be of public utility. Earhart *v.* Farmers' Creamery, 148 Ind. 79, 47 N. E. 226.

11. J. Painter, etc., Co. *v.* W. H. Metz Co., 7 Ind. App. 652, 35 N. E. 27.

12. See *supra*, XI, C, 2, b, (IX), (A), (1).

13. *Arizona.*— Main *v.* Main, (Ariz. 1900) 60 Pac. 888; Miller *v.* Douglas, (Ariz. 1900) 60 Pac. 722.

Dakota.— Franz Falk Brewing Co. *v.* Mielenz, 5 Dak. 136, 37 N. W. 728.

Iowa.— Moffitt *v.* Albert, 97 Iowa 213, 66 N. W. 162; Wicke *v.* Iowa State Ins. Co., 90 Iowa 4, 57 N. W. 632.

Kentucky.— Louisville, etc., R. Co. *v.* Sullivan, 81 Ky. 624, 50 Am. Rep. 186; Daniels *v.* Carter, 6 Ky. L. Rep. 584; Paducah, etc., R. Co. *v.* Terrell, 5 Ky. L. Rep. 925; Taylor *v.* Armstrong, 5 Ky. L. Rep. 251; Pace *v.* Tolle, 5 Ky. L. Rep. 249.

Minnesota.— Mahler *v.* Merchants' Nat. Bank, 65 Minn. 37, 67 N. W. 655; Lytle *v.* Prescott, 57 Minn. 129, 58 N. W. 688.

Nebraska.— Hart *v.* Weber, 57 Nebr. 442, 77 N. W. 1085; National Masonic Acc. Assoc. *v.* Burr, 57 Nebr. 437, 77 N. W. 1098.

South Carolina.— Lanier *v.* Tolleson, 20 S. C. 57.

Texas.— Brown *v.* Vizcaya, (Tex. Civ. App. 1899) 55 S. W. 191; Armstrong *v.* Elliott, 20 Tex. Civ. App. 41, 48 S. W. 605, 49 S. W. 635; Tronnier *v.* Munger Improved Cotton Mach. Mfg. Co., (Tex. Civ. App. 1895) 31 S. W. 245; Johnson *v.* White, (Tex. Civ. App. 1894) 27 S. W. 174.

United States.— Condran *v.* Chicago, etc., R. Co., 67 Fed. 522, 32 U. S. App. 182, 14 C. C. A. 506, 28 L. R. A. 749.

See 3 Cent. Dig. tit. "Appeal and Error," § 3023.

14. Sisson *v.* Kaper, 105 Iowa 599, 75 N. W. 490; Koenigs *v.* Chicago, etc., R. Co., 98 Iowa 569, 65 N. W. 314, 67 N. W. 399; Duncombe *v.* Powers, 75 Iowa 185, 39 N. W. 261; St. Louis, etc., R. Co. *v.* Woolum, 84 Tex. 570, 19 S. W. 782; Harrell *v.* Mexico Cattle Co., 73 Tex. 612, 11 S. W. 863; Mayer *v.* Duke, 72 Tex. 445, 10 S. W. 565; Bumpass *v.* Morrison, 70 Tex. 756, 8 S. W. 596; Houston, etc., R. Co. *v.* McNamara, 59 Tex. 255; Laing *v.* Hanson, (Tex. Civ. App. 1896) 36 S. W. 116; McCown *v.* Terrell, 9 Tex. Civ. App. 66, 29 S. W. 484.

15. Low *v.* Fox, 56 Iowa 221, 9 S. W. 13; Culbertson *v.* McCullom, 1 Ky. L. Rep. 267.

16. King *v.* Chicago, etc., R. Co., 88 Iowa 704, 54 N. W. 204; Kitterman *v.* Chicago, etc., R. Co., 69 Iowa 440, 30 N. W. 174. See also Thomas *v.* Hoffman, 62 Iowa 125, 17 N. W. 431.

Illustrations.— So, assignments of error that "the court should have granted a new trial, because the verdict of the jury is contrary to the preponderance of the facts upon every issue submitted to the court, and to the law as applied to the issues by the court"

(c) *Rule Where Appeal Is From Order Granting or Denying Motion for New Trial.* Under a statute which authorizes an appeal from an order granting or refusing a new trial, if the motion is based on the ground that the evidence is not sufficient to support the verdict or that the verdict is contrary to the evidence, a general assignment of error that the court erred in granting or refusing the new trial, as the case may be, is sufficient; but, when the motion is based on the ground that the verdict was contrary to the law, or that errors of law occurred during the trial, the errors must be specifically pointed out and a general assignment of error must be disregarded.[17]

(x) *Motion in Arrest of Judgment.* An assignment of error that the court erred in overruling a motion in arrest of judgment is too general and will not be noticed, at least in cases where the motion was based on several grounds.[18]

3. Matters in Conflict With Record. Nothing can be assigned for error which is in contradiction of the record.[19]

(Galveston, etc., R. Co. *v.* Cooper, 2 Tex. Civ. App. 42, 20 S. W. 990); that the court erred in not granting a new trial, because the verdict was not supported by the law and was contrary to the law and evidence, and because the preponderance of the evidence was in favor of the plaintiff (Campbell *v.* Reagan, (Tex. Civ. App. 1893) 22 S. W. 824; Noell *v.* Bonner, (Tex. Civ. App. 1892) 21 S. W. 553); that "the court erred in not setting aside the judgment of the court and granting to them a new trial, because the judgment of the court was contrary to law, and because the judgment of the court was contrary to the evidence, and because of the many errors of the court in its rulings as complained of by plaintiffs" (Baxter *v.* Baker, (Tex. Civ. App. 1893) 22 S. W. 258); that "the court erred in not granting a new trial; the evidence did not warrant a possible finding in excess of seven thousand five hundred dollars" (Houston, etc., R. Co. *v.* Snelling, 59 Tex. 116), are insufficient.

17. Cobb *v.* Malone, 92 Ala. 630, 9 So. 738, construing Ala. Acts (1890–91), p. 779.

Illustrations.— Rulings on the admission of evidence which were not specified in the motion as grounds for new trial cannot be revised even if assigned as errors, and though there has been a joinder in such assignment. Mobile *v.* Murphree, 96 Ala. 141, 11 So. 201. So, it has been held that an assignment of error that the court erred in granting a new trial does not raise the question whether proper notice of the motion for new trial was given to the adverse party. Dillard *v.* Savage, 98 Ala. 598, 13 So. 514.

In California an appeal from an order denying a new trial cannot be considered where the statement on the motion for a new trial does not contain as part thereof any specification of errors, but there is merely attached thereto what is designated as an assignment of errors, which forms no part of the statement, is not authenticated as part of the record, and does not appear to have been considered on the motion for new trial. Ackley *v.* Fishbeck, 124 Cal. 409, 57 Pac. 207; Sprigg *v.* Barber, 122 Cal. 573, 55 Pac. 419; Cal. Code Civ. Proc. § 659.

18. Moffitt *v.* Albert, 97 Iowa 213, 66 N. W. 162; Duncombe *v.* Powers, 75 Iowa 185, 39 N. W. 261; Armstrong *v.* Killen, 70 Iowa 51, 30 N. W. 14; and 3 Cent. Dig. tit. "Appeal and Error," § 3022.

In Indiana the practice is different from that stated in the text. In this state an assignment that the court erred in overruling the motion in arrest of judgment embraces and includes every valid reason set out in such motion, and is considered sufficiently definite. Miles *v.* Buchanan, 36 Ind. 490.

19. *Connecticut.*— Cumnor *v.* Sedgwick, 67 Conn. 66, 34 Atl. 763; Wetmore *v.* Plant, 5 Conn. 541.

Indiana.— Heilman *v.* Shanklin, 60 Ind. 424.

Kansas.— Krueger *v.* Beckham, 35 Kan. 400, 11 Pac. 158.

Kentucky.—Cook *v.* Conway, 3 Dana (Ky.) 454.

Maine.— Paul *v.* Hussey, 35 Me. 97; King *v.* Robinson, 33 Me. 114, 54 Am. Dec. 614.

Massachusetts.— Gray *v.* Cook, 135 Mass. 189; Riley *v.* Waugh, 8 Cush. (Mass.) 220.

New Hampshire.— Collins *v.* Walker, 55 N. H. 437; Claggett *v.* Simes, 31 N. H. 22.

New Mexico.—Waldez *v.* Archuleta, 3 N. M. 195, 5 Pac. 327.

New York.— Lovett *v.* Pell, 22 Wend. (N. Y.) 369; Moody *v.* Vreeland, 9 Wend. (N. Y.) 125.

Texas.—Jennings *v.* Willer, (Tex. Civ. App. 1895) 32 S. W. 24.

United States.— Cheney *v.* Bacon, 49 Fed. 305, 4 U. S. App. 207, 1 C. C. A. 244; Field *v.* Gibbs. Pet. C. C. (U. S.) 155, 9 Fed. Cas. No. 4,766.

England.— Molins *v.* Werby, 1 Lev. 76; Helbut *v.* Held, 1 Str. 684; Bradburn *v.* Taylor, 1 Wils. C. P. 85; Hudson *v.* Bank, Cro. Jac. 28; Hollingwood *v.* Lankin, 1 Salk. 262, 2 Saund. 101.

Illustrations.— Thus, it cannot be assigned for error that there is no record. Moody *v.* Vreeland, 9 Wend. (N. Y.) 125. And, if the record states that issue was joined, it cannot be assigned for error that issue was not joined. Waldez *v.* Archuleta, 3 N. M. 195, 5 Pac. 327. See also Lovett *v.* Pell, 22 Wend. (N. Y.) 369. So, if the record show that the judgment was rendered by the court, it cannot be assigned for error that the judgment was rendered by the clerk. Cumnor *v.* Sedg-

4. Matters Not Shown by Record. No rulings or decisions of the court not shown by the record can be assigned as errors.[20]

5. Joinder of Error in Law and Error in Fact. Under the English practice, errors in fact and errors in law cannot be assigned together,[21] and this view has been adopted in a number of American decisions,[22] the reason assigned being that errors in fact and errors in law are distinct things, and require different modes of trial.[23] In one state, however, the rule has been abrogated by express statutory provisions,[24] and in another state by practice and usage for many years.[25]

6. Signature. In some jurisdictions it has been held necessary for the assignment of error to be signed by the appellant or plaintiff in error, or his attorney as such.[26]

wick, 67 Conn. 66, 34 Atl. 763. And if the record states that the party appeared and pleaded, it is conclusive as to that fact. Cook *v.* Conway, 3 Dana (Ky.) 454.

20. *Alabama.*— Haney *v.* Conoly, 57 Ala. 179.

California.— Ferrier *v.* Ferrier, 64 Cal. 23, 27 Pac. 960.

Georgia.— Visage *v.* McKellar, 58 Ga. 140; Leaptrot *v.* Robertson, 37 Ga. 586; Smith *v.* Mitchell, 6 Ga. 456.

Indiana.—Western Union Tel. Co. *v.* Frank, 85 Ind. 480.

Kentucky.— Springfield First Nat. Bank *v.* Wilson, 5 Ky. L. Rep. 927.

Ohio.— Harvey *v.* Brown, 1 Ohio 268.

Texas.— Johnson *v.* Sabine, etc., R. Co., 69 Tex. 641, 7 S. W. 379; Northern Assur. Co. *v.* Samuels, 11 Tex. Civ. App. 417, 33 S. W. 239; Moss *v.* Kittman, (Tex. Civ. App. 1893) 21 S. W. 315; Fox *v.* Brady, 1 Tex. Civ. App. 590, 20 S. W. 1024.

United States.—Woodbury *v.* Shawneetown, 74 Fed. 205, 34 U. S. App. 655, 20 C. C. A. 400.

An assignment of errors cannot be accepted as proof of facts therein alleged, and cannot, therefore, be considered in the absence of anything else in the record to show that the court did or did not rule as asserted in such assignment. Ferrier *v.* Ferrier, 64 Cal. 23, 27 Pac. 960; Patterson *v.* Mills, 121 N. C. 258, 28 S. E. 368; Woodbury *v.* Shawneetown, 74 Fed. 205, 34 U. S. App. 655, 20 C. C. A. 400. Thus, a specification that the court erred in its conclusions of law, on the agreed statement of facts, presents no question in the absence of a bill of exceptions embracing the agreed statement of facts. Western Union Tel. Co. *v.* Frank, 85 Ind. 480.

Assignments of error, founded on extraneous matters in the record which do not pertain to the cause between appellant and appellee, will be stricken out. Hagadon *v.* Campbell, 24 Ala. 375.

21. 2 Tidd Pr. 1169; 2 Bacon Abr.; Comyns Dig.; Jeffry *v.* Wood, 1 Str. 439.

22. Fitch *v.* Lothrop, 2 Root (Conn.) 524; Clarke *v.* Bell, 2 Litt. (Ky.) 162; Brents *v.* Barnett, 3 Bibb (Ky.) 251; Freeborn *v.* Denman, 7 N. J. L. 190; Moody *v.* Vreeland, 7 Wend. (N. Y.) 55.

23. 2 Tidd Pr. 1169; Eliot *v.* McCormick, 141 Mass. 194, 6 N. E. 375, in which case it is said: "There is no good reason why this should not be done. An assignment of errors is analogous to a declaration, which may contain several counts. If an error of law and also errors of fact be assigned, there need be no embarrassment or confusion in the subsequent pleadings or in the trial. The defendant in error can plead *in nullo est erratum*, which is in the nature of demurrer to the assignment of error in law, and traverse the assignments of errors in fact; and, under our practice, the court will take such order as to the trial that all the questions involved in the case may be brought before this court for final determination at the same time. There is no practical force in the objection that errors in law and errors in fact are to be tried by different tribunals. There is no more danger of confusion in the trial than there is in the ordinary case of a declaration containing several counts, to some of which the defendant may demur, while he traverses others. Where a plaintiff in error has several valid objections to a judgment against him, he ought not to be deprived of any of them, or to be compelled to elect at his peril which of the objections he will rely upon. Such a narrow rule of pleading is against the spirit of our laws, and the practice and usage under them."

24. Starbird *v.* Eaton, 42 Me. 569.

25. Eliot *v.* McCormick, 141 Mass. 194, 6 N. E. 375 [*citing* Goodridge *v.* Ross, 6 Metc. (Mass.) 487]; Packard *v.* Matthews, 9 Gray (Mass.) 311; Tilden *v.* Johnson, 6 Cush. (Mass.) 354; Morrison *v.* Underwood, 5 Cush. (Mass.) 52.

26. Sutherland *v.* Putnam, (Ariz. 1890) 24 Pac. 320; State *v.* Delano, 34 Ind. 52; Riley *v.* Murray, 8 Ind. 354. An assignment of errors, which contains the names of the parties, and is signed "Dunn and Lowe, East and Miller, for appellants," is not objectionable, as not being signed by appellants or their attorneys, where the record shows that Dunn, Lowe, East, and Miller were attorneys for appellants in the lower court. Levi *v.* Bray, 12 Ind. App. 9, 39 N. E. 754.

This was formerly the rule in Texas (Fordyce *v.* Dixon, 70 Tex. 694, 8 S. W. 504; Dwyer *v.* Testard, 1 Tex. App. Civ. Cas. § 1228); but the rule requiring it has been repealed by Rule No. 101 of 1891 [20 S. W. xviii], and, as the statute [Tex. Rev. Stat. art. 1037] does not require such signing, an unsigned assignment adopted in appellant's brief so as to identify it as his act should not be disregarded. Bexar Bldg.. etc., Assoc. *v.* Newman, 86 Tex. 380, 25 S. W. 11.

D. Joint Assignments. Upon a joint assignment of error one of several appellants or plaintiffs in error cannot avail himself of errors which are not common to all his co-appellants, but which affect him alone.[27] Nor can parties jointly assign error or take advantage of errors which affect themselves severally, and not jointly.[28] It is an elementary and well-settled rule that joint assignments of error must be good as to all who join therein, or they will not be available as to any of them. If the assignment of error is not good as to one, it will be overruled as to all.[29] This doctrine has been applied in a host of decisions, and under widely varying circumstances. Thus, a joint assignment of error by several appellants presents no question as to a ruling against one of the appellants only, and is ineffective for any purpose.[30] Accordingly, a joint assignment of error by several to the rulings of the court on the separate demurrer of one of them presents no question for the appellate court.[31] A joint assignment of error based upon the action of the court in overruling a motion for a new trial cannot be considered on appeal where the motion for a new trial appearing in the record was the sole and separate motion of one of appellants.[32] It has also been held that where parties join in a demurrer, which is overruled as not being good as to one, the other party, if the overruling is error as to him, can make it available only on a separate assignment of error.[33] If appellants jointly assign as error the rulings on the separate demurrers of each, and separate motions for new trial, such an assignment of error presents no question for the decision of the appellate court, nor is a defect of this character waived by a joinder in error.[34] If a party for whom judgment was rendered and the other appellants jointly assign errors, the assignment will be bad and the appeal will be dismissed.[35] A joint assignment of errors by several defendants, that the complaint does not charge facts sufficient to constitute a cause of action, cannot be sustained unless the complaint is bad as to all.[36]

E. Time of Filing — 1. In General. The time of filing assignments of errors is regulated altogether by statutes or rules of court.[37]

27. Yeoman *v.* Shaeffer, 155 Ind. 308, 57 N. E. 546.

28. Yeoman *v.* Shaeffer, 155 Ind. 308, 57 N. E. 546.

29. *Alabama.*—Davis *v.* Williams, 121 Ala. 542, 25 So. 704; McKissack *v.* Witz, 120 Ala. 412, 25 So. 21.

Illinois.— Brachtendorf *v.* Kehm, 72 Ill. App. 228.

Indiana.— Advance Mfg. Co. *v.* Auch, 25 Ind. App. 687, 58 N. E. 1062; Osborn *v.* State, 25 Ind. App. 521, 58 N. E. 558; Wines *v.* State Bank, 22 Ind. App. 114, 53 N. E. 389; Johnson *v.* Winslow, 22 Ind. App. 104, 53 N. E. 388.

Nebraska.— Moseman *v.* State, 59 Nebr. 629, 81 N. W. 853; American Bank *v.* Hand, 59 Nebr. 273, 80 N. W. 908.

New York.— Kittel *v.* Callahan, 19 N. Y. Suppl. 397, 46 N. Y. St. 404. See also Bosley *v.* National Mach. Co., 123 N. Y. 550, 25 N. E. 990, 34 N. Y. St. 277. But see Fisher *v.* Thirkell, 21 Mich. 1, 4 Am. Rep. 422, in which it was held that a joint assignment of error will be considered joint and several, or joint or several, according to the nature of error assigned and as affecting the respective plaintiffs in error.

See 3 Cent. Dig. tit. "Appeal and Error," § 2985 *et seq.*

30. Sparklin *v.* St. James' Church, 119 Ind. 535, 22 N. E. 8; Hanshew *v.* State, 113 Ind. 261, 14 N. E. 365; Orton *v.* Tilden, 110 Ind. 131, 10 N. E. 936.

31. Grimes *v.* Grimes, 141 Ind. 480, 40 N. E. 912; Arbuckle *v.* Swim, 123 Ind. 208, 24 N. E. 105; Lodoga *v.* Linn, 9 Ind. App. 15, 36 N. E. 159.

32. Meyer *v.* Meyer, 155 Ind. 569, 58 N. E. 842; Carr *v.* Carr, 137 Ind. 232, 36 N. E. 899.

33. Davis *v.* Williams, 121 Ala. 542, 25 So. 704.

34. Louisville, etc., R. Co. *v.* Smoot, 135 Ind. 220, 33 N. E. 905, 34 N. E. 1002.

35. Lillich *v.* Moore, 112 Ala. 532, 20 So. 452.

36. Becknell *v.* Becknell, 110 Ind. 42, 10 N. E. 414; Eichbredt *v.* Angerman, 80 Ind. 208; Durham *v.* Craig, 79 Ind. 117; Advance Mfg. Co. *v.* Auch, 25 Ind. App. 687, 58 N. E. 1062. See also Vigo Real Estate Co. *v.* Reese, 21 Ind. App. 20, 51 N. E. 350.

Exceptions to rule.— In one state it has been held that husband and wife, when joint parties to a suit, may jointly assign errors which affect the wife alone, she being the real party in interest. Hawkins *v.* Heinzman, 126 Ind. 551, 25 N. E. 708; Stewart *v.* Babbs, 120 Ind. 568, 22 N. E. 770.

How defective assignment cured.— A joint assignment of errors, defective because the errors alleged are not errors against all appellants, is cured by the parties against whom there is no appeal declining to join in the appeal. Cooper *v.* Hayes, 96 Ind. 386.

37. *Colorado.*— Haas *v.* Pueblo County, 5 Colo. 125.

2. Effect of Failure to File in Time. It has been said that, under the English practice, if the errors be not assigned within the required time, defendant in error sues out his writ of scire facias quare executionem non, and if, upon such writ, plaintiff in error does not assign his errors, but suffers judgment to go by default, no errors afterward assigned will prevent execution.[38] In most of the American states, under like conditions, the appeal or writ of error is dismissed or the judgment affirmed, according as the statute or rule of court may provide.[39]

3. Waiver of Objection For Failure to File in Time. It has been held that an objection, for failure to file an assignment of errors in time, is waived if not made before argument of the cause on the merits.[40]

Georgia.— Nicholls *v.* Popwell, 80 Ga. 604, 6 S. E. 21; Boyd *v.* Ham, 2 Ga. 190.

Indiana.— Lawrence *v.* Wood, 122 Ind. 452, 24 N. E. 159; Price *v.* Baker, 41 Ind. 572, 13 Am. Rep. 346; Pulaski County *v.* Vurpillat, 14 Ind. App. 311, 42 N. E. 962.

Iowa.— Russell *v.* Johnston, 67 Iowa 279, 25 N. W. 232; Betts *v.* Glenwood, 52 Iowa 124, 2 N. W. 1012.

Kentucky.— Wearen *v.* Smith, 80 Ky. 216; Harpending *v.* Daniel, 78 Ky. 71.

Louisiana.— State *v.* Strong, 32 La. Ann. 173; Keller *v.* Judson, 18 La. Ann. 282.

New Hampshire.— Rochester *v.* Roberts, 25 N. H. 495.

New Mexico.— Lamy *v.* Lamy, 4 N. M. 43, 12 Pac. 650.

North Carolina.—Pleasants *v.* Raleigh, etc., Air-Line R. Co., 95 N. C. 195; Lytle *v.* Lytle, 94 N. C. 522.

Tennessee.— Snapp *v.* Zink, Mart. & Y. (Tenn.) 265.

Texas.—American Legion of Honor *v.* Rowell, 78 Tex. 677, 15 S. W. 217; Phillips *v.* Webb, (Tex. Civ. App. 1897) 40 S. W. 1011; Patrick *v.* Laprelle, (Tex. Civ. App. 1896) 37 S. W. 872; Keyser *v.* Willman, (Tex. Civ. App. 1895) 29 S. W. 832.

Utah.— Bankhead *v.* Union Pac. R. Co., 2 Utah 507.

United States.— Crabtree *v.* McCurtain, 61 Fed. 808, 19 U. S. App. 660, 10 C. C. A. 86; Flahrity *v.* Union Pac. R. Co., 56 Fed. 908, 12 U. S. App. 532, 6 C. C. A. 167; U. S. *v.* Goodrich, 54 Fed. 21, 12 U. S. App. 108, 4 C. C. A. 160.

38. Statement in Rochester *v.* Roberts, 25 N. H. 495 [*citing* Carth. 40, 41; 1 Archbold Pr. 270].

39. *Arizona.*— U. S. *v.* Tidball, (Ariz. 1892) 29 Pac. 385; Sutherland *v.* Putnam, (Ariz. 1890) 24 Pac. 320.

Arkansas.— Tucker *v.* Ellis, 1 Ark. 273.

Indiana.— Lawrence *v.* Wood, 122 Ind. 452, 24 N. E. 159; Bacon *v.* Withrow, 110 Ind. 94, 10 N. E. 624.

Iowa.— McLuen *v.* Bear Grove Dist. Tp., 82 Iowa 742, 48 N. W. 76; Wise *v.* Usry, 72 Iowa 74, 33 N. W. 371.

Kentucky.— Wright *v.* Woolfolk, 14 Bush (Ky.) 308; Philpot *v.* Benge, 4 Ky. L. Rep. 732.

Louisiana.— Lacy *v.* Flucker, 1 La. 50.

Michigan.— Roush *v.* Darmstaetter, 113 Mich. 535, 71 N. W. 867.

Mississippi.— Adams *v.* Munson, 3 How. (Miss.) 77.

Texas.— Malone *v.* Medford, (Tex. Civ. App. 1895) 31 S. W. 685.

Washington.—Meyers *v.* Territory, (Wash. Terr. 1889) 20 Pac. 685.

United States.— Dufour *v.* Lang, 54 Fed. 913, 2 U. S. App. 477, 4 C. C. A. 663; U. S. *v.* Goodrich, 54 Fed. 21, 12 U. S. App. 108, 4 C. C. A. 160.

See 3 Cent. Dig. tit. "Appeal and Error," § 3043 *et seq.*

It has been held, however, in some jurisdictions, that time for filing the assignment of error may be extended for good cause shown (Cannon *v.* McEnanley, (R. I. 1898) 41 Atl. 1016. See also Malone *v.* Medford, (Tex. Civ. App. 1895) 31 S. W. 685; Mitchell *v.* Ingersoll, 2 Cai. (N. Y.) 385, in which last case it was held that a default or failure to assign errors within the time prescribed will be set aside where no laches is imputable to plaintiff because of a delay in obtaining the transcript); and that, if no delay in the submission of the cause has occurred, the appeal will not be dismissed for failure to file the assignment of errors in time (Home *v.* Duff, 5 Colo. 344); or the opposite party has not been prejudiced thereby (Texas Western R. Co. *v.* Gentry, 69 Tex. 625, 8 S. W. 98).

40. Smith *v.* Hill, 83 Iowa 684, 49 N. W. 1043, 32 Am. St. Rep. 329; McKell *v.* Neil, 1 Morr. (Iowa) 271. See also Andrews *v.* Burdick, 62 Iowa 714, 16 N. W. 275; and 3 Cent. Dig. tit. "Appeal and Error," § 3048.

So, it has been held in one case that objection for failure to file in time is waived by filing a joinder in error. Deemer *v.* Falkenburg, 4 N. M. 57, 12 Pac. 717. But *compare* Wright *v.* Woolfolk, 14 Bush (Ky.) 308, in which it was held that an appellee, by filing cross-errors, does not waive his right to have the appeal dismissed for failure to file the assignment of errors within the required time.

An agreement to extend the time of appellant to file his brief is not a waiver of the positive duty imposed on appellant by statute to file his assignment of errors on or before the first day of the term to which the appeal is returnable. Lamy *v.* Lamy, 4 N. M. 140, 13 Pac. 178.

Extending time to prepare a bill of exceptions does not prevent appellant from filing his assignment of errors and schedule within the time prescribed by statute, and does not extend the time to file the assignment of errors. Wright *v.* Woolfolk, 14 Bush (Ky.) 308; Slack *v.* Longshaw, 5 Ky. L. Rep. 253.

F. Service. Statutes and rules of court prescribing service of assignments of error must be strictly complied with.[41] The assignment should not be served until it has been filed, and, when the assignment is not filed until the next day after service thereof, the rule to join in error and all subsequent proceedings will be set aside.[42] Service, it has been held, may be waived by noticing the cause for hearing.[43]

G. Making Assignment Part of Record. The assignment of errors must, generally, be attached to, and made a part of, the record,[44] or be entered on the transcript.[45]

H. Amendments. The right to, in the furtherance of justice, amend assignments of error is very generally recognized,[46] but it is usually necessary to obtain leave of court to make the amendment.[47] A party will not be permitted to amend by filing additional assignments of error which are not founded on the merits of the case,[48] and good cause for permission to make the amendment must be shown by the party assigning.[49] When leave to file an amended assignment of

41. See 3 Cent. Dig. tit. "Appeal and Error," § 3049 *et seq.*

Thus, it has been held that, if the statute requires service on the adverse party, service on the attorney will not be sufficient. Townshend, Appellant, 85 Me. 57, 26 Atl. 969; State *v.* Freeman, 127 N. C. 544, 37 S. E. 206; Smith *v.* Smith, 119 N. C. 314, 25 S. E. 878; State *v.* Price, 110 N. C. 599, 15 S. E. 116. If the statute requires a copy to be attested by a designated officer of court, service of a copy attested by appellant's counsel will not be sufficient. Wait *v.* Demeritt, 119 Mass. 158. If the statute requires service ten days before the first day of the term, the appeal will be dismissed if not served within the time prescribed. Stanley *v.* Barringer, 74 Iowa 34, 36 N. W. 877; Crocker *v.* Ankeny, 48 Iowa 206.

42. Lyme *v.* Ward, 1 N. Y. 531; and see 3 Cent. Dig. tit. "Appeal and Error," § 3051.

43. Frost *v.* Lawler, 34 Mich. 235; and see 3 Cent. Dig. tit. "Appeal and Error," § 3052.

44. Williston *v.* Fisher, 28 Ill. 43; Martin *v.* Russell, 4 Ill. 342; Brown *v.* H. W. Boies Co., 58 Ill. App. 274; Walker *v.* Pratt, 55 Ill. App. 297; Armstrong's Appeal, 68 Pa. St. 409; Cameron *v.* Roemele, 59 Tex. 238; Anderson *v.* Wallace, 10 Tex. 297; Barnes *v.* Miller, 3 Tex. Civ. App. 468, 22 S. W. 659.

New Mexico — Putting on separate paper. — Supreme court rule No. 25 provides that all assignments of errors "shall be written on a separate paper, and filed in the cause, and shall also be copied into the brief of the appellant or plaintiff in error, and the clerk shall enter the fact of such filing on the record." It was held that a writ of error will be dismissed for non-compliance with such rule when it appears that plaintiff in error made an assignment of errors, incorporated it in a transcript containing a statement of the case and brief, and had the same properly filed, but did not file the assignment of error written on a separate paper. Martin *v.* Terry, 6 N. M. 491, 30 Pac. 951.

45. Deputy *v.* Hill, 85 Ind. 75; Vaughn *v.* Ferrall, 50 Ind. 221; Hays *v.* Johns, 42 Ind. 505.

Pasting on transcript.— An assignment of errors which is pasted to the transcript is entered on the record. Moore *v.* Hammons, 119 Ind. 510, 21 N. E. 1111.

In some states, however, the assignment of errors need only appear in the brief of counsel. Donnell Mfg. Co. *v.* Hart, 40 Mo. App. 512; McReavy *v.* Eshelman, 4 Wash. 757, 31 Pac. 35, in which last case it is said that, in the practice of that state, technical assignments of error are obsolete; that if the points of objection are readily found in the brief, the appeal will not be dismissed. See also Ranahan *v.* Gibbons, (Wash. 1900) 62 Pac. 773; Haugh *v.* Tacoma, 12 Wash. 386, 41 Pac. 173, 43 Pac. 37; Wash. Laws (1893), p. 127; Supreme Court Rules, No. 12. See also *infra*, XII.

46. Buhlman *v.* Humphrey, 86 Iowa 597, 53 N. W. 318; Stanley *v.* Barringer, 74 Iowa 34, 36 N. W. 877; Loughran *v.* Des Moines, 72 Iowa 382, 34 N. W. 172; Kendig *v.* Overhulser, 58 Iowa 195, 12 N. W. 264; Brown *v.* Rose, 55 Iowa 734, 7 N. W. 133; Trudo *v.* Anderson, 10 Mich. 357, 81 Am. Dec. 795; Parsons *v.* Copland, 5 Mich. 144; Freeborn *v.* Denman, 7 N. J. L. 190; Hastings, etc., R. Co. *v.* Ingalls, 13 Nebr. 279, 13 N. W. 403; Spencer *v.* Thistle, 13 Nebr. 201, 13 N. W. 208; and see 3 Cent. Dig. tit. "Appeal and Error," § 3058 *et seq.*

47. Casey *v.* Horton, 40 Ill. 54; Baker *v.* Mayo, 86 Ill. App. 86; Betts *v.* Glenwood, 52 Iowa 124, 2 N. W. 1012; Carpenter *v.* Eastern R. Co., 67 Minn. 188, 69 N. W. 720; Minneapolis, etc., R. Co. *v.* Home Ins. Co., 64 Minn. 61, 66 N. W. 132; Greene *v.* Dwyer, 33 Minn. 403, 23 N. W. 546; Shenk *v.* Mingle, 13 Serg. & R. (Pa.) 29.

Where opposite party has not been prejudiced.— It has been held that an amended assignment of errors filed without leave, after appellee's argument, will not be stricken out, it appearing to have been filed in the furtherance of justice, and submission of the case not having been delayed or appellee prejudiced thereby. Bunyan *v.* Loftus, 90 Iowa 122, 57 N. W. 685.

48. Galbraith *v.* Green, 13 Serg. & R. (Pa.) 85; Shenk *v.* Mingle, 13 Serg. & R. (Pa.) 29. See also Myrick *v.* Chamblain, Minor (Ala.) 357; Parsons *v.* Copland, 5 Mich. 144.

49. Casey *v.* Horton, 40 Ill. 54; Anonymous, 40 Ill. 54.

Exercising due care in the first instance.— Under the rules of the Indiana supreme

errors has been granted, but a new assignment has never been made on the transcript or upon some paper attached thereto, as required by a rule of court, the appeal will be considered on the original assignment of errors.[50]

I. Waiver of Defects in Assignment. The submission of a cause by agreement[51] of parties operates as a waiver of all irregularities in the assignment of errors[52] — such as that the assignment does not contain the names of all the parties;[53] that in the assignment of errors one of the parties is made an appellee instead of appellant;[54] that the assignment of errors does not set out the names of the parties in full;[55] or that the assignment of errors does not number the errors as required by the rules of court.[56] So, it has been held that an objection to the form of an assignment of errors, filed on the day of the hearing, will not be considered,[57] and that by arguing a general assignment of errors, the objection that it is not sufficiently specific is waived,[58] and error in a charge, though not specifically assigned, may be reviewed where it is discussed by the counsel for both parties.[59] Under a rule requiring appellee to file a brief upon the assignment of errors within ninety days after the submission of the cause, failure to file until a year thereafter operates as a waiver of any objection thereto unless an examination of it, without suggestion of counsel, shows it to be so wanting in substance as not to present any question.[60]

J. Aider by Extrinsic Matter. According to the weight of authority, an assignment of errors should be complete in itself and not require reference to extrinsic matter to determine the question intended to be presented thereby. Hence, where an assignment of error is not sufficiently specific, it cannot be aided by statements or specifications in the briefs[61] or by reference to a motion for new trial.[62]

court, amendments will not be permitted where it does not appear that due care was exercised in the first instance to make the assignment of errors complete, and no excuse is shown for failure to make early application. Baldwin *v.* Sutton, 148 Ind. 591, 47 N. E. 629, 1067; Lee *v.* Mozingo, 143 Ind. 167, 41 N. E. 454. It has been held not a sufficient excuse for making a defective assignment that the party was in doubt how the assignment should be made. Lee *v.* Mozingo, 143 Ind. 667, 41 N. E. 454.

Where the name of a party to the suit is omitted, the assignment of error may be amended by inserting his name. Meridian Nat. Bank *v.* Hauser, 145 Ind. 496, 42 N. E. 753. But see Loucheim *v.* Seeley, 151 Ind. 665, 43 N. E. 646. And it has been held that where the assignment of errors does not state the full names of the parties as required by rules of court, and appellant has asked for leave to amend, the appellate court will consider the case without requiring a formal amendment. McConahey *v.* Foster, 21 Ind. App. 416, 52 N. E. 619.

50. Rosenbower *v.* Schuetz, 141 Ind. 44, 40 N. E. 256.

51. What does not amount to a submission by agreement.— An agreement by appellees to allow appellants an extension of time within which to file their briefs, stating a request that when the same are filed the case shall be passed upon in the regular way, and afterward a second agreement for an extension in which the right to make any legal objection to the record or assignment of errors is reversed, does not indicate a voluntary submission of the cause by agreement, and an objection to defects in the record or assignment is not waived. Brown *v.* Trexler, 132 Ind. 106, 30 N. E. 418, 31 N. E. 572.

52. Ridenour *v.* Beekman, 68 Ind. 236.

53. Dobbins *v.* Baker, 80 Ind. 52; Bougher *v.* Scobey, 16 Ind. 151.

54. Clark *v.* Continental Imp. Co., 57 Ind. 135.

55. Truman *v.* Scott, 72 Ind. 258.

56. State *v.* Madison County, 92 Ind. 133.

57. Watt *v.* Hunter, 20 Tex. Civ. App. 76, 48 S. W. 593, 49 S. W. 412; Peyton *v.* Cook, (Tex. Civ. App. 1895) 32 S. W. 781.

58. Michigan Cent. R. Co. *v.* Consolidated Car Heating Co., 69 Fed. 1, 37 U. S. App. 211, 16 C. C. A. 106.

59. Kilgore *v.* Jordan, 17 Tex. 341.

60. Hanover F. Ins. Co. *v.* Johnson, (Ind. App. 1900) 57 N. E. 277.

61. Calkins *v.* Chicago, etc., R. Co., 92 Iowa 714, 61 N. W. 423; Lamy *v.* Lamy, 4 N. M. 43, 12 Pac. 650; International, etc., R. Co. *v.* Hinzie, 82 Tex. 623; 18 S. W. 681; Cannon *v.* Cannon, 66 Tex. 682, 3 S. W. 36; Marsalis *v.* Thomas, 13 Tex. Civ. App. 54, 35 S. W. 795; Doe *v.* Waterloo Min. Co., 70 Fed. 455, 44 U. S. App. 204, 17 C. C. A. 190; Grape Creek Coal Co. *v.* Farmers' L. & T. Co., 63 Fed. 891, 24 U. S. App. 38, 12 C. C. A. 350. But *compare* Gilpin *v.* Gilpin, 12 Colo. 504, 21 Pac. 612; Hannan *v.* Connett, 10 Colo. App. 171, 50 Pac. 214; Hartford *v.* Champion, 58 Conn. 268, 20 Atl. 471.

See 3 Cent. Dig. tit. "Appeal and Error," § 3061.

62. McClellan *v.* Pyeatt, 50 Fed. 686, 4 U. S. App. 319, 1 C. C. A. 613.

K. Pleading to Assignments of Errors — 1. Right to Plead or Demur. To an assignment of error the appellee or defendant in error may plead or demur,[63] and, under the practice in some states, certain defects may be availed of by motion.[64]

2. Classification, Nature, and Effect of Pleas — a. In General. Pleas to assignments of error are either common or special.[65]

b. Common Plea. The common plea or joinder, usually known as a plea *in nullo est erratum*, alleges that there is no error in the record or proceedings, and prays that the court may proceed to examine the record and affirm the judgment.[66] This plea is in the nature of a demurrer, and at once refers the matter of law arising to the judgment of the court.[67] It admits the truth of material facts well alleged,[68] but does not admit errors not properly assigned, or which cannot properly be assigned,[69] as, for instance, matters that impeach or contradict the record.[70]

c. Special Pleas — (I) *In General.* Special pleas, on the other hand, contain the matters in confession and avoidance.[71]

(II) *Release of Errors* — (A) *Right to Plead and Necessity of Pleading Specially.* A party against whom an error has been committed in the rendition of judgment may release such error, and his release may be pleaded in bar to his

63. Adams *v.* Beem, 4 Blackf. (Ind.) 128; Acker *v.* Ledyard, 1 Den. (N. Y.) 677; 2 Tidd Pr. 1133.

64. Newman *v.* Kiser, 128 Ind. 258, 26 N. E. 1006; Alexander *v.* Alexander, 104 N. Y. 643, 10 N. E. 37.

65. 2 Tidd Pr. 1173.

66. Adams *v.* Beem, 4 Blackf. (Ind.) 128; Acker *v.* Ledyard, 1 Den. (N. Y.) 677; 2 Tidd Pr. 1173.

67. Adams *v.* Beem, 4 Blackf. (Ind.) 128; Handley *v.* Fitzhugh, 3 A. K. Marsh. (Ky.) 561; Benner *v.* Welt, 45 Me. 483; Booth *v.* Com., 7 Metc. (Mass.) 285; Goodridge *v.* Ross, 6 Metc. (Mass.) 487.

By pleading in nullo est erratum, defendant in error admits the record to be perfect, the effect of his plea being that the record in its present state is without error; and, therefore, after *in nullo est erratum* pleaded, neither party can allege diminution, or pray a certiorari. But though the parties are bound by their own admission, and that equally so as to every part of the record, yet no admission of the parties can or ought to restrain the courts from looking into the record before them. 2 Tidd Pr. 1174.

68. *Indiana.*— Rundles *v.* Jones, 3 Ind. 35.

Maine.— Merrill *v.* Suffolk Bank, 31 Me. 57, 50 Am. Dec. 649; Smith *v.* Rhodes, 29 Me. 360.

Massachusetts.— Haggett *v.* Com., 3 Metc. (Mass.) 457; Blanchard *v.* Wild, 1 Mass. 342.

New Hampshire.— Claggett *v.* Simes, 31 N. H. 22.

New York.— Harvey *v.* Rickett, 15 Johns. (N. Y.) 87; Bliss *v.* Rice, 9 Johns. (N. Y.) 159.

Pennsylvania.— Moore *v.* McEwen, 5 Serg. & R. (Pa.) 373.

Tennessee.— Goodwin *v.* Sanders, 9 Yerg. (Tenn.) 90.

England.— Okeover *v.* Overburgh, T. Raym. 231; Grell *v.* Richards, 1 Lev. 294.

See 3 Cent. Dig. tit. "Appeal and Error," § 3066.

69. Riley *v.* Waugh, 8 Cush. (Mass.) 220; Moody *v.* Vreeland, 9 Wend. (N. Y.) 125; Cole *v.* Greene, 1 Lev. 309; Cross *v.* Tyer, Cro. Eliz. 665; Hayden *v.* Mynn, Cro. Jac. 521; 2 Tidd Pr. 1143.

70. Riley *v.* Waugh, 8 Cush. (Mass.) 220; Whiting *v.* Cochran, 9 Mass. 532; Claggett *v.* Simes, 31 N. H. 22; Helbut *v.* Held, 2 Str. 684.

Thus, the plea does not admit a special assignment of errors that the issues joined were not tried (Lovett *v.* Pell, 22 Wend. (N. Y.) 369); or an assignment that the judgment was entered by the clerk without authority (Claggett *v.* Simes, 31 N. H. 22).

A joinder in short to an assignment of error amounts, it has been held, to a plea of *in nullo est erratum*, and it is in effect an averment that the record generally is without error and subjects the whole to the scrutiny of the court, and the court will not be confined exclusively to an examination of the errors assigned. David *v.* Ransom, 1 Greene (Iowa) 383.

71. Adams *v.* Beem, 4 Blackf. (Ind. 128.

In favor of plaintiff.— If it be assigned as error that some of plaintiffs in error were minors at the time the judgment was rendered, this will be deemed admitted by a plea *in nullo est erratum*. Benner *v.* Welt, 45 Me. 483.

Appearance of infant by attorney.— If it be assigned for error that an infant appeared below by attorney, this is admitted by the common joinder. Moore *v.* McEwen, 5 Serg. & R. (Pa.) 373.

Plea setting up majority at time of judgment.— Where one assigns for error infancy and appearance by attorney, instead of guardian, in the court below, a plea that, at the time of the rendition of the judgment, the party was of full age, is bad as tendering an immaterial issue. Gosling *v.* Acker, 25 Wend. (N. Y.) 639.

Motion to quash execution.— Unless specially pleaded, defendant cannot show that a motion to quash an execution had been made

prosecution of a writ of error to reverse the judgment;[72] but a release of errors by a defendant who did not join in the writ of error cannot be so pleaded.[73] A release of errors should be specially pleaded;[74] but if a release is stated in affidavits, without objection, it has been held that it is too late to object to the form of the proceedings.[75]

(B) *Requisites of Plea.* A plea of a release of errors and all its intendments will be taken most strongly against the pleader.[76] It should state the facts relied on in such release[77] and should show that the release was based upon a good consideration.[78] If the plea alleges a release by plaintiff by his attorneys, such plea will be insufficient if it does not allege that they were in fact his attorneys, or had been retained or had appeared in the case.[79]

(C) *Matters Admitted and Waived by Plea.* The plea operates as a waiver of the right to join in error, and if it is adjudged bad on demurrer the judgment will be reversed.[80] Such a plea amounts to a confession of error, and admits cause of reversal unless the facts alleged in avoidance of the error are found in the pleader's favor.[81]

(D) *Replication to Plea.* A replication to a plea of release of errors must deny or confess and avoid the cause of release set up by the plea.[82] If it is alleged that the release was obtained by fraud the facts constituting the fraud complained of must be stated.[83]

(III) *STATUTE OF LIMITATIONS.* The statute of limitations may be pleaded in bar of a writ of error,[84] and, in some jurisdictions, it cannot be availed of in any other manner,[85] while in other jurisdictions a motion to dismiss will lie.[86] It has also been held that this plea is not a confession of the errors of law.[87]

d. Pleading Several Pleas. An application to plead several pleas to an assignment of error will not be entertained on allowing the writ of error, but

and overruled in the reviewing court for the same cause assigned for error. Handley *v.* Fitzhugh, 3 A. K. Marsh. (Ky.) 561.

72. *Illinois.*— Ruckman *v.* Alwood, 44 Ill. 183; Austin *v.* Bainter, 40 Ill. 82.

Indiana.—Millar *v.* Farrar, 2 Blackf. (Ind.) 219.

Nebraska.— Shreck *v.* Gilbert, 52 Nebr. 813, 73 N. W. 276.

Ohio.— Matthews *v.* Davis, 39 Ohio St. 54; Wilcox *v.* May, 19 Ohio 408.

Tennessee.— Henly *v.* Robertson, 4 Yerg. (Tenn.) 171.

Washington.—Lyons *v.* Bain, 1 Wash. Terr. 482.

See 3 Cent. Dig. tit. "Appeal and Error," § 3067.

Forms of pleas setting up release of errors are set out in:

Arkansas.—Martin *v.* Hawkins, 20 Ark. 150.

Illinois.— Corwin *v.* Shoup, 76 Ill. 246; Austin *v.* Bainter, 40 Ill. 82.

Indiana.— Millar *v.* Farrar, 2 Blackf. (Ind.) 219.

Missouri.— McCutcheon *v.* Sigerson, 34 Mo. 280.

Vermont.— Vaughan *v.* Everts, 40 Vt. 526.

73. Martin *v.* Highway Com'rs, 150 Ill. 158, 36 N. E. 1004.

74. *Georgia.*— Bigby *v.* Powell, 25 Ga. 244, 71 Am. Dec. 168.

Illinois.— School Trustees *v.* Hihler, 85 Ill. 409.

Indiana.— Veach *v.* Pierce, 6 Ind. 48; Adams *v.* Beem, 4 Blackf. (Ind.) 128.

Mississippi.— Vick *v.* Maulding, 1 How. (Miss.) 217.

Nebraska.— Treitschke *v.* Western Grain Co., 10 Nebr. 358, 6 N. W. 427.

Virginia.— Hite *v.* Wilson, 2 Hen. & M. (Va.) 268.

But see McCracken *v.* Cabel, 120 Ind. 266, 22 N. E. 136; Alexander *v.* Alexander, 104 N. Y. 643, 10 N. E. 37, to the effect that it is permissible to take advantage of release of errors by motion to dismiss.

See 3 Cent. Dig. tit. "Appeal and Error," § 3067.

75. Treitschke *v.* Western Grain Co., 10 Nebr. 358, 6 N. W. 427.

76. Beardsley *v.* Smith, 139 Ill. 290, 28 N. E. 1079.

77. Corwin *v.* Shoup, 76 Ill. 246; Chamblin *v.* Blair, 58 Ill. 385.

78. Austin *v.* Bainter, 40 Ill. 82.

79. Corwin *v.* Shoup, 76 Ill. 246.

80. Martin *v.* Highway Com'rs, 150 Ill. 158, 36 N. E. 1004; Page *v.* People, 99 Ill. 418; Fitzpatrick *v.* Rutter, 60 Ill. App. 657.

See 3 Cent. Dig. tit. "Appeal and Error," § 3067.

81. Thornton *v.* Houtze, 91 Ill. 199.

82. McCutcheon *v.* Sigerson, 34 Mo. 280.

83. Wood *v.* Goss, 21 Ill. 604.

84. Day *v.* Huntington, 78 Ind. 280; Jacobs *v.* Graham, 1 Blackf. (Ind.) 392; Allen *v.* Marchand, 5 Ky. L. Rep. 601.

85. Acker *v.* Ledyard, 1 Den. (N. Y.) 677; 2 Tidd Pr. 1174.

86. Day *v.* Huntington, 78 Ind. 280; Buntin *v.* Hooper, 59 Ind. 589; Brooks *v.* Norris, 11 How. (U. S.) 204, 13 L. ed. 665.

87. Hymann *v.* Cook, 2 Den. (N. Y.) 201.

must be made after error is assigned.[88] A plea of *in nullo est erratum* cannot be joined to one of release of errors,[89] or to a plea of the statute of limitations,[90] unless there is some statutory authority therefor.[91] A joinder in error will not put in issue an allegation in the assignment of errors of interest in the party prosecuting the writ. Without a special plea denying such interest it will stand admitted.[92]

3. Time of Filing Pleading. As a proceeding in error is an action and an assignment of errors in the nature of a declaration, which must be filed before defendant can plead, it is not necessary or proper that a plea in abatement to the writ should be filed before the assignment.[93]

4. Effect of Failure to Plead. The practice in England is said to be to set the errors down for hearing *ex parte* in default of joinder of errors,[94] and this practice has been adopted in some American states.[95]

5. Objections Waived by Joinder. A joinder in error by appellee waives objections to the form of the appeal,[96] or to the sufficiency or want of notice of the appeal,[97] or failure to file a transcript within the required time.[98] The ordinary plea of no error on the appeal does not, however, cure the want of assignment of errors,[99] nor will a joinder in error cure an objection that the petition for writ of error did not describe the term at which the judgment was rendered.[1]

6. Withdrawal of Joinder. Where a party has been induced by fraud to join issues in an assignment of errors, it seems that he may be permitted to withdraw the joinder; but as soon as he discovers the fraud he should show it to the court, and move to withdraw the joinder.[2]

7. Demurrers to Assignment of Errors. A demurrer to a plea in bar of a writ of error will lie for such defects as will render a plea to the declaration or complaint in the trial court demurrable.[3] So, it has been held that objections to an application by defendant in error to withdraw his joinder in error and plead a release of errors, upon grounds affecting the merits of the proposed plea, can be properly made only on demurrer thereto.[4] After judgment against a defendant on his demurrer to an assignment of errors in fact he may withdraw the demurrer and rejoin to the assignment.[5]

88. Higbie *v.* Comstock, 1 Den. (N. Y.) 652.
89. Parker *v.* Gilson, 1 Mass. 230.
90. Acker *v.* Ledyard, 1 Den. (N. Y.) 677.
91. Evans *v.* Galloway, 20 Ind. 479.

In Louisiana appellee's joinder in error on the merits, following an exception on the same paper as to the mode of bringing up the appeal, is not a waiver of the objection (Chandler *v.* Witherspoon, 4 La. 67); and appellee may file an answer to the merits, and on the same paper make a written motion to dismiss (Briggs *v.* Briscoe, 12 La. 468).

92. Winne *v.* People, 177 Ill. 268, 52 N. E. 377.
93. State Bank *v.* Ruddell, 10 Ark. 123.
94. See Mayson *v.* Lane, 5 How. (Miss.) 11.
95. Elijah *v.* Taylor, 40 Ill. 79; Mayson *v.* Lane, 5 How. (Miss.) 11; March *v.* Howell, 1 Mo. 138.

See 3 Cent. Dig. tit. "Appeal and Error," § 3071.

In Colorado the practice is to reverse the judgment in case of default. Murdock *v.* Townsend, 1 Colo. 33.

In New York the practice seems to be to allow a default to be taken after the expiration of the rule to join in error, after which a further rule may be taken for judgment of reversal. Oppie *v.* Colegrove, 19 Johns. (N. Y.) 124. See also Brisbin *v.* McLaughlin, 4 Cow. (N. Y.) 533.

A judgment for not joining in error will be overruled where the attorney for the defendant in error pleads that he did not learn of the judgment for several months, and that no notice of the argument had ever been served on defendant or on his attorney, and that he had caused notice of retainer to be served on plaintiff's attorney by mail, though plaintiff's attorney denied that he ever received notice of retainer in the case. Clark *v.* Rawson, 1 How. Pr. (N. Y.) 17.

96. Carter *v.* Thompson, 41 Ala. 375; Magruder *v.* Campbell, 40 Ala. 611. See also Bibb *v.* Hitchcock, 49 Ala. 468, 20 Am. Rep. 288.
97. Newman *v.* Kiser, 128 Ind. 258, 26 N. E. 1006; Beck *v.* State, 72 Ind. 250; Field *v.* Burton, 71 Ind. 380.
98. State *v.* Walters, 64 Ind. 226.
99. Lacy *v.* Flucker, 1 La. 50.
1. Martin *v.* Rutherford, 6 Mart. N. S. (La.) 281.
2. Bigby *v.* Powell, 25 Ga. 244, 71 Am. Dec. 168.
3. Peabody *v.* Kendall, 145 Ill. 519, 32 N. E. 674; Pittsburgh, etc., R. Co. *v.* Swinney, 91 Ind. 399; Millar *v.* Farrar, 2 Blackf. (Ind.) 219.
4. Clapp *v.* Reid, 40 Ill. 121.
5. Arnold *v.* Sandford, 14 Johns. (N. Y.) 417.

L. Effect of Failure to File Assignment of Errors. In some jurisdictions it seems to be the settled practice to affirm the judgment when no assignment of errors has been filed,[6] while in others the practice is to affirm the judgment where there is no error of law apparent of record.[7] In others the appeal will be dismissed,[8] and in still other jurisdictions the appeal is dismissed in some cases, and the judgment affirmed in others.[9]

M. Assignment of Cross-Errors — 1. Right to Assign Without Appealing or Suing Out Writ of Error — a. Rule Stated. In some jurisdictions an assignment of errors by an appellee cannot be considered unless an appeal has been regularly taken by him;[10] but in other jurisdictions error may be assigned by appellee or defendant in error without taking an appeal or suing out a writ of error.[11] It has been held that, even in the absence of a statute expressly authorizing it, cross-errors may be assigned without taking an appeal or suing out a writ of error,[12] and the rule has much to commend it.[13]

6. *Alabama.*— McNeill *v.* Kyle, 86 Ala. 338, 5 So. 461.

Arkansas.— Memphis, etc., Plank-Road Co. *v.* Sullivan, 17 Ark. 529; State Bank *v.* Conway, 13 Ark. 344.

Minnesota.— Day *v.* Eibert, 68 Minn. 499, 71 N. W. 615.

North Dakota.— O'Brien *v.* Miller, 4 N. D. 308, 60 N. W. 841; Globe Invest. Co. *v.* Boyum, 3 N. D. 538, 58 N. W. 339.

Ohio.—Wells *v.* Martin, 1 Ohio St. 386.

See 3 Cent. Dig. tit. "Appeal and Error," § 3089.

7. Maricopa County *v.* Gordon, (Ariz. 1900) 60 Pac. 693; Trimble *v.* Long, (Ariz. 1899) 56 Pac. 731; Wilson *v.* Wilson, 125 N. C. 525, 34 S. E. 685; Collins *v.* Young, 118 N. C. 265, 23 S. E. 1005; Cano *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1900) 57 S. W. 692; Tronnier *v.* Munger Improved Cotton Mach. Mfg. Co., (Tex. Civ. App. 1895) 31 S. W. 245.

See 3 Cent. Dig. tit. "Appeal and Error," § 3089.

In Arizona it has been held that the court may either affirm the judgment or dismiss the appeal. Gila River Co. *v.* Wolfley, (Ariz. 1890) 24 Pac. 257.

In North Carolina, however, it is held that the court cannot dismiss the appeal because there is no assignment of error, as such assignment is not necessary to perfect the appeal. Randleman Mfg. Co. *v.* Simmons, 97 N. C. 89, 1 S. E. 923.

8. Williams *v.* Augusta Southern R. Co., 98 Ga. 392, 27 S. E. 557; Sewell *v.* Conkle, 64 Ga. 436; Hawkins *v.* McDougal, 126 Ind. 544, 25 N. E. 708; Pruitt *v.* Edinburg, etc., Turnpike Co., 71 Ind. 244; Hamilton *v.* Stuart, 5 Ky. L. Rep. 510; Shinnock *v.* Kuhn, 4 N. M. 159, 13 Pac. 424.

See 3 Cent. Dig. tit. "Appeal and Error," § 3088.

9. *California.*— Edmondson *v.* Alameda County, 24 Cal. 349; Williams *v.* Hall, 24 Cal. 156.

Iowa.— Thompson *v.* Frederickson, 88 Iowa 719, 54 N. W. 468; Bradley *v.* Johnson, 67 Iowa 614, 25 N. W. 830.

Louisiana.— Carrollton *v.* Magee, 19 La. Ann. 261; Kennedy *v.* Hynes, 8 La. Ann. 439.

Missouri.— Clark *v.* Estees, 55 Mo. 253; Meyer *v.* Evans, 45 Mo. 32.

United States.— Rowe *v.* Phelps, 152 U. S. 87, 14 S. Ct. 632, 38 L. ed. 365; Stevenson *v.* Barbour, 140 U. S. 48, 11 S. Ct. 690, 35 L. ed. 338; *In re* Olson, 100 Fed. 10, 40 C. C. A. 247.

See 3 Cent. Dig. tit. "Appeal and Error," § 3086 *et seq.*

In Illinois, in some cases, the appeal was dismissed without prejudice (Benneson *v.* Savage, 119 Ill. 135, 11 N. E. 66; Ditch *v.* Sennott, 116 Ill. 288, 5 N. E. 395; Independent Electric Co. *v.* Donald, 86 Ill. App. 166); in others the appeal was dismissed (Chicago City R. Co. *v.* Smith, 82 Ill. App. 305; Marine Bank Co. *v.* Mallers, 58 Ill. App. 232); and in others the judgment was affirmed (Lancaster *v.* Waukegan, etc., R. Co., 132 Ill. 492, 24 N. E. 629; Hammond *v.* Doty, 84 Ill. App. 19). See 3 Cent. Dig. tit. "Appeal and Error," § 3086 *et seq.*

10. Wright *v.* Woolfolk, 14 Bush (Ky.) 308; Jones *v.* Hoggard, 107 N. C. 349, 12 S. E. 286; Perry *v.* Adams, 96 N. C. 347, 2 S. E. 659; Clark *v.* Killian, 103 U. S. 766, 26 L. ed. 607; Dakota Bldg., etc., Assoc. *v.* Logan, 66 Fed. 827, 30 U. S. App. 163, 14 C. C. A. 133; and see 3 Cent. Dig. tit. "Appeal and Error," § 3053 *et seq.*

In one jurisdiction the rule is well settled that cross-assignments of error by appellee or defendant in error, without a cross-appeal or writ of error, cannot be considered where appellant or plaintiff in error has not joined in the same, and his consent neither appears in the record nor is indorsed on the transcript. Golden *v.* Golden, 102 Ala. 353, 14 So. 638; Page *v.* Francis, 94 Ala. 379, 11 So. 736; Charles *v.* Dubose, 29 Ala. 367.

11. Page *v.* People, 99 Ill. 418; Feder *v.* Field, 117 Ind. 386, 20 N. E. 129; Johnson *v.* Culver, 116 Ind. 278, 19 N. E. 129; Carroll *v.* Carroll, 20 Tex. 731; Caperton *v.* Wanslow, 18 Tex. 125; and 3 Cent. Dig. tit. "Appeal and Error," § 3053 *et seq.*

12. Feder *v.* Field, 117 Ind. 386, 20 N. E. 129.

13. Feder *v.* Field, 117 Ind. 386, 20 N. E. 129, in which it was further said: "Under its operation one appeal presents to the appellate court the entire controversy. By the one appeal as much can be accomplished as by two different appeals. If separate appeals are taken then the only method of avoiding

b. Extent and Limits of Rule. It has been held, however, that the appellant or defendant in error cannot assign cross-errors as against a co-appellant or co-plaintiff in error without a cross-appeal or writ of error. He cannot require a revision of any alleged error committed in adjudicating the rights of himself and his co-defendants without so doing.[14]

2. Necessity — a. Rule Stated. It seems to be well settled that errors operating against appellee or defendant in error will not be considered unless duly assigned.[15]

b. Extent and Limits of Rule. Rulings to which appellee has assigned no cross-error in the supreme court will not be reviewed on his complaint even though he assign cross-errors in a court of intermediate appellate jurisdiction.[16]

3. Form and Requisites — a. Attaching to Record. Cross-assignments of error not filed in accordance with the rules will not be considered. If the rules require that all assignments of cross-error must be written upon or attached to the record the rule must be complied with or the assignment will not be considered.[17]

confusion would be to consolidate the cases, and this, while it would accomplish no more than a single appeal, would greatly increase the record, and augment the cost."

14. Gillespie *v.* Crawford, (Tex. Civ. App. 1897) 42 S. W. 621; De la Vega *v.* League, 2 Tex. Civ. App. 252, 21 S. W. 565.

So, it has been held that cross-errors cannot be assigned as to a part of the decree not brought up by the appeal or writ of error (Walker *v.* Pritchard, 121 Ill. 221, 12 N. E. 336; Harding *v.* Helmer, 86 Ill. App. 190); although this is squarely denied in another decision, on the ground that an appeal, when allowed, brings the entire record before the court (Gaines *v.* Merryman, 95 Va. 660, 29 S. E. 738).

15. *Alabama.*—Andrews *v.* Hobson, 23 Ala. 219.

Illinois.—Slocum *v.* Hagaman, 176 Ill. 533, 52 N. E. 332; Long *v.* Hess, 154 Ill. 482, 40 N. E. 335, 45 Am. St. Rep. 143, 27 L. R. A. 791; Smith *v.* Rountree, 85 Ill. App. 161 [*affirmed* in 185 Ill. 219, 56 N. E. 1130]; Kirkwood *v.* Kidwell, 72 Ill. App. 492.

Indiana.—Evansville, etc., R. Co. *v.* Mosier, 114 Ind. 447, 17 N. E. 109; Farmers' Bank *v.* Orr, 25 Ind. App. 71, 55 N. E. 35.

Kansas.—Hanna *v.* Barrett, 39 Kan. 446, 18 Pac. 497.

Texas.—Burns *v.* Falls, 23 Tex. Civ. App. 386, 56 S. W. 576; Gillespie *v.* Crawford, (Tex. Civ. App. 1897) 42 S. W. 621; Wilkerson *v.* Jones, (Tex. Civ. App. 1897) 40 S. W. 1046.

See 3 Cent. Dig. tit. "Appeal and Error," § 3053.

By failing to assign cross-errors the appellee or defendant in error is estopped from complaining thereof. Slocum *v.* Hagaman, 176 Ill. 533, 52 N. E. 332.

Applications of rule.— In applying the rule stated it has been held that an assignment of cross-errors is essential to a review on appeal by plaintiff of a decision of a motion by defendant to suppress a deposition (Long *v.* Hess, 154 Ill. 482, 40 N. E. 335, 45 Am. St. Rep. 143, 27 L. R. A. 791); to question an allowance to appellant for attorney's fees (Moore *v.* Blum, (Tex. Civ. App. 1897) 40 S. W. 511); to question a ruling of the court as to the sufficiency of the complaint (Anderson Bldg., etc., Assoc. *v.* Thompson, 88 Ind. 405; Farmers' Bank *v.* Orr, 25 Ind. App. 71, 55 N. E. 35); to raise the question whether the recovery is as large as it ought to be (Smith *v.* Rountree, 85 Ill. App. 161); to raise the objection that the court erred in reducing the amount found due appellee by the master (Kirkwood *v.* Kidwell, 72 Ill. App. 492); to question the action of the court below in ordering its record to be amended so as to show entering of the bill of exceptions within the statutory time (Adler *v.* Sewell, 29 Ind. 598); to question the action of the court in admitting certain evidence (Evansville, etc., R. Co. *v.* Mosier, 114 Ind. 447, 17 N. E. 109); to question the action of an intermediate reviewing court in overruling appellee's motion to strike from the record the paper purporting to be a bill of exceptions (Steele *v.* Grand Trunk Junction R. Co., 125 Ill. 385, 17 N. E. 483).

The Louisiana doctrine.— Under the Louisiana statute an amendment of the judgment must be prayed for in the answer to the appeal, otherwise error therein will not be corrected. Talle *v.* De Monasterio, 48 La. Ann. 1232, 20 So. 687; Morris *v.* Cain, 39 La. Ann. 712, 1 So. 797, 2 So. 418; Jamison *v.* Barelli, 20 La. Ann. 452; Michel *v.* Beale, 10 La. Ann. 352; Hiligsberg's Succession, 1 La. Ann. 340. This rule is not satisfied by filing a brief or argument in which such relief is asked. Hood *v.* Knox, 8 La. Ann. 73; De Coux's Succession, 5 La. Ann. 140.

16. Gardner *v.* Bunn, (Ill. 1888) 21 N. E. 614; Hurd *v.* Ascherman, 117 Ill. 501, 6 N. E. 160.

It has been held in Illinois that, where an appeal is taken from a decree in chancery, it is not necessary, in order to bring the whole case before the court, that cross-errors should be assigned, but that in such case the reviewing court will look into the whole record and consider it upon its merits without the assignment of cross-errors. Carter *v.* Moses, 40 Ill. 55; Allegretti Chocolate Cream Co. *v.* Rubel, 86 Ill. App. 604.

17. Henderson *v.* Hatterman, 146 Ill. 555, 34 N. E. 1041; St. Louis Bridge Co. *v.* People, 128 Ill. 422, 21 N. E. 428; Harding *v.*

b. Filing Copy in Court Below. If the rule requires the assignment of errors to be filed in the trial court, and this is not done, the assignment will not be considered.[18]

c. Giving Names of Parties. It has been held that an assignment of cross-errors need not give the names of the parties as required by rule of court on an assignment of error.[19]

d. Notice. In the absence of a rule requiring it, the appellee, on assigning cross-errors, need not give notice to appellants who are acting parties; but notice is necessary to be given to persons who do not join in the appeal or who are in court merely upon notice from appellant.[20] It has been held, however, that if they voluntarily join in error the notice will be waived.[21]

e. Obtaining Leave to File. If, under the statutes, a petition in error may be filed without leave of court, the same rule is applicable in the case of a cross-petition.[22]

f. Time of Filing. If the assignment of errors is not filed within the time required by statute or rule of court, it will not be considered,[23] and the same is the case when it does not appear when the assignment of errors was filed.[24]

4. Effect on Right to Dismiss Appeal. Filing cross-errors is not a waiver by appellee of his right to have the appeal dismissed because the assignment of error and schedule or transcript was not filed within the time prescribed by statute.[25]

5. Effect of Dismissal of Appeal. The dismissal of an appeal by an appellant does not carry the case so far as it is affected by an assignment of cross-errors.[26]

6. Effect of Overruling Assignment on Right to Writ of Error. If an appellee assigns certain matter by way of cross-error, and the same is decided against him, he will be precluded from prosecuting a writ of error assigning the same matter as error.[27]

7. Necessity of Redocketing. The assignment of cross-errors does not require a redocketing, as that does not change the title of the case or require a new record.[28]

Helmer, 86 Ill. App. 190; Dutton *v.* Dutton, 30 Ind. 452; and see 3 Cent. Dig. tit. "Appeal and Error," § 3055.

This rule is not complied with by filing an assignment of errors upon a separate piece of paper, and filing it among other papers in the cause. Gage *v.* Brown, 125 Ill. 522, 17 N. E. 754; Benneson *v.* Savage, 119 Ill. 135, 11 N. E. 66; Ditch *v.* Sennott, 116 Ill. 288, 5 N. E. 395.

18. Morrow *v.* Terrell, 21 Tex. Civ. App. 28, 50 S. W. 734; Lincoln *v.* Hollenbach, (Tex. Civ. App. 1899) 49 S. W. 686; Patterson *v.* Seeton, 19 Tex. Civ. App. 430, 47 S. W. 732.

A certificate by the clerk of the trial court, indorsed on appellee's brief, that a cross-assignment of error therein set forth was filed in the court below, complies with the rule requiring such cross-assignments of error to be filed. Burns *v.* Falls, 23 Tex. Civ. App. 386, 56 S. W. 536.

19. State *v.* Jeffersonville First Nat. Bank, 89 Ind. 302; Nichol *v.* Henry, 89 Ind. 54.

20. Feder *v.* Field, 117 Ind. 386, 20 N. E. 129. But see Carrico *v.* Brommell, 4 Ky. L. Rep. 859, in which it was held that, after submission of the case, notice must be given of a motion to file cross-errors on the cross-appeal and the notice must state the grounds of the motion.

21. Smith *v.* Wright, 71 Ill. 167.

22. Bundy *v.* Ophir Iron Co., 35 Ohio St. 80; Shunk *v.* Galion First Nat. Bank, 22 Ohio St. 508, 10 Am. Rep. 762.

23. St. Louis Bridge Co. *v.* People, 128 Ill. 422, 21 N. E. 428; Cohoon *v.* Fisher, 146 Ind. 583, 44 N. E. 664, 45 N. E. 787, 36 L. R. A. 193; McCormack *v.* Showalter, 11 Ind. App. 98, 38 N. E. 875; Peterson *v.* Western Union Tel. Co., (Ind. App. 1894) 36 N. E. 926; Leavenworth Lodge No. 2, etc., *v.* Byers, 54 Kan. 323, 38 Pac. 261, and 3 Cent. Dig. tit. "Appeal and Error," § 3057.

24. Cohoon *v.* Fisher, 146 Ind. 583, 44 N. E. 654, 45 N. E. 787, 36 L. R. A. 193.

If no time for filing an assignment of cross-errors is provided by statute, the time governing the taking out of a writ of error is applicable, and if not filed within that time the assignment will not be noticed. Peak *v.* Bull, 8 B. Mon. (Ky.) 428.

25. Wright *v.* Woolfolk, 14 Bush (Ky.) 308.

26. Feder *v.* Field, 117 Ind. 386, 20 N. E. 129.

27. Smith *v.* Wright, 71 Ill. 167.

28. Smith *v.* Wright, 71 Ill. 167.

It is otherwise in North Carolina, where a transcript must be docketed by each party when both appeal. This requirement cannot be waived by agreement of parties. Jones *v.* Hoggard, 107 N. C. 349, 12 S. E. 286; Perry *v.* Adams, 96 N. C. 347, 2 S. E. 659.

XII. BRIEFS.

A. Definition. A brief is a written or printed document, prepared by counsel to serve as the basis of an argument upon a cause in an appellate court, furnished for the information of the court and opposing counsel, and embodying the points of law which the counsel desires to establish, together with the arguments and authorities upon which he raises his contention.[29]

B. Necessity. The requirement that the parties to the cause shall file briefs is practically universal,[30] and cannot be waived by agreement of the parties.[31] It applies with equal force to both appellant or plaintiff in error and appellee or defendant in error. The former must file a brief to point out for the court and opposing counsel errors on which a reversal is sought, and must support the specifications of error with reasons and the citation of authorities.[32] On the other hand, counsel for appellee or defendant in error must file a brief maintaining the correctness of the proceedings and judgment of the trial court;[33] and when cross-errors have been assigned they must be referred to therein, or they will be considered to have been waived.[34] Where a brief has been filed, it cannot be withdrawn without the consent of all parties interested.[35]

C. Contents — 1. Statement of Case — a. Necessity. The brief must contain a clear and concise statement of the facts, or an abstract of the case,[36] and nothing should appear therein which is not justified by the evidence produced.[37] The statement should not consist in a reprint of the whole record, but should be a concise summary of what is claimed to be the substance of the record,[38] and simply including the pleadings and evidence substantially as set forth in the printed case is not a compliance with the requirement.[39]

b. Effect of Non-Compliance With Requirement. The action to be taken by the court for non-compliance with the rule discussed in the preceding section depends upon the provisions contained in the rules of court.[40] In one jurisdiction it is held that a non-compliance with the requirement authorizes a dismissal;[41] in other jurisdictions it has been held that the judgment must be affirmed.[42] In

29. Black L. Dict. 155; Anonymous, 40 Ill. 57. See also Anderson L. Dict.; Bouvier L. Dict.; Haberlau *v.* Lake Shore, etc., R. Co., 73 Ill. App. 261; Elliott App. Proc. § 438.

30. See the statutes and rules of court of various states; 3 Cent. Dig. tit. "Appeal and Error," § 3090; and cases cited *infra*, XII, I.

31. Disse *v.* Frank, 52 Mo. 551; Woodward *v.* Hodge, 24 Mo. App. 677; State *v.* Burns, 14 Mo. App. 581.

32. See *supra*, XII, A; and *infra*, XII, C.

33. Chamberlain *v.* Lesley, 39 Fla. 452, 22 So. 736. See also cases cited *infra*, XII, D.

34. Willis *v.* Smith, 72 Tex. 565, 10 S. W. 683.

35. Trouilly's Succession, 52 La. Ann. 276, 26 So. 851.

In North Carolina filing briefs is still left optional with counsel. Supreme Court Rules, No. 12. But the court has said that a brief is always desirable. Alexander *v.* Alexander, 120 N. C. 472, 27 S. E. 121.

36. *Kansas.*—Smith *v.* Woods, 9 Kan. App. 884, 59 Pac. 660.

Missouri.— Long *v.* Long, 96 Mo. 180, 8 S. W. 766.

Montana.— Harrington *v.* Smith, (Mont. 1901) 63 Pac. 1036; Beck *v.* O'Connor, 21 Mont. 109, 53 Pac. 94.

Pennsylvania.— Levin *v.* Second Ave. Traction Co., 194 Pa. St. 156, 45 Atl. 134; Silliman *v.* Kuhn, 142 Pa. St. 461, 21 Atl. 974.

Texas.— Connor *v.* Sewell, (Tex. Civ. App. 1896) 39 S. W. 128.

Washington.— Dunsmuir *v.* Port Angeles Gas, etc., Co., (Wash. 1901) 63 Pac. 1095.

Wisconsin.— McLimans *v.* Lancaster, 63 Wis. 596, 23 N. W. 689; Heath *v.* Silverthorn Lead Min., etc., Co., 39 Wis. 146.

United States.— Lincoln *v.* Sun Vapor Street-Light Co., 59 Fed. 756, 19 U. S. App. 431, 8 C. C. A. 253.

See 3 Cent. Dig. tit. "Appeal and Error," § 3091 *et seq.*

37. Levin *v.* Second Ave. Traction Co., 194 Pa. St. 156, 45 Atl. 134.

38. McLimans *v.* Lancaster, 63 Wis. 596, 23 N. W. 689.

39. Mast *v.* Lockwood, 59 Wis. 48, 17 N. W. 543.

40. Cases cited *infra*, notes 41–46; and see 3 Cent. Dig. tit. "Appeal and Error," § 3104 *et seq.*

41. Beck *v.* O'Connor, 21 Mont. 109, 53 Pac. 94. See also Heath *v.* Silverthorn Lead Min., etc., Co., 39 Wis. 146; and 3 Cent. Dig. tit. "Appeal and Error," § 3108.

42. Smith *v.* Woods, 9 Kan. App. 884, 59 Pac. 660; Long *v.* Long, 96 Mo. 180, 8 S. W. 766; and 3 Cent. Dig. tit. "Appeal and Error," § 3109.

one state it has been held that an order will be granted striking out the brief, such order to be subject to the right of the party filing the brief to amend it within a specified time ;[43] but it has been held that a motion to strike out the brief because of an imperfect or erroneous statement of fact will not be entertained ; that an appellee who objects to appellant's statement of facts must set forth his objections in his brief, and, upon a submission of the case, the statement of appellant will be investigated to ascertain whether the objections are well founded ;[44] and statements in appellant's brief not controverted by appellee will be accepted as correct.[45] In another jurisdiction it has been held that appellee must point out what essential statements are omitted, and state them as an addition to appellant's statement.[46]

2. Restatement of Errors Specified in Assignment of Errors. Errors stated in the assignment of errors, but not included in the brief as points relied on, will be considered to have been abandoned and will not be noticed,[47] and this is true even though such errors were urged on oral argument, at least when respondent does not waive the point.[48] The rule is subject to the exception that a question as to the want of jurisdiction may be considered, even though it is not urged in the brief,[49] and assignments of error, even though not set out in the brief, will be considered for the purpose of determining whether respondent is entitled to damages on account of the appeal being taken for delay only.[50]

3. Specifications of Errors — a. Statement of Rule. The errors for which a reversal is sought should be specifically pointed out in the brief.[51] It is not the

43. Arnold *v.* Chamberlin, (Tex. Civ. App. 1896) 33 S. W. 767.

44. Denecamp *v.* Townsend, (Tex. Civ. App. 1895) 33 S. W. 254.

45. Miller *v.* Itasca Cotton Seed Oil Co., (Tex. Civ. App. 1897) 41 S. W. 366.

46. Shinglemeyer *v.* Wright, 124 Mich. 230, 82 N. W. 887.

47. *Alabama.*— Ashley *v.* Martin, 50 Ala. 537; Rowland *v.* Plummer, 50 Ala. 182.

Arizona.— Daggs *v.* Hoskins, (Ariz. 1898) 52 Pac. 350.

Florida.— Jacksonville, etc., R. Co. *v.* Griffin, 33 Fla. 602, 15 So. 336; Jordan *v.* Sayre, 24 Fla. 1, 3 So. 329.

Georgia.— Brown *v.* State, 82 Ga. 224, 7 S. E. 915.

Illinois.— Lewis *v.* King, 180 Ill. 259, 54 N. E. 330; Rhodes *v.* Rhodes, 172 Ill. 187, 50 N. E. 170; Chicago, etc., R. Co. *v.* Murowski, 78 Ill. App. 661; Inter-State Bldg., etc., Assoc. *v.* Ayers, 71 Ill. App. 529.

Indiana.— Memphis, etc., Packet Co. *v.* Pikey, 142 Ind. 304, 40 N. E. 527; Louisville, etc , Ferry Co. *v.* Nolan, 135 Ind. 60, 34 N. E. 710.

Iowa.— Renwick *v.* Davenport, etc., R. Co., 49 Iowa 664.

Michigan.— Roberts *v.* Wilkinson, 34 Mich. 129.

Minnesota.— Guiterman *v.* Saterlie, 76 Minn. 19, 78 N. W. 863; Johnson *v.* Johnson, 57 Minn. 100, 58 N. W. 824.

Montana.— Cope *v.* Upper Missouri Min., etc., Co., 1 Mont. 53.

Nebraska.— Erck *v.* Omaha Nat. Bank, 43 Nebr. 613, 62 N. W. 67; Hedrick *v.* Strauss, 42 Nebr. 485, 60 N. W. 928.

New York.— Cumings *v.* Morris, 3 Bosw. (N. Y.) 560; Mierson *v.* New York, 6 Daly (N. Y.) 74.

North Carolina.— Merrimon *v.* Lyman, 124 N. C. 434, 32 S. E. 732.

Oklahoma.— Penny *v.* Fellner, 6 Okla. 386, 50 Pac. 123.

Texas.— Gulf, etc., R. Co. *v.* Wilson, 69 Tex. 739, 7 S. W. 653; International, etc., R. Co. *v.* Martinez, (Tex. Civ. App. 1900) 57 S. W. 689; Horseman *v.* Coleman County, (Tex. Civ. App. 1900) 57 S. W. 304; Hill *v.* Grant, (Tex. Civ. App. 1898) 44 S. W. 1016.

Vermont.— Paine *v.* Webster, 64 Vt. 105, 23 Atl. 615.

Wyoming.— Rock Springs First Nat. Bank *v.* Ludvigsen, 8 Wyo. 230, 56 Pac. 994, 57 Pac. 934.

United States.— Van Gunden *v.* Virginia Coal, etc., Co., 52 Fed. 838, 8 U. S. App. 229, 3 C. C. A. 294; Branch *v.* Texas Lumber Mfg. Co., 53 Fed. 849, 2 U. S. App. 623, 4 C. C. A. 52. See also Benites *v.* Hampton, 123 U. S. 519, 8 S. Ct. 254, 31 L. ed. 260.

See 3 Cent. Dig. tit. "Appeal and Error," § 3094.

48. Dodge *v.* McMahan, 61 Minn. 175, 63 N. W. 487.

Reference to assignments by number.— Assignments of error cannot be considered where they are referred to in appellant's brief by number only, without setting them out or stating what they contain. San Antonio, etc., R. Co. *v.* Adams, 6 Tex. Civ. App. 102, 24 S. W. 839.

49. Arrington *v.* Roach, 42 Ala. 155; Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 116 U. S. 472, 6 S. Ct. 644, 29 L. ed. 696.

50. Langholz *v.* Western Tanning Co., (Tex. Civ. App. 1895) 29 S. W. 831.

51. *Arizona.*— Daggs *v.* Field, (Ariz. 1898) 52 Pac. 773; Daggs *v.* Hoskins, (Ariz. 1898) 52 Pac. 350.

duty of the reviewing court to search for such errors;[52] and the fact that the court has occasionally overlooked infractions of the rule does not require it to abrogate the same or overlook such infractions in other instances.[53] While assignments of error relating to the same matters may be grouped,[54] those relating to different questions or matters should be separately presented.[55] The court will not examine a large number of objections referred to *en masse*, without any particular error being specified.[56]

b. Applications of Rule. In applying the principles just stated, it has been held that if error is alleged in the admission or rejection of evidence, the particular evidence must be pointed out,[57] or a specific reference made to the pages of the record where it is to be found[58] — otherwise the error will not be considered, and that the grouping together of a large number of assignments of error to the admission of different kinds of evidence prevents a consideration of such specification.[59] So, if it is objected that the verdict is supported only by incompetent evidence, such evidence should be pointed out in the brief,[60] and a brief which merely asserts that the allegations of the complaint are supported by the evi-

California.— Joyce *v.* White, 95 Cal. 236, 30 Pac. 524.

Colorado.— Bitter *v.* Mouat Lumber, etc., Co., (Colo. 1899) 59 Pac. 403.

District of Columbia.— Bradshaw *v.* Stott, 4 App. Cas. (D. C.) 527.

Florida.— St. Johns, etc., R. Co. *v.* Shalley, 33 Fla. 397, 14 So. 890.

Indiana.— New Albany Gas Light, etc., Co. *v.* New Albany, 139 Ind. 660, 39 N. E. 462.

Iowa.— Herriott *v.* Kersey, 69 Iowa 111, 28 N. W. 468.

Kansas.— Smith *v.* Woods, 9 Kan. App. 884, 59 Pac. 660.

Minnesota.— Woodbury *v.* Day, 24 Minn. 463.

Missouri.— David Adler, etc., Clothing Co. *v.* Corl, 155 Mo. 149, 55 S. W. 1017; Bauer *v.* School Dist. No. 127, 78 Mo. App. 442; Isaac *v.* Bohn-Verdin Lumber Co., 47 Mo. App. 30.

Montana.— Charles Schatzlein Paint Co. *v.* Godin, 24 Mont. 483, 62 Pac. 819; Cole *v.* Ryan, 24 Mont. 122, 60 Pac. 991.

Nebraska.— Farmers', etc., Ins. Co. *v.* Wiard, 59 Nebr. 451, 81 N. W. 312; Ætna Ins. Co. *v.* Simmons, 49 Nebr. 811, 69 N. W. 125.

New York.— Landers *v.* Staten Island R. Co., 13 Abb. Pr. N. S. (N. Y.) 338.

Oklahoma.—Custer County *v.* Moon, 8 Okla. 205, 57 Pac. 161.

Tennessee.— Loveman *v.* Taylor, 85 Tenn. 1, 2 S. W. 29; Huntingdon *v.* Mullins, 16 Lea (Tenn.) 738.

Washington.— Doran *v.* Brown, 16 Wash. 703, 48 Pac. 251; Perkins *v.* Mitchell, 15 Wash. 470, 46 Pac. 1039.

Wisconsin.— Weyerhaeuser *v.* Earley, 99 Wis. 445, 75 N. W. 80.

United States.— Schooner Catherine *v.* U. S., 7 Cranch (U. S.) 99, 3 L. ed. 281; Western Assur. Co. *v.* Polk, 104 Fed. 649, 44 C. C. A. 104.

See 3 Cent. Dig. tit. "Appeal and Error," § 3093.

52. Busenbark *v.* Park, 5 Kan. App. 17, 47 Pac. 324.

53. Rehberg *v.* Greiser, 24 Mont. 487, 63 Pac. 41.

54. Gulf, etc., R. Co. *v.* Box, 81 Tex. 670, 17 S. W. 375; Houston, etc., R. Co. *v.* Guisar, (Tex. Civ. App. 1894) 27 S. W. 1045; Sabine, etc., R. Co. *v.* Ewing, 1 Tex. Civ. App. 531, 21 S. W. 700; Goetzinger *v.* Rosenfield, 16 Wash. 392, 47 Pac. 882, 38 L. R. A. 257.

55. *Colorado.*— Bitter *v.* Mouat Lumber, etc., Co., (Colo. 1899) 59 Pac. 403.

Illinois.— Gillespie *v.* Rout, 40 Ill. 58.

Minnesota.— Duncan *v.* Kohler, 37 Minn. 379, 34 N. W. 594; Woodbury *v.* Day, 24 Minn. 463.

Missouri.— Bauer *v.* School Dist. No. 127, 78 Mo. App. 442; Honeycutt *v.* St. Louis, etc., R. Co., 40 Mo. App. 674.

Montana.— Rehberg *v.* Greiser, 24 Mont. 487, 62 Pac. 820, 63 Pac. 41; Cole *v.* Ryan, 24 Mont. 122, 60 Pac. 991.

New York.— Nelson *v.* Canisteo, 100 N. Y. 89, 2 N. E. 473.

Oklahoma.—Custer County *v.* Moon, 8 Okla. 205, 57 Pac. 161.

Texas.— Cooper *v.* Hiner, 91 Tex. 658, 45 S. W. 554; Galveston, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1900) 57 S. W. 999; Davis *v.* Converse, (Tex. Civ. App. 1898) 46 S. W. 910; Houston, etc., Co. *v.* Guisar, (Tex. Civ. App. 1894) 27 S. W. 1045.

56. Woodbury *v.* Day, 24 Minn. 463.

57. Ruble *v.* Helm, 57 Ark. 304, 21 S. W. 470; Moore *v.* Auge, 125 Ind. 562, 25 N. E. 816; Hall *v.* Gallemore, 138 Mo. 638, 40 S. W. 891; Tuttle *v.* Davis, 48 Mo. App. 9; McKensie *v.* Missouri Pac. R. Co., 24 Mo. App. 392. See also Ackermann *v.* Ackermann Schuetzen Verein, (Tex. Civ. App. 1900) 60 S. W. 366.

58. Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; Bowman *v.* Simpson, 68 Ind. 229; Sanders *v.* Scott, 68 Ind. 130; Rout *v.* Woods, 67 Ind. 319; McKeen *v.* Boord, 60 Ind. 280; Harrison *v.* Hedges, 60 Ind. 266; Moxley *v.* Haskin, 39 Kan. 653, 18 Pac. 820; Eggleston *v.* Austin, 27 Kan. 245; Gregg *v.* Kommers, 22 Mont. 511, 57 Pac. 92.

59. Galveston, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1900) 57 S. W. 999. See also Filley *v.* Walker, 28 Nebr. 506, 44 N. W. 737.

60. Congdon *v.* Olds, 18 Mont. 487, 46 Pac. 261.

dence, without referring to the part of the record in which the evidence is contained, is insufficient to enable the court to review the evidence.[61] If it is objected that the judgment is not supported by the evidence, the pages of the record in which the evidence is to be found should be referred to.[62] If the objection is urged that the instructions given were erroneous or that the court erroneously refused to give instructions requested, the instructions in respect to which error was alleged should be set out in the brief,[63] and, on an assignment of error that the court erred in refusing an instruction, the brief should refer to evidence in the record which would warrant the instruction.[64] If it is claimed that the court misstated the evidence in its charge, the evidence on which the error is based must be pointed out, or it will not be considered.[65] Under a requirement that all points relied on must be stated in the briefs of the respective parties, appellant cannot raise the point that the complaint was insufficient unless he has suggested the question in his brief, and this notwithstanding the statutory provision that such question may be raised at any time.[66] If the objection is raised that the verdict failed to find upon a given issue, the evidence bearing on the issue should be stated in the brief.[67]

4. Assigning Reasons Why Rulings Are Erroneous — a. Statement of Rule. A party, to be entitled to have alleged errors considered, must do more than merely call attention to them and assert that they are errors.[68] To simply assert that the court erred, without pointing out wherein the error consists, is the allegation of a mere conclusion, without furnishing the facts or authority upon which it is based, and is insufficient.[69] The rule is well settled that, in addition to specifying the alleged errors complained of, the brief should state reasons to show why the rulings complained of are erroneous.[70]

61. Wolverton *v.* Taylor, 54 Ill. App. 380. **Where it is complained that the evidence does not support the findings,** the particular finding or findings objected to should be specified. Powers *v.* Kindt, 13 Kan. 74. See also Rehberg *v.* Greiser, 24 Mont. 487, 62 Pac. 820, 63 Pac. 41.

62. Conger *v.* Dingman, 98 Wis. 417, 74 N. W. 125.

63. Olathe *v.* Folmer, 9 Kan. App. 881, 57 Pac. 239; Shaw *v.* Cunningham, 16 S. C. 631; Meridian First Nat. Bank *v.* Stephens, 19 Tex. Civ. App. 560, 47 S. W. 832.

64. Missouri Pac. R. Co. *v.* Kingsbury, (Tex. Civ. App. 1894) 25 S. W. 322. See also Le Roy, etc., R. Co. *v.* Crum, 39 Kan. 642, 18 Pac. 944.

65. Rogers *v.* Ferris, 107 Mich. 126, 64 N. W. 1048.

66. Francioli *v.* Brue, 4 Wash. 124, 29 Pac. 928.

67. Stroud *v.* Palmer, 66 Tex. 129, 18 S. W. 344.

68. Chicago, etc., R. Co. *v.* Hunter, 128 Ind. 213, 27 N. E. 477; Irwin *v.* Lowe, 89 Ind. 540.

69. Robbins *v.* Magee, 96 Ind. 174.

70. *Alabama.*— Rowland *v.* Plummer, 50 Ala. 182; Ashley *v.* Martin, 50 Ala. 537.

Arizona.— Daggs *v.* Hoskins, (Ariz. 1898) 52 Pac. 350.

California.— Kyle *v.* Craig, 125 Cal. 107, 57 Pac. 791; Gavin *v.* Gavin, 92 Cal. 292, 28 Pac. 567.

Florida.— Porter *v.* Parslow, 39 Fla. 50, 21 So. 574.

Georgia.— Stubbs *v.* State, 86 Ga. 773, 13 S. E 107.

Illinois.— Schumacher *v.* Bell, 164 Ill. 181, 45 N. E. 428; Firemen's Ins. Co. *v.* Appleton Paper, etc., Co., 161 Ill. 9, 43 N. E. 713; Chicago *v.* Spoor, 91 Ill. App. 472; Illinois Cent. R. Co. *v.* Heisner, 45 Ill. App. 143.

Indiana.— Gates *v.* Baltimore, etc., R. Co., 154 Ind. 338, 56 N. E. 722; Loucheim *v.* Seeley, 151 Ind. 665, 43 N. E. 646; Watson *v.* Deeds, 3 Ind. App. 75, 29 N. E. 151.

Iowa.— Wachendorf *v.* Lancaster, 61 Iowa 509, 14 N. W. 316, 16 N. W. 533.

Kansas.— Jackson *v.* Linnington, 47 Kan. 396, 28 Pac. 173, 27 Am. St. Rep. 300; Wheeler *v.* Joy, 15 Kan. 389.

Michigan.— Mason *v.* Partrick, 100 Mich. 577, 59 N. W. 239; Ashman *v.* Flint, etc., R. Co., 90 Mich. 567, 51 N. W. 645.

Mississippi.— Shaw *v.* Brown, 42 Miss. 309.

Missouri.— McKensie *v.* Missouri Pac. R. Co., 24 Mo. App. 392.

Nebraska.— Townsend *v.* J. I. Case Threshing Mach. Co., 31 Nebr. 836, 48 N. W. 899.

New York.— Simpson *v.* Masson, 11 Misc. (N. Y.) 351, 32 N. Y. Suppl. 136, 65 N. Y. St. 278; Landers *v.* Staten Island R. Co., 13 Abb. Pr. N. S. (N. Y.) 338.

Oklahoma.— Jay *v.* Zeissness, 6 Okla. 591, 52 Pac. 928; Carter *v.* Missouri Min., etc., Co., 6 Okla. 11, 41 Pac. 356.

Oregon.— Du Bois *v.* Perkins, 23 Oreg. 144, 31 Pac. 201.

Tennessee.— Thompson *v.* Watson, 12 Lea (Tenn.) 390.

Texas.— Western Union Tel. Co. *v.* Sanders, (Tex. Civ. App. 1894) 26 S. W. 734; Missouri, etc., R. Co. *v.* Wells, (Tex. Civ. App. 1900) 58 S. W. 842; Guerguin *v.* McGown, (Tex. Civ. App. 1899) 53 S. W. 585.

b. Applications of Rule. In applying the rule stated in the preceding paragraph it has been held that reasons must be stated for error assigned in the admission or exclusion of evidence.[71] So, a general statement that the court erred in giving an instruction specified is not sufficient;[72] that the judgment is excessive;[73] that the court erred in refusing leave to file a plea in bar;[74] or that the conclusions of law are not supported by the findings, has been held to be insufficient.[75] If it is urged that certain hypothetical questions assume evidence not proven, the brief must point out wherein this assumption consists,[76] and the reviewing court will not examine a question raised by a motion for judgment upon answers to interrogatories unless it is shown in the brief why the motion should have been sustained.[77]

5. Citing Authorities in Support of Reasons Assigned. So far as is possible, the reasons assigned should be supported by the citation of authorities,[78] and a brief which merely sets out propositions of law, with authorities in support thereof, without showing the applicability of such propositions to the errors assigned is insufficient.[79] The rule requiring citation of authorities is not violated, however, merely because the authorities cited do not support the reasons assigned.[80]

6. Urging Points Not Raised in Trial Court or Assigned as Error. A point not raised in the trial court[81] or not specified in the assignment of errors,[82] will not be considered even though it be discussed in the brief. And it has also been held that arguments in the brief of counsel, based on parts of the bill of exceptions which have been officially stricken out, will be disregarded.[83]

7. Effect of Disrespectful or Abusive Language — a. Directed Against Trial Court. The practice of inserting in briefs language which tends to bring ridicule on the trial judge, or which impugns his motives and conduct, is considered a very reprehensible one and deserving of the strongest censure. The penalty therefor depends in a measure on the degree of the offense. In a number of cases the reviewing court seemed to consider it sufficient to reprimand counsel and sound a

Vermont.—Paine *v.* Webster, 64 Vt. 105, 23 Atl. 615.

See 3 Cent. Dig. tit. "Appeal and Error," § 3090 *et seq.*

Curing defects by supplemental briefs.— Where appellant's original brief waived his assignments of error by merely asserting that the court erred, without attempting to show wherein the court's actions were erroneous, a subsequent brief, containing arguments on the assignments, filed long after the original brief and after the expiration of the time within which the original brief was required to be filed, did not cure the defects in the original brief. Gates *v.* Baltimore, etc., R. Co., 154 Ind. 338, 56 N. E. 722.

71. Chicago *v.* Spoor, 91 Ill. App. 472; Pratt *v.* Allen, 95 Ind. 404; Simpson *v.* Masson, 11 Misc. (N. Y.) 351, 32 N. Y. Suppl. 136, 65 N. Y. St. 278; Mississippi Mills *v.* Bauman, 12 Tex. Civ. App. 312, 34 S. W. 681.

72. Chicago *v.* Spoor, 91 Ill. App. 472.

73. Chicago *v.* Spoor, 91 Ill. App. 472.

74. Pratt *v.* Allen, 95 Ind. 404.

75. Collins *v.* McDuffie, 89 Ind. 562.

76. Xenia Real Estate Co. *v.* Drook, 140 Ind. 259, 39 N. E. 870.

77. Cooper *v.* Robertson, 87 Ind. 222.

78. *California.*— Gavin *v.* Gavin, 92 Cal. 292, 28 Pac. 567.

Florida.— Porter *v.* Parslow, 39 Fla. 50, 21 So. 574.

Illinois.— Kerr *v.* Smiley, 77 Ill. App. 88.

Indiana.— Peele *v.* Provident Fund Soc., 147 Ind. 543, 44 N. E. 661, 46 N. E. 990; Bonnel *v.* Shirley, 131 Ind. 362, 31 N. E. 64; Citizens' St. R. Co. *v.* Union Trust Co., 19 Ind. App. 402, 49 N. E. 359.

Kansas.— Patterson *v.* Patterson, 3 Kan. App. 342, 45 Pac. 129.

Missouri.— Bauer *v.* School Dist. No. 127, 78 Mo. App. 442; Hatch *v.* Hanson, 46 Mo. App. 323.

Montana.— Missoula Mercantile Co. *v.* O'Donnell, 24 Mont. 65, 60 Pac. 594.

Tennessee.— Thompson *v.* Watson, 12 Lea (Tenn.) 390.

Texas.— Gallagher *v.* Goldfrank, 75 Tex. 562, 12 S. W. 964.

See 3 Cent. Dig. tit. "Appeal and Error," § 3096.

79. Haugh *v.* Tacoma, 12 Wash. 386, 41 Pac. 173, 43 Pac. 37.

80. Fishback *v.* Bramel, 6 Wyo. 293, 44 Pac. 840.

81. Nall *v.* Wabash, etc., R. Co., 97 Mo. 68, 10 S. W. 610; Turner *v.* Houston, 21 Tex. Civ. App. 214, 51 S. W. 642.

82. Lacey *v.* Police Jury, 28 La. Ann. 455; Ostrom *v.* Arnold, (Tex. Civ. App. 1900) 58 S. W. 630; Cassetty Oil Co. *v.* Disborough. (Tex. Civ. App. 1896) 33 S. W. 1004. See also Vider *v.* O'Brien, 62 Fed. 326, 18 U. S. App. 711, 10 C. C. A. 385, in which it was held that each specification of the brief should conform substantially to the particular assignment of error on which it was based.

83. Clayton *v.* May, 68 Ga. 27.

note of warning against any further repetition of his misconduct,[84] and in other cases objectionable matter was ordered to be stricken from the briefs.[85] In some cases the court, on motion of counsel or on its own motion, has ordered the objectionable briefs to be stricken from the files.[86] There appears, however, to be some diversity of opinion as to what should be done when the briefs are ordered stricken from the files. In one case the court decided the case upon the record and the petition in error,[87] but in others counsel were directed to file another brief within a certain time, in default of which the appeal would be dismissed.[88] So, in one state, the court said that the language used was sufficient to authorize the court to order the briefs stricken from the files and to dismiss the appeal; but, nevertheless, the court seem to have determined the case on the merits.[89]

b. Directed Against Counsel or Parties. It is also considered highly reprehensible to attack the character of counsel or parties.[90]

8. Signature. Where the rules of court require a brief to be signed, an appeal will be dismissed if the brief is not signed by either the party taking the appeal or by his counsel.[91]

D. Reply Briefs. Points, raised by appellant or plaintiff in error in his reply brief, which were not presented in the opening brief will not, as a general rule, be considered.[92] If new questions can be raised in the reply brief, good cause

84. Confrey *v.* Stark, 73 Ill. 187; Smith *v.* Bingman, 3 Ill. App. 65; Sax *v.* Drake, 69 Iowa 760, 28 N. W. 423; Paine *v.* Frost, 67 Iowa 282, 25 N. W. 243; Brownell *v.* McCormick, 7 Mont. 12, 14 Pac. 651; Lau *v.* W. B. Grimes Dry Goods Co., 38 Nebr. 215, 56 N. W. 954; Flannagan *v.* Elton, 34 Nebr. 355, 51 N. W. 967; and 3 Cent. Dig. tit. "Appeal and Error," § 3102.

85. Rosenberg *v.* Stern, 77 Ill. App. 248; Cassidy *v.* Palo Alto County, 58 Iowa 125, 12 N. W. 231; Matthews' Appeal, 104 Pa. St. 444. In this last case, counsel, in speaking of the action of the court, said: "Such reason is contrary to common sense. It is akin to the utterance of a crank; . . . a ruling which more closely resembles the utterance of a crank than the reasoning of a chancellor." This matter was stricken out and argument was held by consent of opposite counsel.

86. *California.*— San Diego Water Co. *v.* San Diego, 117 Cal. 556, 49 Pac. 582.

Colorado.—Diamond Tunnel Gold, etc., Min. Co. *v.* Faulkner, 17 Colo. 9, 28 Pac. 472.

Illinois.— Scroggin *v.* Brown, 14 Ill. App. 338.

Kansas.— Stager *v.* Harrington, 27 Kan. 414; Scott *v.* Brown, (Kan. App. 1901) 63 Pac. 451.

Nebraska.—State *v.* Kennedy, 60 Nebr. 300. 83 N. W. 87; Ganzer *v.* Schiffbauer, 40 Nebr. 633, 59 N. W. 98.

Wisconsin.— Eureka Steam Heating Co. *v.* Sloteman, 69 Wis. 398, 34 N. W. 387.

Disavowing objectionable language.— In Friedlander *v.* Sumner Gold, etc., Min. Co., 61 Cal. 116, it was held that disrespectful language to the court was a sufficient ground for striking the brief from the files, but it afterward appearing to the satisfaction of the court that the objectionable language in the brief was marked for erasure but inadvertently printed, and counsel having disavowed the objectionable language and communicated such disavowal to the trial court, the reviewing court permitted the brief to remain on file.

Specific objectionable language.— It has been held that a motion to strike out a brief for grossly improper language toward the trial judge should be denied where the moving party's brief does not point out the objectionable language. Littlejohn *v.* Miller, 5 Wash. 399, 31 Pac. 758.

Where the alleged scandalous character of the language does not clearly appear, the brief will not be stricken from the files. Duncan *v.* Times-Mirror Co., 120 Cal. 402, 52 Pac. 652.

87. Stager *v.* Harrington, 27 Kan. 414.

88. Sears *v.* Starbird, 75 Cal. 91, 16 Pac. 531, 7 Am. St. Rep. 123; Scroggin *v.* Brown, 14 Ill. App. 338.

89. Tomlinson *v.* Territory, 7 N. M. 195, 33 Pac. 950.

90. People *v.* Parks, 26 Colo. 322, 57 Pac. 692; Taggart *v.* Bundick, (Kan. 1896) 43 Pac. 243; Green *v.* Elbert, 137 U. S. 615, 11 S. Ct. 188, 34 L. ed. 792. In Taggart *v.* Bundick, (Kan. 1896) 43 Pac. 243, it was held that charges, incorporated in a brief, that counsel of the adverse party were guilty of tampering with the record would be expunged. In People *v.* Parks, 26 Colo. 322, 57 Pac. 692, it was said that, except in extreme cases, a brief would not be stricken from the files on the ground that it contained scandalous or abusive matter in regard to parties. In Green *v.* Elbert, 137 U. S. 615, 11 S. Ct. 188, 34 L. ed. 792, the brief was ordered stricken from the files, but the appeal was dismissed on a consideration of the merits of the case.

91. McAlister *v.* Eastman, 92 Ga. 448, 17 S. E. 675.

92. Schumacher *v.* Bell, 164 Ill. 181, 45 N. E. 428; Harris *v.* Shebek, 151 Ill. 287, 37 N. E. 1015; Chicago, etc., R. Co. *v.* Murowski, 78 Ill. App. 661; Inter-State Bldg., etc., Assoc. *v.* Ayers, 71 Ill. App. 529; Peck *v.* Stanfield, 12 Wash. 101, 40 Pac. 635; Vestal *v.* Morris, 11 Wash. 451, 39 Pac. 960; Stickler *v.* Giles, 9

must be shown therefor, and leave of court must be obtained.[93] Nevertheless, a wrong citation in appellant's points on the appeal may, so as to save the question on the point, be corrected in the reply briefs when distinctly raised by the answer and distinctly made in the points, although the statute erroneously cited, standing alone, would have left the question in doubt.[94]

E. Supplemental or Additional Briefs. Supplemental or additional briefs setting up errors not specified in the original brief cannot usually be filed without leave of court or consent of the opposite party.[95] Ordinarily only such points as counsel make and rely upon for reversal in the original brief will be considered by the court in disposing of the case.[96]

F. Service of Brief — 1. By Appellant or Plaintiff in Error. Rules of court usually require copies of briefs of appellants or plaintiffs in error to be served on the opposite party.[97] In one jurisdiction the court may, on non-compliance with the rule, continue or dismiss the cause or affirm the judgment,[98] and, in another jurisdiction, under a rule requiring appellant to serve copies of his brief on the attorney for appellee thirty days before the date when the case is assigned for hearing, and providing that on failure so to do the party not in default may have a continuance or have the case submitted on the papers filed at the time of default, where appellant from a judgment at law fails to serve copies of his argument till within two weeks of the time when the appeal was set for hearing, and appellee asks that the appeal be submitted on the papers on file when the default occurred, the judgment below, if it is a law action, must be affirmed, because in that state exceptions in law actions not argued are waived.[99] In still another jurisdiction it has been held that delivery of briefs may be made by mail, and, when properly mailed, will be presumed to have been delivered in due course of mail, although this presumption may be rebutted.[1] Objections for failure to serve a brief are waived where the cause is duly submitted on behalf of the opposite party,[2] and a brief coming to the court in the usual time and manner will be presumed to have been submitted to the opposing counsel notwithstanding the statement of the latter to the contrary on a petition for rehearing.[3]

Wash. 147, 37 Pac. 293; and 3 Cent. Dig. tit. "Appeal and Error," § 3097.

An objection by appellee to the hearing of an appeal, because of a technical deficiency in the record as certified, will not avail when raised for the first time in his reply. Kendrick *v.* Eggleston, 56 Iowa 128, 8 N. W. 786, 41 Am. Rep. 90.

Exception to rule.— Where, on appeal, an estate of a deceased person is sought to be protected the court will consider a point, raised by appellant's counsel for the first time in his reply, after allowing appellee to be heard thereon, if it goes to the merits. Pratt *v.* Elgin Baptist Soc., 93 Ill. 475, 34 Am. Rep. 187.

93. Kahn *v.* Wilson, 120 Cal. 643, 53 Pac. 24.

94. Bancroft *v.* San Diego, 120 Cal. 432, 52 Pac. 712.

95. Greene *v.* Dwyer, 33 Minn. 403, 23 N. W. 546; Matter of Besondy, 32 Minn. 385, 20 N. W. 366, 50 Am. Rep. 579. See also Adams, Petitioner, 165 Mass. 497, 43 N. E. 682; and 3 Cent. Dig. tit. "Appeal and Error," § 3098.

96. McDaneld *v.* Logi, 143 Ill. 487, 32 N. E. 423; Western Union Tel. Co. *v.* Ferris, 103 Ind. 91, 2 N. E. 240; Black *v.* Dawson, 82 Mich. 485, 46 N. W. 793; State *v.* Omaha Nat. Bank, 59 Nebr. 483, 81 N. W. 319.

On appeal from the appellate court to the supreme court the briefs used in the appellate court may be filed without special leave for that purpose. Counsel may, if he choose, file additional or supplemental briefs. Devine *v.* Edwards, 100 Ill. 473.

On correction of record.— Where appellee filed an amended abstract with his argument, and afterward the parties entered into an agreement as to the true state of the record, an additional argument by appellee, bearing upon the record as thus shown, will not be stricken from the files. Meka *v.* Brown, 84 Iowa 711, 45 N. W. 1041, 50 N. W. 46.

97. **In North Carolina** filing a brief has the same effect as personal appearance by counsel. Supreme Court Rules, No. 12. If brief is filed, no continuance is allowed except for cause shown. Dibbrell *v.* Georgia Home Ins. Co., 109 N. C. 314, 13 S. E. 739.

98. Paden *v.* Worrell, 4 Okla. 92, 43 Pac. 1059.

99. Harrington *v.* Hubinger, (Iowa 1900) 83 N. W. 812.

1. Bachman *v.* Brown, 56 Mo. App. 396.

2. Salscheider *v.* Ft. Howard, 45 Wis. 519; Thomas *v.* Wooldridge, 23 Wall. (U. S.) 283, 23 L. ed. 135.

3. Hall *v.* Harris, 61 Iowa 500, 13 N. W. 665, 16 N. W. 535.

2. By Appellee or Defendant in Error. A motion to strike appellee's brief from the files because not served in time will not be decided where the court cannot consider appellant's assignments of error on account of their generality.[4]

G. Printing or Typewriting Briefs. Statutes and rules of court usually require briefs to be typewritten or printed.[5] If the rule requires a printed brief, the furnishing of a typewritten brief is not a compliance therewith.[6] And if a typewritten brief is prescribed, the typewriting must be clear and legible.[7] The penalty for failure to file a typewritten or printed brief depends on the provisions of the statute or rule of court which prescribes the kind of brief to be furnished. Thus, in one state, non-compliance by plaintiff is a ground for affirmance of the judgment of the court below, if no satisfactory excuse be forthcoming.[8] In others, non-compliance is a ground for dismissal.[9] So, in one jurisdiction the brief was ordered stricken from the files and, under penalty of dismissal for failure so to do, appellant required to file copies complying with the rule within a specified time,[10] and in another jurisdiction it is held that if the filing of a brief be not in accordance with the requirements of the rule, it operates as a waiver of errors.[11] Under the rules of one state, if the brief furnished by appellee does not comply with the rule the judgment will be reversed *pro forma*.[12]

H. Time of Filing — 1. Statutory Provisions and Rules of Court. The time within which briefs are to be filed is very generally prescribed by statutes or rules of court.[13] These statutes and rules of court confer rights which may be enforced by the litigants.[14]

2. Effect of Failure to File in Time — a. Default of Appellant or Plaintiff in Error. In regard to the penalties inflicted for failure to file briefs in time no general rules can be stated, because the statutes and rules of court vary considerably in their provisions. In Iowa the court will not affirm a cause summarily on motion,[15] or strike out the argument because it was not filed in time.[16] If prejudice has resulted to either party by delay redress must be sought in some other way[17] — as for instance, by obtaining further time for the filing of a counter-argument.[18] So, in Montana, it has been held that, in the absence of a rule to

4. Anheuser-Busch Brewing Assoc. *v.* Gates, 88 Iowa 700, 53 N. W. 1076; Anheuser-Busch Brewing Assoc. *v.* Oxley, 88 Iowa 699, 53 N. W. 1075.

5. Poyntz *v.* Reynolds, 37 Fla. 533, 19 So. 649; Carroll *v.* Holmes, 19 Ill. App. 564; Pate *v.* Hull, 6 Ind. 285; Sanborn *v.* Robinson, 22 Mich. 92; Johnson County *v.* Bryson, 26 Mo. App. 484; National Bank *v.* Lovenberg, 63 Tex. 506; Collart *v.* Fisk, 38 Wis. 238; Ingersoll *v.* Mecklem, 16 Wis. 90; Wilcox *v.* Hathaway, 12 Wis. 543; and 3 Cent. Dig. tit. "Appeal and Error," § 3099.

6. Carroll *v.* Holmes, 19 Ill. App. 564; Johnson County *v.* Bryson, 26 Mo. App. 484; National Bank *v.* Lovenberg, 63 Tex. 506; State *v.* Oleson, 9 Wash. 186, 37 Pac. 419.

7. National Bank *v.* Lovenberg, 63 Tex. 506; Bermea Land, etc., Co. *v.* Adoue, 20 Tex. Civ. App. 655, 50 S. W. 131; Heath *v.* Hall, (Tex. Civ. App. 1894) 27 S. W. 160.

8. Sanborn *v.* Robinson, 22 Mich. 92. See also State *v.* Oleson, 9 Wash. 186, 37 Pac. 419, in which a typewritten brief was stricken out and the judgment of the lower court affirmed.

9. Poyntz *v.* Reynolds, 37 Fla. 533, 19 So. 649; Johnson County *v.* Bryson, 26 Mo. App. 484; Ingersoll *v.* Mecklem, 16 Wis. 90.

10. Heath *v.* Hall, (Tex. Civ. App. 1894) 27 S. W. 160.

11. Pate *v.* Hull, 6 Ind. 285.

12. Carroll *v.* Holmes, 19 Ill. App. 564.

13. See the statutes and rules of court of the several states; and 3 Cent. Dig. tit. "Appeal and Error," §§ 3100, 3104.

Reasonableness of rule.— A rule of court that plaintiff in error or appellant must file briefs on or before the second day of the term, unless the time shall be extended, there being no statute governing in this respect, and that on failure to so do the judgment shall be affirmed, is a reasonable one which is within the power of the court to make. Challenor *v.* Mulligan, 110 Ill. 666.

Where no definite time is allowed.— When a case is submitted on briefs to be filed, and no definite time is granted, the briefs must be filed within such time that the case can be disposed of when reached. Phelps *v.* Funkhouser, 40 Ill. 27.

14. Shain *v.* People's Lumber Co., 98 Cal. 120, 32 Pac. 878.

15. Fowler *v.* Strawberry Hill, 74 Iowa 644, 38 N. W. 521.

16. Cox *v.* Forest City, etc., R. Co., 66 Iowa 289, 23 N. W. 672; Kellam *v.* McAlpine, 63 Iowa 251, 18 N. W. 914.

17. Fowler *v.* Strawberry Hill, 74 Iowa 644, 38 N. W. 521.

18. Cox *v.* Forest City, etc., R. Co., 66 Iowa 289; 23 N. W. 672; Kellam *v.* McAlpine, 63 Iowa 251, 18 N. W. 914.

that effect, appellant's failure to file briefs within the time required by the rules is no ground for dismissal.[19] On the other hand, in some jurisdictions, the penalty is the dismissal of the case,[20] and, in other jurisdictions, the court may affirm the judgment.[21] So, in one state it has been held that a motion to be permitted to file briefs which are not filed in time should be denied except where counsel for the other party consents in writing that the brief may be filed.[22]

b. Default of Appellee or Defendant in Error. In Illinois it has been held in a recent decision that the decree will not be reversed *pro forma* if the court, on an examination of the record, deems it proper to decide the case upon its merits.[23] In Iowa a brief not filed in time will not be stricken from the files, but the court, when asked, will tax the costs thereof to the party filing it, unless the failure to file within the time prescribed has been reasonably excused;[24] and the party in default is deprived of the right to argue the case orally.[25] In California, if no sufficient excuse is shown for failure to file the brief in time, appellants are entitled to have the case placed upon the submission calendar, to be submitted in due course when the business of the court shall permit such submission, and the application of respondents to file points and authorities will be denied.[26]

3. Excuses for Failure to File in Time. On a proper showing, the reviewing court will not dismiss an appeal because appellant's brief was not filed in time.[27] Thus, the court has power, in its discretion, to relieve against a failure to file in

19. Logan *v.* Rickards, 14 Mont. 334, 36 Pac. 318.

20. *California.*— Suman *v.* Archibald, 116 Cal. 41, 47 Pac. 865; Sorensen *v.* Dorris, (Cal. 1894) 37 Pac. 870.

Colorado.— Denver, etc., R. Co. *v.* Wilford, 13 Colo. 551, 22 Pac. 897; Owen *v.* Going, 13 Colo. 290, 22 Pac. 768.

Indiana.— Spencer *v.* Spencer, 136 Ind. 414, 36 N. E. 210; Stephens *v.* Stephens, 51 Ind. 542.

Missouri.— Missouri Pac. R. Co. *v.* Illig, 20 Mo. App. 327.

Ohio.— Kaiser *v.* Wells, 63 Ohio St. 349, 58 N. E. 803.

South Carolina.— New England Mortg. Security Co. *v.* McMillan, 41 S. C. 547, 19 S. E. 692; Trimmier *v.* Thomson, 39 S. C. 554, 17 S. E. 782, 851; Union Mortg., etc., Co. *v.* Brown, 39 S. C. 552, 17 S. E. 724.

See 3 Cent. Dig. tit. "Appeal and Error," § 3104.

Appeal in vacation.— The rule of court that, where the cause is submitted on call or by agreement, the clerk shall enter an order dismissing the appeal if appellant fails to file a brief within sixty days, applies as well to cases appealed in the term of the court below as to those appealed in vacation. Murray *v.* Williamson, 79 Ind. 287.

Effect of subsequently filing brief.— The operation of Supreme Court Rules, No. 14, that where a cause is submitted on call or by agreement, and appellant fails to file his brief within sixty days thereafter, the appeal will stand dismissed, is not affected by the subsequent filing of a brief by appellant and the failure of the clerk to enter the dismissal. Stephens *v.* Stephens, 51 Ind. 542.

Failure of clerk to enter order of dismissal. — The right of appellee, under Appellate Court Rules, No. 19 [27 N. E. vi], providing that, on failure of appellant to file a brief within sixty days after the cause is submitted, the clerk shall enter an order dismissing the appeal, to have the appeal dismissed, is not affected by the failure of the clerk to enter the order. Island Coal Co. *v.* Clemmitt, 12 Ind. App. 206, 40 N. E. 143.

21. See Goudy *v.* Lake View, 27 Ill. App. 505.

Showing that briefs were not filed in time.— To sustain an assignment of error that the appellate court refused a motion to affirm the judgment or the decree appealed from for a failure of appellant to file briefs within the time limited by a rule of the appellate court, it must appear upon the record of that court that the briefs were not filed in the proper time. That fact cannot be shown by affidavits filed in the supreme court. Mutual Bldg., etc., Assoc. *v.* Tascott, 143 Ill. 305, 32 N. E. 376.

22. Werner *v.* Kasten, (Tex. Civ. App. 1894) 25 S. W. 317.

23. Ribordy *v.* Murray, 70 Ill. App. 527. But *compare* Asher *v.* Mitchell, 7 Ill. App. 127.

24. Renwick *v.* Bancroft, 59 Iowa 116, 12 N. W. 801.

25. Bartle *v.* Des Moines, 37 Iowa 635.

26. Hale, etc., Silver Min. Co. *v.* Fox, 120 Cal. 261, 52 Pac. 499.

27. Barbour *v.* Flick, 121 Cal. 425, 53 Pac. 927; Santa Paula Water Works *v.* Peralta, (Cal. 1895) 42 Pac. 239; Farleigh *v.* Kelly, 24 Mont. 369, 62 Pac. 495; Wagner *v.* Portland, (Oreg. 1900) 60 Pac. 985; Neppach *v.* Jones, 28 Oreg. 286, 39 Pac. 999, 42 Pac. 519; Skagit R., etc., Co. *v.* Cole, 1 Wash. 330, 26 Pac. 535; and 3 Cent. Dig. tit. "Appeal and Error," § 3105. But see New England Mortg. Security Co. *v.* McMillan, 41 S. C. 547, 19 S. E. 692, 695, in which it was held that, although counsel used commendable judgment in attempting a compliance with the rule of court requiring briefs to be filed within a certain time, this will constitute no ground to reinstate an appeal which was dismissed because of such failure.

time, such failure resulting from sickness of counsel,[28] a misunderstanding between two attorneys as to which was to act, superinduced by the party's ignorance of the English language,[29] counsel's refusal to act, in consequence of a disagreement between himself and his client,[30] neglect or delay of the printer,[31] heavy public duties of appellant's counsel and the clerk — it appearing to the court that the case was important[32] — reliance of counsel on a stipulation between the parties to put the case at the foot of the docket,[33] or because appellant was unable, by a diligent search, to find many of the necessary papers in the case within the time for filing the brief, because such papers were, without his knowledge, in the office of appellee's attorney.[34] So, where a case was continued because there was no evidence of service of the scire facias, and thereafter appellee produced the writ, showing due service, his motion to set aside the order of continuance because of appellant's failure to file briefs will be denied.[35] On the other hand, a default is not excused by the fact that one of appellees, pending the appeal, was adjudged insolvent, and that no assignee had been appointed;[36] that counsel was too much engrossed with other business;[37] or that counsel, who was from another state, was ignorant of the time for filing.[38] So, under a rule requiring the clerk, in case appellant fails to file his brief within the time limited therefor, to enter an order dismissing the appeal unless appellee files a written request that the case be passed on by the court, the failure of the clerk to enter such order will not entitle appellant to a hearing.[39] And it has been held that the fact that the only error intended to be raised is the insufficiency of the complaint will not excuse a failure to file a brief within the required time, though it is provided by rule of court that no alleged error will be considered unless stated in the brief, except that the objection that the complaint does not state facts sufficient to constitute a cause of action may be taken at any time.[40]

4. Extension of Time for Filing. It has been held that counsel cannot, by private agreement among themselves, extend the time for filing briefs, the view being taken that the rule specifying the time for filing briefs is made for the benefit of the court, and not for that of counsel or parties.[41] In some states the rules provide for the granting of an extension of time, but the prerequisites for obtaining it must be at least substantially complied with.[42] In California it has

28. Wagner *v.* Portland, (Oreg. 1900) 60 Pac. 985.

29. Santa Paula Water Works *v.* Peralta, (Cal. 1895) 42 Pac. 239.

30. Skagit R., etc., Co. *v.* Cole, 1 Wash. 330, 26 Pac. 535.

31. Neppach *v.* Jones, 28 Oreg. 286, 39 Pac. 999, 42 Pac. 519. *Contra,* Ussery *v.* Vogel, 36 S. C. 603, 15 S. E. 512, from which case it seems that the court does not recognize any excuse whatever for failure to file a brief in time.

32. Benn *v.* Chehalis County, 10 Wash. 294, 38 Pac. 1039.

33. Barbour *v.* Flick, 121 Cal. 425, 53 Pac. 927; Mutual Bldg., etc., Assoc. *v.* Tascott, 143 Ill. 305, 32 N. E. 376, in which it was held that the court would not dismiss the case even though the judges had, before the term began, informed appellee that they would not respect the stipulation, when no inconvenience or delay resulted.

34. Merchant's Nat. Bank *v.* McKinney, 1 S. D. 78, 45 N. W. 203.

35. Blair *v.* Reading, 96 Ill. 130.

36. Suman *v.* Archibald, 116 Cal. 41, 47 Pac. 865.

37. Smith *v.* Tenney, 60 Ill. App. 442; Ambrose *v.* Gwinnup, 16 Wash. 333, 47 Pac. 737; Sheperd *v.* Sheperd, 4 Wash. 615, 30 Pac. 664.

38. Cronkhite *v.* Bothwell, 3 Wyo. 739, 31 Pac. 400.

39. Smith *v.* Wells Mfg. Co., 144 Ind. 266, 43 N. E. 131.

40. Lacey *v.* North Olympia Land Co., 4 Wash. 261, 29 Pac. 929.

41. Lehigh Coal, etc., Co. *v.* Scallen, 61 Minn. 63, 63 N. W. 245.

42. Shain *v.* People's Lumber Co., 98 Cal. 129, 32 Pac. 878; National Christian Assoc. *v.* Simpson, 21 Wash. 16, 56 Pac. 814.

In California the proper practice, for an attorney desiring an order of the supreme court extending the time within which he may file his points and authorities, is to show by the affidavit upon which he asks the order the date when the transcript was filed and whether any time in addition to that stipulated by the rule has been given, either by order or by stipulation, so that it may be determined therefrom whether, within the discretion of the court, it ought to grant the time asked for. Shain *v.* People's Lumber Co., 98 Cal. 120, 32 Pac. 878.

A stipulation extending the time of filing appellant's brief gives no extension of time to respondent within which to file his. Carlson *v.* Van de Vanter, (Wash. 1898) 52 Pac. 323.

been held that, if the brief is not filed within the extended time, the appeal should, in the absence of any reasonable excuse, be dismissed.[43]

5. Waiver of Objection for Delay in Filing. In some cases it has been held that, under certain circumstances, objections for delay in filing a brief may be waived. Thus, it has been held that delay in filing a brief is waived where the opposite party files his brief,[44] or argues the case without objection.[45] So, where appellant fails to file his brief till after the date required by the rule, but, on the day he does so, appellee obtains an extension of time for filing his brief, the latter thereby waives objection for failure of appellant to file his brief in time.[46]

I. Effect of Failure to File Briefs[47]**— 1. Default of Appellant or Plaintiff in Error.** The penalty for failure of appellant or plaintiff in error to file briefs depends, it is apprehended, on the provisions of the statutes or rules of court. In Alabama, California, Florida, Michigan, Montana, Nevada, and Oregon, the judgment has been affirmed where appellant failed to file a brief.[48] In Colorado, on an appeal directly from the trial court to the supreme court, the appeal was dismissed,[49] and, on an appeal from an intermediate court of appellate jurisdiction (a rule of the supreme court requiring new briefs to be filed), the court dismissed the appeal and affirmed the judgment for non-compliance with the rule.[50] In Illinois, Indiana, Iowa, Kansas, Missouri, and the United States supreme court, the court in some cases affirmed the judgment,[51] and in other cases dismissed the appeal.[52]

43. Pilger *v.* Strassman, 119 Cal. 691, 52 Pac. 40.

44. Gulf, etc., R. Co. *v.* Mitchell, 21 Tex. Civ. App. 463, 51 S. W. 662.

45. Whitehead *v.* Tulane, 11 La. Ann. 302. See also Livesley *v.* Pier, 9 Wash. 658, 38 Pac. 156.

46. Yates *v.* Thompson, 44 Ill. App. 145.

47. See 3 Cent. Dig. tit. "Appeal and Error," § 3104 *et seq.*

48. *Alabama.*— Doe *v.* McDougal, 48 Ala. 383.

California.— Drexler *v.* Seal Rock Tobacco Co., 78 Cal. 624, 21 Pac. 372; Peek *v.* Peek, 75 Cal. 298, 17 Pac. 213; Scott *v.* Snowden, (Cal. 1888) 16 Pac. 768; Faris *v.* Lampson, 73 Cal. 190, 14 Pac. 674; Whitman *v.* Hay, (Cal. 1885) 9 Pac. 99; Easterby *v.* Napa (Cal. 1885) 8 Pac. 600; Brewster *v.* Johnson, 51 Cal. 222; Hickinbotham *v.* Monroe, 28 Cal. 489; Holm *v.* Roach, 25 Cal. 37.

Florida.— Clarke *v.* Southern Express Co., 33 Fla. 617, 15 So. 252.

Michigan.— Busch *v.* Fisher, 89 Mich. 192, 50 N. W. 788; Woodward *v.* Chester, 42 Mich. 461, 4 N. W. 167.

Montana.— State *v.* Dakin, 15 Mont. 556, 39 Pac. 848; Steuffen *v.* Jefferis, 9 Mont. 66, 22 Pac. 152.

Nevada.— Matthewson *v.* Boyle, 20 Nev. 88, 16 Pac. 434; Robinson *v.* Longley, 18 Nev. 71, 1 Pac. 377; Goodhue *v.* Shedd, 17 Nev. 140, 30 Pac. 615; Finlayson *v.* Montgomery, 14 Nev. 397.

Oregon.— Giachetta *v.* Marquam, 24 Oreg. 160, 33 Pac. 537; Tucker *v.* Constable, 16 Oreg. 239, 17 Pac. 878.

49. Howlett *v.* Tuttle, 10 Colo. 222, 15 Pac. 342; Denver, etc., R. Co. *v.* Woy, 7 Colo. 556, 5 Pac. 815.

50. Rarick *v.* Vandevier, (Colo. 1900) 62 Pac. 364; Catholic Cemetery Assoc. *v.* Denver, 24 Colo. 500, 52 Pac. 669.

51. *Illinois.*— Skinner *v.* Zimmer, 52 Ill. 235.

Indiana.— Davis *v.* Franklin First Nat. Bank, 28 Ind. 240; Ferris *v.* Hayes, 16 Ind. 160; Falkner *v.* McIlroy, 11 Ind. 510; Zehnor *v.* Crull, 10 Ind. 547; Henderson *v.* Burch, 10 Ind. 54.

Iowa.— Beams *v.* Crawford, 86 Iowa 753, 53 N. W. 225; Raynor *v.* Raynor, 77 Iowa 282, 42 N. W. 184; State *v.* Ullins, 74 Iowa 763, 38 N. W. 549; Clime *v.* Phipps, 62 Iowa 759, 17 N. W. 590; Mores *v.* Hanchett, 54 Iowa 747, 6 N. W. 140.

Kansas.—Campbell *v.* Phillips, 28 Kan. 753; Davis *v.* Fillmore, 15 Kan. 333.

Missouri.— State *v.* Whitten, 23 Mo. App. 459; Sedalia First Nat. Bank *v.* Kruse, 17 Mo. App. 511; Swallow *v.* Duncan, 17 Mo. App. 336; Macon Wagon Co. *v.* Carney, 17 Mo. App. 330; Ward *v.* Davidson, 13 Mo. App. 573.

United States.— Ryan *v.* Koch, 17 Wall. (U. S.) 19, 21 L. ed. 611.

52. *Illinois.*— Hooper *v.* McCaffery, 77 Ill. App. 278.

Indiana.— Carriger *v.* Kennedy, 134 Ind. 107, 33 N. E. 909; Louisville, etc., R. Co. *v.* Indianapolis, etc., Gravel Road Co., 104 Ind. 600, 4 N. E. 41; Shulties *v.* Keiser, 95 Ind. 159; Indianapolis, etc., R. Co. *v.* Ferguson, 58 Ind. 445.

Iowa.— Scott *v.* Neises, 61 Iowa 62, 15 N. W. 663; Niles *v.* Chicago, etc., R. Co., 13 Iowa 598.

Kansas.— Peak *v.* Howald, 30 Kan. 27.

Missouri.—Parkville *v.* Clough, 39 Mo. 520; Dean *v.* Ewing, 33 Mo. 172; Kinney *v.* Springfield, 35 Mo. App. 97; Dykes *v.* Wabash, etc., R. Co., 17 Mo. App. 174; Schiller *v.* Voelker, 9 Mo. App. 572; Eyerman *v.* Zeppenfeld, 9 Mo. App. 572.

United States.— Schooner Catherine *v.* U. S., 7 Cranch (U. S.) 99, 3 L. ed. 281.

Where a brief filed with a case on appeal has been withdrawn or lost, and counsel has been requested to file a brief, but, after long delay, has failed to do so, the appeal should be dismissed. Couse *v.* Hanes, 44 Ind. 282.

In Kentucky the judgment was affirmed in one case,[53] in another the appeal was dismissed,[54] and in another the appeal was dismissed without prejudice.[55] In Nebraska some of the decisions broadly state that the judgment will be affirmed without an examination of the record,[56] while other decisions state that the judgment will be affirmed where, on a consideration of the record, the court is satisfied that the verdict and judgment conform to the pleadings and evidence.[57] In Oklahoma the court may dismiss the appeal, affirm the judgment, or continue the case.[58] In South Carolina it has been held that the appeal will, on motion by respondent, be dismissed.[59] In Texas, in some cases, it was said that the appeal should be dismissed;[60] in another case it was held that, when no briefs are filed, only fundamental errors will be considered,[61] and in still another case that, where there is material error apparent on the face of the record, the appeal will not be dismissed because there is no brief for either party.[62] In Utah the court may, in its discretion, affirm the judgment appealed from or dismiss the appeal, or it may examine the record and render such judgment as it may deem just.[63] In Washington, in one case, the judgment was affirmed,[64] in another case it was held that the appeal should be dismissed,[65] and in another it was held that the appeal should be dismissed where, without satisfactory reasons being given, appellant had failed to file a brief and appellee had, in accordance with the rules of court, filed a certified copy of the judgment and notice of the appeal.[66] In Wisconsin, in a case where no brief was filed by either party, the appeal was dismissed.[67]

2. Default of Appellee or Defendant in Error. As regards the effect of failure of appellee or defendant in error to file a brief the practice varies in different states, owing to the difference in the provisions of the statutes and rules of court requiring briefs to be filed. In Florida no penalty is provided for failure to file briefs, and the court has to content itself with grumbling at counsel for neglecting his obvious duty.[68] In California it has been held that, where respondent fails to file a brief or make oral argument, and the findings or verdict are attacked for insufficiency of the evidence to uphold them, the judgment will be reversed.[69] In Illinois the court may, in its discretion, reverse the case *pro forma*[70] unless, on examination of the record, it shall deem it proper to decide the case on its merits.[71]

53. Morse *v.* Lucas, 15 Ky. L. Rep. 85, 22 S. W. 216.

54. Williams *v.* Tyler, 13 Ky. L. Rep. 392, 17 S. W. 276.

55. Bain *v.* G. W. McAlpin Co., 17 Ky. L. Rep. 575, 32 S. W. 175.

56. Betz *v.* Martin, 45 Nebr. 341, 63 N. W. 811; Miller *v.* Lewis, 41 Nebr. 692, 60 N. W. 11; Zimmerman Mfg. Co. *v.* Tower, 40 Nebr. 306, 58 N. W. 931; Stabler *v.* Gund, 35 Nebr. 648, 53 N. W. 570.

57. Moore *v.* McCollum, 43 Nebr. 617, 62 N. W. 41; Langdon *v.* Campbell, 43 Nebr. 67, 61 N. W. 84; Norwegian Plow Co. *v.* Mower, 42 Nebr. 659, 60 N. W. 915; Obert *v.* Wentz, 42 Nebr. 104, 60 N. W. 353; Damon *v.* Omaha, 38 Nebr. 583, 57 N. W. 287; Brown *v.* Dunn, 38 Nebr. 52, 56 N. W. 703; Phenix Ins. Co. *v.* Reams, 37 Nebr. 423, 55 N. W. 1074. See also Rawalt *v.* Brewer, 15 Nebr. 56, 17 N. W. 266.

58. Ballew *v.* Schlosser, 5 Okla. 146, 48 Pac. 182; Paden *v.* Worrell, 4 Okla. 92, 43 Pac. 1059; Conkling *v.* Cameron, 3 Okla. 525, 41 Pac. 609.

59. Marion Bank *v.* Everett, 40 S. C. 549, 18 S. E. 891.

60. Pearson *v.* Household Sewing Mach. Co., 78 Tex. 385, 14 S. W. 890; Gant *v.* Timmons, 78 Tex. 11, 14 S. W. 236; Shanks *v.* Carroll, 50 Tex. 17.

61. Avant *v.* Cowley, (Tex. Civ. App. 1898) 47 S. W. 1036.

62. Dyer *v.* Dement, 37 Tex. 431.

63. Emerick *v.* Ogden, 9 Utah 372, 36 Pac. 633.

64. Blair *v.* Cassin, 19 Wash. 127, 52 Pac. 1011.

65. Oregon R., etc., Co. *v.* O'Brien, 3 Wash. Terr. 21, 13 Pac. 757.

66. Higgins *v.* Burns, 2 Wash. 372, 26 Pac. 755.

67. Holmes *v.* Braman, 15 Wis. 603.

68. Chamberlain *v.* Lesley, 39 Fla. 452, 22 So. 736.

69. Kelly *v.* Bradbury, 104 Cal. 237, 37 Pac. 872; Davis *v.* Hart, 103 Cal. 530, 37 Pac. 486; Richter *v.* Fresno Canal, etc., Co., 101 Cal. 582, 36 Pac. 96.

70. Wm. Nevius Banking Co. *v.* Brunges, 72 Ill. App. 596; Manning *v.* Jarnagan, 71 Ill. App. 406; Newell *v.* Reynolds, 71 Ill. App. 405; Kurtz *v.* Kurtz, 71 Ill. App. 71; Jackson *v.* Mt. Morris, 70 Ill. App. 613; Hamilton *v.* Andrews, 68 Ill. App. 393; Rehkopf *v.* McCambridge, 63 Ill. App. 160; Mullen *v.* Brown, 48 Ill. App. 592; Chicago, etc., Coal Co. *v.* Peterson, 39 Ill. App. 114.

71. Levi *v.* Brown, 84 Ill. App. 147; Wenz *v.* Tirrill, 48 Ill. App. 41; Mattoon *v.* Holmes, 14 Ill. App. 392; Terre Haute, etc., R. Co. *v.*

In Indiana, if appellee assigns cross-errors, but files no brief, the cross-errors will be stricken out.[72] In Iowa the case will be examined and determined with such care as its importance demands and the time of the court will permit of. It is very justly said, however, that the result is always reached with the greatest liability to error;[73] and only such questions will be considered as are necessary to determine the case.[74] In Kansas the court may dismiss the case, or affirm or reverse the judgment,[75] or it may consider the case on the merits. In that event, however, the court will not carefully search the record to find a theory upon which the judgment below can be sustained.[76] In Texas it has been held that a cross-appeal will be deemed abandoned where no brief is filed.[77]

XIII. RECORD, AND PROCEEDINGS NOT IN RECORD.

A. Matters to Be Shown by Record — 1. JURISDICTION OF APPELLATE COURT — a. In General. An appeal or writ of error will be dismissed, for want of jurisdiction, when the record fails to show affirmatively the proper taking of all the steps and the existence of all the facts necessary to confer jurisdiction upon the appellate court.[78]

b. Taking and Perfecting of Proceedings for Review — (I) *IN GENERAL.* A cause will be dismissed by the appellate court for want of jurisdiction when it does not appear from the record that any appeal was taken or writ of error sued out,[79] and the record must show to what term the writ of error is returnable.[80] In the federal courts a writ of error need not be set out in the record if the original writ of error is filed in the appellate court;[81] but if the record does not show

Goodwin, 4 Ill. App. 165; Cox *v.* Tuscola, 2 Ill. App. 628.

72. Sumner *v.* Dunkin, 42 Ind. 530.

73. Russell *v.* Torbet, 81 Iowa 754, 46 N. W. 1095.

74. Richardson *v.* Probst, 103 Iowa 241, 72 N. W. 521; Dodd *v.* Scott, 81 Iowa 319, 46 N. W. 1057, 25 Am. St. Rep. 492, 10 L. R. A. 360; Gilfeather *v.* Council Bluffs, 69 Iowa 310, 28 N. W. 610.

75. Naylor *v.* Beery, 7 Kan. App. 815, 52 Pac. 580.

76. Douglass *v.* Craig, 9 Kan. App. 885, 61 Pac. 320.

77. Randolph *v.* State, 73 Tex. 485, 11 S. W. 487.

78. *Illinois.*— Brownell *v.* Baker, 5 Ill. App. 571.

Indiana.— Louisville, etc., R. Co. *v.* Jackson, 64 Ind. 398.

Kansas.— Webber *v.* Carey, 2 Kan. App. 165, 43 Pac. 284; Clark *v.* Ottawa, 1 Kan. App. 304, 40 Pac. 1071.

Louisiana.— Rathbone *v.* St. James Parish, 28 La. Ann. 324.

Missouri.— Baldwin *v.* Fries, 103 Mo. 286, 15 S. W. 760.

Tennessee.— Matter of Bates, 2 Heisk. (Tenn.) 533.

United States.— Semple *v.* Hager, 4 Wall. (U. S.) 431, 18 L. ed. 402; Suydam *v.* Williamson, 20 How. (U. S.) 427, 15 L. ed. 978; Agnew *v.* Dorman, Taney (U. S.) 386, 1 Fed. Cas. No. 100.

See 3 Cent. Dig. tit. "Appeal and Error," § 2310.

79. *Alabama.*— Shulman *v.* Brantly, 48 Ala. 193.

Florida.— Rabon *v.* State, 7 Fla. 9.

Iowa.— J. P. Calnan Construction Co. *v.* Brown, 110 Iowa 37, 81 N. W. 163; Brandenburg *v.* Keller, 100 Iowa 747, 69 N. W. 448.

Massachusetts.— Lund *v.* George, 1 Allen (Mass.) 403; Moore *v.* Lyman, 13 Gray (Mass.) 394.

Mississippi.— Devane *v.* Calching, 2 How. (Miss.) 884.

Missouri.—State *v.* Gabhart, 51 Mo. 147; Harper *v.* Standard Oil Co., 74 Mo. App. 644.

New Mexico.— Wheeler *v.* Fick, 4 N. M. 149, 13 Pac. 217.

North Carolina. — Howell *v.* Jones, 109 N. C. 102, 13 S. E. 889; Randleman Mfg. Co. *v.* Simmons, 97 N. C. 89, 1 S. E. 923.

Texas.— Bennett *v.* Spillars, 7 Tex. 600.

See 3 Cent. Dig. tit. "Appeal and Error," § 2312.

The court will, of its own motion, dismiss the cause, even though appellee appears and does not raise the question of a want of jurisdiction when the record fails to show that an appeal was taken. Plummer *v.* People's Bank, 73 Iowa 752, 33 N. W. 150, 74 Iowa 731.

An appeal is not sufficiently shown by the record when the only thing to indicate it is a recital in the appeal bond that an appeal had been taken. Hall *v.* Bewley, 11 Humphr. (Tenn.) 105. *Contra,* Mulanphy *v.* Murray, 12 Mart. (La.) 429.

Presumption as to judgment appealed from. — Where the record states that "on the ninth day of November the defendants perfected an appeal to the supreme court of the state of Iowa," it will be presumed that the appeal was from the judgment recited in the former part of the record. Waller *v.* Waller, 76 Iowa 513, 41 N. W. 307.

80. Mills *v.* Bagby, 4 Tex. 320.

81. Amis *v.* Pearle, 15 Pet. (U. S.) 211, 10 L. ed. 714.

that the original writ of error has been indorsed as filed by the clerk of the trial court the appellate court is without jurisdiction, even though the writ was in fact delivered to the clerk of the trial court.[82]

(II) *By Same Parties Against Whom Judgment Rendered.* An appeal or writ of error will be dismissed for want of jurisdiction when the record fails to show distinctly and affirmatively that the appeal was taken or the writ of error sued out by the same party or parties against whom the judgment or decree complained of was rendered, or by their properly qualified legal representatives,[83] or by one whose rights were concluded by such judgment or decree.[84]

(III) *Application and Allowance or Leave.* Where allowance of an appeal is necessary it is essential to the jurisdiction of the appellate court that the record should show affirmatively that appellant prayed an appeal, and complied with all the requirements of the law entitling him to it, and that the appeal was granted by the lower court.[85] A deficiency in the record in this respect has, however, often been supplied either by the presence in the record of an appeal bond, or by recital, in the bill of exceptions or other part of the transcript outside of the record proper, that an appeal had been prayed and allowed.[86]

(IV) *Time of Taking Proceedings*—(A) *In General.* The record must show unmistakably that the appeal was taken within the time fixed by law, or the appellate court is without jurisdiction.[87]

82. Mutual L. Ins. Co. *v.* Phinney, 76 Fed. 617, 48 U. S. App. 78, 22 S. C. A. 425.

83. *Alabama.*— Collins *v.* Baldwin, 109 Ala. 402, 19 So. 862.

Georgia.— Townsend *v.* Davis, 1 Ga. 495, 44 Am. Dec. 675.

Illinois.— Clapp *v.* Reid, 40 Ill. 30; Arnold *v.* Kilchman, 76 Ill. App. 665.

Kansas.— Johnson L. & T. Co. *v.* Burr, 7 Kan. App. 703, 51 Pac. 916.

Louisiana.— Azemard *v.* Campo, McGloin (La.) 64.

84. Hughes *v.* Smith, 59 N. H. 311.

85. *Arkansas.*— Matthews *v.* Lane, 65 Ark. 419, 46 S. W. 946; Neale *v.* Peay, 21 Ark. 93.

Louisiana.— Lewis *v.* Boyet, 45 La. Ann. 1220, 14 So. 119, 120; Phillips *v.* Her Creditors, 35 La. Ann. 935. *Compare* Edgerly *v.* Smith, 27 La. Ann. 97.

Maine.— Moody *v.* Moody, 11 Me. 247.

Missouri.— Swank *v.* Swank, 85 Mo. 198; State *v.* Missouri Pac. R. Co., 84 Mo. 129; Meyers *v.* Meyers, 19 Mo. App. 140.

Tennessee.— Bailey *v.* State, 95 Tenn. 391, 32 S. W. 250: Simmons *v.* Leonard, (Tenn. Ch. 1895) 36 S. W. 846.

See 3 Cent. Dig. tit. "Appeal and Error," § 2315.

There is a sufficient showing that an appeal was granted where the record shows that the appeal was "granted him upon giving bond and security for costs," and the bond executed on the same day was certified as a part of the record (Childress *v.* Marks, 2 Baxt. (Tenn.) 12); where the record showed that an appeal was prayed, and that the chancellor allowed the party a certain time in which to make and file an appeal bond, but failed to show that an appeal was granted (Charleston Bank *v.* Johnston, 105 Tenn. 521, 59 S. W. 131); or, where the record shows the filing of a petition for an appeal and its allowance, the filing and approval of a bond containing a recital that appellant had obtained an appeal and filed a copy thereof in the clerk's office, and that citation was served and duly filed, this is a plain showing that the appeal as allowed was duly filed (Harkrader *v.* Wadley, 172 U. S. 148, 19 S. Ct. 119, 43 L. ed. 399).

If it appear in the case on appeal that an appeal was entered in the trial court, it is no ground for dismissal that the record proper does not show that fact. Fore *v.* Western North Carolina R. Co., 101 N. C. 526, 8 S. E. 335; Allison *v.* Whittier, 101 N. C. 490, 8 S. E. 338. Moore *v.* Vanderburg, 90 N. C. 10, is not in conflict, for that merely holds that such entry must be actually made in the trial court. See also Sterner *v.* Hodgson, 63 Mich. 419, 30 N. W. 77, wherein it was held that, although the record did not contain the appeal affidavit which was essential to the jurisdiction of the appellate court, the judgment of the circuit court would not be disturbed when no error was assigned, and none appeared in the proceedings.

86. Edgerly *v.* Smith, 27 La. Ann. 97; Mulanphy *v.* Murray, 12 Mart. (La.) 429; Douglas *v.* Orr, 58 Mo. 573; Rodenbough *v.* Rosebury, 24 N. J. L. 491; Hudgins *v.* Kemp, 18 How. (U. S.) 530, 15 L. ed. 511. See also Newman *v.* Biggs, 78 Mo. 675. *Contra,* Anthony *v.* Brooks, 31 Ark. 725; Teasdale *v.* Manchester Produce Co., 104 Tenn. 267, 56 S. W. 853; Craighead *v.* Rankin, 6 Baxt. (Tenn.) 131; Hall *v.* Bewley, 11 Humphr. (Tenn.) 105; O'Riley *v.* Zollicoffer, 4 Yerg. (Tenn.) 298.

87. *Alabama.*— Alabama, etc., R. Co. *v.* Hungerford, 41 Ala. 388.

Iowa.— Wambach *v.* Grand Lodge, etc., 88 Iowa 313, 55 N. W. 516; Gleason *v.* Collett, 77 Iowa 448, 42 N. W. 367.

Pennsylvania.— Horan *v.* Dieter, 7 Kulp (Pa.) 560.

(B) *Extension of Time.* Where there has been an extension of time, this fact must appear in the record, either by an order of the court, or by stipulation of the parties.[88]

(V) *Security and Affidavits In Forma Pauperis*—(A) *In General.* It is a rule of almost universal application that the record must show that a bond or undertaking on appeal, conditioned and executed as prescribed by law, was filed within the required time;[89] and in many jurisdictions it is necessary that the bond itself be inserted or copied in the record, and a mere certificate of its filing, by the clerk of the trial court, is insufficient.[90]

(B) *Waiver of Security.* Where the parties may waive security, a stipulation to that effect must appear in the record.[91]

(C) *Affidavit on Appeal In Forma Pauperis.* Where an appeal or writ of error is prosecuted *in forma pauperis*, the record must contain the affidavit thereto, an order of the trial court granting an appeal to a party as a pauper being of itself insufficient to sustain the jurisdiction of the appellate court.[92]

Texas.— Houston, etc., R. Co. *v.* Greenwood, 40 Tex. 361.

United States.— Jacobs *v.* Jacobs, Hempst. (U. S.) 101, 13 Fed. Cas. No. 7,161*a*.

See 3 Cent. Dig. tit. "Appeal and Error," § 2313.

Approval of an appeal bond in open court on the day after a demurrer was filed sufficiently shows the appeal to have been taken during the term at which the demurrer was overruled (McKee *v.* Coffee, 58 Miss. 653); and where an appeal taken after final judgment is not a matter which can appear of record, it is sufficient if the appeal bond appears to have been executed and approved within the time allowed for an appeal after judgment was rendered (Busby *v.* Grayham, 26 Miss. 210).

Discrepancy as to date or judgment.—Where defendant filed an amended abstract reciting that judgment was rendered June 29th, and the notice of appeal showed a judgment as of June 9th, and there was nothing to show that the appeal was not from the judgment in the case or that the order was not taken in time, it was held to be properly before the court. Kennedy *v.* Rosier, 71 Iowa 671, 33 N. W. 226.

Presumption as to time.—An appeal from an order sustaining a demurrer will be presumed to have been taken in time when the record fails to show that respondents ever served on appellants a written notice of the entry of the order. Debenture Corp. *v.* Warren, 9 Wash. 312, 37 Pac. 451.

Where appellant is a non-resident, and as such is entitled to more time than a resident, the record of an appeal taken within the time allowed non-residents need not show that appellant is a non-resident, the statute not requiring the fact to be stated either in the affidavit or the bond. Webster *v.* Spindler, 36 Mo. App. 355.

88. Smith *v.* Pollack, 58 Mo. 161.

89. *Arizona.*— Sutherland *v.* Putnam, (Ariz.) 1890) 24 Pac. 320.

California.— San Francisco, etc., R. Co. *v.* Anderson, 77 Cal. 297, 19 Pac. 517; Franklin *v.* Reiner, 8 Cal. 340.

Idaho.— Rich *v.* French, (Ida. 1893) 35 Pac. 173.

Montana.— State *v.* Millis, 19 Mont. 444, 48 Pac. 773.

North Carolina.— Sever *v.* McLaughlin, 82 N. C. 332.

Texas.— Hayes *v.* Gallagher, (Tex. Civ. App. 1898) 46 S. W. 77.

Washington.— Fisher *v.* Fisher, 9 Wash. 694, 38 Pac. 133.

Wisconsin.— Eaton *v.* Manitowoc County, 42 Wis. 317.

Contra, Stetson *v.* Corinna, 44 Me. 29; Sholts *v.* Judges, 2 Cow. (N. Y.) 506; Robinson *v.* Chadwick, 22 Ohio St. 527.

See 3 Cent. Dig. tit. "Appeal and Error," § 2316.

Necessity of naming sureties in clerk's certificate.— If the names of the sureties are shown by the record this is sufficient even though they are not named in the clerk's certificate. Hall *v.* Wallace, 25 Ala. 438.

90. *Alabama.*— Spencer *v.* Thompson, 24 Ala. 512, where a judgment is to be superseded.

Illinois.— Leach *v.* People, 118 Ill. 157, 8 N. E. 670; Pickering *v.* Mizner, 9 Ill. 334; Phœnix Ins. Co. *v.* Hedrick, 69 Ill. App. 184.

Louisiana.— Lewis *v.* Boyet, 45 La. Ann. 1220, 14 So. 119, 120.

Michigan.— Maynard *v.* Hoskins, 8 Mich. 81.

Missouri.— Corbin *v.* Laswell, 48 Mo. App. 626.

North Carolina.— McCanless *v.* Reynolds, 91 N. C. 244; Lytle *v.* Lytle, 90 N. C. 647; Wade *v.* Newbern, 72 N. C. 498.

Texas.— Bastrop Corp. *v.* Gilmore. Dall. (Tex.) 573.

Wisconsin.— Shewey *v.* Manning, 14 Wis. 448.

Contra, San Francisco, etc., R. Co. *v.* Anderson, 77 Cal. 297, 19 Pac. 517; Menard *v.* Montana Cent. R. Co., 22 Mont. 340, 56 Pac. 592.

91. San Francisco, etc., R. Co. *v.* Anderson, 77 Cal. 297, 19 Pac. 517; Rich *v.* French, (Ida. 1893) 35 Pac. 173; State *v.* Millis, 19 Mont. 444, 48 Pac. 773; McCanless *v.* Reynolds, 91 N. C. 244; Lytle *v.* Lytle, 90 N. C. 647; Sever *v.* McLaughlin, 82 N. C. 332; Wade *v.* Newbern, 72 N. C. 498.

92. Herd *v.* Dew, 9 Humphr. (Tenn.) 364. *Contra,* State *v.* Jackson, 112 N. C. 849, 16 S. E. 906; State *v.* Tow, 103 N. C. 350, 9 S. E. 411.

(VI) *Process or Notice*—(A) *Filing and Service of Notice.* The record must show affirmatively an exact compliance with statutory requirements as to giving and filing notice of appeal,[93] and the serving of notice of appeal or citation in error upon the opposite party or his attorney,[94] and upon the clerk of the trial court,[95] such facts being jurisdictional.

If affidavit is in record and defective, appellee can have appeal dismissed as a matter of right. State *v.* Bramble, 121 N. C. 603, 28 S. E. 269.

See also CRIMINAL LAW.

93. *Iowa.*— State *v.* Wilmoth, (Iowa 1883) 15 N. W. 605.

Kansas.— State *v.* Ashmore, 19 Kan. 544.

Texas.— Hicks *v.* Gray, 25 Tex. 82; Bennett *v.* Spillars, 7 Tex. 600; Clark *v.* Burk, (Tex. Civ. App. 1896) 35 S. W. 27.

Washington.— Merchants' Nat. Bank *v.* Ault, 14 Wash. 701, 44 Pac. 129.

Wisconsin.—Shewey *v.* Manning, 14 Wis. 448.

United States.— Jacobs *v.* Jacobs, Hempst. (U. S.) 101, 13 Fed. Cas. No. 7,161*a*. But see Hudgins *v.* Kemp, 18 How. (U. S.) 530, 15 L. ed. 511.

See 3 Cent. Dig. tit. "Appeal and Error," § 2317.

A recital in a decree that certain parties "in open court give notice to the Court of Civil Appeals" is sufficient to show that notice of appeal was given (Moon Bros. Carriage Co. *v.* Waxahachie Grain, etc., Co., 13 Tex. Civ. App. 103, 35 S. W. 337); but an ambiguous or imperfect entry on the judge's docket, indicating that an appeal was taken, will not supply the place of a notice of appeal given in open court and entered of record (Forest *v.* Rawlings, 40 Tex. 502).

If the bill of exceptions sets out the fact that notice was given in open court, and the presiding judge has signed the same as a true bill of exceptions, this establishes the fact beyond any doubt that notice of an appeal was given, and that it was a mere clerical omission that such notice did not appear in the records of the cause. Busby *v.* Lynn, 37 Tex. 146.

No statement of facts authenticating notice and making it part of record is necessary where an oral notice given in open court is entered on the record, a notice of appeal being a necessary part of the transcript. Elma *v.* Carney, 4 Wash. 418, 30 Pac. 732.

94. *California.*— People *v.* Colon, 119 Cal. 668, 51 Pac. 1082; Frederick *v.* Tierney, 54 Cal. 583; Hill *v.* Weisler, 49 Cal. 146.

Florida.— Kennesaw Mills Co. *v.* Bynum, 34 Fla. 360, 16 So. 276.

Idaho.— Adams *v.* McPherson, (Ida. 1893) 34 Pac. 1095; Tootle *v.* French, 2 Ida. 745, 25 Pac. 1091.

Iowa.— Norwegian Plow Co. *v.* Bruning, (Iowa 1896) 65 N. W. 984; Taylor *v.* Taylor, 94 Iowa 493, 63 N. W. 180.

Kansas.— Carr *v.* State, 1 Kan. 331.

New York.— Eames *v.* Sanger, 3 Paige (N. Y.) 556.

North Carolina.— Delozier *v.* Bird, 123 N. C. 689, 31 S. E. 834.

Ohio.— Browne *v.* Wallace, 16 Ohio Cir. Ct. 124.

Texas.— Thomas *v.* Thomas, 57 Tex. 516; Thomas *v.* Childs, 36 Tex. 148; Bird Canning Co. *v.* Cooper Grocery Co., (Tex. Civ. App. 1900) 58 S. W. 1038.

Utah.— Voorhees *v.* Manti City, 13 Utah 435, 45 Pac. 564.

Wisconsin.— Eaton *v.* Manitowoc County, 42 Wis. 317; Yates *v.* Shepardson, 37 Wis. 315.

Wyoming.— Hester *v.* Smith, 5 Wyo. 291, 40 Pac. 310.

Contra, Perkins *v.* Douglass, 46 S. C. 6, 24 S. E. 42; Hudgins *v.* Kemp, 18 How. (U. S.) 530, 15 L. ed. 511.

See 3 Cent. Dig. tit. "Appeal and Error," § 2317.

Deficiency — How supplied.— Where the record fails to show service of notice of appeal, the deficiency may be supplied by the filing of a certified copy of proceedings in the lower court, showing that the original notice of appeal has been lost and that it has been established to the satisfaction of that court that the notice of appeal set forth in the printed transcript was duly served. Knowlton *v.* Mackenzie, 110 Cal. 183, 42 Pac. 580.

Service on minor.— Under Iowa Code, § 2615, service on a minor over fourteen years old being sufficient to give the court jurisdiction as to him, it is a sufficient showing that service of notice of appeal is made when the record recites that the notice was served on all the defendants according to statute, and the minor was named in the notice. Brundage *v.* Cheneworth, 101 Iowa 256, 70 N. W. 211, 63 Am. St. Rep. 382.

Where an administrator has been substituted for a deceased defendant, and the record merely recites that there was legal service of notice of appeal on all the defendants, and the administrator's name does not appear in the list of defendants set out in the notice of appeal, this is not a sufficient showing that notice of appeal was served on him. Brundage *v.* Cheneworth, 101 Iowa 256, 70 N. W. 211, 63 Am. St. Rep. 382.

95. Norwegian Plow Co. *v.* Bruning, (Iowa 1896) 65 N. W. 984; Merchant *v.* Soleman, (Iowa 1895) 63 N. W. 464; Carr *v.* State, 1 Kan. 314; Eaton *v.* Manitowoc County, 42 Wis. 317; Yates *v.* Shepardson, 37 Wis. 315.

See 3 Cent. Dig. tit. "Appeal and Error," § 2317.

Dismissal ex mero motu.— When the record fails to show service of notice of appeal upon the clerk of the trial court, the appeal will be dismissed for want of jurisdiction, notwithstanding an appearance by the parties, and that no objection was made by them for the want of such service. State *v.* Clossner, 84 Iowa 401, 51 N. W. 16.

(B) *Acceptance and Waiver of Service.* Where the necessity of such service has been obviated by the giving of notice of appeal in open court,[96] or by an acceptance[97] or waiver of service,[98] such facts must be shown clearly by the record.

c. Jurisdictional Amount. The record must show clearly that the amount in controversy or value of the thing involved is sufficient to confer jurisdiction upon the appellate court, when such fact is jurisdictional,[99] unless it shows that the cause belongs to one of the classes expressly excepted by statute from the operation of the general rule.[1] It has been held, however, that a deficiency in the record in this respect may be supplied by affidavits filed in the appellate court.[2]

d. Constitutional Question. When the jurisdiction of the appellate court is dependent upon the existence of a constitutional question, the record must show clearly that the question was properly raised in the trial court, and was decided there.[3]

e. Rendition and Entry of Appealable Judgment, Decree, or Order — (I) *In General.* The record must show the rendition and entry in the lower court of an appealable judgment, decree, or order, presenting a final adjudication against

96. Delozier *v.* Bird, 123 N. C. 689, 31 S. E. 834.

97. Thomas *v.* Thomas, 57 Tex. 516. *Contra,* Yates *v.* Shepardson, 37 Wis. 315, wherein it was held that an appeal must, in the absence from the record of notice of appeal and service thereof, be dismissed for want of jurisdiction even though the record contained a stipulation, signed by the respective counsel, each admitting due service of a notice of appeal by the other party from the judgment. This decision was based on Wis. Laws (1860), c. 264, § 3, the court holding that causes could only be taken by appeal to the supreme court in the manner prescribed by that statute.

98. Atkinson *v.* Asheville St. R. Co., 113 N. C. 581, 18 S. E. 254; Bird Canning Co. *v.* Cooper Grocery Co., (Tex. Civ. App. 1900) 58 S. W. 1038.

99. *California.*— Bienenfeld *v.* Fresno Milling Co., 82 Cal. 425, 22 Pac. 1113.

Colorado.— Conly *v.* Boyvin, 25 Colo. 498, 55 Pac. 732.

Connecticut.— Richards *v.* Eno, 23 Conn. 413.

Illinois.— Piper *v.* Jacobson, 98 Ill. 389.

Kansas.— Roberts *v.* Jordan, 60 Kan. 859, 57 Pac. 938; Weil *v.* Pooch, 9 Kan. App. 883, 57 Pac. 1057; Werner *v.* Barber Asphalt-Paving Co., 7 Kan. App. 815, 53 Pac. 890.

Louisiana.— Hite *v.* Hinsel, 39 La. Ann. 113, 1 So. 415; New Orleans *v.* Apken, 36 La. Ann. 419.

Missouri.— Parlin, etc., Co. *v.* Hord, 145 Mo. 117, 46 S. W. 753.

Texas.— Scottish-American Mortg. Co. *v.* Board of Equalization, (Tex. Civ. App. 1898) 45 S. W. 757; Ray *v.* San Antonio, etc., R. Co., 18 Tex. Civ. App. 665, 45 S. W. 479.

West Virginia.— Aspinall *v.* Barrickman, 29 W. Va. 508, 2 S. E. 795.

United States.— Hunt *v.* Blackburn, 127 U. S. 774, 8 S. Ct. 1395, 32 L. ed. 323; Johnson *v.* Wilkins, 116 U. S. 392, 6 S. Ct. 600, 29 L. ed. 671; Agnew *v.* Dorman, Taney (U. S.) 386, 1 Fed. Cas. No. 100.

Canada.— Ontario, etc., R. Co. *v.* Marcheterre, 17 Can. Supreme Ct. 141.

See 3 Cent. Dig. tit. "Appeal and Error," § 2311.

Showing in bill of exceptions.— Where a bill of exceptions has been properly made part of the record, it may, upon a motion to dismiss a writ of error for want of jurisdiction, be looked to to ascertain the sufficiency or insufficiency of the jurisdictional amount. U. S. *v.* Hill, 123 U. S. 681, 8 S. Ct. 308, 31 L. ed. 275.

1. *Connecticut.*— Richards *v.* Eno, 23 Conn. 413.

Illinois.— Piper *v.* Jacobson, 98 Ill. 389.

Kansas.— Atchison, etc., R. Co. *v.* Anderson, 5 Kan. App. 707, 49 Pac. 108; Preston *v.* Barber Asphalt-Paving Co., 5 Kan. App. 882, 49 Pac. 97.

Missouri.— Parlin, etc., Co. *v.* Hord, 145 Mo. 117, 46 S. W. 753.

Texas.— Ray *v.* San Antonio, etc., R. Co., 18 Tex. Civ. App. 665, 45 S. W. 479.

Exception — How shown.— The exception must be shown by judge's certificate (Packard *v.* Packard, 56 Kan. 132, 42 Pac. 335; Loomis *v.* Bass, 48 Kan. 26, 28 Pac. 1012; Missouri Pac. R. Co. *v.* Townsend, 8 Kan. App. 694, 56 Pac. 150), and such certificate must be incorporated in the record itself. It is not sufficient if it is merely attached thereto (Missouri Pac. R. Co. *v.* Townsend, 8 Kan. App. 694, 56 Pac. 150; Sparks *v.* Sparks, 6 Kan. App. 750, 50 Pac. 973; Preston *v.* Barber Asphalt-Paving Co., 5 Kan. App. 882, 49 Pac. 97; Atchison, etc., R. Co. *v.* Anderson, 5 Kan. App. 707, 49 Pac. 108). Where the record on appeal does not show that the judgment passed on the constitutionality of a statute, statements to that effect in the briefs of counsel are insufficient to supply the deficiencies of the record. Parlin, etc., Co. *v.* Hord, 145 Mo. 117, 46 S. W. 753.

2. Broom's Succession, 14 La. Ann. 67; U. S. *v.* Trans-Missouri Freight Assoc., 166 U. S. 290, 17 S. Ct. 540, 41 L. ed. 1007; Johnson *v.* Wilkins, 116 U. S. 392, 6 S. Ct. 600, 29 L. ed. 671.

3. Missouri, etc., R. Co. *v.* Smith, 154 Mo. 300, 55 S. W. 470; Vansandt *v.* Hobbs, 153 Mo. 655, 55 S. W. 147; Parlin, etc., Co. *v.* Hord, 145 Mo. 117, 46 S. W. 753.

appellant or plaintiff in error, as to some right or rights claimed by him, or the appeal or writ of error will be dismissed by the appellate court for want of jurisdiction.[4]

4. *Alabama.*—Moses *v.* Katzenberger, (Ala. 1887) 3 So. 302; Lister *v.* Vivian, 8 Port. (Ala.) 375.

California.— *In re* De Leon, (Cal. 1893) 35 Pac. 309; Savings, etc., Soc. *v.* Meeks, 66 Cal. 371, 5 Pac. 624.

Colorado.— Yuma County *v.* Lovell, 20 Colo. 80, 36 Pac. 878; Alvord *v.* McGaughey, 5 Colo. 244; Northrop *v.* Jenison, 12 Colo. App. 523, 56 Pac. 187.

Florida.— Ropes *v.* Eldridge, 39 Fla. 47, 21 So. 570; Vanhorne *v.* Henderson, 37 Fla. 354, 19 So. 659.

Georgia.—Strohecker *v.* Dessau, 72 Ga. 900; McAndrew *v.* Augusta Mut. Loan Assoc., 57 Ga. 607.

Illinois.— Armstrong *v.* People, 74 Ill. 178; Arnold *v.* Kilchman, 76 Ill. App. 665; Adams *v.* Ellinger, 63 Ill. App. 479.

Indiana.— Ætna L. Ins. Co. *v.* Benson, 142 Ind. 323, 40 N. E. 797; Gray *v.* Singer, 137 Ind. 257, 36 N. E. 209, 1109; Jeffersonville *v.* Tomlin, 7 Ind. App. 681, 35 N. E. 29.

Iowa.— Perry *v.* Reineger, 61 Iowa 750, 16 N. W. 136; McKissick *v.* Chandler, 58 Iowa 757, 12 N. W. 629.

Kansas.— Ft. Scott *v.* Deeds, 36 Kan. 621, 14 Pac. 268; Paul *v.* Whetstone, 28 Kan. 634; Russell *v.* Thompson, 1 Kan. App. 467, 40 Pac. 831.

Louisiana.— Bynum *v.* Hamilton, 19 La. Ann. 446.

Maryland.— Heiskell *v.* Rollins, 81 Md. 397, 32 Atl. 249.

Minnesota.— Anderson *v.* Kittell, 37 Minn. 125, 33 N. W. 330.

Mississippi.— Nelson *v.* Henderson, (Miss. 1895) 16 So. 911; Moody *v.* Nichol, 26 Miss. 109.

Missouri.— State *v.* Wymer, 79 Mo. 277; Price *v.* Brown, 63 Mo. 347; Mills *v.* McDaniels, 59 Mo. App. 331.

Montana.— Brunell *v.* Logan, 16 Mont. 307, 40 Pac. 597.

Nebraska.— New Home Sewing-Mach. Co. *v.* Thornburg, 56 Nebr. 636, 77 N. W. 86; Casler *v.* Nordgren, 55 Nebr. 669, 76 N. W. 524.

New Jersey.— Mershon *v.* Castree, 57 N. J. L. 484, 31 Atl. 602; Thompson *v.* Bowne, 39 N. J. L. 2.

New York.— Ridgway *v.* Bacon, 68 Hun (N. Y.) 506, 22 N. Y. Suppl. 1016, 52 N. Y. St. 600.

North Carolina.— Rosenthal *v.* Roberson, 114 N. C. 594, 19 S. E. 667; High *v.* Carolina Cent. R. Co., 112 N. C. 385, 17 S. E. 79; Merritt Milling Co. *v.* Finlay, 110 N. C. 411, 15 S. E. 4.

Oklahoma.—Sproat *v.* Durland, 7 Okla. 230, 54 Pac. 458.

Texas.— Hicks *v.* Gray, 25 Tex. 82; St. Louis, etc., R. Co. *v.* Wills, (Tex. Civ. App. 1895) 29 S. W. 431.

Utah.— Voorhees *v.* Manti City, 13 Utah 435, 45 Pac. 564.

Washington.— Buckley *v.* Conley, 16 Wash. 338, 47 Pac. 735.

Wisconsin.— Sayles *v.* Gudath, 9 Wis. 159; Blodget *v.* Hatfield, 5 Wis. 77; Wheeler *v.* Scott, 3 Wis. 362.

United States.— Clarke *v.* McDade, 165 U. S. 168, 17 S. Ct. 284, 41 L. ed. 673.

Canada.— Thompson *v.* Robinson, 16 Ont. App. 175; Grand Trunk R. Co. *v.* Amey, 20 U. C. C. P. 6.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 2285, 2286.

Motion to dismiss in time if made on rehearing.— The writ of error must be dismissed when no final judgment is found in the record, notwithstanding the fact that the point was not raised until the rehearing of the cause. Savage *v.* State, 19 Fla. 561.

Cause remanded for nunc pro tunc entry of order.—Where the record showed no judgment or order from which an appeal could have been taken, the cause was remanded for the purpose of allowing a *nunc pro tunc* entry of the order. Carter *v.* Elmore, 119 N. C. 296, 26 S. E. 35; Cameron *v.* Bennett, 110 N. C. 277, 14 S. E. 779.

Judgment on demurrer.— The record must show the entry of a judgment sustaining a demurrer. A mere showing in the record that the demurrer was sustained is insufficient. Highway Com'rs *v.* Rock Falls, 3 Ill. App. 464; Holloway *v.* Holloway, 20 Ind. 154; Reid *v.* Ramsay, (Can.) 6th June, 1879. *Contra*, Winfried *v.* Yates, Dall. (Tex.) 363, holding that, in order to authorize the supreme court to review a judgment sustaining or annulling a demurrer, it is not necessary that the record should show that there was such judgment. See also Taylor *v.* Coon, 79 Wis. 76, 48 N. W. 123, wherein it was held that, although a motion to strike out a demurrer was noticed to be heard before the judge at chambers, yet an order made thereon which reads: "The court having heard the argument of the counsel of the respective parties, it is ordered that said demurrer be, and the same is hereby, stricken from the files in this action," will be deemed to have been made upon a hearing by the court and be held appealable.

In New York an appeal from a final judgment overruling a demurrer will be dismissed when the appeal book fails to show a decision in writing of the issues of law raised by the demurrer, as required by N. Y. Code Civ. Proc. § 1010. Palmyra *v.* Wynkoop, 53 Hun (N. Y.) 82, 17 N. Y. Civ. Proc. 187, 6 N. Y. Suppl. 62, 24 N. Y. St. 824; McNulty *v.* Urban, 1 Misc. (N. Y.) 422, 21 N. Y. Suppl. 247, 50 N. Y. St. 565 [*affirmed* in 140 N. Y. 660, 35 N. E. 893, 55 N. Y. St. 932].

Appeal from order for distribution of money.—An order for the distribution of money by a receiver may in some cases be a final judgment, but an appeal therefrom must present it as the final result of some proceeding, and

(II) *Orders Affecting Judgment.* Where an appeal is taken from an order allowing or denying a motion to modify, vacate, or otherwise affect the judgment, the record must contain both the order and the judgment, or the appeal will be dismissed.[5]

(III) *Mere Recital Insufficient.* The judgment itself must be set out in the record proper, and its absence is not supplied by a mere recital in the bill of exceptions, or other part of the record, that judgment has been entered;[6] nor

the record must show what such proceeding is. Adams *v.* Woods, 21 Cal. 165.

Remittitur must appear in the record.— Where a judgment was rendered for a greater amount than claimed by the petition, the record must show that the *remittitur* was entered before the judgment was signed, and it should appear in the transcript. It is not sufficient that it appears, from a document attached to appellee's answer to the appeal, to have been filed in the recorder's office. Gantt *v.* Eaton, 25 La. Ann. 507.

5. Savings, etc., Soc. *v.* Meeks, 66 Cal. 371, 5 Pac. 624; Barthe *v.* New Orleans, McGloin (La.) 80; Brunell *v.* Logan, 16 Mont. 307, 40 Pac. 597; La Selle *v.* Nicholls, 56 Nebr. 458, 76 N. W. 870.

Failure to indicate the page and line of the record in which a motion to modify the judgment and ruling thereon appear will raise a presumption on appeal that such motion and ruling have not been embodied in the record. Martin *v.* Marks, 154 Ind. 549, 57 N. E. 249.

Grounds of motion.— Whether or not a proceeding to vacate an order allowing a claim against a decedent's estate was based on Nebr. Code, § 602, subsec. 3, providing for vacation of judgment in certain cases, is to be determined from the grounds upon which the application is based, as disclosed by the record on appeal. McKenna *v.* McCormick, 60 Nebr. 595, 83 N. W. 844.

In contempt proceedings, where an appeal is taken from the judgment of the chancellor in forcing a decree in an attachment for contempt, and neither the record nor the bill of exceptions sets forth such decree, the judgment of the chancellor will be affirmed. Gunn *v.* Calhoun, 51 Ga. 501.

Where the record shows that two decrees were entered, the latter one being different from the first, plaintiff, on his appeal from an order overruling his motion to strike out the second decree, is not entitled to a reversal of the judgment when there is no showing in the record to sustain his assertion that the second decree was not signed until after the adjournment of the term. Dickerman *v.* Lubiens, 70 Iowa 345, 30 N. W. 610.

6. **Recital in bill of exceptions** is insufficient.

California.— *In re* De Leon, (Cal. 1893) 35 Pac. 309.

Colorado.— Yuma County *v.* Lovell, 20 Colo. 80, 36 Pac. 878; Alvord *v.* McGaughey, 5 Colo. 244.

Florida.—Vanhorne *v.* Henderson, 37 Fla. 354, 19 So. 659; Tunno *v.* International R., etc., Co., 34 Fla. 300, 16 So. 180.

Illinois.—Alton Lime, etc., Co. *v.* Calvey, 47 Ill. App. 343.

Indiana.— Gray *v.* Singer, 137 Ind. 257, 36 N. E. 209, 1109.

Mississippi.— Moody *v.* Nichol, 26 Miss. 109.

Missouri.— Matter of Spencer, 61 Mo. 375.

Wisconsin.— Sayles *v.* Gudath, 9 Wis. 159.

United States.— Clarke *v.* McDade, 165 U. S. 168, 17 S. Ct. 284, 41 L. ed. 673.

Recital in notice of appeal is insufficient.— Ridgway *v.* Bacon, 68 Hun (N. Y.) 506, 22 N. Y. Suppl. 1016, 52 N. Y. St. 600.

Memorandum of clerk that "judgment was rendered in favor of the plaintiff for ——— dollars and costs," is not the record of a final judgment; it is the mere saying of the clerk — not the consideration of the court. Wheeler *v.* Scott, 3 Wis. 362.

Memorandum of judge.— Where the judgment of the court does not appear save in the minutes and memoranda of the judge in his own docket, kept for his personal convenience and which the law does not require him to keep, the appeal will be dismissed. Launtz *v.* Heller, 41 Ill. App. 528.

Recital in petition in error.— Where there is no showing in the record of any final disposition of the case, and the only allegation in the petition in error is "that the District Court erred in overruling the motion for the defendant below to quash a summons and dismiss the action," there is nothing for the court to review. Simpson *v.* Stein, 43 Kan. 35, 22 Pac. 1020.

Judgment in papers not part of record.— Where the only judgment of the lower court found in the record is among papers purporting to be the evidence, affidavits, and journal entries attached to the case-made, but not made a part thereof by reference, signature, or otherwise, the appeal must be dismissed. Bell *v.* Coffin, 51 Kan. 684, 685, 33 Pac. 296, 621.

Recital in transcript is insufficient. Johnson *v.* McFall, 61 Mo. 413. See, *contra*, Denslow *v.* Moore, 2 Day (Conn.) 12, wherein it was held that, where the record on appeal from the judgment of the superior court contained a recital in these words: "Appeal from a decree of a Court of Probate, held at Hartford in the District of Hartford on the 8th day of June, 1801, approving the last will and testament of Keziah Barber," this was a sufficient showing as to what decree of the probate court was appealed from, and would supply a deficiency in the record caused by the absence of the decree itself.

Recital in appeal bond held sufficient.— Where, on an appeal to the supreme court in a cause originating in a justice's court, the justice's judgment did not appear in the record otherwise than by recital in the bond for appeal to the circuit court, it was held that this was sufficient to show that judgment had been rendered, especially in view of the fact that the party taking the appeal suffered judg-

with the incorporation in the bill of exceptions of the judgment itself cure such omission from the record proper.[7]

(IV) *Verdict or Finding of Facts Does Not Supply Absence of Judgment.* The presence of the judgment is essential, even though the record contains a copy of a rule for judgment,[8] or the verdict of the jury,[9] or, in a trial without the intervention of a jury, the judge's findings of fact and conclusions of law.[10]

(V) *Effect of Judgment Against Some Parties Only.* It seems, however, that where there is a decree in the record, which fails to dispose of the cause as to some of defendants, the cause will be remanded, and not dismissed.[11]

2. Jurisdiction of Inferior Court — a. Intermediate Court. In proceedings to review the judgment of an intermediate court the jurisdiction of such court must appear from the record, which must show the rendition of a judgment in the trial court,[12] and the taking and perfection of an appeal therefrom to such intermediate court within the time required by law.[13]

b. Trial Court — (I) *In General.* On appeal or writ of error, all the facts essential to sustain the jurisdiction of the trial court must be shown affirmatively by the record,[14] particularly when the court whose judgment is under review is

ment by default to be taken against him in the circuit court. McAlpin *v.* Pool, Minor (Ala.) 316.

7. Northrop *v.* Jenison, 12 Colo. App. 523, 56 Pac. 187.

8. Thompson *v.* Bowne, 39 N. J. L. 2.

9. *Alabama.*— Wagon *v.* Keenan, 77 Ala. 519.

Illinois.— Harrison *v.* Singleton, 3 Ill. 21.

Iowa.—McKissick *v.* Chandler, 58 Iowa 757, 12 N. W. 629; Heath *v.* Groce, 10 Iowa 591.

Mississippi.— Parrott *v.* Poppenheimer, (Miss. 1895) 16 So. 911.

Missouri.— Dale *v.* Copple, 53 Mo. 321.

10. *In re* De Leon, (Cal. 1893) 35 Pac. 309; Yuma County *v.* Lovell, 20 Colo. 80, 36 Pac. 878; Alvord *v.* McGaughey, 5 Colo. 244; Ætna L. Ins. Co. *v.* Benson, 142 Ind. 323, 40 N. E. 797.

11. County Com'rs *v.* Reeves, 5 Ill. App. 606. *Compare* Amsterdam First Nat. Bank *v.* Miller, 163 N. Y. 164, 57 N. E. 308 [*reversing* 24 N. Y. App. Div. 551, 49 N. Y. Suppl. 981], where the judgment of the lower court was affirmed without prejudice to the right of the party whose interests were not disposed of to bring an action for the adjudication of such interests.

12. Andrews *v.* Wallace, 72 Miss. 291, 16 So. 204; Wilkes *v.* Cornelius, 21 Oreg. 341, 23 Pac. 473; Spanish Fork City *v.* Thomas, 4 Utah 485, 11 Pac. 667.

13. *Arkansas.*— Merrill *v.* Manees, 19 Ark. 647.

Maryland.— Cox *v.* Bryan, 81 Md. 287, 31 Atl. 447, 852.

Mississippi.— Parrott *v.* Poppenheimer, (Miss. 1895) 16 So. 911; Crapoo *v.* Grand Gulf, 9 Sm. & M. (Miss.) 205.

Missouri.— Tarwater *v.* Long, 36 Mo. App. 182.

Oregon.—Wilkes *v.* Cornelius, 21 Oreg. 341, 23 Pac. 473.

Texas.— Merrick *v.* Rogers, (Tex. Civ. App. 1898) 46 S. W. 370; Osborne *v.* Ayers, (Tex. Civ. App. 1895) 32 S. W. 73. *Compare* Shiner *v.* Shiner, 14 Tex. Civ. App. 489, 40 S. W. 439; Bledsoe *v.* Gulf, etc., R. Co., 6 Tex. Civ. App. 280, 25 S. W. 314.

Utah.— Spanish Fork City *v.* Thomas, 4 Utah 485, 11 Pac. 667.

Contra, Beecher *v.* Conradt, 3 Abb. Dec. (N. Y.) 1 note, 11 How. Pr. (N. Y.) 181.

Need not show undertaking on appeal.— Under Nebr. Code, § 1007, which provides that the giving of an undertaking by appellant, and its approval by the justice, are necessary to confer jurisdiction on the district court of an appeal from a justice, a judgment of the district court will not be enjoined for want of jurisdiction, on a petition which alleges that the record does not show that an undertaking was filed, but does not allege that none was filed. Johnson *v.* Van Cleve, 23 Nebr. 559, 37 N. W. 320.

14. *Illinois.*— Miller *v.* Glass, 14 Ill. App. 177.

Indiana.— Fountain County *v.* Coats, 17 Ind. 150.

Missouri.— Cooper *v.* Barker, 33 Mo. App. 181.

New York.— Tyroler *v.* Gummersbach, 28 Misc. (N. Y.) 151, 59 N. Y. Suppl. 266, 319. But the rule stated does not necessarily require that the jurisdiction be set out in the complaint and summons in such a case. Clyde, etc., Plank Road Co. *v.* Parker, 22 Barb. (N. Y.) 323.

North Carolina.— State *v.* Preston, 104 N. C. 735, 10 S. E. 85; Bethea *v.* Byrd, 93 N. C. 141.

Texas.— Lane *v.* Doak, 48 Tex. 227; Miller *v.* City Bank, 1 Tex. App. Civ. Cas. § 1287.

See 3 Cent. Dig. tit. "Appeal and Error," § 2282.

The whole record must be considered, however, in determining whether the court below had jurisdiction, and the fact that the judgment entry does not show jurisdiction does not warrant the conclusion that it did not exist. Brown *v.* Woody, 64 Mo. 547.

one of inferior and limited or of special jurisdiction,[15] or where proceedings are authorized by statute only, and are unknown to the common law.[16]

(II) *Convention and Constitution of Court.* The record on appeal or error is fatally defective if it fails to show that the lower court was duly convened at the time and place and in the manner prescribed by law,[17] and that it was presided over by the judge or judges lawfully designated for that purpose.[18] When a cause is tried by a special judge, the record must show affirmatively that he was legally selected and qualified.[19]

15. *Alabama.*—Wilson *v.* Wilson, 36 Ala. 655; Talladega *v.* Thompson, 18 Ala. 694.

Georgia.— Macon, etc., R. Co. *v.* Davis, 13 Ga. 68.

Kentucky.— Hare *v.* Bryant, 7 J. J. Marsh. (Ky.) 375.

Michigan.— Wight *v.* Warner, 1 Dougl. (Mich.) 384.

New York.— Frees *v.* Ford, 6 N. Y. 176.

Virginia.— Hill *v.* Pride, 4 Call (Va.) 107.

West Virginia.— Yates *v.* Taylor County Ct., 47 W. Va. 376, 35 S. E. 24.

Municipal court of the city of New York.— The jurisdiction of the municipal court of the city of New York will be sustained on appeal to the supreme court, appellate term, though the record does not show that defendant was a resident of the city of New York. Moore *v.* Rankin, 33 Misc. (N. Y.) 749, 67 N. Y. Suppl. 179, wherein, defendant having contended to the contrary, the court said: "Since the decision of the cases referred to by counsel for the appellant, this court has held that it is not necessary that the record should show that the defendant was a resident of the city of New York in order to sustain the jurisdiction of the court below." The case referred to by the court is Masu *v.* Blumenstein, 32 Misc. (N. Y.) 691, 66 N. Y. Suppl. 449 [*following* Worthington *v.* London Guarantee, etc., Co., 164 N. Y. 81, 58 N. E. 102].

16. Levert *v.* Planters, etc., Bank, 8 Port. (Ala.) 104; Bates *v.* Planters', etc., Bank, 8 Port. (Ala.) 99; Wight *v.* Warner, 1 Dougl. (Mich.) 384.

17. The record should show the style of the court, the day when, and the place where, it was convened, the judge who presided, and what other officers were present (Skinner *v.* Beshoar, 2 Colo. 383; McDonald *v.* Penniston, 1 Nebr. 324; Jones *v.* Hoggard, 107 N. C. 349, 12 S. E. 286); and, where the record on appeal contains no *placita* or convening order of the court, the judgment will be reversed (Keller *v.* Brickey, 63 Ill. 496; Planing Mill Lumber Co. *v.* Chicago, 56 Ill. 304; Chicago *v.* Brennan, 61 Ill. App. 247; High *v.* Carolina Cent. R. Co., 112 N. C. 385, 17 S. E. 79; State *v.* Preston, 104 N. C. 735, 10 S. E. 85).

Must show place properly selected.— Where it appears from the record that the court was not held at the place designated by law, and it nowhere appears that the place where it was held had been properly selected, the judgment must be reversed. Baisley *v.* Baisley, 15 Oreg. 183, 13 Pac. 888.

Where commissioners are appointed by the court to settle the estate of a decedent, the commission must appear in the record, and its existence and legality cannot be supplied by intendment or by recital in the minutes of the clerk of the county court or by the report of the commission itself. Lister *v.* Vivian, 8 Port. (Ala.) 375.

18. Skinner *v.* Beshoar, 2 Colo. 383; Keller *v.* Brickey, 63 Ill. 496; McDonald *v.* Penniston, 1 Nebr. 324; State *v.* Preston, 104 N. C. 735, 10 S. E. 85.

Discrepancy as to name of judge.— Where the *placita* in the record, on an appeal from the county court, shows that one S is "the sole presiding judge" of that court, while the bill of exceptions shows that the case was tried before B, "one of the judges of said court," the judgment must be reversed for want of jurisdiction in B. Stubbings *v.* Evanston, 156 Ill. 338, 40 N. E. 966.

Where the various steps are taken before different judges, in the superior court of Cook county, the record should show what was done by each judge, and that he acted alone in that particular. Courson *v.* Browning, 78 Ill. 208. *Compare* Jones *v.* Albee, 70 Ill. 34, which holds that in cases coming from the courts of Cook county, the record should show that the court was held by one judge only, who should be the one before whom the cause was tried, and who should sign the bill of exceptions in actions at law, and sign the decree and certify the evidence in suits of equity.

Presumption when record shows opening by proper authority.— On an appeal from the county court the record must show that at least three judges were present to hold the court; but if it appear that three judges opened court it will be inferred that they continued to hold it, notwithstanding an adjournment. State *v.* King, 27 N. C. 203. To same effect see Christian *v.* Ashley County, 24 Ark. 142.

19. Wall *v.* Looney, 52 Ark. 113, 12 S. W. 202; Worsham *v.* Murchison, 66 Ga. 715; Merrick *v.* Rogers, (Tex. Civ. App. 1898) 46 S. W. 370.

Must show disqualification of regular judge.— In Iowa, on an appeal from a judgment rendered by the clerk of the county court, acting as judge, it must appear from the record that both the judge and the prosecuting attorney of the county were incapacitated from discharging the duties of the office. Burlington University *v.* Stewart, 12 Iowa 442.

Must show why cause was tried before special judge.— When a cause is tried before a special judge, the record must show how he became special judge, and why the cause was assigned to him for trial. Lane *v.* Doak, 48 Tex. 227; Brinkley *v.* Harkins, 48 Tex. 225.

When oath sufficient.— When the record

(III) *Jurisdiction of the Parties*—(A) *Issuance and Service of Process or Waiver and Appearance.* A judgment by default will be reversed unless the record shows that the trial court acquired jurisdiction of defendant by the due issuance and service of appropriate process,[20] or by defendant's appearance.[21]

(B) *Process and Return Must Be Copied Into Record.* The summons and return, where there was personal service, and the affidavits for, order of, and proof of, publication, where there was service by publication, must be copied into the record;[22] and, in their absence, service cannot be shown by a mere recital in the record.[23]

shows affirmatively "that the oath prescribed by law was duly administered to the special judge before whom the cause was tried," it is sufficiently shown that he took the oath prescribed by the constitution. D'Arrigo *v.* Texas Produce Co., 18 Tex. Civ. App. 41, 44 S. W. 531.

Notice to special judge need not be shown in record where he is called upon to preside, under the provisions of the Indiana act of 1855, in the place of another judge who is disqualified; and the notice given to him by such disqualified judge, being simply to secure his attendance, is not part of the record necessary to show jurisdiction. The special judge derives his authority from the statute and not from the notice given him by the disqualified judge. Benjamin *v.* Evansville, etc., R. Co., 28 Ind. 416.

20. *Alabama.*— Cook *v.* Rogers, 64 Ala. 406; Dow *v.* Whitman, 36 Ala. 604.

California.— Houghton *v.* Tibbets, 126 Cal. 57, 58 Pac. 318.

Idaho.— Applington *v.* G. V. B. Min. Co., (Ida. 1898) 55 Pac. 241.

Illinois.— Randall *v.* Songer, 16 Ill. 27; Miller *v.* Glass, 14 Ill. App. 177.

Indiana.— Cincinnati, etc., R. Co. *v.* Calvert, 13 Ind. 489; New Albany, etc., R. Co. *v.* Welsh, 9 Ind. 479.

Louisiana.— Bouligny *v.* White, 5 La. Ann. 31.

Mississippi.—Houston *v.* Black, (Miss. 1894) 14 So. 529.

North Carolina.— Jones *v.* Hoggard, 107 N. C. 349, 12 S. E. 286.

Texas.— Burditt *v.* Howth, 45 Tex. 466; Gulf, etc., R. Co. *v.* Eastham, (Tex. Civ. App. 1899) 54 S. W. 648.

Contra. Davidson *v.* Farrell, 8 Minn. 258, holding that it will be presumed that defendant was properly in court, unless the record shows affirmatively that he was not.

See 3 Cent. Dig. tit. "Appeal and Error," § 2284.

Recital as to calling of defendant.— A judgment by default is not reversible because the record fails to show that defendant was solemnly called and came not. Hart *v.* Flynn, 8 Dana (Ky.) 190.

A statement in the record that "defendants were severally called but came not, nor either of them," shows that they were not present by attorney or otherwise, even though one of the defendants was a corporation. Union Pac. R. Co. *v.* Horney, 5 Kan. 340.

21. *Arkansas.*— Davis *v.* Whittaker, 38 Ark. 435.

Florida.— Anderson *v.* Agnew, 38 Fla. 30, 20 So. 766.

Indiana.—Fee *v.* State, 74 Ind. 66; Symmes *v.* Major, 21 Ind. 443.

Iowa.— Cooper *v.* Miller, 10 Iowa 532.

Louisiana.— Bouligny *v.* White, 5 La. Ann. 31.

Mississippi.—Houston *v.* Black, (Miss. 1894) 14 So. 529.

North Carolina.— Jones *v.* Hoggard, 107 N. C. 349, 12 S. E. 286.

Texas.—McMickle *v.* Texarkana Nat. Bank, 4 Tex. Civ. App. 210, 23 S. W. 428.

Wisconsin.— Upper Mississippi Transp. Co. *v.* Whittaker, 16 Wis. 220.

See 3 Cent. Dig. tit. "Appeal and Error," § 2284.

Appearance of infant by attorney.— On an appeal in a motion to set aside a judgment the appellate court will not review the refusal of the lower court to correct an alleged error consisting of the fact that defendant, who was an infant, appeared by attorney instead of by guardian, unless the original record is brought up. Mains *v.* Cosner, 67 Ill. 536.

22. *Alabama.*—Cook *v.* Rogers, 64 Ala. 406; Dow *v.* Whitman, 36 Ala. 604.

California.— Hibernia Sav., etc., Soc. *v.* Matthai, 116 Cal. 424, 48 Pac. 370; Kahn *v.* Matthai, 115 Cal. 689, 47 Pac. 698.

Illinois.— Wenner *v.* Thornton, 98 Ill. 156; Randall *v.* Songer, 16 Ill. 27 .

Indiana.— Fee *v.* State, 74 Ind. 66; Cincinnati, etc., R. Co. *v.* Calvert, 13 Ind. 489.

Kentucky.— Mims *v.* Mims, 3 J. J. Marsh. (Ky.) 103.

Texas.— Burditt *v.* Howth, 45 Tex. 466; McMickle *v.* Texarkana Nat. Bank, 4 Tex. Civ. App. 210, 23 S. W. 428.

See 3 Cent. Dig. tit. "Appeal and Error," § 2284.

23. *Alabama.*— Dow *v.* Whitman, 36 Ala. 604.

California.— Houghton *v.* Tibbets, 126 Cal. 57, 58 Pac. 318. *Compare* Lick *v.* Stockdale, 18 Cal. 219.

Illinois.— Randall *v.* Songer, 16 Ill. 27.

Indiana.— Fee *v.* State, 74 Ind. 66; Cincinnati, etc., R. Co. *v.* Calvert, 13 Ind. 489.

Kentucky.— Mims *v.* Mims, 3 J. J. Marsh. (Ky.) 103.

Mississippi.—Houston *v.* Black, (Miss. 1894) 14 So. 529.

Texas.— Burditt *v.* Howth, 45 Tex. 466.

Contra, White *v.* Smith, 63 Ark. 513, 39 S. W. 555 (holding that a recital is sufficient under Sandels & H. Dig. Ark. § 4191); Hun-

(IV) *Jurisdiction of Subject-Matter.* Where the subject-matter of the litigation is real estate, the record must show that the trial court had jurisdiction thereof.[24]

(V) *Jurisdictional Amount.* Where the jurisdiction of the trial court is dependent upon the amount involved, the record must show affirmatively that the amount in controversy is sufficient to confer jurisdiction.[25]

3. Proceedings Sustaining Judgment, Order, or Decree — a. In General. The record must show that the action was properly constituted in the court below,[26] and was legally maintainable by the judgment plaintiff[27] against the judgment defendant.[28] Where the proceedings under review are summary in their nature, or are purely statutory, or are in derogation of the common law, or involve extraordinary remedies, the record must, as a general rule, show affirmatively everything necessary to sustain the judgment, decree, or order of the trial court.[29] It has been held that the record, in an action of tort, must show that the assessment of damages was founded on evidence,[30] and that any material admission made by counsel at the trial must appear in the record.[31]

b. Pleadings and Joinder and Submission of Issue. It is essential that the pleadings should be set out in the record,[32] a mere recital in the record of the fact

ter *v.* Spotswood, 1 Wash. (Va.) 145 (holding that a showing of proof of publication in a chancery decree is sufficient).

24. Snitjer *v.* Downing, 80 Mo. 586. *Compare* Schad *v.* Sharp, 95 Mo. 573, 8 S. W. 549.

25. Gulf, etc., R. Co. *v.* Buford, 85 Tex. 430, 21 S. W. 678; Northern Pac. R. Co. *v.* Walker, 148 U. S. 391, 13 S. Ct. 650, 37 L. ed. 494.

26. Markham *v.* Hicks, 90 N. C. 1; Gordon *v.* Sanderson, 83 N. C. 1.

27. Connell *v.* Brown, 17 La. Ann. 111.

28. Spence *v.* Rutledge, 11 Ala. 557; Britton *v.* Scott, 21 La. Ann. 112.

29. *Alabama.*— Jemison *v.* Planters, etc., Bank, 17 Ala. 754; Hill *v.* State Bank, 5 Port. (Ala.) 537. *Compare* Barnett *v.* Riser, 63 Ala. 347.

Illinois.— Campbell *v.* People, 22 Ill. 234 (scire facias on judgment); Culbertson *v.* Galena, 7 Ill. 129 (judgment based upon an ordinance); Siegel *v.* Schueck, 60 Ill. App. 429 (garnishment proceedings); Parker *v.* Singer Mfg. Co., 9 Ill. App. 383 (damages on dissolution of injunction).

Indiana.— Henrie *v.* Sweasey, 5 Blackf. (Ind.) 273, foreign attachment.

Tennessee.— Rothchilds *v.* Forbes, 2 Heisk. (Tenn.) 13, holding that an entry of record, showing that a motion to dismiss a certiorari is disposed of, is sufficient to show that the motion was made, though no entry appears of record to that effect.

Wisconsin.— Milwaukee Harvester Co. *v.* Teasdale, 91 Wis. 59, 64 N. W. 422, holding that an objection, urged for the first time on appeal, that the petition for certiorari from the circuit court to the justice's court was defectively specified, and that the writ itself did not appear to have been allowed by the judge, must be affirmatively supported by the record; and that if the record is silent the objection will not be sustained.

30. Boswell *v.* St. Louis, etc., R. Co., 73 Mo. 470; Snider *v.* St. Louis, etc., R. Co., 73 Mo. 465.

31. Advance Elevator, etc., Co. *v.* Eddy, 16 Ill. App. 263. *Contra,* Byers *v.* Rothschild, 11 Wash. 296, 39 Pac. 688.

32. *California.*— Todd *v.* Winants, 36 Cal. 129; Hart *v.* Plum, 14 Cal. 148.

Georgia.— Slater *v.* Mams, 60 So. 594.

Illinois.—Road District No. 3 *v.* Miller, 156 Ill. 221, 40 N. E. 447; Olsen *v.* Crescio, 10 Ill. App. 541; Wakefield *v.* Pennington, 9 Ill. App. 374.

Indiana.— Geisen *v.* Reder, 151 Ind. 529, 51 N. E. 353, 1060; Marsh *v.* Bower, 151 Ind. 356, 51 N. E. 480; Reid *v.* Reid, 149 Ind. 274, 49 N. E. 2. But see Bonsell *v.* Bonsell, 41 Ind. 476 (holding that the fact that no complaint appears in the record is not ground for reversal where the record showed that a complaint was filed, but the clerk certified that no complaint appeared on file); and Emerson *v.* Opp. 9 Ind. App. 581, 34 N. E. 840, 37 N. E. 24 (holding that where an answer has been treated and considered part of the record throughout the trial, it will be so considered on appeal, though it is not made a part of the record by an order-book entry).

Iowa.— Perry *v.* Reineger, 61 Iowa 750, 16 N. W. 136.

Kentucky.— Chambers *v.* Simpson, 1 T. B. Mon. (Ky.) 112. But see Gill *v.* Warren, 1 J. J. Marsh. (Ky.) 590, holding that a plea of *non assumpsit* need not be spread upon the record.

Maryland.—Scholls *v.* Shriner, 3 Harr. & J. (Md.) 490.

Missouri.— Thomason *v.* St. Louis, etc., R. Co., 74 Mo. 560.

Nebraska.— Calmelett *v.* Sichl, 54 Neb. 97, 74 N. W. 407; Smith *v.* People's Bldg., etc., Assoc., 52 Nebr. 445, 72 N. W. 486.

New York.— Roberts *v.* Jenkins, 52 N. Y. App. Div. 491, 65 N. Y. Suppl. 385.

North Carolina.— Cox *v.* Jones, 110 N. C. 309, 14 S. E. 782; Bethea *v.* Byrd, 93 N. C. 141; Williamson *v.* Rainey, 10 N. C. 9.

Pennsylvania.— Ritchie *v.* Hastings, 2 Yeates (Pa.) 433.

they were filed being wholly insufficient,[33] although in most cases, where counsel so agree, a summary will answer every purpose;[34] and, where there was a trial below on the merits, the record must show a joinder and submission of issue, in order that the appellate court may ascertain the nature and state of the case, issue, or question which the parties submitted for trial or decision in the lower court.[35]

c. Stipulation Waiving Jury. In jurisdictions where the right to trial by jury must be expressly waived, the written stipulation of the parties waiving the jury must appear in the record.[36]

d. Selecting, Impaneling, and Swearing of Jury. The record must show that the jury were duly selected, impaneled, and sworn, in the manner and form required by law, to try the issues submitted to them.[37]

Wisconsin.—Eaton *v.* Patchin, 20 Wis. 485.

Canada.— Murphy *v.* Northern R. Co., 13 U. C. C. P. 32.

Contra, Davidson *v.* Farrell, 8 Minn. 258 [*followed* in Libby *v.* Husby, 28 Minn. 40, 8 N. W. 903], wherein it was held that, unless the record shows to the contrary, it will be presumed that there were proper pleadings, it being incumbent upon plaintiff in error to show affirmatively by the record that there were in fact no pleadings.

See 3 Cent. Dig. tit. "Appeal and Error," § 2289.

Affidavit for appointment of receiver.— Upon an appeal from an interlocutory order appointing a receiver without notice, upon causes shown by affidavit, it is necessary that the affidavit as well as the complaint be made a part of the record. Stewart *v.* Adam, etc., Co., (Ind. 1899) 55 N. E. 760.

Proposed answer on decree pro confesso.— Upon an appeal from an order setting aside, or refusing to set aside, a decree *pro confesso* or a judgment by default, the answer proposed to be filed by defendant must be set out in the record, or the appellate court will not review the question presented thereby (Pettigrew *v.* Sioux Falls, 5 S. D. 646, 60 N. W. 27; Wilson *v.* Waters, 7 Coldw. (Tenn.) 323), and even though copied into the transcript it is not part of the record unless made so by a bill of exceptions (Wilson *v.* Waters, 7 Coldw. (Tenn.) 323).

Where counts to the complaint are withdrawn by plaintiff the record should show the withdrawal by an entry on the record proper, and it should not be left to be shown by the bill of exceptions only. Alabama Great Southern R. Co. *v.* Burgess, 114 Ala. 587, 22 So. 169.

33. Collins *v.* U. S. Express Co., 27 Ind. 11; Chambers *v.* Simpson, 1 T. B. Mon. (Ky.) 112. But see Gill *v.* Warren, 1 J. J. Marsh. (Ky.) 590, to the effect that a note of the general issue being filed is sufficient. See also *infra,* XIII, A, 5.

A mere allegation that issue was joined is insufficient. Nye *v.* Wright, 3 Ill. 222.

34. Todd *v.* Winants, 36 Cal. 129. See also Lawton *v.* Eagle, (Kan. App. 1900) 61 Pac. 868.

35. Clagget *v.* Foree, 1 Dana (Ky.) 428; Smith *v.* McGlasson, 7 J. J. Marsh. (Ky.) 154; Marion Mach. Works *v.* Craig, 18 W. Va. 559.

Sufficient showing of submission.— A record, where part of defendants made default and the others answered, showing that "this cause is submitted to the court for trial on the complaint, default, and exhibits herein filed, and after examining and deliberating the court finds," etc., sufficiently shows, on appeal to the supreme court, a submission of the cause for trial as to defendants who had answered, on the default of those who had not. Heavenridge *v.* Nelson, 56 Ind. 90.

Ambiguity as to issue decided.— Where a judgment was rendered in a suit for divorce, with which was also coupled a rule for alimony, the record leaving it in doubt whether the issue disposed of was the question of alimony or the divorce itself, the judgment should be reversed and the cause remanded. Reddy *v.* Carroll, 47 La. Ann. 1135, 17 So. 695.

Failure to decide issue submitted.— A motion to dismiss a writ of error, on the ground that one of the issues did not appear by the record to have been decided, will be denied when the issue which was found by the jury made the plea upon which no issue appeared to have been decided immaterial. Dufaur *v.* Couprey, 6 Pet. (U. S.) 170, 8 L. ed. 359.

Where a case involves questions both in law and equity, it should appear distinctly from the record that the issues on the equity side of the court were first tried and disposed of; or, if the whole action and all the issues were submitted and brought together, that fact should appear upon the record. Martin *v.* Zellerbach, 38 Cal. 300, 99 Am. Dec. 365.

36. Bond *v.* Dustin, 112 U. S. 604, 5 S. Ct. 296, 28 L. ed. 835 [*followed* in Spalding *v.* Manasse, 131 U. S. 65, 9 S. Ct. 649, 33 L. ed. 86]; Alexander County *v.* Kimball, 106 U. S. 623, 2 S. Ct. 86, 27 L. ed. 311; Duncan *v.* Atchison, etc., R. Co., 72 Fed. 808, 44 U. S. App. 427, 19 C. C. A. 202; and see 3 Cent. Dig. tit. "Appeal and Error," § 2290.

In Missouri a showing in the record of an oral waiver is sufficient. Batterton *v.* Sims, 73 Mo. App. 351.

37. Neal *v.* Peevey, 39 Ark. 337; McDaniel *v.* Hanauer, 25 Ark. 48; Irwin *v.* Jones, 1 How. (Miss.) 497; Beall *v.* Campbell, 1 How. (Miss.) 24. But see Perdue *v.* Burnett, Minor (Ala.) 138; Goyne *v.* Howell, Minor (Ala.) 62 (holding that the record need not show that the jury were sworn); and Rearden *v.* Smith, 36 Ill. 204 (holding that the

e. Assessment of Damages Upon Default. Whenever there is a statute or a rule of practice requiring that proof shall be heard before rendition of judgment, upon defendant's default, it is essential that the record should show compliance with such statute or rule of practice.[38]

f. Verdict. Where there was a trial by jury, the record must show what the verdict of the jury was.[39]

g. Findings of Fact and Conclusions of Law. Where there was a trial without the intervention of a jury, the record on appeal or error must disclose the trial judge's findings of fact and conclusions of law,[40] and must show that they were signed by the judge,[41] and filed with the clerk.[42] It is usually required that the findings of fact and the conclusions of law should be stated separately.[43] A

appellate court, in the absence of anything in the record showing the contrary, will presume that the proceedings are regular).

See 3 Cent. Dig. tit. "Appeal and Error," § 2291.

When necessity of jury must be shown.— In proceedings on a petition by the vendee of real estate to compel the personal representative of his deceased vendor to make him a title, the testimony showing the necessity for a jury must be spread upon the record, as the orphans' court has no power to impanel a jury unless a real doubt arises as to some disputed fact. Driver *v.* Hudspeth, 16 Ala. 348.

38. *Alabama.*— Crosby *v.* Brantly, 20 Ala. 287.

Florida.— Snell *v.* Irvine, 17 Fla. 234.

Kentucky.— Mead *v.* Nevill, 2 Duv. (Ky.) 280; Marr *v.* Prather, 3 Metc. (Ky.) 196.

Louisiana.— Escurieux *v.* Chapduc, 4 Rob. (La.) 323.

Michigan.— Stevens *v.* Townsend, 1 Dougl. (Mich.) 77.

See 3 Cent. Dig. tit. "Appeal and Error," § 2293.

The record must disclose in what manner and upon what proofs the amount of the judgment was ascertained. Snell *v.* Irvine, 17 Fla. 234.

Sufficient showing of compliance.—For cases in which the record was held sufficient see McKenzie *v.* Penfield, 87 Ill. 38; Dehoney *v.* Sandford, 2 Bush (Ky.) 169; Johnson *v.* Godlove, 71 Mo. 400; Anderson *v.* Doolittle, 38 W. Va. 629, 18 S. E. 724.

39. Perry *v.* Reineger, 61 Iowa 750, 16 N. W. 136; Anderson *v.* Kittell, 37 Minn. 125, 33 N. W. 330; Buckley *v.* Conley, 16 Wash. 338, 47 Pac. 735.

40. *Arkansas.*— Wood *v.* Boyd, 28 Ark. 75.

California.— Dowd *v.* Clarke, 51 Cal. 262.

Missouri.— Derrick *v.* Jewett, 21 Mo. 444; Bates *v.* Bower, 17 Mo. 550.

New York.— Wood *v.* Lary, 124 N. Y. 83, 26 N. E. 338, 35 N. Y. St. 53 [*affirming* 47 Hun (N. Y.) 550]; MacNaughton *v.* Osgood, 114 N. Y. 574, 21 N. E. 1044, 24 N. Y. St. 531; Reinmiller *v.* Skidmore, 59 N. Y. 661; Johnson *v.* Whitlock, 13 N. Y. 344; Hunt *v.* Bloomer, 13 N. Y. 341; Farnham *v.* Hotchkiss, 2 Abb. Dec. (N. Y.) 93; Gamble *v.* Queens County Water Co., 51 Hun (N. Y.) 640, 4 N. Y. Suppl. 955, 20 N. Y. St. 917; Matthews *v.* New York, 14 Abb. Pr. (N. Y.) 209; *In re* Falls, 10 N. Y. Suppl. 41.

North Dakota.— Garr *v.* Spaulding, 2 N. D. 414, 51 N. W. 867.

Ohio.— Sanderson *v.* Ætna Iron, etc., Co., 34 Ohio St. 442; Empire Transp. Co. *v.* Blanchard, 31 Ohio St. 650.

Texas.— Thomas *v.* Jones, 41 Tex. 265; Chrisman *v.* Miller, 15 Tex. 159; North *v.* Lambert, 3 Tex. App. Civ. Cas. § 54.

United States.— U. S. *v.* The Old Settlers, 148 U. S. 427, 13 S. Ct. 650, 37 L. ed. 509; Davenport *v.* Paris, 136 U. S. 580, 10 S. Ct. 1064, 34 L. ed. 548; Kentucky L., etc., Ins. Co. *v.* Hamilton, 63 Fed. 93, 22 U. S. App. 386, 11 C. C. A. 42; Ross *v.* U. S., 12 Ct. Cl. 565.

Contra, Drefahl *v.* Tuttle, 42 Iowa 177. To same effect see Watson *v.* Sawyer, 12 Wash. 35, 40 Pac. 413, 41 Pac. 43, holding that an appeal will not be dismissed because of the insufficiency of the findings of fact in the record, the decision being based on the ground that it was respondent's fault that the findings were not as complete as they should have been, and that appellant should not be deprived thereby of the right to have the question of the sufficiency of such findings as were excepted to tested in the supreme court.

See 3 Cent. Dig. tit. "Appeal and Error," § 2293.

Where service is had by publication, the statute requires that the court shall make out and incorporate with the record of the cause a statement of the facts proved on the trial; and the omission to do this is fatal. Hewitt *v.* Thomas, 46 Tex. 232.

41. *In re* De Leon, (Cal. 1893) 35 Pac. 309; Gamble *v.* Queens County Water Co., 51 Hun (N. Y.) 640, 4 N. Y. Suppl. 955, 20 N. Y. St. 917; Simis *v.* McElroy, 20 N. Y. Civ. Proc. 288, 14 N. Y. Suppl. 241, 38 N. Y. St. 3.

42. *In re* De Leon, (Cal. 1893) 35 Pac. 309; Garr *v.* Spaulding, 2 N. D. 414, 51 N. W. 867.

43. *Arkansas.*— Wood *v.* Boyd, 28 Ark. 75.

Missouri.— Bates *v.* Bower, 17 Mo. 550.

New York.— MacNaughton *v.* Osgood, 114 N. Y. 574, 21 N. E. 1044, 24 N. Y. St. 531; Johnson *v.* Whitlock, 13 N. Y. 344; Hunt *v.* Bloomer, 13 N. Y. 341; *In re* Falls, 10 N. Y. Suppl. 41.

Texas.— Kidd *v.* Dugan, 2 Tex. App. Civ. Cas. § 50.

United States.— U. S. *v.* Clark, 94 U. S. 73, 24 L. ed. 67.

defect in the record in this respect is not cured by the fact that the record contains either the evidence[44] or the opinion of the court.[45] It has been held, however, that it is sufficient if the material facts upon which the judgment is based are set out in the record,[46] the bill of exceptions,[47] or the judgment.[48]

h. Grounds of Decision. In some jurisdictions a judgment will be reversed whenever the grounds supporting it are not shown by the record as required by constitutional[49] or statutory[50] provision. In various others it has been held that the appellate courts will not review the action of the trial judge when the record does not show the grounds of his decision.[51]

4. Evidence — a. In General. The record must show that the evidence contained therein was properly filed and made a part thereof.[52]

b. To Support Findings or Judgment. It being the duty of appellant to see that the evidence is in the record, the appellate court will not reverse a judgment because the record fails to show that any evidence was given.[53] Where the only error complained of is one of law, and the finding of the court upon the facts is not questioned, the evidence need not be embodied in the record;[54] nor is it necessary that the record show the evidence in a cause which was disposed of on demurrer,[55] or where the record recites a fact, and shows no objection to the testimony by which the fact was established.[56] The record on appeal, in a statutory

44. Graham *v.* Bayne, 18 How. (U. S.) 60, 15 L. ed. 265.

45. Sanderson *v.* Ætna Iron, etc., Co., 34 Ohio St. 442; Empire Transp. Co. *v.* Blanchard, 31 Ohio St. 650; Kentucky L., etc., Ins. Co. *v.* Hamilton, 63 Fed. 93, 22 U. S. App. 386, 11 C. C. A. 42.

46. Bush *v.* Robinson, 44 Ala. 328.

47. Cowles *v.* Clark, 3 Ga. 381.

48. Leary *v.* Leary, 68 Wis. 662, 32 N. W. 623.

49. Block *v.* McGuire, 18 La. Ann. 417. *Compare* Beard *v.* Simon, 18 La. Ann. 270, wherein it was held that although the reasons upon which a judgment is founded should be reduced to writing whenever it is practicable, the court would refuse to reverse on the ground that no reasons were given when the record showed that reasons were given orally.

50. Hayward *v.* Grand Trunk R. Co., 32 U. C. Q. B. 392.

Where no written judgment has been delivered by the court appealed from, a statement of the grounds assigned therefor should be obtained from the reporter, or from the notes of counsel who attended to hear judgment, and should be inserted in the appeal book. Blackley *v.* Kenny, 16 Ont. App. 522.

51. *Florida.*— Adams *v.* Fry, 29 Fla. 318, 10 So. 559, in fixing solicitor's fees upon a master's report.

Illinois.— Mullen *v.* People, 138 Ill. 606, 28 N. E. 988 (on an appeal from the county court's decision on a motion); Miller *v.* Dyas, 32 Ill. App. 385 (in deciding a suit to settle a partnership).

Iowa.— Roberts *v.* Malloy, 100 Iowa 372, 69 N. W. 674, in refusing a judgment by default.

Minnesota.— Floberg *v.* Joslin, 75 Minn. 75, 77 N. W. 557, holding that, in the absence of a showing that the trial court was right in its conclusion, although giving a wrong reason therefor, a judgment of dismissal on the ground that the complaint failed to state a cause of action is erroneous.

New York.— Lakeside Paper Co. *v.* State, 55 N. Y. App. Div. 208, 66 N. Y. Suppl. 959, on appeal from the New York court of claims.

South Carolina.— Collins *v.* Hall, 55 S. C. 336, 33 S. E. 466, in granting or refusing a motion for nonsuit.

Texas.— Texas, etc., R. Co. *v.* Hardin, 62 Tex. 367, refusing a continuance.

Where the ground is clearly apparent from the record, it has been held that the court will review the action of the trial judge in granting a nonsuit, even though the record does not expressly state the particular ground therefor. Morgan *v.* Thrift, 2 Cal. 562.

52. *Georgia.*— Pounds *v.* Hanson, 64 Ga. 668.

Illinois.— Illinois Cent. R. Co. *v.* Wren, 43 Ill. 77.

Iowa.— Bonney *v.* Cocke, 61 Iowa 303, 61 N. W. 139.

Louisiana.— Marchand *v.* Coyle, 18 La. Ann. 482.

Texas.— Riddle *v.* Bickerstaff, 50 Tex. 155.

Order-book entry not necessary.— Where the record shows the filing of the evidence by the certificate of the clerk, it is not necessary that it should also be shown by an order-book entry. Pennsylvania Co. *v.* Ebaugh, 144 Ind. 687, 43 N. E. 936.

53. Winslow *v.* Gohransen, 88 Cal. 450, 26 Pac. 504; Rogers *v.* Union Cent. L. Ins. Co., 111 Ind. 343, 12 N. E. 495, 60 Am. Rep. 701; Harrison *v.* Their Creditors, 43 La. Ann. 91, 9 So. 15; Barcklow *v.* Hutchinson, 32 N. J. L. 195. But where the record showed evidence introduced by the defendant and none by the plaintiff, a judgment in favor of the latter was reversed and the cause remanded. Davis *v.* Marshall, 25 Tex. 372.

54. Rogers *v.* Omaha Hotel Co., 4 Nebr. 54.

55. Jackson *v.* Glos, 144 Ill. 21, 32 N. E. 536; Missouri, etc., R. Co. *v.* Dinsmore, 108 U. S. 30, 2 S. Ct. 9, 27 L. ed. 640.

56. Lester *v.* Mobile Bank, 7 Ala. 490.

proceeding by an administrator for leave to sell real estate to pay debts, need not preserve the evidence sustaining the judgment;[57] nor is it necessary for the record to show the evidence upon which the court acted in rendering judgment on motion in behalf of the security against his principal in a summary proceeding.[58] It has been held, on the other hand, that the record must show sufficient evidence to prove the material facts at issue constituting the gist of the action.[59]

c. In Equity Suits. A decree in equity will be reversed, upon appeal or error, when the record does not preserve sufficient evidence to sustain it,[60] either by certificate,[61] bill of exceptions,[62] or by recitals in the decree itself.[63]

d. Filing Longhand Manuscript of Evidence. Some statutes authorize the

57. Bree *v.* Bree, 51 Ill. 367.

58. Reading *v.* Holton, Hard. (Ky.) 63.

59. *Illinois.*—Wisner *v.* Kelley, 16 Ill. App. 403.

Indiana.— Westervelt *v.* National Paper, etc., Co., 154 Ind. 673, 57 N. E. 552; Roberts *v.* Lindley, 121 Ind. 56, 22 N. E. 967.

Iowa.— Dickinson *v.* Athey, 96 Iowa 363, 65 N. W. 326.

Louisiana.— Breard *v.* Blanks, 51 La. Ann. 1507, 26 So. 618; Florance *v.* McFarlane, 15 La. 231.

Mississippi.— Officers of Court *v.* Port Gibson Bank, 4 Sm. & M. (Miss.) 431.

Missouri.— Chandler *v.* Bailey, 89 Mo. 641, 1 S. W. 745.

Nebraska.— Missouri Pac. R. Co. *v.* Hays, 15 Nebr. 224, 18 N. W. 51.

North Carolina.— Whichard *v.* Wilmington, etc., R. Co., 117 N. C. 614, 23 S. E. 437.

Pennsylvania.— Litz *v.* Kauffman, 2 Walk. (Pa.) 227.

Tennessee.— Bird *v.* Fannon, 3 Head (Tenn.) 12.

Texas.— Mason *v.* Rodgers, 83 Tex. 389, 18 S. W. 811; Finlay *v.* Jackson, (Tex. Civ. App. 1897) 43 S. W. 310.

See 3 Cent. Dig. tit. "Appeal and Error," § 2322.

Sufficient statement as to evidence.— In an action brought to try the right to an office, if the record shows in any manner that all the election returns were given in evidence, the judgment will not be reversed by the appellate court even though there is no formal statement in the record that such returns were all in evidence. People *v.* Holden, 28 Cal. 123.

Evidence before trial court but not in record.— The fact that certain schedules referred to in a master's report, and filed with it, do not appear in the record on appeal is no ground for reversing the decree where it is clear that the schedules were before the trial court. Snell *v.* De Land, 138 Ill. 55, 27 N. E. 707.

Assertions of counsel.— Mere assertions made by counsel on appeal, unsupported by evidence in the record, will not be considered as evidence by the appellate court. Adams *v.* Savery House Hotel Co., 107 Wis. 109, 82 N. W. 703.

Evidence which cannot possibly affect the issue to be passed upon by the appellate court need not be set out in the record. Ohio, etc., R. Co. *v.* Bath, 11 Ind. 538.

Cherokee claims.— The evidence should be included in the record on an appeal, from the court of claims, relating to the Cherokee claims. U. S. *v.* The Old Settlers, 148 U. S. 427, 13 S. Ct. 650, 37 L. ed. 509 [*following* Harvey *v.* U. S., 105 U. S. 671, 26 L. ed. 1206].

60. *Alabama.*— Harn *v.* Dadeville, 100 Ala. 199, 14 So. 9.

Georgia.— Harp *v.* Sapp, 59 Ga. 624. But see Bugg *v.* Towner, 41 Ga. 315, to the effect that immaterial evidence need not be preserved.

Illinois.— Gogan *v.* Burdick, 182 Ill. 126, 55 N. E. 126; Lawrence *v.* Lawrence, 181 Ill. 248, 54 N. E. 918; Ames *v.* Stockhoff, 73 Ill. App. 427. But see Lengfelder *v.* Smith, 69 Ill. App. 238, to the effect that the rule does not apply to a decree dismissing a bill.

Iowa.— State *v.* Roenisch, 77 Iowa 379, 42 N. W. 325.

Missouri.— Laberge *v.* Chauvin, 2 Mo. 179; Bird *v.* Bolduc, 1 Mo. 701.

Washington.— Proulx *v.* Stetson, etc., Mill Co., 6 Wash. 478, 33 Pac. 1067; Gilbranson *v.* Squier, 5 Wash. 99, 31 Pac. 423.

United States.— Blease *v.* Garlington, 92 U. S. 1, 23 L. ed. 521; New Orleans *v.* U. S., 5 Pet. (U. S.) 449, 8 L. ed. 187; Conn *v.* Penn, 5 Wheat. (U. S.) 424, 5 L. ed. 125.

Contra, Bennett *v.* Welch, 15 Ind. 332; Smith *v.* Lavin, 8 Wis. 265; Shaw *v.* Shaw, 8 Wis. 168. But see Flint *v.* Jones, 5 Wis. 84, where the case contained none of the evidence and the appeal was dismissed.

See 3 Cent. Dig. tit. "Appeal and Error," § 2323.

Rule applies only to parties seeking affirmative relief and is not applicable to one occupying a negative position in the lower court. Alexander *v.* Alexander, 45 Ill. App. 211.

Verdict of jury takes place of evidence.— Where a decree is based on the verdict of a jury, the evidence need not be preserved in the record (Kelly *v.* Chapman, 13 Ill. 530; Bonnell *v.* Lewis, 3 Ill. App. 283); but a decree entered contrary to the verdict must be sustained by evidence contained in the record (Bonnell *v.* Lewis, 3 Ill. App. 283).

61. Jackson *v.* Sackett, 146 Ill. 646, 35 N. E. 234; Moss *v.* McCall, 75 Ill. 190.

62. Harp *v.* Sapp, 59 Ga. 624; Wilhite *v.* Pearce, 47 Ill. 413.

63. Gogan *v.* Burdick, 182 Ill. 126, 55 N. E. 126; Lawrence *v.* Lawrence, 181 Ill. 248, 54 N. E. 918; Ames *v.* Stockhoff, 73 Ill. App. 427.

See 3 Cent. Dig. tit. "Appeal and Error," § 2323.

filing in the trial court of a translation of the stenographer's[64] shorthand notes of the evidence[65] given on the trial, and provide that, when the original manuscript of such translation is incorporated in the bill of exceptions and properly certified[66] as part of the record in review proceedings, the appellate court will consider such manuscript as presenting the evidence. Evidence preserved and presented in this form will be disregarded unless the record shows affirmatively that it was filed in the trial court[67] before its incorporation in the bill of exceptions.[68] In Indiana, under the provisions of a recent statute,[69] where the record contains the original bill of exceptions, embracing the evidence in the cause, it is not necessary that the record should show affirmatively that the longhand manuscript of the evidence was filed in the clerk's office before incorporation in the bill of exceptions.[70]

5. Filing of Papers Part of Record. Pleadings, motions, and other papers

64. **Showing as to choice and swearing of stenographer.**— Failure of the record to show affirmatively that the stenographer was elected or agreed upon by the parties, or that he was sworn to report the case, is not ground for excluding the evidence authenticated by the statement of the trial judge that it was all the evidence given in the cause. Gaar *v.* Wilson, 21 Ind. App. 91, 51 N. E. 502.

65. **Original papers read in evidence,** accompanying and identified by the longhand manuscript of the evidence, may be treated as embraced therein and properly in the record. Zeis *v.* Passwater, 142 Ind. 375, 41 N. E. 796 [*following* Indiana, etc., R. Co. *v.* Quick, 109 Ind. 295, 9 N. E. 788–925].

66. **Must certify that all evidence is contained.**— Even though the record shows the filing of the longhand manuscript of the evidence, that it was signed by the judge, and ordered made a part of the record, the evidence will not be considered by the appellate court unless it appears that this was all the evidence in the case. Porter *v.* Fraleigh, 19 Ind. App. 562, 49 N. E. 863.

Request to clerk to certify.— The record on appeal need not show appellant's request to the clerk to certify up the original report of the evidence, and, hence, it will not be presumed that the clerk did not have authority to so certify the report. F. W. Cook Brewing Co. *v.* Ball, 22 Ind. App. 656, 52 N. E. 1062.

67. Beatty *v.* Miller, 146 Ind. 231, 44 N. E. 8; McGinnis *v.* Boyd, 144 Ind. 393, 42 N. E. 678; Gaar *v.* Wilson, 21 Ind. App. 91, 51 N. E. 502; Harrison *v.* Snair, 76 Iowa 558, 41 N. W. 315. *Compare* Bunyan *v.* Loftus, 90 Iowa 122, 57 N. W. 685; Everling *v.* Holcomb, 74 Iowa 722, 39 N. W. 117.

See 3 Cent. Dig. tit. "Appeal and Error," § 2325.

Sufficient preservation of evidence.— Where the clerk certifies that the longhand manuscript of the evidence is embodied in the bill of exceptions, it is sufficiently shown that the manuscript was filed with the clerk (Everman *v.* Hyman, (Ind. App. 1891) 28 N. E. 1022); and where he certifies that the bill of exceptions contains a copy of the longhand manuscript of the evidence, such evidence, though not previously filed, is properly in the record (Madden *v.* State, 148 Ind. 183, 47 N. E. 220; Standard L., etc., Ins. Co. *v.* Martin, 133 Ind. 376, 33 N. E. 105).

68. Cooper *v.* Bartlett, 150 Ind. 693, 49 N. E. 827; McIntosh *v.* Zaring, 150 Ind. 301, 49 N. E. 164; Davis *v.* Union Trust Co., 150 Ind. 46, 49 N. E. 817; Fitch *v.* Byall, 149 Ind. 554, 49 N. E. 455; Garrett *v.* State, 149 Ind. 264, 49 N. E. 33; Lowe *v.* Lowe, 40 Iowa 220.

See 3 Cent. Dig. tit. "Appeal and Error," § 2325.

Must be filed before bill of exceptions filed.— It being necessary to file the longhand manuscript before it is incorporated in the bill of exceptions, it follows that it must be filed within the time allowed for the filing of the bill. Indiana, etc., R. Co. *v.* Lynch, 145 Ind. 1, 43 N. E. 934; Lowery *v.* Carver, 104 Ind. 447, 4 N. E. 52. *Compare* Garn *v.* Working, 5 Ind. App. 14, 31 N. E. 821; Bunyan *v.* Loftus, 90 Iowa 122, 57 N. W. 685.

Sufficient showing as to time of filing.— A statement by the clerk in his certificate to the transcript that the longhand manuscript was filed before it was incorporated in the bill of exceptions is sufficient to show that fact. Moore *v.* Hewitt, 147 Ind. 464, 46 N. E. 905.

Must show filing within time allowed for appeal.— It is necessary that the record show that both the shorthand notes and the translation thereof were filed in the trial court within the time allowed for the taking of an appeal. Chicago Lumber Co. *v.* Davis, 82 Iowa 731, 47 N. W. 1079; Hammond *v.* Wolf, 78 Iowa 227, 42 N. W. 778. *Compare* Slone *v.* Berlin, 88 Iowa 205, 55 N. W. 341 [*following* Hammond *v.* Wolf, 78 Iowa 227, 42 N. W. 778, and *distinguishing* Harrison *v.* Snair, 76 Iowa 558, 41 N. W. 315; Lowe *v.* Lowe, 40 Iowa 220].

See 3 Cent. Dig. tit. "Appeal and Error," § 2325.

69. Thornton's Rev. Stat. Ind. (1897), § 670.

70. Weakley *v.* Wolf, 148 Ind. 208, 47 N. E. 466; Decatur *v.* Stoops, 21 Ind. App. 397, 52 N. E. 623; National Exch. Bank *v.* Berry, 21 Ind. App. 261, 52 N. E. 104; Stevens Store Co. *v.* Hammond, (Ind. App. 1898) 51 N. E. 506.

set out in the transcript which are required by law to be filed in the lower court, will be disregarded by the appellate court when the record fails to show that they were so filed.[71]

6. Making and Filing of Bill of Exceptions, Case, or Statement — a. In General. A bill of exceptions, case, or statement found in the record will be disregarded by the appellate court when the record fails to show affirmatively that it was properly allowed and filed in the trial court and thereby made a part of the record,[72] and these facts must be shown by the record proper, independent of the bill itself.[73]

b. Time of Making and Filing — (I) *In General.* It is also essential that the record should show affirmatively that the bill was tendered, signed,[74] and

71. Ritchie *v.* Warrensburg, 32 Ill. App. 181; Cates *v.* Wooldridge, 1 J. J. Marsh. (Ky.) 267; Davis *v.* Harrison, 4 Litt. (Ky.) 261; Nickell *v.* Fallen, 11 Ky. L. Rep. 621, 12 S. W. 767; Lamorere *v.* Cox, 32 La. Ann. 1045; Bloodgood *v.* Clark, 4 Paige (N. Y.) 574. But see, *contra*, Daniels *v.* Brodie, 54 Ark. 216, 15 S. W. 467, 11 L. R. A. 81; Novelty Iron Works *v.* Capital City Oatmeal Co., 88 Iowa 524, 55 N. W. 518; Jamison *v.* Weaver, 87 Iowa 72, 53 N. W. 1076 [*reversing* 50 N. W. 34, and *distinguishing* Kavalier *v.* Machula, 77 Iowa 121, 41 N. W. 590; Arts *v.* Culbertson, 73 Iowa 13, 34 N. W. 490]; Smith *v.* Profitt, 82 Va. 832, 1 S. E. 67; and *compare* Hawkins *v.* Ball, 18 B. Mon. (Ky.) 816, 68 Am. Dec. 755; Carter *v.* Stennet, 10 B. Mon. (Ky.) 250; State *v.* Badon, 14 La. Ann. 783.

Order permitting filing.— In West Virginia it seems that it is necessary that the record should also show an order of the court permitting the pleading to be filed. Williams *v.* Ewart, 29 W. Va. 659, 2 S. E. 881; Handy *v.* Scott, 26 W. Va. 710; and see 3 Cent. Dig. tit. "Appeal and Error," § 2318.

The papers become part of the record, when filed, as fully as if copied into the record book of the court (Stevison *v.* Earnest, 80 Ill. 513), and a paper is filed when it is delivered to the proper officer and by him received (Hull *v.* Louth, 109 Ind. 315, 10 N. E. 270, 58 Am. Rep. 405; Evansville, etc., R. Co. *v.* Lavender, (Ind. App. 1893) 34 N. E. 109).

72. *Georgia.*— Spriggs *v.* Spriggs, 40 Ga. 510.

Colorado.— Swem *v.* Green, 9 Colo. 358, 12 Pac. 202.

Indiana.— Lowry *v.* Downey, 150 Ind. 364, 50 N. E. 79; Fitch *v.* Byall, 149 Ind. 554, 49 N. E. 455; Elkins *v.* Bennett, 18 Ind. App. 110, 47 N. E. 472.

Mississippi.— Stephenson *v.* Smith, 23 Miss. 507.

Missouri.— Dinwiddie *v.* Jacobs, 82 Mo. 195; Newman *v.* Biggs, 78 Mo. 675; Bondurant *v.* German Ins. Co., 73 Mo. App. 477.

New York.— Reese *v.* Boese, 92 N. Y. 632; Pickard *v.* Carr, 61 Hun (N. Y.) 624, 17 N. Y. Suppl. 605, 40 N. Y. St. 988; Butts *v.* Lowville, 25 Hun (N. Y.) 317; Todd *v.* U. S. Life Ins. Co., 25 Hun (N. Y.) 311; Anonymous, 4 Wend. (N. Y.) 193.

Ohio.— Burk *v.* Pittsburg, etc., R. Co., 26 Ohio St. 643; Acheson *v.* Western Reserve Bank, 8 Ohio 117; Corthell *v.* State, 11 Ohio Cir. Ct. 570, 5 Ohio Cir. Dec. 123.

Washington.— Clarke County *v.* Clarke County, 1 Wash. Terr. 250.

West Virginia.— Adkins *v.* Globe F. Ins. Co., 45 W. Va. 384, 32 S. E. 194; Griffith *v.* Corrothers, 42 W. Va. 59, 24 S. E. 569.

Wyoming.— Moyer *v.* Preston, 6 Wyo. 308, 44 Pac. 845, 71 Am. St. Rep. 914; Geer *v.* Murrin, 1 Wyo. 37; Murrin *v.* Ullman, 1 Wyo. 36.

See 3 Cent. Dig. tit. "Appeal and Error," § 2319.

Signature of judge makes bill part of record and it is not necessary that the minutes of the court should show that it was signed and sealed and made a part of the record, although this is the usual formula (Grubbs *v.* Greer, 5 Coldw. (Tenn.) 160; McBride *v.* Union Pac. R. Co., 3 Wyo. 183, 18 Pac. 635); nor is it necessary that the bill should be marked "Filed" (Kimball *v.* Mitchell, 57 Mass. 632).

Must be signed before filed or the bill will not be considered a part of the record. Chicago, etc., R. Co. *v.* Cason, 151 Ind. 329, 50 N. E. 569; Drew *v.* Geneva, 150 Ind. 662, 50 N. E. 871, 42 L. R. A. 814; Seiss *v.* Cleveland, etc., R. Co., 18 Ind. App. 707, 47 N. E. 935; Sherwood *v.* State, 18 Ind. App. 260, 47 N. E. 936.

73. Hoover *v.* Weesner, 147 Ind. 510, 45 N. E. 650, 46 N. E. 905; Beatty *v.* Miller, 146 Ind. 231, 44 N. E. 8; Indiana, etc., R. Co. *v.* Lynch, 145 Ind. 1, 43 N. E. 934; Denman *v.* Warfield, 20 Ind. App. 664, 51 N. E. 345; Dinwiddie *v.* Jacobs, 82 Mo. 195; Newman *v.* Biggs, 78 Mo. 675; Pope *v.* Thomson, 66 Mo. 661; McGrew *v.* Foster, 66 Mo. 30; Burk *v.* Pittsburg, etc., R. Co., 26 Ohio St. 643; White *v.* Lapp, 4 Ohio N. P. 31, 4 Ohio Dec. 434; Klugman *v.* Mauk, 6 Cinc. L. Bul. 665; Griffith *v.* Corrothers, 42 W. Va. 59, 24 S. E. 569; Quaker City Nat. Bank *v.* Showacre, 26 W. Va. 48. *Compare* Pugh *v.* Ayres, 47 Mo. App. 590.

See 3 Cent. Dig. tit. "Appeal and Error," § 2319.

74. *Alabama.*— Union India Rubber Co. *v.* Mitchell, 37 Ala. 314; Haden *v.* Brown, 22 Ala. 572. *Compare* Ryall *v.* Maix, 48 Ala. 537, holding that a defect in the record in this respect will not vitiate an appeal when it appears that there has been a final judgment and that the appeal has been otherwise regularly taken.

filed,[75] within the time prescribed by statute for making, tendering, and filing such bill.

(II) *Allowance and Extension of Time.* When it appears from the record that the bill of exceptions was filed after the expiration of the statutory time, the record must show that the trial court allowed an extension of time for its making and filing,[76] and that it was made and filed within the time so extended.[77] It is not sufficient that these facts appear from the bill of exceptions only, and not from the record proper.[78]

7. Presentation and Reservation of Grounds of Review — a. Questions and Objections and Rulings Thereon — (I) *In General.* A party alleging error as a ground for reversing a judgment of a lower court must show the errors com-

Arizona.— Sutherland *v.* Putnam, (Ariz. 1890) 24 Pac. 320.

Arkansas.— Lyon *v.* Evans, 1 Ark. 349.

Georgia.— Newton *v.* Burtz, 44 Ga. 599; Justices *v.* Barrington, 6 Ga. 578.

Indiana.— Stoner *v.* Louisville, etc., R. Co., 6 Ind. App. 226, 33 N. E. 242; Budd *v.* Rutherford, (Ind. App. 1891) 28 N. E. 210.

Kansas.— Brush Electric Light, etc., Co. *v.* Grosch, 1 Kan. App. 110, 40 Pac. 933.

Ohio.— Hill *v.* Bassett, 27 Ohio St. 597.

Wyoming.— Geer *v.* Murrin, 1 Wyo. 37; Murrin *v.* Ullman, 1 Wyo. 36.

See 3 Cent. Dig. tit. "Appeal and Error," § 2320.

75. *Georgia.*— Vickers *v.* Sanders, 106 Ga. 265, 32 S. E. 102.

Indiana.— White *v.* Gregory, 126 Ind. 95, 25 N. E. 806; Nichol *v.* Thomas, 53 Ind. 42; Denman *v.* Warfield, 20 Ind. App. 664, 51 N. E. 345.

Missouri.— Eau Claire Lumber Co. *v.* Howard, 76 Mo. 517; Baker *v.* Loring, 65 Mo. 527.

Tennessee.— Jones *v.* Moore, (Tenn. 1900) 61 S. W. 81.

Texas.— Gulf, etc., R. Co, *v.* Holliday, 65 Tex. 512; Folts *v.* Ferguson, (Tex. Civ. App. 1894) 24 S. W. 657.

See 3 Cent. Dig. tit. "Appeal and Error," § 2320.

Where the bill of exceptions is filed in vacation it will not be disregarded on that ground unless the fact appears affirmatively from the record (Taylor *v.* Newman, 77 Mo. 257; Weil *v.* Jones, 70 Mo. 560), and when the bill is filed in vacation the clerk need not indorse the fact of the filing of the bill itself if there is an entry to that effect in the record (Ferguson *v.* Thacher, 79 Mo. 511 [*overruling* Carter *v.* Prior, 78 Mo. 222 (*followed* in Campbell *v.* Missouri Pac. R. Co., 78 Mo. 639)]).

76. Anderson *v.* Anderson, 141 Ind. 567, 40 N. E. 131, 1082; Benson *v.* Baldwin, 108 Ind. 106, 8 N. E. 909; Baltimore, etc., R. Co. *v.* Countryman, 16 Ind. App. 139, 44 N. E. 265; Lawson *v.* Mills, 150 Mo. 428; 51 S. W. 678; Rine *v.* Chicago, etc., R. Co., 88 Mo. 392; Nichols *v.* Engler, 78 Mo. App. 501.

See 3 Cent. Dig. tit. "Appeal and Error," § 2321.

If the bill was filed during the term at which the trial was had, it will be considered a part of the record even though the record does not show an allowance of time for making and filing it. Ogborn *v.* Hoffman, 52 Ind. 439; Noblesville Gas, etc., Co. *v.* Teter, 1 Ind. App. 322, 27 N. E. 635; Pershing *v.* Canfield, 70 Mo. 140.

Consent of parties to extension.— In Missouri, a bill of exceptions filed after the term will not be considered unless the record shows not only a copy of the order of the court allowing the extension, but the consent of the parties thereto (Johnson *v.* Greenleaf, 73 Mo. 671; State *v.* Duckworth, 68 Mo. 156; Smith *v.* Pollack, 58 Mo. 161; Coste *v.* Stifel, 8 Mo. App. 601; Bosley *v.* Hart, 7 Mo. App. 581); but the stipulation of the parties is insufficient in the absence of a showing in the record that the court concurred (Campbell *v.* Missouri Pac. R. Co., 78 Mo. 639; Carter *v.* Prior, 78 Mo. 222), and the agreement of the parties must be copied into the transcript, a mere recital by the clerk that the time had been extended being insufficient (Halderman *v.* Sitlington, 1 Mo. App. Rep. 203).

77. *Alabama.*— Morris *v.* Brannen, 103 Ala. 602, 15 So. 865.

Colorado.— Widner *v.* Buttles, 3 Colo. 1.

Indiana.— McFadden *v.* Owens, 150 Ind. 213, 49 N. E. 1058; Horner *v.* Hoadley, 97 Ind. 600; Stames *v.* Schofield, 5 Ind. App. 4, 31 N. E. 480.

Missouri.— Lafollette *v.* Thompson, 83 Mo. 199; Eau Claire Lumber Co. *v.* Howard, 76 Mo. 517; Bosley *v.* Hart, 7 Mo. App. 581.

Ohio.— Felch *v.* Hodgman Mfg. Co., 61 Ohio St. 93, 55 N. E. 171; Heffner *v.* Moyst, 40 Ohio St. 112.

See 3 Cent. Dig. tit. "Appeal and Error," § 2321.

The record must show exact date of filing the bill, and a statement in the record that the bill was filed within the time allowed is insufficient. Dunn *v.* Hubble, 81 Ind. 489; Logansport Gas-Light, etc., Co. *v.* Davidson, 51 Ind. 472.

78. Benson *v.* Baldwin, 108 Ind. 106, 8 N. E. 909; Newcomer *v.* Perril, 83 Ind. 600; Baltimore, etc., R. Co. *v.* Countryman, 16 Ind. App. 139, 44 N. E. 265; Lawson *v.* Mills, 150 Mo. 428, 51 S. W. 678; Eau Claire Lumber Co. *v.* Howard, 76 Mo. 517. *Contra*, Glasser *v.* Hackett, 37 Fla. 358, 20 So. 532; Stephens *v.* Hale, 33 Fla. 618, 15 So. 251; Baker *v.* Chatfield, 23 Fla. 540, 2 So. 822.

See 3 Cent. Dig. tit. "Appeal and Error," § 2321.

plained of clearly and affirmatively by the record,[79] and must show that he has been prejudicially affected thereby.[80] The record must so present the matters sought to be reviewed that the reviewing court will have before it specific questions for definite determination.[81]

(II) *As to Pleadings.* An appellate court will not consider questions affecting the sufficiency and form of pleadings unless the record contains the pleadings complained of,[82] and shows that the objections relied on for attacking the sufficiency or form thereof were duly and properly presented to the trial court,[83]

79. *Alabama.*— Findlay *v.* Pruitt, 9 Port. (Ala.) 195.

Arizona.— U. S. *v.* Ellis, (Ariz. 1887) 14 Pac. 300.

Nebraska.— Andrews *v.* Kerr, 54 Nebr. 618, 74 N. W. 1071.

New Jersey.— Coxe *v.* Field, 13 N. J. L. 215.

New Mexico.— Witt *v.* Cuenod, 9 N. M. 143, 50 Pac. 328.

North Dakota.— Garr *v.* Spaulding, 2 N. D. 414, 51 N. W. 867.

Texas.—International, etc., R. Co. *v.* Leak, 64 Tex. 654.

West Virginia.— Griffith *v.* Corrothers, 42 W. Va. 59, 24 S. E. 569; Anderson *v.* Doolittle, 38 W. Va. 629, 18 S. E. 724.

United States.— Suydam *v.* Williamson, 20 How. (U. S.) 427, 15 L. ed. 978.

See 3 Cent. Dig. tit. "Appeal and Error," § 2295.

80. Andrews *v.* Kerr, 54 Nebr. 618, 74 N. W. 1071; Florida R. Co. *v.* Smith, 21 Wall. (U. S.) 255, 22 L. ed. 513.

81. Baker *v.* Flagg, 99 Ga. 87, 27 S. E. 170; Rayl *v.* Hammond, 95 Mich. 22, 54 N. W. 693; Witt *v.* Cuenod, 9 N. M. 143, 50 Pac. 328. See also Detroit Western Transit, etc., Co. *v.* Crane, 50 Mich. 182, 15 N. W. 73.

Must show that question arose during trial. — The appellate court will not consider or pass upon any question which should have been raised and decided in the lower court, unless the record shows that the question actually arose during the progress of the trial, was duly and properly presented to the court for decision, and was actually decided by the court.

California.— Bagley *v.* Cohen, 121 Cal. 604, 53 Pac. 1117.

Connecticut.— Farrell *v.* Waterbury Horse R. Co., 60 Conn. 239, 21 Atl. 675, 22 Atl. 544; New Haven Sav. Bank, etc., Assoc. *v.* McPartlan, 40 Conn. 90.

Georgia.—Farmers' Mut. Ins. Assoc. *v.* Austin, 109 Ga. 689, 35 S. E. 122.

Illinois.— Chicago, etc., R. Co. *v.* Clausen, 173 Ill. 100, 50 N. E. 680 [*affirming* 70 Ill. App. 550]; Chicago, etc., R. Co. *v.* Calumet, 151 Ill. 512, 40 N. E. 625.

Indiana.— Lipes *v.* Hand, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160; Short *v.* Stutsman, 81 Ind. 115; Tarplee *v.* Capp, 25 Ind. App. 56, 56 N. E. 270.

Iowa.— Borland *v.* McNally, 48 Iowa 440.

Kansas.— Moore *v.* Emmert, 21 Kan. 1.

Maryland.—Caledonian F. Ins. Co. *v.* Traub, 86 Md. 86, 37 Atl. 782; Gabelein *v.* Plaenker, 36 Md. 61.

Massachusetts.— Dorman *v.* Kane, 5 Allen (Mass.) 38; Troy, etc., R. Co. *v.* Newton, 8 Gray (Mass.) 596.

Michigan.— Maclean *v.* Scripps, 52 Mich. 214, 17 N. W. 815, 18 N. W. 209; Nelson *v.* Cheboygan Slack-Water Nav. Co., 44 Mich. 7, 5 N. W. 998, 38 Am. Rep. 222; Daniels *v.* Clegg, 28 Mich. 32.

Mississippi.—Barrow *v.* Burbridge, 41 Miss. 622; Hatch *v.* Roberts, 41 Miss. 92.

Missouri.— Mumford *v.* Keet, 71 Mo. App. 535; Ashenbroedel Club *v.* Finlay, 53 Mo. App. 256.

Nebraska.— Forbes *v.* Morearty, 54 Nebr. 505, 74 N. W. 822; School District No. 1 *v.* Bishop, 46 Nebr. 850, 65 N. W. 902.

New York.— Dunckel *v.* Dunckel, 141 N. Y. 427, 36 N. E. 405, 57 N. Y. St. 618; Godfrey *v.* Godfrey, 75 N. Y. 434; Prentiss *v.* Weatherly, 68 Hun (N. Y.) 114, 22 N. Y. Suppl. 680, 52 N. Y. St. 80 [*affirmed* in 144 N. Y. 707, 39 N. E. 858]; Pritchard *v.* Hirt, 39 Hun (N. Y.) 378; Steubing *v.* New York El. R. Co., 19 N. Y. Suppl. 313, 46 N. Y. St. 799 [*affirmed* in 138 N. Y. 658, 34 N. E. 369, 53 N. Y. St. 186].

Oregon.— Haley *v.* Bevis, 23 Oreg. 238, 31 Pac. 484; Henderson *v.* Morris, 5 Oreg. 24.

Texas.— Moss *v.* Katz, 69 Tex. 411, 6 S. W. 764; Blair *v.* Parr, 49 Tex. 85.

Vermont.— Brigham *v.* Hutchins, 27 Vt. 569; Allen *v.* Rice, 24 Vt. 647.

Wyoming.— Syndicate Imp. Co. *v.* Bradley, 6 Wyo. 171, 43 Pac. 79, 44 Pac. 60.

See 3 Cent. Dig. tit. "Appeal and Error," § 2295.

Rulings of the trial court must be set out in the record.

Alabama.— Davis *v.* Louisville, etc., R. Co., 108 Ala. 660, 18 So. 687.

Colorado.— Leach *v.* Lothian, 10 Colo. 439, 15 Pac. 816.

Indiana.— Xenia Real Estate Co. *v.* Drook, 140 Ind. 259, 39 N. E. 870; Reeder *v.* English, 62 Ind. 78; Coleman *v.* Dobbins, 8 Ind. 156.

South Dakota.— Johnson *v.* Gilmore, 6 S. D. 276, 60 N. W. 1070.

Texas.— Supreme Commandery Knights of Golden Rule *v.* Rose, 62 Tex. 321.

82. Sivoly *v.* Scott, 56 Ala. 555; Xenia Real Estate Co. *v.* Drook, 140 Ind. 259, 39 N. E. 870; Keesling *v.* Ryan, 84 Ind. 89; Davis *v.* Binford, 58 Ind. 457; Kahn *v.* Gavit, 23 Ind. App. 274, 55 N. E. 268; Earnest *v.* Shoemaker, 10 Ind. App. 696, 38 N. E. 543; Parks *v.* Van Dergriff, (Tenn. Ch. 1900) 57 S. W. 177. See also *supra*, XIII, A, 3, b, and XIII, A, 5.

83. *California.*— Sukeforth *v.* Lord, 87 Cal. 399, 25 Pac. 497.

Indiana.— Webber *v.* Harding, 155 Ind. 408, 58 N. E. 533; Carter *v.* Lacy, 3 Ind. App. 54, 29 N. E. 168.

and, further, that such court duly and properly acted upon the objections ruled on.[84]

(III) *As to Evidence* — (A) *Admission* — (1) Objections. In order to obtain a review, by the appellate court, of alleged errors committed by the trial judge in admitting evidence, the record must show that objections to the admission of such evidence were made [85] at the time it was offered.[86]

(2) Grounds of Objection. The record must also disclose the precise nature and grounds of the objections so made.[87]

Maryland.— Ashton *v.* Ashton, 35 Md. 496.

Ohio.— Youngstown *v.* Moore, 30 Ohio St. 133.

Texas.— Karnes County *v.* Nichols, (Tex. Civ. App. 1899) 54 S. W. 656; Johnson *v.* Gurlach, (Tex. Civ. App. 1897) 42 S. W. 1048.

See 3 Cent. Dig. tit. "Appeal and Error," § 2296.

84. *Alabama.*— Davis *v.* Louisville, etc., R. Co., 108 Ala. 660, 18 So. 687; Pounds *v.* Hamner, 57 Ala. 342.

Florida.— Taylor *v.* Baker, 1 Fla. 282.

Indiana.— Hamilton *v.* Goddard, 125 Ind. 600, 25 N. E. 543; Smith *v.* Smith, 106 Ind. 43, 5 N. E. 411; Rittenhouse *v.* Knoop, 9 Ind. App. 126, 36 N. E. 384.

New York.— Wynkoop *v.* Osborne, 53 Hun (N. Y.) 632, 7 N. Y. Suppl. 954, 25 N. Y. St. 1038; Palmyra *v.* Wynkoop, 53 Hun (N. Y.) 82, 6 N. Y. Suppl. 62, 24 N. Y. St. 824, 17 N. Y. Civ. Proc. 187.

Texas.— Brown *v.* Thompson, 79 Tex. 58, 15 S. W. 168; Headley *v.* Obenchain, 33 Tex. 682; Karnes County *v.* Nichols, (Tex. Civ. App. 1899) 54 S. W. 656; Johnson *v.* Gurlach, (Tex. Civ. App. 1897) 42 S. W. 1048.

See 3 Cent. Dig. tit. "Appeal and Error," § 2396.

Must be in record proper.— Rulings on pleadings cannot be reviewed unless they appear in the record proper, and will not be noticed when they are set out in the bill of exceptions only. Davis *v.* Louisville, etc., R. Co., 108 Ala. 660, 18 So. 687.

Must show definitely what objections sustained.— Broussard *v.* Sabine, etc., R. Co., 75 Tex. 702, 13 S. W. 68.

85. *Colorado.*— Denver, etc., R. Co. *v.* Rosuck, 7 Colo. App. 288, 43 Pac. 456; Rabjohns *v.* Sorenson, 5 Colo. App. 425, 38 Pac. 992.

Georgia.— Jacobs' Pharmacy Co. *v.* Norcross, 110 Ga. 304, 34 S. E. 999; Richmond, etc., R. Co. *v.* Leathers, 92 Ga. 93, 18 S. E. 360.

Illinois.— Wright *v.* Smith, 82 Ill. 527; Krebaum *v.* Cordell, 63 Ill. 23; St. Louis, etc., R. Co. *v.* Waggoner, 53 Ill. App. 651.

Indiana.— Bush *v.* Banta, 94 Ind. 509; McKinney *v.* Shaw, etc., Mfg. Co., 51 Ind. 219; Kaiger *v.* Brandenburg, 4 Ind. App. 497, 31 N. E. 211.

Iowa.— Bonney *v.* Cocke, 61 Iowa 303, 16 N. W. 139.

Maine.— Merrill *v.* Merrill, 67 Me. 70.

Massachusetts.— Peirce *v.* Adams, 8 Mass. 383.

Mississippi.— Learned *v.* Matthews, 40 Miss. 210.

Missouri.— Margrave *v.* Ausmuss, 51 Mo. 561; Bowman *v.* Stiles, 34 Mo. 141.

North Carolina.—Rosey *v.* Patton, 109 N. C. 455, 14 S. E. 64; State *v.* Brady, 104 N. C. 737, 10 S. E. 261; Bernard *v.* Johnston, 78 N. C. 25.

Pennsylvania.— Duvall *v.* Darby, 38 Pa. St. 56.

Tennessee.— Montgomery *v.* Coldwell, 14 Lea (Tenn.) 29.

Texas.— International, etc., R. Co. *v.* Leak, 64 Tex. 654; Willis *v.* Donac, 61 Tex. 588; Houston, etc., R. Co. *v.* White, 23 Tex. Civ. App. 280, 56 S. W. 204.

See 3 Cent. Dig. tit. "Appeal and Error," § 2297.

86. *Georgia.*—Jacobs' Pharmacy Co. *v.* Norcross, 110 Ga. 304, 34 S. E. 999; Equitable Mortg. Co. *v.* Brown, 105 Ga. 474, 30 S. E. 687.

Indiana.— McKinney *v.* Shaw, etc., Mfg. Co., 51 Ind. 219.

Missouri.— Johnson *v.* Wabash, etc., R. Co., 22 Mo. App. 597.

Pennsylvania.— Duvall *v.* Darby, 38 Pa. St. 56.

Texas.— Willis *v.* Donac, 61 Tex. 588.

United States.— U. S. *v.* Carey, 110 U. S. 51, 3 S. Ct. 424, 28 L. ed. 67, holding that though an objection to evidence, to be of any avail, must be taken at the trial, it may be reduced to form, and signed afterward, but that the fact that it was seasonably taken must appear affirmatively in the record.

See 3 Cent. Dig. tit. "Appeal and Error," § 2297.

87. *Arkansas.*— Crisman *v.* McDonald, 28 Ark. 8; Keizer *v.* Seabrook, 25 Ark. 334.

Georgia.— Equitable Mortg. Co. *v.* Brown, 105 Ga. 474, 30 S. E. 687; Cartersville *v.* Maguire, 84 Ga. 174, 10 S. E. 603; Tarver *v.* Torrance, 81 Ga. 261, 6 S. E. 177, 12 Am. St. Rep. 311.

Illinois.— Davis *v.* Ransom, 26 Ill. 100.

Indiana.— Shafer *v.* Ferguson, 103 Ind. 90, 2 N. E. 302; Bottenberg *v.* Nixon, 97 Ind. 106; Nave *v.* Flack, 90 Ind. 205, 46 Am. Rep. 205; Hamilton *v.* Pearson, 1 Ind. 540, 50 Am. Dec. 480; Kaiger *v.* Brandenburg, 41 Ind. App. 497, 31 N. E. 211.

Iowa.— Connors *v.* Chingren, 111 Iowa 437, 82 N. W. 934; Johnson *v.* Jordan, 87 Iowa 410, 54 N. W. 250; Bell *v.* Byerson, 11 Iowa 233, 77 Am. Dec. 142.

Kansas.— Ferguson *v.* Graves, 12 Kan. 39.

Massachusetts.— Cox *v.* Jackson, 6 Allen (Mass.) 108; Odiorne *v.* Bacon, 6 Cush. (Mass.) 185.

Missouri.— Bogie *v.* Nolan, 96 Mo. 85, 9 S. W. 14; Allen *v.* Mansfield, 82 Mo. 688; Akers *v.* Clarkson, 6 Mo. App. 600.

Nebraska.—Stevenson *v.* Anderson, 12 Nebr.

(3) Injury in Admission. It has been held, too, that the record must show that the evidence admitted over objection was prejudicial to the excepting party.[88]

(B) *Exclusion.* Error predicated upon the exclusion of evidence will be disregarded by the appellate court unless the record shows the grounds urged against its admission,[89] and the grounds upon which it was excluded.[90] Where the error is based upon the court's refusal to permit a witness to testify, the record must disclose what was proposed to be proven by him.[91]

(C) *Rulings.* There is nothing as to evidence before the appellate court for review when the record does not contain the rulings of the trial court upon its admission and exclusion.[92] Objections, grounds of objection, and rulings on admission or exclusion of evidence must be shown by bill of exceptions in the record,[93]

83, 10 N. W. 552; Michel *v.* Ware, 3 Nebr. 229.

New Jersey.— Columbia Delaware Bridge Co. *v.* Geisse, 38 N. J. L. 39; Oliver *v.* Phelps, 21 N. J. L. 597; Moran *v.* Green, 21 N. J. L. 562.

New York.— West *v.* Van Tuyl, 119 N. Y. 620, 23 N. E. 450, 28 N. Y. St. 549; Richardson *v.* Hartmann, 68 Hun (N. Y.) 9, 22 N. Y. Suppl. 645, 52 N. Y. St. 41; Carroll *v.* O'Shea, 2 Misc. (N. Y.) 437, 21 N. Y. Suppl. 956, 51 N. Y. St. 579 [*affirming* 19 N. Y. Suppl. 374, 46 N. Y. St. 297].

Pennsylvania.— Norbeck *v.* Davis, 157 Pa. St. 399, 33 Wkly. Notes Cas. (Pa.) 150, 27 Atl. 712; Plank-Road Co. *v.* Ramage, 20 Pa. St. 95; Corkery *v.* O'Neill, 9 Pa. Super. Ct. 335, 43 Wkly. Notes Cas. (Pa.) 420.

Texas.— Willis *v.* Donac, 61 Tex. 588; Bonart *v.* Waag, 61 Tex. 33; Schoch *v.* San Antonio, (Tex. Civ. App. 1900) 57 S. W. 893.

West Virginia.— Carlton *v.* Mays, 8 W. Va. 245.

United States.— Ward *v.* Blake Mfg. Co., 56 Fed. 437, 12 U. S. App. 295, 5 C. C. A. 538.

See 3 Cent. Dig. tit. "Appeal and Error," § 2297.

88. Noyes *v.* Smith, (Me. 1887) 10 Atl. 462; Pratt *v.* Johnson, 6 Md. 397. See also Lewis *v.* Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385.

89. Toby *v.* Reed, 9 Conn. 216; Arambula *v.* Sullivan, 80 Tex. 615, 16 S. W. 436; Franklin *v.* Tiernan, 62 Tex. 92; Endick *v.* Endick, 61 Tex. 559; Flanagan *v.* Boggess, 46 Tex. 330; Calhoun *v.* Quinn, (Tex. Civ. App. 1892) 21 S. W. 705. *Contra*, Abshire *v.* Williams, 76 Ind. 97; Gore *v.* Gore, 3 Ind. 522. See also Richardson *v.* Stewart, 4 Binn. (Pa.) 198, holding that where the record does not show that any questions were asked on the trial as to the purpose of introducing a deed rejected as irrelevant, the aggrieved party may show that the deed was material in any aspect of his case.

90. *Connecticut.*— Toby *v.* Reed, 9 Conn. 216.

Georgia.— Keans *v.* Jones, 77 Ga. 90.

Indiana.— Wilkerson *v.* Springer, 16 Ind. 376.

Iowa.— Jones *v.* Currier, 65 Iowa 533, 22 N. W. 663.

Kentucky.— Kimberlin *v.* Faris, 5 Dana (Ky.) 533.

Louisiana.— Hale *v.* New Orleans, 13 La. Ann. 499.

Nevada.— State *v.* Lewis, 20 Nev. 333, 22 Pac. 241.

Ohio.— Armstrong *v.* Clark, 17 Ohio 495.

Texas.— Arambula *v.* Sullivan, 80 Tex. 615, 16 S. W. 436; Stark *v.* Ellis, 69 Tex. 543, 7 S. W. 76.

See 3 Cent. Dig. tit. "Appeal and Error," § 2297.

91. Singer *v.* Tormoehlen, 150 Ind. 287, 49 N. E. 1055.

92. *Indiana.*— Bowen *v.* Pollard, 71 Ind. 177.

Iowa.— Patterson *v.* Pitts, (Iowa 1900) 81 N. W. 689; Walker *v.* Dailey, 87 Iowa 375, 54 N. W. 344; McGarvy *v.* Roods, 73 Iowa 363, 35 N. W. 488.

Michigan.— Comstock *v.* Smith, 26 Mich. 306.

Nebraska.— Hanscom *v.* Meyer, 57 Nebr. 786, 78 N. W. 367, 73 Am. St. Rep. 544; Haller *v.* Blaco, 10 Nebr. 36, 4 N. W. 362.

Tennessee.— Stone *v.* Manning, 103 Tenn. 232, 52 N. W. 990; Montgomery *v.* Coldwell, 14 Lea (Tenn.) 29.

Texas.— Cundiff *v.* McLean, 40 Tex. 391.

Contra, School Dist. No. 4 *v.* Holmes, 53 Mo. App. 487.

See 3 Cent. Dig. tit. "Appeal and Error," § 2297.

Insufficient showing of ruling.— A recital in the record that the counsel assigning error "said," at the time of the admission of objectionable evidence, that the court overruled his objection, is not equivalent to a recital that "the court did" overrule such objection, there being nothing in the record showing that the court heard and assented to his remark. Powell *v.* McCord, 121 Ill. 330, 12 N. E. 262.

93. *Arkansas.*— Hezekiah *v.* Montross, 21 Ark. 454.

California.— Kelly *v.* Murphy, 70 Cal. 560, 12 Pac. 467.

Colorado.— Brahoney *v.* Denver, etc., R. Co., 14 Colo. 27, 23 Pac. 172.

Illinois.— Ritchey *v.* West, 23 Ill. 385.

Indiana.— Thomson *v.* Madison Bldg., etc., Assoc., 103 Ind. 279, 2 N. E. 735.

Iowa.— Williams *v.* Meeker, 29 Iowa 292.

Kentucky.— Kimberlin *v.* Faris, 5 Dana (Ky.) 533.

Louisiana.— Castell *v.* Castell, 28 La. Ann. 91; Hale *v.* New Orleans, 13 La. Ann. 499.

Massachusetts.— Cox *v.* Jackson, 6 Allen (Mass.) 108; Peirce *v.* Adams, 8 Mass. 383.

Missouri.—Woodburn *v.* Cogdal, 39 Mo. 222;

and such objections, grounds of objections, and rulings cannot be shown otherwise.[94]

(D) *Waiver of Rules of Evidence.* Where the parties agreed to waive the ordinary rules of evidence, their agreement must appear in the record.[95]

(E) *Alleged Altered Instrument Offered in Evidence.* The appellate court cannot assume that an instrument produced in evidence has been erased or altered; but the record must show the fact,[96] and the instrument should be copied in the record.[97] Where error is predicated on the action of the trial court in admitting or excluding an instrument offered in evidence, to which objection was made because of apparent alterations or interlineations, it seems that the practice adopted is to send up the original instrument for the inspection of the appellate court;[98] but the appellate court will refuse to order the original instrument to be sent up where it does not appear that any benefit could be derived from such a course, or that any information could be imparted to the court which is not already shown by the copy in the record.[99]

(IV) *Instructions.* Where it is alleged that the trial judge erred in giving certain instructions, the record must show that objections thereto were made at the time the instructions were given;[1] and an alleged refusal to give instructions

Hannibal, etc., R. Co. *v.* Moore, 37 Mo. 338; Demetz *v.* Benton, 35 Mo. App. 559.

Nebraska.— Haskell *v.* Valley County, 41 Nebr. 234, 59 N. W. 680; Republican Valley R. Co. *v.* Arnold, 13 Nebr. 485, 14 N. W. 478.

New Jersey.— Oliver *v.* Phelps, 21 N. J. L. 597.

Ohio.— Armstrong *v.* Clark, 17 Ohio 495.

Texas.— Franklin *v.* Tiernan, 62 Tex. 92; Whitaker *v.* Gee, 61 Tex. 217; Ortiz *v.* Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581; Yeised *v.* Burdett, 10 Tex. Civ. App. 155, 29 S. W. 912.

West Virginia.— Carlton *v.* Mays, 8 W. Va. 245.

United States.— Ward *v.* Blake Mfg. Co., 56 Fed. 437, 12 U. S. App. 295, 5 C. C. A. 538.

See 3 Cent. Dig. tit. "Appeal and Error," § 2297.

94. Hezekiah *v.* Montross, 21 Ark. 454; Thomson *v.* Madison Bldg., etc., Assoc., 103 Ind. 279, 2 N. E. 735; Kimberlin *v.* Faris, 5 Dana (Ky.) 533. *Contra*, Richmond, etc., R. Co. *v.* Leathers, 92 Ga. 93, 18 S. E. 360; Scott *v.* Zachry, 62 Ga. 573.

95. Kellogg *v.* Scheuerman, 18 Wash. 293, 51 Pac. 344, 52 Pac. 237.

96. Arn *v.* Matthews, 39 Kan. 272, 18 Pac. 65; Edelin *v.* Sanders, 8 Md. 118.

97. Hay *v.* Douglas, 2 Sweeny (N. Y.) 49.

98. *Alabama.*— Ward *v.* Cheney, 117 Ala. 238, 22 So. 996.

Illinois.— Merritt *v.* Boyden, (Ill. 1901) 60 N. E. 907 [*citing* Yocum *v.* Smith, 63 Ill. 321, 14 Am. Rep. 120; Riley *v.* Dickens, 19 Ill. 29; Prins *v.* South Branch Lumber Co., 20 Ill. App. 236]; Russell *v.* Peyton, 4 Ill. App. 473.

Iowa.— Wing *v.* Stewart, 68 Iowa 13, 25 N. W. 905.

Pennsylvania.— Heffner *v.* Wenrich, 32 Pa. St. 423.

South Dakota.— See Moddie *v.* Breiland, 9 S. D. 506, 70 N. W. 637, wherein it is held that, in order that a note sued on and excluded for alleged alterations may be inspected on appeal, it is not enough that it is a part of the bill of exceptions; but plaintiff should print the facsimile in his abstract, or allege that there was no alteration apparent on its face, and, if it is not denied by additional abstract, the contention would be conceded; or, if denied, the original could be examined.

Presumption in absence of instrument or proper record.— Where the record contains neither the original deed nor any description of supposed interlineations, the appellate court, if necessary to support the action of the lower court, will presume that the interlineations were not apparent on the face of the instrument, or that they were not suspicious. Ward *v.* Cheney, 117 Ala. 238, 22 So. 996; Sirrine *v.* Briggs, 31 Mich. 443; Munroe *v.* Eastman, 31 Mich. 283; People *v.* Minck, 21 N. Y. 539. But see, otherwise, Heffner *v.* Wenrich, 32 Pa. St. 423.

99. Bumpass *v.* Timms, 3 Sneed (Tenn.) 459.

1. *Colorado.*— Wray *v.* Carpenter, 16 Colo. 271, 27 Pac. 248, 25 Am. St. Rep. 265; Denver, etc., R. Co. *v.* Rosuck, 7 Colo. App. 288, 43 Pac. 456.

Indiana.— Weatherly *v.* Higgins, 6 Ind. 73.

Pennsylvania.— Curtis *v.* Winston, 186 Pa. St. 492, 42 Wkly. Notes Cas. (Pa.) 329, 40 Atl. 786; Corkery *v.* O'Neill, 9 Pa. Super. Ct. 335, 43 Wkly. Notes Cas. (Pa.) 420.

Texas.— Thatcher *v.* Mills, 14 Tex. 13, 65 Am. Dec. 95.

United States.— Hutchins *v.* King, 1 Wall. (U. S.) 53, 17 L. ed. 544.

See 3 Cent. Dig. tit. "Appeal and Error," § 2298.

Misdirection in matter of law.— Where a new trial was prayed for, on the ground that the jury were misdirected by the trial judge, in a matter of law, the record should show what the direction of the judge in the matter of law was. Bond *v.* Cutler, 7 Mass. 205.

Instruction to disregard law read by counsel. — The supreme court cannot consider an alleged error of the trial judge in instructing the jury not to be guided by the law read to them by counsel unless the record discloses what law was thus read. Goldin *v.* State, 104 Ga. 549, 30 S. E. 749.

is not available as error unless the record discloses a request therefor,[2] and the ruling of the trial judge upon the request.[3]

(v) *Findings of Fact.* Error predicated upon the refusal of the trial court to make findings requested will not be considered by the appellate court unless the record shows that findings were asked and refused.[4]

(vi) *Report or Reservation and Certification of Case.* Where questions of law arising on the trial are reported or reserved for the decision of the appellate court the questions reserved, and the proper reservation thereof, must be shown by the record,[5] which must be verified by the trial judge.[6]

b. Exceptions to Rulings — (i) *In General.* In order to obtain a review of the rulings of the trial court it must appear from the record that exceptions thereto were properly taken by appellant or plaintiff in error,[7] within the time

2. Hand *v.* Scodeletti, 128 Cal. 674, 61 Pac. 373; Citizens' St. R. Co. *v.* Hobbs, 15 Ind. App. 610, 43 N. E. 479, 44 N. E. 377.

3. Western Union Tel. Co. *v.* Eskridge, 7 Ind. App. 208, 33 N. E. 238.

4. Hooper *v.* Hooper, 26 Mich. 435; Gallagher *v.* Cornelius, 23 Mont. 27, 57 Pac. 447.

It is not sufficient that the record contains a paper showing objections and exceptions, if it is not settled in any bill or statement. Gallagher *v.* Cornelius, 23 Mont. 27, 57 Pac. 447.

5. Robinson *v.* Scott, 5 T. B. Mon. (Ky.) 278; Aldrich *v.* Boston, etc., R. Co., 100 Mass. 31, 97 Am. Dec. 74, 1 Am. Rep. 76; Destefano *v.* Calandriello, 57 N. J. L. 483, 31 Atl. 385; Tracy *v.* Card, 2 Ohio St. 431.

Time of reservation.— The reservation of the question of law must be made a part of the record at the time of the reservation, and the omission to do so is not cured by a statement of the reservation in the opinion of the court, filed on entering judgment. Buckley *v.* Duff, 111 Pa. St. 223, 3 Atl. 823.

6. Tracy *v.* Card, 2 Ohio St. 431.

7. *Alabama.*— Horn *v.* Grayson, 7 Port. (Ala.) 270.

Dakota.— Raymond *v.* Spicer, 6 Dak. 45, 50 N. W. 399; Golden Terra Min. Co. *v.* Smith, 2 Dak. 377, 11 N. W. 98.

Georgia.— Roberts *v.* Crowley, 81 Ga. 429, 7 S. E. 740.

Illinois.— Chicago, etc., R. Co. *v.* Calumet, 151 Ill. 512, 40 N. E. 625; Martin *v.* Foulke, 114 Ill. 206, 29 N. E. 683; Chicago, etc., R. Co. *v.* Lackman, 62 Ill. App. 437.

Indiana.— Memphis, etc., Packet Co. *v.* Pikey, 142 Ind. 304, 40 N. E. 527; Lipes *v.* Hand, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160; Conaway *v.* Conaway, 10 Ind. App. 229, 37 N. E. 189.

Iowa.— Krapfel *v.* Pfiffner, 24 Iowa 176; Young *v.* Peet, 18 Iowa 574.

Kansas.— Lalonde *v.* Collins, 5 Kan. 361.

Maine.— Manheim *v.* Carr, 62 Me. 473.

Maryland.— Stokes *v.* Detrick, 75 Md. 256, 23 Atl. 846; Ayres *v.* Kain, 3 Gill & J. (Md.) 24.

Massachusetts.— Doherty *v.* Lincoln, 114 Mass. 362.

Michigan.— Maclean *v.* Scripps, 52 Mich. 214, 17 N. W. 815, 18 N. W. 209; Wilkinson *v.* Earl, 39 Mich. 626.

Mississippi.— Neeley *v.* Planters' Bank, 4 Sm. & M. (Miss.) 113; Patterson *v.* Phillips, 1 How. (Miss.) 572.

Missouri.— Smith *v.* Smith, 20 Mo. 166; Steamboat Raritan *v.* Smith, 10 Mo. 527; Messerly *v.* Hull, 60 Mo. App. 132.

New Jersey.— Perth Amboy Mfg. Co. *v.* Condit, 21 N. J. L. 659; Coxe *v.* Field, 13 N. J. L. 215.

New York.— Enos *v.* Eisenbrodt, 32 N. Y. 444; Wilcox *v.* Hawley, 31 N. Y. 648; Weed *v.* New York, etc., R. Co., 29 N. Y. 616; Hunt *v.* Bloomer, 13 N. Y. 341, 12 How. Pr. (N. Y.) 567; Borley *v.* Wheeler, etc., Mfg. Co., 58 Hun (N. Y.) 605, 12 N. Y. Suppl. 45, 34 N. Y. St. 987; Abenheim *v.* Samuels, 49 Hun (N. Y.) 607, 1 N. Y. Suppl. 868, 16 N. Y. St. 907; Dainese *v.* Allen, 14 Abb. Pr. N. S. (N. Y.) 363.

North Carolina.— State *v.* Ashford, 120 N. C. 588, 26 S. E. 915; State *v.* King, 119 N. C. 910, 26 S. E. 261; Kendrick *v.* Dellinger, 117 N. C. 491, 23 S. E. 438; Clark's Code Civ. Proc. (1900), p. 774.

Ohio.— Geauga Iron Co. *v.* Street, 19 Ohio 300; Willenger *v.* Bramsche, 7 Ohio Cir. Ct. 208.

Oregon.— White *v.* School Dist. No. 5, (Oreg. 1892) 30 Pac. 313; Eaton *v.* Oregon R., etc., Co., 22 Oreg. 497, 30 Pac. 311.

Pennsylvania.— Com. *v.* Fleming, 157 Pa. St. 644, 27 Atl. 783.

South Carolina.— State *v.* Cason, 11 S. C. 392. *Compare* Lorick *v.* McCreery, 20 S. C. 424.

Texas.— Griffin *v.* Chadwick, 44 Tex. 406; Leaverton *v.* Leaverton, 40 Tex. 218.

Virginia.— Washington, etc., Tel. Co. *v.* Hobson, 15 Gratt. (Va.) 122.

Vermont.— Stilphen *v.* Read, 64 Vt. 400, 23 Atl. 725; Rutland, etc., R. Co. *v.* Thrall, 35 Vt. 536.

Wisconsin.— Eastland *v.* Fogo, 66 Wis. 133, 27 N. W. 159, 28 N. W. 143.

Wyoming.— Syndicate Imp. Co. *v.* Bradley, 6 Wyo. 171, 43 Pac. 79, 44 Pac. 60.

United States.— Norris *v.* Jackson, 9 Wall. (U. S.) 125, 19 L. ed. 608; Pomeroy *v.* Indiana State Bank, 1 Wall. (U. S.) 592, 17 L. ed. 638.

See 3 Cent. Dig. tit. "Appeal and Error," § 2300.

Exceptions to master's report.— The appellate court will not consider exceptions to the report of a master or referee unless the exceptions are incorporated in the record.

required by law.[8] The bill of exceptions being the proper place for such exceptions to appear,[9] it is insufficient if they are shown only by other parts of the record.[10]

(II) *As to Pleadings.* Rulings of the trial court affecting the sufficiency and form of pleadings will not be reviewed when the record does not show that exceptions were taken thereto.[11] So, too, the record must show an exception taken to an order permitting an amended answer to be filed.[12]

(III) *As to Evidence.* Rulings of the trial court admitting or excluding evidence against objections cannot be reviewed when the record fails to show clearly and affirmatively that exceptions were taken to such rulings[13] and

Alabama.— Stewart *v.* Cross, 66 Ala. 22.

Illinois.— Crown Coal, etc., Co. *v.* Thomas, 73 Ill. App. 679; Foster *v.* Van Ostern, 72 Ill. App. 307.

Massachusetts.— Smith *v.* Butler, 176 Mass. 38, 57 N. E. 322.

Michigan.— Loveland *v.* Peter, 108 Mich. 154, 65 N. W. 748.

New York.— Sutherland *v.* Rose, 47 Barb. (N. Y.) 144.

North Carolina.— Perry *v.* Hardison, 99 N. C. 21, 5 S. E. 230; Rhyne *v.* Love, 98 N. C. 486, 4 S. E. 536; Traders' Nat. Bank *v.* Lawrence Mfg. Co., 96 N. C. 298, 3 S. E. 363.

United States.— Topliff *v.* Topliff, 145 U. S. 156, 12 S. Ct. 825, 36 L. ed. 658; Belford *v.* Scribner, 144 U. S. 488, 12 S. Ct. 734, 36 L. ed. 514.

8. *Alabama.*— Tombeckbee Bank *v.* Malone, 1 Stew. (Ala.) 269.

Georgia.— Roberts *v.* Crowley, 81 Ga. 429, 7 S. E. 740.

Kentucky.— Vandever *v.* Griffith, 2 Metc. (Ky.) 425.

Missouri.— McAnaw *v.* Matthis, 129 Mo. 142, 31 S. W. 344.

North Carolina.—State *v.* Harris, 120 N. C. 577, 26 S. E. 774; State *v.* Downs, 118 N. C. 1242, 24 S. E. 531; Tucker *v.* Inter-States L. Assoc., 112 N. C. 796, 17 S. E. 532.

Ohio.— Willenger *v.* Bramsche, 7 Ohio Cir. Ct. 208.

Virginia.— Powell *v.* Tarry, 77 Va. 250; Washington, etc., Tel. Co. *v.* Hobson, 15 Gratt. (Va.) 122.

United States.— Pacific Express Co. *v.* Malin, 132 U. S. 531, 10 S. Ct. 166, 33 L. ed. 450.

See 3 Cent. Dig. tit. "Appeal and Error," § 2300.

9. *Colorado.*— German Nat. Bank *v.* Elwood, 16 Colo. 244, 27 Pac. 705.

Illinois.— Chicago, etc., R. Co. *v.* Calumet, 151 Ill. 512, 40 N. E. 625; Martin *v.* Foulke, 114 Ill. 206, 29 N. E. 683; Harrison *v.* Boetter, 88 Ill. App. 549.

Maryland.— Ayres *v.* Kain, 3 Gill & J. (Md.) 24; Dorsey *v.* Whetcroft, 1 Harr. & J. (Md.) 463.

Michigan.— Maclean *v.* Scripps, 52 Mich. 214, 17 N. W. 815, 18 N. W. 209.

Mississippi.— Patterson *v.* Phillips, 1 How. (Miss.) 572.

New Jersey.— Perth Amboy Mfg. Co. *v.* Condit, 21 N. J. L. 659.

North Carolina.—Upper Appomattox Co. *v.* Buffaloe, 121 N. C. 37, 27 S. E. 999.

Ohio.— Geauga Iron Co. *v.* Street, 19 Ohio 300.

United States.— Pacific Express Co. *v.* Colvin, 132 U. S. 531, 10 S. Ct. 166, 33 L. ed. 450; Pomeroy *v.* Indiana State Bank, 1 Wall. (U. S.) 592, 17 L. ed. 638.

See 3 Cent. Dig. tit. "Appeal and Error," § 2300.

10. Frieder *v.* B. Goodman Mfg. Co., 101 Ala. 242, 13 So. 423; German Nat. Bank *v.* Elwood, 16 Colo. 244, 27 Pac. 705; Harrison *v.* Boetter, 88 Ill. App. 549; Young *v.* Young, 133 N. Y. 626, 30 N. E. 1012, 44 N. Y. St. 909 [*reversing* 18 N. Y. Suppl. 116, 44 N. Y. St. 652]. *Contra,* O'Neal *v.* District of Columbia, MacArthur & M. (D. C.) 68; Kœhler *v.* Ball, 2 Kan. 160, 83 Am. Dec. 451; Blumer *v.* Bennett, 44 Nebr. 873, 63 N. W. 14.

11. State *v.* Mustard, 80 Ind. 280; Rees *v.* Cupp, 59 Ind. 566; McCormick Harvesting Mach. Co. *v.* Russell, 86 Iowa 556, 53 N. W. 310; Linn County *v.* Day, 18 Iowa 581; Hopson *v.* Schoelkopf, (Tex. Civ. App. 1894) 27 S. W. 283; Levis *v.* Black River Imp. Co., (Wis. 1900) 81 N. W. 405.

See 3 Cent. Dig. tit. "Appeal and Error," § 2301.

Sufficient showing of exception.— Where a demurrer to a complaint has been sustained, and plaintiff excepts to the ruling of the court by bill of exceptions, which states that, "After hearing the argument, the court sustains the demurrer, to which opinion the plaintiff excepts," this is sufficient to show that the exception was taken at the time the ruling was made. Pace *v.* Oppenheim, 12 Ind. 533.

12. Hiatt *v.* Kinkaid, 40 Nebr. 178, 58 N. W. 700.

13. *Alabama.*— Croft *v.* Ferrell, 21 Ala. 351.

Illinois.— Shober, etc., Lithographing Co. *v.* Kerting, 107 Ill. 344; Indianapolis, etc., R. Co. *v.* Rhodes, 76 Ill. 285.

Indiana.— Rains *v.* Ballow, 54 Ind. 79.

Iowa.— Spelman *v.* Gill, 75 Iowa 717, 38 N. W. 168; Gale *v.* Bohanan, 73 Iowa 501, 35 N. W. 599.

Maryland.— Ashton *v.* Ashton, 35 Md. 496.

Michigan.— Comstock *v.* Smith, 26 Mich. 306.

Mississippi.— Deloach *v.* Walker, 7 How. (Miss.) 164.

Missouri.— Downey *v.* Read, 125 Mo. 501, 28 S. W. 860; Bray *v.* Kremp, 113 Mo. 552, 21 S. W. 220; Logan *v.* Enterprise Invest., etc., Co., 47 Mo. App. 510.

New York.— Carey *v.* Carey, 4 Daly (N. Y.)

that such exceptions were taken in the court below at the time the rulings complained of were made.[14]

(IV) *Instructions.* When it is sought to review the action of the trial court in giving or refusing instructions, the record must show that exceptions thereto were reserved in the manner,[15] and at the time,[16] prescribed by law.

(V) *Dismissal and Nonsuit.* The ruling of the trial court upon a nonsuit, or motion to dismiss, presenting a question of law, no review thereof can be had when the record fails to show that a proper exception was taken to the ruling.[17]

270. *Compare* Sanger *v.* Vail, 4 Abb. Pr. (N. Y.) 217, 13 How. Pr. (N. Y.) 500.

North Carolina.— Greensboro *v.* McAdoo, 110 N. C. 430, 14 S. E. 974; Watts *v.* Warren, 108 N. C. 514, 13 S. E. 232; Ferrell *v.* Thompson, 107 N. C. 420, 12 S. E. 109, 10 L. R. A. 361.

Texas.— Ballew *v.* Casey, (Tex. 1888) 9 S. W. 189; Saul *v.* Frame, 3 Tex. Civ. App. 596, 22 S. W. 984.

United States.— Newport News, etc., R. Co. *v.* Pace, 158 U. S. 36, 15 S. Ct. 743, 39 L. ed. 887; San Pedro, etc., Co. *v.* U. S., 146 U. S. 120, 13 S. Ct. 94, 36 L. ed. 911; Marion Phosphate Co. *v.* Cummer, 60 Fed. 873, 13 U. S. App. 604, 9 C. C. A. 279.

See 3 Cent. Dig. tit. "Appeal and Error," § 2303.

Judgment on exception.—In Wisconsin, it is necessary that the record should show not only an exception to the ruling on evidence, but the judgment of the court upon the exception. Nevil *v.* Clifford, 51 Wis. 483, 8 N. W. 296; Johannes *v.* Youngs, 42 Wis. 401.

14. *Arizona.*—Sutherland *v.* Putnam, (Ariz. 1890) 24 Pac. 320.

Illinois.— Shober, etc., Lithographing Co. *v.* Kerting, 107 Ill. 344.

Mississippi.— Deloach *v.* Walker, 7 How. (Miss.) 164.

Missouri.— Downey *v.* Read, 125 Mo. 501, 28 S. W. 860; Bray *v.* Kremp, 113 Mo. 552, 21 S. W. 220.

North Carolina.—Posey *v.* Patton, 109 N. C. 455, 14 S. E. 64.

United States.— Hutchins *v.* King, 1 Wall. (U. S.) 53, 17 L. ed. 544.

See 3 Cent. Dig. tit. "Appeal and Error," § 2303.

15. *Illinois.*— Shober, etc., Lithographing Co. *v.* Kerting, 107 Ill. 344; Indianapolis, etc., R. Co. *v.* Rhodes, 76 Ill. 285; Love *v.* Moynehan, 16 Ill. 277, 63 Am. Dec. 306; Gaynor *v.* Pease Furnace Co., 51 Ill. App. 292.

Indiana.— Indiana, etc., R. Co. *v.* Bundy, 152 Ind. 590, 53 N. E. 175; Jenkins *v.* Wilson, 140 Ind. 544, 40 N. E. 39; Richardson *v.* League, 21 Ind. App. 429, 52 N. E. 618.

Iowa.— Bowman *v.* Western Fur Mfg. Co., 96 Iowa 188, 64 N. W. 775; State *v.* Lavin, 80 Iowa 555, 46 N. W. 553.

Kansas.— Kansas Pac. R. Co. *v.* Nichols, 9 Kan. 235, 12 Am. Rep. 494.

Maryland.— Lewis *v.* Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385.

Mississippi.—Bourland *v.* Itawamba County, 60 Miss. 996.

Missouri.— Elsner *v.* Supreme Lodge, etc., 98 Mo. 640, 11 S. W. 991; Logan *v.* Enterprise Invest., etc., Co., 47 Mo. App. 510.

Nebraska.— State *v.* Bartley, 56 Nebr. 810, 77 N. W. 438; Lowe *v.* Vaughan, 48 Nebr. 651, 67 N. W. 464.

North Carolina.— State *v.* Harris, 120 N. C. 577, 26 S. E. 774; Blackburn *v.* St. Paul F. & M. Ins. Co., 116 N. C. 821, 21 S. E. 922; Ferrell *v.* Thompson, 107 N. C. 420, 12 S. E. 109, 10 L. R. A. 361; Bernard *v.* Johnston, 78 N. C. 25.

Pennsylvania.— Thomas *v.* Johnson, 175 Pa. St. 458, 34 Atl. 845.

South Carolina.— Sullivan *v.* Sullivan, 20 S. C. 509.

Utah.— Hadra *v.* Utah Nat. Bank, 9 Utah 412, 35 Pac. 508.

Wisconsin.— Cotton *v.* Watkins, 6 Wis. 629.

United States.— New Orleans, etc., R. Co. *v.* Jopes, 142 U. S. 18, 12 S. Ct. 109, 35 L. ed. 919; Crane *v.* Crane, 5 Pet. (U. S.) 190, 8 L. ed. 92; American Cent. Ins. Co. *v.* Heiserman, 67 Fed. 947, 32 U. S. App. 409, 15 C. C. A. 95.

See 3 Cent. Dig. tit. "Appeal and Error," § 2304.

16. Charlesworth *v.* Williams, 16 Ill. 338; Hesler *v.* Degant, 3 Ind. 501; Citizens' St. R. Co. *v.* Hobbs, 15 Ind. App. 610, 43 N. E. 479, 44 N. E. 377; Watson *v.* Stotts, 68 Iowa 659, 27 N. W. 127; Whitney *v.* Olmstead, 5 Iowa 373; Gover *v.* Dill, 3 Iowa 337; Taylor *v.* Plummer, 105 N. C. 56, 11 S. E. 266; New Orleans, etc., R. Co. *v.* Jopes, 142 U. S. 18, 12 S. Ct. 109, 35 L. ed. 919.

17. Craig *v.* Hesperia Land, etc., Co., 107 Cal. 675, 40 Pac. 1057; Malone *v.* Beardsley, 92 Cal. 150, 28 Pac. 218; Pritchard *v.* Hirt, 39 Hun (N. Y.) 378.

Sufficient showing of exception.— Where the bill of exceptions, after stating that the motion to dismiss was granted, and that the court thereupon dismissed the suit, added: "To which ruling of the court to dismiss said suit the said plaintiff excepts and prays an appeal," it was held that this was sufficient to show that the exception was taken at the time the ruling was made. Northrup *v.* Smothers, 39 Ill. App. 588; Crews *v.* Cantwell, 125 N. C. 516, 34 S. E. 688.

Insufficient showing of exception.— The record showed that, after plaintiff's evidence was in, defendant moved to instruct the jury to return a verdict for defendant. Pending the argument of the motion, the jury were excused, and the court having sustained the motion, "and the jury being absent, the making of the entry is continued" till next day, at which time "plaintiff moves . . . to dismiss her action," and afterward, on the same day, "this matter coming on for hearing upon

(VI) *Findings of Fact and Decision.* In a cause tried without the intervention of a jury, neither the judge's findings of fact, nor the judgment thereon, can be questioned in the appellate court unless the record discloses exceptions thereto, taken in the lower court,[18] and this can only be shown by the bill of exceptions.[19]

c. Motions for New Trial— (I) *In General.* When the record does not contain a motion for new trial, the appellate court will not review the action of the lower court in granting or refusing such motion,[20] and will disregard matters [21] and alleged errors which should have been brought to the attention of the trial court by motion for new trial.[22] While the general rule is otherwise, it has

the motion of the plaintiff, . . . the court . . . doth overrule said motion. Thereupon the jury is instructed by the court to return a verdict for the defendant, which is accordingly done, to which plaintiff excepts." It was held that the record showed no exception taken to the ruling of the court refusing to allow plaintiff's motion to dismiss. Westlake *v.* Muscatine, 85 Iowa 119, 52 N. W. 117.

18. *Alabama.*— Denson *v.* Gray, 113 Ala. 608, 21 So. 925; Hood *v.* Pioneer Min., etc., Co., 95 Ala. 461, 11 So. 10.

California.— Hutchinson *v.* Ryan, 11 Cal. 142.

Illinois.— Martin *v.* Foulke, 114 Ill. 206, 29 N. E. 683; Sherman *v.* Skinner, 83 Ill. 584; Wehrheim *v.* Thiel Detective Co., 87 Ill. App. 565.

Michigan.— Wertin *v.* Crocker, 47 Mich. 642, 6 N. W. 683.

New York.— West *v.* Van Tuyl, 119 N. Y. 620, 23 N. E. 450, 28 N. Y. St. 549. See also Dainese *v.* Allen, 36 N. Y. Super. Ct. 98, 14 Abb. Pr. N. S. (N. Y.) 363.

Contra, Mitchell *v.* Baratta, 17 Gratt. (Va.) 445; Board of Education *v.* Parsons, 24 W. Va. 551.

See 3 Cent. Dig. tit. "Appeal and Error," § 2305.

Appeal sufficient exception.—In North Carolina the rule is that "the appeal is itself a sufficient exception to the judgment" because the judgment, being a part of the record proper, no formal exception thereto need be entered. Delozier *v.* Bird, 123 N. C. 689, 31 S. E. 834. If the findings of fact, a jury being waived, are not excepted to, the finding is not reviewable. White *v.* Morris, 107 N. C. 92, 12 S. E. 80.

19. Denson *v.* Gray, 113 Ala. 608, 21 So. 925; Hood *v.* Pioneer Min., etc., Co., 95 Ala. 461, 11 So. 10; Percy Consol. Min. Co. *v.* Hallam, 22 Colo. 233, 44 Pac. 509; Martin *v.* Foulke, 114 Ill. 206, 29 N. E. 683; Wehrheim *v.* Thiel Detective Co., 87 Ill. App. 565; Ettlinger Printing Co. *v.* Copelin, 76 Ill. App. 520; Everett *v.* Collinsville Zinc Co., 41 Ill. App. 552; Lewis *v.* May, 22 Iowa 599. *Compare* Western Union Tel. Co. *v.* Trissal, 98 Ind. 566, which holds that an exception, although informal, is sufficient when it follows the finding and judgment in the same entry.

20. *Georgia.*— Cruce *v.* State, 63 Ga. 159.

Illinois.— Horn *v.* Eckert, 63 Ill. 522.

Indiana.—New Albany *v.* Iron Substructure Co., 141 Ind. 500, 40 N. E. 44; La Follette *v.* Higgins, 109 Ind. 241, 9 N. E. 780; Anheuser-Busch Brewing Assoc. *v.* George, 14 Ind. App. 1, 42 N. E. 245.

Kansas.— Illingsworth *v.* Stanley, 40 Kan. 61, 19 Pac. 352; Typer *v.* Sooy, 19 Kan. 593.

Mississippi.— New Orleans, etc., R. Co. *v.* Allbritton, 38 Miss. 242, 75 Am. Dec. 98.

Missouri.— Arnold *v.* Boyer, 108 Mo. 310, 18 S. W. 913; Ward *v.* Quinlivin, 65 Mo. 453.

Montana.— Gum *v.* Murray, 6 Mont. 10, 9 Pac. 447; Helena First Nat. Bank *v.* McAndrews, 5 Mont. 251, 5 Pac. 279.

Nebraska.— Brown *v.* Johnson, 58 Nebr. 222, 78 N. W. 515.

Tennessee.— Nashville, etc., R. Co. *v.* Egerton, 98 Tenn. 541, 41 S. W. 1035.

See 3 Cent. Dig. tit. "Appeal and Error," § 2306.

The record need not show a judgment, where an appeal is taken from an order denying a motion for a new trial, for the reason that, if the order is reversed, the effect is to vacate the judgment, if any has been entered. Bedford *v.* Kissick, 8 S. D. 586, 67 N. W. 609.

21. As, for instance, an objection to the form of the verdict (Weatherly *v.* Higgins, 6 Ind. 73), or an objection that the verdict is contrary to the evidence (Providence Gold-Min. Co. *v.* Marks, (Ariz. 1900) 60 Pac. 938; Ogden *v.* Danz, 22 Ill. App. 544; Hover *v.* Cockins, 17 Kan. 518).

22. *Arizona.*— Providence Gold-Min. Co. *v.* Marks, (Ariz. 1900) 60 Pac. 938; Sutherland *v.* Putnam, (Ariz. 1890) 24 Pac. 320.

Arkansas.— Berman *v.* Wolf, 40 Ark. 251.

Illinois.— Springfield F. & M. Ins. Co. *v.* Newman, 31 Ill. App. 393.

Indiana.— La Follette *v.* Higgins, 109 Ind. 241, 9 N. E. 780; Patterson *v.* State, 91 Ind. 364.

Kansas.— Gille *v.* Emmons, 61 Kan. 217, 59 Pac. 338; Cole *v.* Bower, 53 Kan. 468, 36 Pac. 1000.

Missouri.—State *v.* Burckhartt, 83 Mo. 430; Bollinger *v.* Carrier, 79 Mo. 318; Furber *v.* Conway, 23 Mo. App. 412.

Nebraska.— Chicago, etc., R. Co. *v.* Young, 58 Nebr. 678, 79 N. W. 556; Scroggin *v.* National Lumber Co., 41 Nebr. 195, 59 N. W. 548.

Tennessee.— Nashville, etc., R. Co. *v.* Egerton, 98 Tenn. 541, 41 S. W. 1035.

Washington.— Clarke County *v.* Clarke County Com'rs, 1 Wash. Terr. 250.

Wyoming.— Garbanati *v.* Uinta County, 2 Wyo. 257; Geer *v.* Murrin, 1 Wyo. 37.

See 3 Cent. Dig. tit. "Appeal and Error," § 2306.

been held that objections to the findings of the lower court, where the trial was without a jury, will not be considered on review unless the record contains a motion for new trial.[23] The motion must be set out in the record, the weight of authority indicating the bill of exceptions as the proper place, although there is some conflict on this point.[24] The authorities are agreed, however, that a mere recital, in the bill of exceptions, that the motion was made is insufficient.[25] The absence of the motion cannot be supplied by stipulation of counsel as to the contents of the motion.[26]

(II) *Grounds of Motion.* It is essential that the record should disclose the grounds upon which the motion for new trial was based.[27] The record must show compliance with a statutory requirement that the grounds for the motion should be stated in writing,[28] and the statement and affidavits used upon the hearing of the motion must be included in the record.[29]

(III) *Notice of Motion.* When there is a statute requiring that notice of the motion shall be filed and served upon the adverse party, the record must show, affirmatively, compliance therewith.[30]

Appeal from court of claims.— A motion for a new trial should not be embodied in the record transmitted from the court of claims to the supreme court of the United States. Kellogg *v.* U. S., 18 Ct. Cl. 73.

23. Duncan *v.* Chandler, 5 Ill. App. 499; La Follette *v.* Higgins, 109 Ind. 241, 9 N. E. 780.

24. Horn *v.* Eckert, 63 Ill. 522; State *v.* Burckhartt, 83 Mo. 430; Baker *v.* Loring, 65 Mo. 527; Collins *v.* Barding, 65 Mo. 496; Ward *v.* Quinlivin, 65 Mo. 453; Rotchford *v.* Creamer, 65 Mo. 48; Garbanati *v.* Uinta County, 2 Wyo. 257; Geer *v.* Murrin, 1 Wyo. 37; Murrin *v.* Ullman, 1 Wyo. 36. *Compare* Arnold *v.* Boyer, 108 Mo. 310, 18 S. W. 913, and State *v.* Gaither, 77 Mo. 304.

Must be in record proper.— Nashville, etc., R. Co. *v.* Egerton, 98 Tenn. 541, 41 S. W. 1035.

25. *Arizona.*—Sutherland *v.* Putnam, (Ariz. 1890) 24 Pac. 320.

Kansas.— White *v.* Douglas, 51 Kan. 402, 32 Pac. 1092; Illingsworth *v.* Stanley, 40 Kan. 61, 19 Pac. 352.

Mississippi.— New Orleans, etc., R. Co. *v.* Allbritton, 38 Miss. 242, 75 Am. Dec. 98.

Missouri.— Collins *v.* Barding, 65 Mo. 496; Rotchford *v.* Creamer, 65 Mo. 48.

Tennessee.— Nashville, etc., R. Co. *v.* Egerton, 98 Tenn. 541, 41 S. W. 1035.

Compare Brittain *v.* Griggs, 88 Ga. 232, 14 S. E. 609.

26. Parker *v.* Remington Sewing-Mach. Co., 24 Kan. 31.

27. *Arizona.*— Providence Gold-Min. Co. *v.* Marks, (Ariz. 1900) 60 Pac. 938; Sutherland *v.* Putnam, (Ariz. 1890) 24 Pac. 320.

Indiana.— Earnest *v.* Shoemaker, 10 Ind. App. 696, 38 N. E. 543.

Iowa.— Kennedy *v.* Des Moines, 84 Iowa 187, 50 N. W. 880.

Kansas.— List *v.* Jockheck, 59 Kan. 143, 52 Pac. 420; Cole *v.* Bower, 53 Kan. 468, 36 Pac. 1000; White *v.* Douglas, 51 Kan. 402, 32 Pac. 1092; Illingsworth *v.* Stanley, 40 Kan. 61, 19 Pac. 352.

Kentucky.— Booton *v.* Floyd County, 13 Ky. L. Rep. 877; May *v.* Deposit Bank, 5 Ky. L. Rep. 682.

Minnesota.— Clark *v.* C. N. Nelson Lumber Co., 34 Minn. 289, 25 N. W. 628. *Compare* Searles *v.* Thompson, 18 Minn. 316.

New York.— Dresser *v.* Boatmen's F. & M. Ins. Co., 47 Hun (N. Y.) 153; Coakley *v.* Nahar, 36 Hun (N. Y.) 157; Alfaro *v.* Davidson, 39 N. Y. Super. Ct. 463; Gridley *v.* St. Francis Xavier College, 17 N. Y. Suppl. 653, 45 N. Y. St. 1; McDermott *v.* Conley, 11 N. Y. Suppl. 403, 33 N. Y. St. 560; Stedman *v.* Batchelor, 8 N. Y. Suppl. 37, 28 N. Y. St. 436. *Compare* Cowles *v.* Watson, 14 Hun (N. Y.) 41.

Ohio.— Randall *v.* Turner, 17 Ohio St. 262.

Virginia.— McArter *v.* Grigsby, 84 Va. 159, 4 S. E. 369.

28. La Follette *v.* Higgins, 109 Ind. 241, 9 N. E. 780; Kissell *v.* Anderson, 73 Ind. 485; Kirby *v.* Cannon, 9 Ind. 371. But see Ottawa, etc., R. Co. *v.* McMath, 91 Ill. 104, holding that this is unnecessary, when neither the court nor the opposite party requires that it be done.

29. Bodley *v.* Ferguson, 25 Cal. 584; Loucks *v.* Edmondson, 18 Cal. 203; Horn *v.* Eckert, 63 Ill. 522; Ballard *v.* Chicago, etc., R. Co., 51 Mo. App. 453. But the record must show that they were filed and used below (Whipple *v.* Hopkins, 119 Cal. 349, 51 Pac. 535; Fitzgerald *v.* Wygal, (Tex. Civ. App. 1900) 59 S. W. 621), and the statement is unnecessary when the only point is as to whether it was filed in time (Harper *v.* Minor, 27 Cal. 107).

30. Gum *v.* Murray, 6 Mont. 10, 9 Pac. 447; Helena First Nat. Bank *v.* McAndrews, 5 Mont. 251, 5 Pac. 279; and 3 Cent. Dig. tit. "Appeal and Error," § 2307.

But in California it is held that the notice need not appear in the record, and that, in order to predicate error on its absence, the record must show affirmatively that no notice was given, the California code of civil procedure not requiring that the notice should be made part of the judgment-roll. Nippert *v.* Warneke, 128 Cal. 501, 61 Pac. 96, 270; Kahn *v.* Wilson, 120 Cal. 643, 53 Pac. 24; Scott *v.* Wood, 81 Cal. 398, 22 Pac. 871; Gage *v.* Downey, 79 Cal. 140, 21 Pac. 527, 855; Pico *v.* Cohn, 78 Cal. 384, 20 Pac. 706; Braly *v.* Henry, (Cal. 1888) 18 Pac. 798.

(IV) *Time of Filing.* It must appear clearly and affirmatively from the record that the motion for new trial was filed within the time fixed by law.[31] Where the time was extended by order of the court or agreement of counsel, the record should show these facts, and should also show that the motion was filed within the extended time.[32]

(V) *Decision on Motion*—(A) *In General.* It is necessary that the record should show the disposition made by the trial judge of the motion for new trial.[33]

(B) *Must Be Set Out in Record Proper.* The ruling or order on the motion must be set out in the record proper,[34] and not in the bill of exceptions.[35] It follows, therefore, that the ruling is not sufficiently shown by a minute entry which does not set the ruling out,[36] although it has been held that a recital in the bill of exceptions that the motion had been disposed of is sufficient.[37]

(C) *Grounds of Decision.* It has also been held that the record must show the grounds upon which the new trial was granted or refused.[38]

31. *Indiana.*— Wallace *v.* Ransdell, 90 Ind. 173; Pennsylvania Co. *v.* Sedwick, 59 Ind. 336.

Iowa.— Rowen *v.* Sommers, 101 Iowa 734, 66 N. W. 897; McKissick *v.* Chandler, 58 Iowa 757, 12 N. W. 629.

Kansas.— Julius Winkelmeyer Brewing Assoc. *v.* Wolff, 53 Kan. 323, 36 Pac. 711.

Kentucky.— Webb *v.* Vermillion, 13 Ky. L. Rep. 367.

Missouri.—Bollinger *v.* Carrier, 79 Mo. 318; Welsh *v.* St. Louis, 73 Mo. 71; Monett Bank *v.* Stone, 80 Mo. App. 406; Bruns *v.* Capstick, 62 Mo. App. 57.

See 3 Cent. Dig. tit. "Appeal and Error," § 2308.

But objection must be made in trial court or it is not available on appeal. Twist *v.* Kelly, 11 Nev. 377.

Sufficient showing as to time.— Morrison *v.* Wells, 48 Kan. 494, 29 Pac. 601; Elliott *v.* Missouri Pac. R. Co., 8 Kan. App. 191, 55 Pac. 490; St. Louis, etc., R. Co. *v.* Blakely, 6 Kan. App. 814, 49 Pac. 752; Joseph Schlitz Brewing Co. *v.* Duncan, 6 Kan. App. 178, 51 Pac. 310; Webb *v.* Vermillion, 13 Ky. L. Rep. 367; Duff *v.* Neilson, 90 Mo. 93, 2 S. W. 222.

Insufficient showing as to time.— Demske *v.* Hunter. 23 Mo. App. 466.

32. Pennsylvania Co. *v.* Sedwick, 59 Ind. 336.

33. *Arizona.*— Providence Gold-Min. Co. *v.* Marks, (Ariz. 1900) 60 Pac. 938; Fleury *v.* Jackson, 1 Ariz. 361, 25 Pac. 669; Sutherland *v.* Putnam, (Ariz. 1890) 24 Pac. 320.

Indiana.— *Compare* State *v.* Hitchens, 25 Ind. App. 244, 57 N. E. 935.

Iowa.—Kennedy *v.* Des Moines, 84 Iowa 187, 50 N. W. 880; McKissick *v.* Chandler, 58 Iowa 757, 12 N. W. 629; Martin *v.* State F. Ins. Co., 58 Iowa 609, 12 N. W. 624.

Kansas.— Ft. Scott *v.* Deeds, 36 Kan. 621, 14 Pac. 268; Rexford *v.* Kansas First Mortg. Co., 7 Kan. App. 663, 53 Pac. 886.

Minnesota.— Granite Sav. Bank, etc., Co. *v.* Weinberg, 62 Minn. 202, 64 N. W. 380.

Mississippi.— New Orleans, etc., R. Co. *v.* Pressley, 45 Miss. 66; Byrne *v.* Cummings, 41 Miss. 192; Melius *v.* Houston, 41 Miss. 59; New Orleans, etc., R. Co. *v.* Allbritton, 38 Miss. 242, 75 Am. Dec. 98.

Missouri.— State *v.* Burckhartt, 83 Mo. 430.

Nebraska.— Chicago, etc., R. Co. *v.* Young, 58 Nebr. 678, 79 N. W. 556; Scroggin *v.* National Lumber Co., 41 Nebr. 195, 59 N. W. 548.

Wisconsin.— Kellogg *v.* Smith, 10 Wis. 135.

See 3 Cent. Dig. tit. "Appeal and Error," § 2309.

34. *Arizona.*— Fleury *v.* Jackson, 1 Ariz. 361, 25 Pac. 669.

Kansas.— Rexroad *v.* Kansas First Mortg. Co., 7 Kan. App. 663, 53 Pac. 886.

Mississippi.— Byrne *v.* Cummings, 41 Miss. 192; Melius *v.* Houston, 41 Miss. 59; New Orleans, etc., R. Co. *v.* Allbritton, 38 Miss. 242, 75 Am. Dec. 98.

New York.— Richardson *v.* Hartmann, 68 Hun (N. Y.) 9, 22 N. Y. Suppl. 645, 52 N. Y. St. 41; Coakley *v.* Mahar, 36 Hun (N. Y.) 157; Levy *v.* Coogan, 16 Daly (N. Y.) 137, 9 N. Y. Suppl. 534, 30 N. Y. St. 553; Victory *v.* Foran, 56 N. Y. Super. Ct. 507, 4 N. Y. Suppl. 392, 24 N. Y. St. 27; Steubing *v.* New York El. R. Co., 19 N. Y. Suppl. 313, 46 N. Y. St. 799 [*affirmed* in 138 N. Y. 658, 34 N. E. 369, 53 N. Y. St. 186]; Gridley *v.* St. Francis Xavier College, 17 N. Y. Suppl. 653, 45 N. Y. St. 1; Blohm *v.* Bamber, 10 N. Y. Suppl. 98, 31 N. Y. St. 816.

Ohio.— Windhorst *v.* Wilhelms, 1 Ohio Cir. Ct. 28, 1 Ohio Cir. Dec. 17.

Texas.— Forrest *v.* Rawlings, 40 Tex. 502.

Wisconsin.— Hendricks *v.* Van Camp, 10 Wis. 442.

35. Byrne *v.* Cummings, 41 Miss. 192; Melius *v.* Houston, 41 Miss. 59; New Orleans, etc., R. Co. *v.* Allbritton, 38 Miss. 242, 75 Am. Dec. 98. *Contra*, State *v.* Burckhartt, 83 Mo. 430.

36. Sutherland *v.* Putnam, (Ariz. 1890) 24 Pac. 320; Blohm *v.* Bamber, 10 N. Y. Suppl. 98, 31 N. Y. St. 816.

37. Wilk *v.* Key, 117 Ala. 285, 23 So. 6; King *v.* Ohio Valley R. Co., 10 Ky. L. Rep. 748, 10 S. W. 631.

38. Sweetser *v.* Mellick, (Ida. 1898) 51 Pac. 985. And that the record must show all the facts upon which the ruling was based, otherwise it will be presumed that granting the new trial was an exercise of the discretionary power of the court. Braid *v.* Lukins, 95 N. C. 123; Keller *v.* Gilman, 96 Wis. 445, 71 N. W. 809, holding that the statement of the trial judge showing the grounds upon which a new

(VI) *Exception to Decision.* The appellate court will not review an order or ruling, upon a motion for new trial, unless the record shows that an exception, thereto was taken by appellant[39] at the time the ruling was made or the order entered.[40] Such exception must appear in the bill of exceptions,[41] and not in the record proper.[42]

8. Proceedings of Intermediate Courts. On an appeal or writ of error from a judgment of an intermediate court having jurisdiction of appeals from courts of record, reversing a judgment of a lower court, the record must show the grounds of reversal,[43] and that the judgment of the intermediate court is conclusive of the case, provided the evidence shall be the same upon another trial.[44]

B. Scope and Contents of Record Proper — 1. Matters Included — a. In General. Whatever proceedings or facts the law or practice of the court requires to be enrolled constitute and form a part of the record;[45] but what it is not necessary to enroll does not form any part of the record unless made so by order of the court, by agreement of parties, by a demurrer to evidence, by oyer,

trial was granted is no part of the record in respect to which errors may be assigned.

39. *Arizona.*—Sutherland *v.* Putnam, (Ariz. 1890) 24 Pac. 320.

Arkansas.— Berman *v.* Wolf, 40 Ark. 251.

California.— Mazkewitz *v.* Pimentel, 83 Cal. 450, 23 Pac. 527.

Illinois.— Stern *v.* People, 96 Ill. 475; Love *v.* Moynehan, 16 Ill. 277, 63 Am. Dec. 306; McCormick Harvesting Mach. Co. *v.* Adele, 47 Ill. App. 542.

Indiana.— Indiana Imp. Co. *v.* Wagner, 138 Ind. 658, 38 N. E. 49. See also State *v.* Hitchens, 25 Ind. App. 244, 57 N. E. 935.

Missouri.— State *v.* Hitchcock, 86 Mo. 231; Wilson *v.* Haxby, 76 Mo. 345.

Wisconsin.— Webster *v.* Modlin, 12 Wis. 368.

See 3 Cent. Dig. tit. "Appeal and Error," § 2309; and *supra*, V.

40. Johnson *v.* Bell, 10 Ind. 363.

41. Berman *v.* Wolf, 40 Ark. 251; Stern *v.* People, 96 Ill. 475; McClurkin *v.* Ewing, 42 Ill. 283; Love *v.* Moynehan, 16 Ill. 277, 63 Am. Dec. 306.

42. Sutherland *v.* Putnam, (Ariz. 1890) 24 Pac. 320. But see, *contra*, State *v.* Bartley, 56 Nebr. 810, 77 N. W. 438; Gilmer *v.* Sydenstricker, 42 W. Va. 52, 24 S. E. 566; Van Winkle *v.* Blackford, 28 W. Va. 670.

43. McWhinney *v.* Briggs, 85 Ind. 535; Hanna *v.* Aebker, 84 Ind. 411; Gutperle *v.* Koehler, 84 Ind. 237; People *v.* Clausen, 163 N. Y. 523, 57 N. E. 739 [*dismissing* appeal, 50 N. Y. App. Div. 286, 63 N. Y. Suppl. 993]. *Compare* Shotwell *v.* Dixon, 163 N. Y. 43, 57 N. E. 178 [*affirming* 22 N. Y. App. Div. 258, 48 N. Y. Suppl. 984]. See 3 Cent. Dig. tit. "Appeal and Error," § 2326.

44. Galveston, etc., R. Co. *v.* Masterson, 91 Tex. 383, 43 S. W. 875.

In a proceeding to review the judgment of an intermediate court it is not necessary that its proceedings should appear in the record or that the transcript should contain a bill of exceptions preserving the matters sought to be reviewed, as is required upon an appeal from a *nisi prius* court, since the entire record before the intermediate court is transferred to the higher court by the appeal. Akron Bank *v.* Dole, 24 Colo. 94, 48 Pac. 1044. But see State *v.* Bost, 125 N. C. 707, 34 S. E. 650.

45. Montgomery *v.* Carpenter, 5 Ark. 264; Lenox *v.* Pike, 2 Ark. 14; Tustin *v.* Gaunt, 4 Oreg. 305.

Where a statute does not prescribe what the record usually contains, as in the case of final orders, it consists of all papers and documents properly filed and before the court below (Ankeny *v.* Fairview Milling Co., 10 Oreg. 390), and a bill of exceptions is unnecessary (Pieper *v.* Centinela Land Co., 56 Cal. 173, construing Cal. Code Civ. Proc. (1874), § 951). § 951).

Bond for costs.— A prosecution bond constitutes a part of the record of the cause and will be included in the transcript if the cause be removed to another court. Maxwell *v.* Salts, 4 Coldw. (Tenn.) 233. *Contra*, Montgomery *v.* Carpenter, 5 Ark. 264.

Fee-book and fee-bill.— Under some statutes, the transcript of the fee-book is a part of the record; but, unless the fee-bill is made up under the direction of the judge, it is a record merely of the action of the clerk, and not of the proceedings of the court. Yeager *v.* Circle, 1 Greene (Iowa) 438.

"At common law a record signified a roll of parchment upon which the proceedings and transactions of a court were entered or drawn up by its officers, and which was then deposited in its treasury *in perpetuam rei memoriam*. Such rolls were termed the record of the court, and were of such high and supereminent authority that their truth could not be called in question. In inferior courts, or courts not of record, the proceedings were not thus enrolled, and hence the distinction between two classes of courts. In the United States, paper has universally supplied the place of parchment as the material for record, and the roll form, formerly employed, has on that account fallen into disuse; but in other respects the forms of the English records have, with some modification, been generally adopted. . . . The roll of parchment has given place to what is named 'the judgment-roll.'" St. Croix Lumber Co. *v.* Pennington, 2 Dak. 467, 11 N. W. 497.

by bill of exceptions, or by special verdict.[46] In an action tried upon issues of fact the record consists of the summons, with the return thereon, the pleadings,

46. Lenox *v.* Pike, 2 Ark. 14. See also Pace *v.* Lanier, 32 Fla. 291, 13 So. 360; Sutterfield *v.* Magowan, 12 S. D. 139, 80 N. W. 180 (holding nothing before the court but the judgment-roll).

Bail and recognizance.— In a proceeding upon a recognizance by scire facias, the indorsement on the indictment of the bail fixed by the court constitutes no part of the record (Peacock *v.* People, 83 Ill. 331), nor does the recognizance (Richardson *v.* State, 31 Ala. 347; Davis *v.* Com., 4 T. B. Mon. (Ky.) 113).

Docket entries, minutes, etc.— Ordinarily, entries in dockets, journals, or order-books, or minutes or memoranda of what takes place in court, made by the judge or by the clerk, form no part of the record.

Alabama.— Lienkauff *v.* Tuskaloosa Sale, etc., Co., 99 Ala. 619, 12 So. 918; Baker *v.* Swift, 87 Ala. 530, 6 So. 153 (extracts from the clerk's docket).

California.— De Pedrorena *v.* Hotchkiss, 95 Cal. 636, 30 Pac. 787; Douglas *v.* Dakin, 46 Cal. 49.

Dakota.— St. Croix Lumber Co. *v.* Pennington, 2 Dak. 467, 11 N. W. 497; Golden Terra Min. Co. *v.* Smith, 2 Dak. 377, 11 N. W. 98.

Illinois.— McIntosh *v.* Barnes, 54 Ill. App. 274.

Indiana.— Mull *v.* McKnight, 67 Ind. 535.

Iowa.— Gifford *v.* Cole, 57 Iowa 272, 10 N. W. 672, holding that a bar docket is not contemplated by Iowa Code, § 2747, making the appearance docket a part of the court records.

Kentucky.— Gates *v.* Waltrip, 17 Ky. L. Rep. 768, 32 S. W. 414.

Missouri.—Clarke *v.* Kane, 37 Mo. App. 258.

Nebraska.— Brown *v.* Ritner, 41 Nebr. 52, 59 N. W. 360.

New York.— Scott *v.* Morgan, 94 N. Y. 508.

Texas.— Stark *v.* Miller, 63 Tex. 164; Swearingen *v.* Wilson, 2 Tex. Civ. App. 157, 21 S. W. 74.

Wisconsin.— Bunn *v.* Valley Lumber Co., 63 Wis. 630, 24 N. W. 403.

See 3 Cent. Dig. tit. "Appeal and Error," § 2334.

But in Indiana, by statute, all proper entries made by the clerk and all papers pertaining to a cause and filed therein, except such as relate to collateral matters, are part of the record. Gray *v.* Singer, 137 Ind. 257, 36 N. E. 209, 1109 (holding order-book entries an essential part of the record); Kesler *v.* Myers, 41 Ind. 543. And in Vermont, docket entries (Spaulding *v.* Warner, 57 Vt. 654), and justice's records (Wheelock *v.* Sears, 19 Vt. 559) may be referred to as a part of the case, though not made a part of the bill of exceptions.

Opinion of court below.— Ordinarily, the opinion of the court below forms no part of the record.

California.— White *v.* Merrill, 82 Cal. 14, 22 Pac. 1129; Wilson *v.* Wilson, 64 Cal. 92, 27 Pac. 861.

Florida.— McLeod *v.* Dell, 9 Fla. 427.

Illinois.— Pennsylvania Co. *v.* Versten, 140 Ill. 637, 30 N. E. 540, 15 L. R. A. 798; Fuller *v.* Bates, 96 Ill. 132.

Maryland.— State *v.* Ramsburg, 43 Md. 325; Baltimore M. E. Church *v.* Browne, 39 Md. 160.

Massachusetts.— Coolidge *v.* Inglee, 13 Mass. 26; McFadden *v.* Otis, 6 Mass. 323.

Missouri.— Kreis *v.* Missouri Pac. R. Co., (Mo. 1895) 30 S. W. 310; Butcher *v.* Keil, 1 Mo. 262 (where on a point not presented by an issue of law); Field *v.* Crecelius, 20 Mo. App. 302.

Montana.— Fant *v.* Tandy, 7 Mont. 443, 17 Pac. 560.

New York.— Randall *v.* New York El. R. Co., 149 N. Y. 211, 43 N. E. 540; Dibble *v.* Dimick, 143 N. Y. 549, 38 N. E. 724, 62 N. Y. St. 798; Wheatland *v.* Pryor, 133 N. Y. 97, 30 N. E. 652, 44 N. Y. St. 311; Van Bergen *v.* Bradley, 36 N. Y. 316; Shute *v.* Jones, 78 Hun (N. Y.) 99, 28 N. Y. Suppl. 1072, 60 N. Y. St. 534; Thomas *v.* Tanner, 14 How. Pr. (N. Y.) 426, the last case distinguishing between "decision" and "opinion." But see Bryant *v.* Allen, 54 N. Y. App. Div. 500, 67 N. Y. Suppl. 89, holding that by General Practice Rules, No. 41, the opinion of the trial court is made a part of the record, and, on appeal to the appellate division, may be looked to to ascertain the grounds for the lower court's disposition of the case.

Pennsylvania.— Overseers of Poor *v.* Overseers of Poor, (Pa. 1886) 7 Atl. 204; Buckley *v.* Duff, 111 Pa. St. 223, 3 Atl. 823. But under the Pennsylvania act of Feb. 24, 1806, § 25, the opinion of the court might be filed as a substitute for a bill of exceptions (Downing *v.* Baldwin, 1 Serg. & R. (Pa.) 298), though it had to appear by the record that the opinion was filed at the request of one of the parties (Lancaster *v.* De Normandie, 1 Whart. (Pa.) 49 [*distinguishing* Brown *v.* Caldwell, 10 Serg. & R. (Pa.) 114, 13 Am. Dec. 660]).

Wisconsin.— Hill *v.* American Surety Co., 107 Wis. 19, 81 N. W. 1024, 82 N. W. 691.

United States.— England *v.* Gebhardt, 112 U. S. 502, 5 S. Ct. 287, 28 L. ed. 811; Gibson *v.* Chouteau, 8 Wall. (U. S.) 314, 19 L. ed. 317.

See 3 Cent. Dig. tit. "Appeal and Error," § 2339.

This rule applies to the opinion of an intermediate appellate court as well as to the opinion of the trial court (Ohio, etc., R. Co. *v.* Wangelin, 152 Ill. 138, 38 N. E. 760; Moore *v.* Williams, 132 Ill. 591, 24 N. E. 617; and see 3 Cent. Dig. tit. "Appeal and Error," § 2400), and is adhered to by the United States supreme court, even though judges are required by state statute to file their opinions in writing among the papers of the cause

and verdict, if tried by a jury, or the decision, if tried by the court, and the judgment.[47] While the record ought not to show anything more than a final decision of the matters litigated,[48] there is a tendency in some states to get into, and make a part of the record, as much of the proceedings as possible;[49] but whatever part of the proceedings should be incorporated in the bill of exceptions is not made a part of the record by the mere entry of the clerk.[50]

b. Process and Appearance. It is laid down broadly in many cases that the writ, and the officer's return of his doings in virtue of it, are a part of the record.[51]

(Williams *v.* Norris, 12 Wheat. (U. S.) 117, 6 L. ed. 571), and though a rule of the supreme court requires a copy of the opinion of the lower court to be annexed to and transmitted with the record (England *v.* Gebhardt, 112 U. S. 502, 5 S. Ct. 287, 28 L. ed. 811); and although a different rule has been adopted, in case of review by writ of error to the supreme court of Louisiana, since the statute of that state, and the practice thereunder, require the opinion of the court to be entered on the record (New Orleans Waterworks Co. *v.* Louisiana Sugar Refining Co., 125 U. S. 18, 8 S. Ct. 741, 31 L. ed. 607; Delmas *v.* Merchants' Mut. Ins. Co., 14 Wall. (U. S.) 661, 20 L. ed. 757), the opinion of the court is not made a part of the record in a case coming from the circuit court of the United States by such a statute of the state in which the court sits (Parks *v.* Turner, 12 How. (U. S.) 39, 13 L. ed. 883).

The judgment appealed from may, however, so refer to the opinion as to make it an important and material part of the record (Koehler *v.* Hughes, 148 N. Y. 507, 42 N. E. 1051; Tolman *v.* Syracuse, etc., R. Co., 92 N. Y. 353), and, even though an opinion is not an essential part of the record, a motion to strike it from the record will not be allowed (Colorado Fuel, etc., Co. *v.* Adams, 14 Colo. App. 84, 60 Pac. 367; Gregg *v.* Spencer, 96 Iowa 501, 65 N. W. 411; Mellerup *v.* Travelers' Ins. Co., 95 Iowa 317, 63 N. W. 665; McLean *v.* Ficke, 94 Iowa 283, 62 N. W. 753 [but see King County *v.* Hill, 1 Wash. 63, 23 Pac. 926, wherein such a motion was entertained, the opinion not purporting to be a finding of facts or anything but the views of the judge]).

Proceedings for removal of cause to federal court.— The motion to transfer a cause from the state to the federal court, and the accompanying papers, and the ruling of the court thereon, are no part of the record unless made so by a bill of exceptions (Rough *v.* Booth, (Cal. 1884) 3 Pac. 91; Wabash, etc., R. Co. *v.* People, 106 Ill. 652; Home Ins. Co. *v.* Heck, 65 Ill. 111; American Carbon Co. *v.* Jackson, 24 Ind. App. 390, 56 N. E. 862 [construing Ind. Rev. Stat. (1894), § 662]; Singleton *v.* Boyle, 4 Nebr. 414), and do not become such by being filed by the clerk and copied into the transcript (Cromie *v.* Van Nortwick, 56 Ill. 353).

See 3 Cent. Dig. tit. "Appeal and Error," § 2338.

Report of judge.— The report of a judge is not a part of the record proper and will be wholly disregarded by the appellate court in determining whether the judgment ought to be reversed or affirmed. Coolidge *v.* Inglee, 13 Mass. 26; McFadden *v.* Otis, 6 Mass. 323; Suydam *v.* Williamson, 20 How. (U. S.) 427, 15 L. ed. 978; Inglee *v.* Coolidge, 2 Wheat. (U. S.) 363, 4 L. ed. 261.

Rules of trial court.— Unless the rules of a trial court are made a part of the record by special order or bill of exceptions, the action of the lower court, taken in accordance with its rules, cannot be reviewed. Black *v.* Bent, 20 Colo. 342, 38 Pac. 387; Chicago, etc., R. Co. *v.* McCahill, 56 Ill. 28; Harrigan *v.* Turner, 53 Ill. App. 292; Rout *v.* Ninde, 111 Ind. 597, 13 N. E. 107. But see Waite *v.* Wingate, 4 Wash. 324, 30 Pac. 81; Walla Walla Printing, etc., Co. *v.* Budd, 2 Wash. Terr. 336, 5 Pac. 602 (holding that such rules are a part of the record of every cause tried in such court, and may be certified to the appellate court as a part of such record).

47. St. Croix Lumber Co. *v.* Pennington, 2 Dak. 467, 11 N. W. 497 (construing Dak. Code, § 299); Golden Terra Min. Co. *v.* Smith, 2 Dak. 377, 11 N. W. 98; Officers of Court *v.* Fisk, 7 How. (Miss.) 403; State *v.* Merriam, 159 Mo. 655, 60 S. W. 1112; Nicol *v.* Hyre, 58 Mo. App. 134; Greene County *v.* Wilhite, 35 Mo. App. 39.

In proceedings by scire facias, the record, where there is no bill of exceptions, is made up of the writ, pleadings, verdict of the jury, or the findings of the court, as the case may be, and the judgment. Straus *v.* Oltusky, 62 Ill. App. 660; Winn *v.* Burt, 6 Blackf. (Ind.) 183 (holding that in a suit against replevin bail, the proceedings in the suit against the principal were no part of the record); Robinson *v.* Tousey, 6 Blackf. (Ind.) 256 (holding that the transcript of a judgment of a justice of the peace of one county was no part of the record of a suit by scire facias issued by a justice of another county).

The name of a cause and note of appearance, made on the cover of a transcript, are no part of the record. Evans *v.* Hannibal, etc., R. Co., 58 Mo. App. 427.

48. Kipper *v.* Sizer, 2 N. Y. St. 386.

49. Brewer, J., in Leavenworth, etc., R. Co. *v.* Douglas County, 18 Kan. 169, 177.

50. Watts *v.* McLean, 28 Ill. App. 537; Wright *v.* State, 20 Ind. 23.

51. *Arkansas.*— Renner *v.* Reed, 3 Ark. 339.

Dakota.— St. Croix Lumber Co. *v.* Pennington, 2 Dak. 467, 11 N. W. 497; Golden Terra Min. Co. *v.* Smith, 2 Dak. 377, 11 N. W. 98.

Illinois.— Straus *v.* Oltusky, 62 Ill. App. 660; Van Cott *v.* Sprague, 5 Ill. App. 99.

In other jurisdictions, however, while, if there is no appearance, the summons and return are a part of the record,[52] yet if there is an appearance, they do not constitute a part thereof.[53] Where jurisdiction is acquired by other than personal service — as by appearance or by publication under the statute — whatever confers jurisdiction should, by analogy, be construed to be a part of the record proper.[54]

c. Pleadings — (I) *In General* — (A) *Rule Stated.* The pleadings form part of the record without a bill of exceptions;[55] but a pleading which is treated as a nullity, because filed without leave,[56] or because a demurrer is sustained to the whole or a portion thereof,[57] is not a part of the record. So, too, pleadings which are rejected by the court are no part of the record, and an order rejecting them cannot be reviewed unless brought into the record in some legitimate way.[58]

Maine.— Gore *v.* Elwell, 22 Me. 442.

Mississippi.— Walker *v.* Walker, 6 How. (Miss.) 500.

Missouri.— Greene County *v.* Wilhite, 35 Mo. App. 39.

Virginia.— Hickam *v.* Larkey, 6 Gratt. (Va.) 210.

Contra, Childs *v.* Risk, 1 Morr. (Iowa) 439. See also Gregg *v.* Pemberton, 53 Cal. 251 (holding that neither the writ of mandamus nor the sheriff's return, nor the acknowledgment of satisfaction thereon, is part of the judgment-roll); and Lambert *v.* Ensign Mfg. Co., 42 W. Va. 813, 26 S. E. 431 (wherein it was held that the writ is never a part of the record, except to sustain the judgment or proceeding, unless it is made so by being read on oyer).

See 3 Cent. Dig. tit. "Appeal and Error," § 2341.

52. Woods *v.* Brown, 93 Ind. 164, 47 Am. Rep. 369; Barnes *v.* Roemer, 39 Ind. 589; Macomber *v.* New York, 17 Abb. Pr. (N. Y.) 35; Thomas *v.* Tanner, 14 How. Pr. (N. Y.) 426.

See 3 Cent. Dig. tit. "Appeal and Error," § 2341.

53. Cincinnati, etc., R. Co. *v.* Street, 50 Ind. 225; Jeffersonville, etc., R. Co. *v.* Ross, 35 Ind. 108; Christal *v.* Kelly, 88 N. Y. 285; Bosworth *v.* Vandewalker, 53 N. Y. 597.

See 3 Cent. Dig. tit. "Appeal and Error," § 2341.

54. Baldwin *v.* McClelland, 50 Ill. App. 645. See also Johnson *v.* Layton, 5 Harr. (Del.) 252.

On an inquest of lunacy the notice and information correspond to the summons in an ordinary action and form a part of the record proper. Crow *v.* Meyersieck, 88 Mo. 411.

A special appearance in writing by a party's attorney should be incorporated in a bill of exceptions, instead of being certified to by the clerk. Syndicate Imp. Co. *v.* Bradley, 6 Wyo. 171, 43 Pac. 79, 44 Pac. 60.

55. *Alabama.*— Petty *v.* Dill, 53 Ala. 641; Rogers *v.* Jones, 51 Ala. 353.

Arkansas.—Shattuck *v.* Lyons, 62 Ark. 338, 35 S. W. 436.

Georgia.— Jordan *v.* Gaulden, 73 Ga. 191; Bean *v.* Hadley, 57 Ga. 100, where the writ of error was dismissed because the record contained no declaration showing the nature of the action.

Idaho.— Rich *v.* French, (Ida. 1893) 35 Pac. 173, construing Ida. Rev. Stat. (1887), § 4456.

Illinois.— Zimmerman *v.* Cowan, 107 Ill. 631, 47 Am. Rep. 476; Whiting *v.* Fuller, 22 Ill. 33 (affidavit of merits to plea); Van Cott *v.* Sprague, 5 Ill. App. 99.

Indiana.— Home Electric Light, etc., Co. *v.* Globe Tissue Paper Co., 146 Ind. 673, 45 N. E. 1108; Slagle *v.* Bodmer, 75 Ind. 330, holding that a verified complaint must be treated as a pleading, although by agreement it was to be treated as evidence.

Iowa.— Davis *v.* Campbell, 93 Iowa 524, 61 N. W. 1053.

Kansas.— Junction City *v.* Webb, 44 Kan. 71, 23 Pac. 1073.

Mississippi.— Jamison *v.* Moon, 43 Miss. 598; Whitfield *v.* Westbrook, 40 Miss. 311.

Nevada.— Bliss *v.* Grayson, 24 Nev. 422, 56 Pac. 231.

New York.— Tuttle *v.* Jackson, 6 Wend. (N. Y.) 213, 21 Am. Dec. 306.

North Carolina.— McKinnon *v.* Morrison, 104 N. C. 354, 10 S. E. 513; Thornton *v.* Brady, 100 N. C. 38, 5 S. E. 910.

West Virginia.— Stephens *v.* Brown, 24 W. Va. 234.

Wyoming.— Dobson *v.* Owens, 5 Wyo. 85, 37 Pac. 471.

See 3 Cent. Dig. tit. "Appeal and Error," § 2342.

56. Mayfield *v.* Swearingen, 4 Mo. 220.

57. Tron *v.* Yohn, 145 Ind. 272, 43 N. E. 437.

58. *Georgia.*— Reid *v.* Wilson, 109 Ga. 424, 34 S. E. 608, amendment to a petition.

Indiana.— Pratt *v.* Allen, 95 Ind. 404; Lee *v.* Carter, 52 Ind. 342, motion to reject an amended complaint.

Kentucky.—Mitchell *v.* New Farmers' Bank, (Ky. 1901) 60 S. W. 375; Carpenter *v.* Bell, 15 Ky. L. Rep. 649, 25 S. W. 109 (petition of third person to be made party defendant); Bohannon *v.* Ellison, 9 Ky. L. Rep. 616.

Ohio.— Smucker *v.* Wright, 3 Ohio Cir. Ct. 620, 2 Ohio Cir. Dec. 360.

Virginia.—Bowyer *v.* Hewitt, 2 Gratt. (Va.) 192.

West Virginia.—King *v.* Burdett, 12 W. Va. 688. But see Sweeney *v.* Baker, 13 W. Va. 158, 31 Am. Rep. 757, holding that if the record otherwise shows that the rejection was excepted to, the action of the court will be reviewed without a formal bill of exception, if

(B) *Demurrers.* A demurrer, and the action of the court thereon, are part of the record, and no bill of exceptions or case is necessary to procure a review thereof.[59] And rulings on demurrer, not shown otherwise than by bill of exceptions, will not be reviewed.[60]

(C) *Judgment on Pleadings.* While a motion for judgment on the pleadings partakes of the nature of a demurrer, in that it admits all facts that are well pleaded, yet it is not a demurrer,[61] and hence a ruling on such a motion cannot be reviewed without a bill of exceptions[62] unless the judgment recites that it was entered on the pleadings.[63]

(D) *Interrogatories to, and Answer of, Garnishee.* In some jurisdictions interrogatories to,[64] and the answer of,[65] a garnishee are a part of the record, and need not be preserved by bill of exceptions. In other jurisdictions, however, where such answer is regarded in the nature of evidence,[66] the answer of a gar-

the rejected plea has been ordered on the record.

See 3 Cent. Dig. tit. "Appeal and Error," § 2342.

In chancery, where a plea or answer is referred to in a decree or order as having come under the cognizance of the court either for the purpose of filing or rejecting it, it becomes thereby part of the record and no further action by way of exception or otherwise is necessary to enable the prosecution of an appeal upon the rejection of such plea or answer. Barrett *v.* McAllister, 35 W. Va. 103, 12 S. E. 1106 [*following* Craig *v.* Sebrell, 9 Gratt. (Va.) 131, and *disapproving dictum* to the contrary in Ruffner *v.* Hewitt, 14 W. Va. 737].

Effect of giving matter thereof in evidence. — The rule stated applies notwithstanding a memorandum in the record that the matter contained in the rejected pleas was introduced in evidence with the consent of the court. White *v.* Toncray, 9 Leigh (Va.) 347.

A petition for certiorari is not in the record until it is granted. James *v.* Davis, 76 Ga. 100; Elsas *v.* Clay, 67 Ga. 327.

59. *Alabama.*— Powers *v.* Decatur, 54 Ala. 214.

Arizona.— Maricopa County *v.* Rosson, (Ariz. 1895) 40 Pac. 314.

California.— McEntee *v.* Cook, 76 Cal. 187, 18 Pac. 258.

Illinois.— Chase *v.* De Wolf, 69 Ill. 47; Hamlin *v.* Reynolds, 22 Ill. 207; Atkins *v.* Lackawanna Transp. Co., 79 Ill. App. 19.

Indiana.— Matlock *v.* Todd, 19 Ind. 130.

Missouri.— State *v.* Campbell, 120 Mo. 396, 25 S. W. 392; Hannah *v.* Hannah, 109 Mo. 236, 19 S. W. 87; Barton *v.* Martin, 54 Mo. App. 134.

North Carolina.— Chamblee *v.* Baker, 95 N. C. 98.

Oregon.— Reynolds *v.* Jackson County, 33 Oreg. 422, 53 Pac. 1072.

Washington.— State *v.* McQuade, 12 Wash. 554, 41 Pac. 897.

United States.— Suydam *v.* Williamson, 20 How. (U. S.) 427, 15 L. ed. 978.

Contra, Harbert *v.* Henly, 31 Tex. 666; and see Milner *v.* Vandivere, 86 Ga. 540, 12 S. E. 879, holding that, under Ga. Acts (1889), p. 114, where the bill of exceptions does not specify the demurrer as material to a clear understanding of the error, the clerk has no authority to include it in the transcript, and neither the demurrer, nor rulings thereon, nor exceptions thereto, will be considered as part of the record. And see Varner *v.* Varner, 55 Ga. 573.

See 3 Cent. Dig. tit. "Appeal and Error," § 2346.

A demurrer which has been abandoned stands on the same footing as an amended pleading and is no longer a part of the record. Brown *v.* Saratoga R. Co., 18 N. Y. 495.

Notice of overruling demurrer.— Cal. Code Civ. Proc. § 476, provides that when a demurrer to any pleading is sustained or overruled, and time to amend or answer is given, the time so given runs from service of notice. Such notice is not of itself a part of the judgment-roll, but, if the party desires to have it appear that such notice was or was not given, he must incorporate the fact in a bill of exceptions. Catanich *v.* Hayes, 52 Cal. 338.

60. Petty *v.* Dill, 53 Ala. 641 [*followed* in Chapman *v.* Holding, 60 Ala. 522], wherein the court said: "We cannot sanction the looseness of practice which would obtain if we assumed the bill of exceptions correctly stated that which ought otherwise to appear of record. . . . The bill cannot . . . be permitted to take the place of the record." See also Cofer *v.* Schening, 98 Ala. 338, 13 So. 123, holding that Ala. Code, § 2759, authorizing a plaintiff to suffer a nonsuit, and by bill of exceptions reserve adverse rulings of the trial court, does not extend to rulings and decisions on demurrers to pleadings.

61. Sternberg *v.* Levy, 159 Mo. 617, 60 S. W. 1114, wherein the two are distinguished.

62. Hemme *v.* Hays, 55 Cal. 337; Hill *v.* Jamieson, 16 Ind. 125, 79 Am. Dec. 414 [*citing* Kirby *v.* Cannon, 9 Ind. 371]; Mechanics' Bank *v.* Klein, 33 Mo. 559; Swaggard *v.* Hancock, 25 Mo. App. 596.

See 3 Cent. Dig. tit. "Appeal and Error," § 2355.

63. Weeks *v.* Garibaldi South Gold Min. Co., 73 Cal. 599, 15 Pac. 302.

64. Rankin *v.* Simonds, 27 Ill. 352.

65. Rankin *v.* Simonds, 27 Ill. 352; Deffenbaugh *v.* Andrew, 91 Ill. App. 142; Burckett *v.* Hopson, 19 La. Ann. 489.

66. Brainard *v.* Simmons, 58 Iowa 464, 9 N. W. 382, 12 N. W. 484.

nishee is not a part of the record proper,[67] but may become such by being identified by a decree or judgment recital.[68]

(E) *Motions.* Motions to make more specific or certain,[69] to require pleading to be separated into distinct paragraphs and numbered,[70] or for leave to file a set-off to plaintiff's demand,[71] are not a part of the record proper and can be made a part thereof only by bill of exceptions.

(F) *Rules or Notices to Plead.* Rules or notices to plead,[72] or motions to set aside a rule to plead,[73] are not to be considered in the record, unless under statutory provision.[74]

(II) *Bills of Particulars.* A bill of particulars is not, strictly speaking, a part of the pleading to which it refers, and is not, therefore, a part of the record;[75] and if a motion to compel plaintiff to file such a bill be overruled, it cannot be reviewed in the upper court unless the proper steps are taken to have it preserved in the record.[76]

(III) *Exhibits.* It is generally held that exhibits are not part of the pleadings, and, if not contained in a bill of exceptions or brought into the record by some substitute therefor, cannot be considered on appeal.[77] It has been held to the contrary,[78] however, and in a chancery suit exhibits which are made part of the bill or answer and filed therewith are a part of the record.[79]

(IV) *Instrument Sued on.* If the instrument sued on is to be examined by the court on appeal, it must be made a part of the record by a bill of exceptions, or in some other legitimate way,[80] unless, where actions are brought under certain

67. Jones *v.* Manier, 102 Ala. 676, 15 So. 437; Bostwick *v.* Beach, 18 Ala. 80. See 3 Cent. Dig. tit. "Appeal and Error," § 2345.

68. Jones *v.* Manier, 102 Ala. 676, 15 So. 437; Bland *v.* Bowie, 53 Ala. 152. See 3 Cent. Dig. tit. "Appeal and Error," § 2345.

69. Pittsburgh, etc., R. Co. *v.* Indiana Horseshoe Co., 154 Ind. 322, 56 N. E. 766; Arnold *v.* Arnold, 140 Ind. 199, 39 N. E. 862; Baltimore, etc., R. Co. *v.* Countryman, 16 Ind. App. 139, 44 N. E. 265. *Contra,* Leavenworth, etc., R. Co. *v.* Douglas County, 18 Kan. 169, holding that Kan. Gen. Stat. § 417, including in the record "all material acts and proceedings of the court," is broad enough to include motions to reform the pleadings.

See 3 Cent. Dig. tit. "Appeal and Error," § 2353.

Where such a motion has been copied into the transcript without an order of the court, it is not brought into the record by a reference in the bill of exceptions to the motion, "Heretofore set out in this record on page 4." Ohio, etc., R. Co. *v.* Engrer, 4 Ind. App. 261, 30 N. E. 924.

70. Balue *v.* Richardson, 124 Ind. 480, 25 N. E. 11; Fasnacht *v.* German Literary Assoc., 99 Ind. 133; Union Cent. L. Ins. Co. *v.* Huyck, 5 Ind. App. 474, 32 N. E. 580. See 3 Cent. Dig. tit. "Appeal and Error," § 2354.

71. Haney *v.* Clark, 1 Pinn. (Wis.) 301. See also Pledger *v.* Glover, 2 Port. (Ala.) 174.

72. Iglehart *v.* Pitcher, 17 Ill. 307; Lemonds *v.* French, 4 Greene (Iowa) 123.

73. Clodfelter *v.* Hulett, 92 Ind. 426.

74. Lemonds *v.* French, 4 Greene (Iowa) 123.

75. *California.*— Edelman *v.* McDonell, 126 Cal. 210, 58 Pac. 528.

Colorado.— Fryer *v.* Breeze, 16 Colo. 323, 26 Pac. 817.

Illinois.— Eggleston *v.* Buck, 24 Ill. 262; Robinson *v.* Holmes, 75 Ill. App. 203.

New Jersey.— State St. Methodist Church *v.* Gordon, 31 N. J. L. 264.

New York.— Arrow Steamship Co. *v.* Bennett, 23 N. Y. Civ. Proc. 234, 26 N. Y. Suppl. 948, construing N. Y. Code Civ. Proc. § 1237, which provides that a bill of particulars shall be made part of the judgment-roll only where it involves the merits or necessarily affects the judgment.

See also, generally, PLEADING.

76. Thomas *v.* Griffin, 1 Ind. App. 457, 27 N. E. 754.

77. *Illinois.*— Hart *v.* Tolman, 6 Ill. 1.

Kentucky.— Batterton *v.* Chiles, 12 B. Mon. (Ky.) 348, 54 Am. Dec. 539; Com. *v.* Chambers, 1 Dana (Ky.) 11.

Missouri.— Price *v.* Southern Ins. Co., 58 Mo. App. 554; Haarstick *v.* Shields, 8 Mo. App. 601.

Texas.— Dunlap *v.* Yoakum, 18 Tex. 582.

Wisconsin.— Haney *v.* Clark, 1 Pinn. (Wis.) 301.

United States.— Reed *v.* Gardner, 17 Wall. (U. S.) 409, 21 L. ed. 665 [*distinguishing* Flanders *v.* Tweed, 9 Wall. (U. S.) 425, 19 L. ed. 678].

See 3 Cent. Dig. tit. "Appeal and Error," § 2348.

78. Patterson *v.* Collier, 77 Ga. 292, 3 S. E. 119.

79. Moss *v.* McCall, 75 Ill. 190; Perciful *v.* Hurd, 5 J. J. Marsh. (Ky.) 670.

A mere reference in the answer, to a bill and the exhibits thereto of another suit by defendant against plaintiff, and a prayer that they may be taken as part of the answer, do not make such papers exhibits nor entitle them to consideration as part of the record. Siggers *v.* Snow, 15 App. Cas. (D. C.) 407; Shepherd *v.* Shepherd, 12 Heisk. (Tenn.) 275.

80. *Alabama.*— Rhodes *v.* Walker, 44 Ala. 213.

statutory provisions, such instrument becomes part of the pleading.[81] But papers do not become a part of the record by being filed with the pleadings, in conformity with a statutory provision which does not make them a part thereof.[82] Simple profert of an instrument, without oyer, does not make it a part of the record.[83] But when oyer of the instrument is given it becomes part of the pleading;[84] and if profert is in fact, though unnecessarily, made, and oyer craved and given, the instrument becomes a part of the record.[85]

(v) *When Stricken Out.* Where a pleading or a paragraph thereof is struck out on motion, it is as though such pleading had never been tendered, and it will not be considered part of the record unless made so by a bill of exceptions or order of court,[86] and will be stricken from the record on motion.[87] So it has been held that neither the motion to strike out a pleading or a paragraph thereof,[88]

Illinois.— Boyles *v.* Chytraus, 175 Ill. 370, 51 N. E. 563; Gatton *v.* Dimmitt, 27 Ill. 400; Thompson *v.* Kimball, 55 Ill. App. 249.

Indiana.— Herod *v.* Duck Pond Ditching Assoc., 42 Ind. 538; Dobson *v.* Duck Pond Ditching Assoc., 42 Ind. 312.

Kentucky.— Leyman *v.* Morrison, 10 Ky. L. Rep. 117; Baker *v.* Gilbert, 4 Ky. L. Rep. 621.

Mississippi.—Marshal *v.* Hamilton, 41 Miss. 229.

Missouri.— State *v.* Eldridge, 65 Mo. 584.

Ohio.— Burch *v.* Young, 2 Ohio Dec. 377.

Tennessee.— Williams *v.* Duffy, 7 Humphr. (Tenn.) 255; McConnell *v.* Read, Mart. & Y. (Tenn.) 224.

Wisconsin.— Reid *v.* Jase, 14 Wis. 429.

See 3 Cent. Dig. tit. "Appeal and Error," § 2348.

It is not made a part of the record by the clerk's recital of it (McConnell *v.* Read, Mart. & Y. (Tenn.) 224), or by being indorsed on the declaration (Franey *v.* True, 26 Ill. 184).

Presumption in favor of judgment.— If the instrument which is the foundation of the action is not so incorporated, every reasonable intendment must be indulged in favor of the judgment of the court being in accordance with its term. Matney *v.* Gregg Brothers Grain Co., 19 Mo. App. 107.

81. Allen *v.* Young, 62 Ga. 617; Blow *v.* White, 41 Ga. 293; Hamer *v.* Rigby, 65 Miss. 41, 3 So. 137 (where the action was brought under Miss. Code, § 1640); Marshal *v.* Hamilton, 41 Miss. 229.

Where, in special assessment proceedings, a statute requires that the ordinance authorizing the proposed improvement be recited in the petition, such recital makes the ordinance a part of the petition, and consequently of the record, and it is a sufficient recital if the ordinance is attached to the petition. Holden *v.* Chicago, 185 Ill. 526, 57 N. E. 1118; Lane *v.* Chicago, 185 Ill. 368, 56 N. E. 1127; Foss *v.* Chicago, 184 Ill. 436, 56 N. E. 1133; Lundberg *v.* Chicago, 183 Ill. 572, 56 N. E. 415.

82. Haney *v.* Tempest, 3 Metc. (Ky.) 95; Dodd *v.* King, 1 Metc. (Ky.) 430.

83. Pollard *v.* Yoder, 2 A. K. Marsh. (Ky.) 264; Harlan *v.* Dew, 3 Head (Tenn.) 504.

On craving oyer instrument must be set out, and, where profert has been made, craving oyer, without setting out the instrument, does not make it a part of the record. Story *v.* Dobson, 2 Heisk. (Tenn.) 29.

84. Cummins *v.* Woodruff, 5 Ark. 116; Stone *v.* Bennett, 4 Ark. 71; Adams *v.* Bradshaw, Hard. (Ky.) 555; McClelland *v.* Strong, Hard. (Ky.) 522; Suydam *v.* Williamson, 20 How. (U. S.) 427, 15 L. ed. 978; Cook *v.* Gray, Hempst. (U. S.) 84, 6 Fed. Cas. No. 3,156*a*.

See 3 Cent. Dig. tit. "Appeal and Error," § 2349.

Does not make assignment thereon part of record.— Craving oyer of an instrument does not entitle the party to oyer of the assignment thereon and does not make such assignment a part of the record. Dardenne *v.* Bennett, 4 Ark. 458; Pelham *v.* State Bank, 4 Ark. 202; Clarke *v.* Gibson, 2 Ark. 109.

85. Kendal *v.* Talbot, 1 A. K. Marsh. (Ky.) 321.

86. Halpern *v.* Spencer, (Ark. 1898) 47 S. W. 637; Pelham *v.* Page, 6 Ark. 535; Iddings *v.* Iddings, 134 Ind. 322, 33 N. E. 1101; Carrothers *v.* Carrothers, 107 Ind. 530, 8 N. E. 563; Harness *v.* Ross, 13 Ind. App. 575, 41 N. E. 1065; Fry *v.* Leslie, 87 Va. 269, 12 S. E. 671. See 3 Cent. Dig. tit. "Appeal and Error," § 2352.

Interrogatories and answers thereto which are stricken out are not in the record, unless by bill of exceptions or order of court. Helm *v.* Huntington First Nat. Bank, 91 Ind. 44; Klingensmith *v.* Reed, 31 Ind. 389.

87. Alcock *v.* Teeters, (Ky. 1900) 56 S. W. 723.

88. *California.*— Sutter *v.* San Francisco, 36 Cal. 112.

Illinois.— Hill *v.* Harding, 93 Ill. 77; Harms *v.* Aufield, 79 Ill. 257.

Indiana.— Evansville, etc., R. Co. *v.* Maddux, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; Lang *v.* Clapp, 103 Ind. 17, 2 N. E. 197; Bennett *v.* Seibert, 10 Ind. App. 369, 35 N. E. 35, 37 N. E. 1071.

Michigan.— People *v.* Judges, 1 Dougl. (Mich.) 434.

Missouri.— Ray *v.* Brown, 80 Mo. 230; National Banking, etc., Co. *v.* Knaup, 55 Mo. 154; Hubbard *v.* Quisenberry, 32 Mo. App. 459.

See 3 Cent. Dig. tit. "Appeal and Error," § 2352.

the notice of motion,[89] the affidavit accompanying it,[90] nor the ruling on the motion,[91] is a part of the record proper.

(VI) *When Substituted or Amended.* Where a pleading is amended,[92] it is superseded by the amended pleading and forms no part of the record.[93] Neither are affidavits used on motion to amend,[94] a rejected amendment,[95] or an order allowing an amendment,[96] a part of the technical record.

89. Morris *v.* Angle, 42 Cal. 236.

90. Dimick *v.* Campbell, 31 Cal. 238; Indiana Mfg. Co. *v.* Millican, 87 Ind. 87; Merritt *v.* Cobb, 17 Ind. 314.

91. *Alabama.*— Central Georgia R. Co. *v.* Joseph, 125 Ala. 313, 28 So. 35.

Arkansas.— Pelham *v.* Page, 6 Ark. 535.

California.— Hawley *v.* Kocher, 123 Cal. 77, 55 Pac. 696 [*distinguishing* Abbott *v.* Douglass, 28 Cal. 295]; Sutton *v.* Stephan, 101 Cal. 545, 36 Pac. 106.

Colorado.— Brink *v.* Posey, 11 Colo. 521, 19 Pac. 467.

Illinois.— Hill *v.* Harding, 93 Ill. 77; Harms *v.* Aufield, 79 Ill. 257.

Indiana.— Allen *v.* Hollingshead, 155 Ind. 178, 57 N. E. 917; Holland *v.* Holland, 131 Ind. 196, 30 N. E. 1075; Huntington *v.* Cast, 24 Ind. App. 501, 56 N. E. 949.

Iowa.— Swafford *v.* Whipple, 3 Greene (Iowa) 261, 54 Am. Dec. 498.

Missouri.— Childs *v.* Kansas City, etc., R. Co., 117 Mo. 414, 23 S. W. 373 (distinguishing between mere matters of exception and errors appearing upon the face of the record proper, and holding the refusal of the court to strike out a pleading to be a mere matter of exception); Barber Asphalt Paving Co. *v.* Benz, 81 Mo. App. 246 (holding that if the motion challenges the sufficiency of the entire defense, it is in legal effect a demurrer thereto and need not be preserved in the bill of exceptions); Boatmen's Sav. Bank *v.* McMenamy, 35 Mo. App. 198.

But see Bank of Commerce *v.* Fuqua, 11 Mont. 285, 28 Pac. 291, 28 Am. St. Rep. 461, 14 L. R. A. 588; Dodson *v.* Nevitt, 5 Mont. 518, 6 Pac. 358, in which cases it was held that a motion to strike out a pleading, or a portion thereof, is in fact and in substance a demurrer to the portion attacked, and that the ruling thereon is reviewable without a formal bill.

See 3 Cent. Dig. tit. "Appeal and Error," § 2352.

The order striking out cannot be reviewed unless the motion, the pleading, and the order are brought up by bill of exceptions. It is not enough that they are printed in the transcript. Halpern *v.* Spencer, (Ark. 1898) 47 S. W. 637; Barber *v.* Mulford, 117 Cal. 356, 49 Pac. 206; Ganceart *v.* Henry, 98 Cal. 281, 33 Pac. 92; Supreme Tent Knights, etc. *v.* Volkert, 25 Ind. App. 627, 57 N. E. 203.

See 3 Cent. Dig. tit. "Appeal and Error," § 2352.

92. An amended plea filed in the court below without leave, either asked or given, or deposited among the papers in the cause, is no part of the record (Young *v.* Bennett, 7 Bush (Ky.) 474; Dobbins *v.* Jacobs, 9 Ky. L. Rep. 621; Thorn *v.* Henderson, 9 Ky. L. Rep. 619), and it will be presumed that the court paid no attention to it (Bentley *v.* Dickson, 1 Ark. 165). So, too, a paper substituted for a lost plea, without leave of the court, is no part of the record. Burkam *v.* McElfresh, 88 Ind. 223.

If leave is taken to amend, it will be presumed that such leave was followed up by filing the amended plea, and that the pleading found in the record is such plea. Dick *v.* Hitt, 82 Ind. 92.

93. Huntington *v.* Folk, 154 Ind. 91, 54 N. E. 759; Aydelott *v.* Collings, 144 Ind. 602, 43 N. E. 867; Raymond *v.* Thexton, 7 Mont. 299, 17 Pac. 258 (wherein it was held that neither the original complaint nor the demurrer were properly in the record, where the complaint was amended without objection, after demurrer filed, but not acted upon); Brown *v.* Saratoga R. Co., 18 N. Y. 495; Kanouse *v.* Martin, 3 Code Rep. (N. Y.) 124, 3 Sandf. (N. Y.) 593; Thornton *v.* St. Paul, etc., R. Co., 6 Daly (N. Y.) 511.

See 3 Cent. Dig. tit. "Appeal and Error," § 2347.

Extent of rule.— An amended pleading supersedes the original only to the extent of the amendment, and, in case of an amendment of the complaint, the original complaint remains for the purpose of showing when the action was commenced and whether or not a new or different cause of action was introduced by the amendment (Redington *v.* Cornwell, 90 Cal. 49, 27 Pac. 40 [wherein the amended complaint alleged substantially the same cause of action and was held a pleading within the meaning of Cal. Code Civ. Proc. § 670, subsec. 2, which makes the pleading part of the judgment-roll]; Fearns *v.* Atchison, etc., R. Co., 33 Kan. 275, 6 Pac. 237 [wherein no amendments were made to the original pleadings further than to substitute the names of defendants]); and where an amended bill is filed after a demurrer is sustained, and a demurrer to that is also sustained and an appeal taken, the original bill is a part of the record (Riopelle *v.* Doellner, 26 Mich. 102).

94. Swan *v.* Clark, 80 Ind. 57.

95. Van Duzer *v.* Towne, 12 Colo. App. 4, 55 Pac. 13.

96. Carter *v.* Paige, (Cal. 1889) 20 Pac. 729; Van Duzer *v.* Towne, 12 Colo. App. 4, 55 Pac. 13 (construing Colo. Code, §§ 60, 387); Shepard *v.* Birth, 53 Ind. 105.

Upon refusal to allow an amendment the proposed amendment and the ruling must be incorporated in the statement or brought up by bill of exceptions. Campbell *v.* Freeman, 99 Cal. 546, 34 Pac. 113; Moore *v.* Guyton, 110 Ga. 330, 35 S. E. 339; Boon *v.* Jackson, 98 Ga. 490, 25 S. E. 518; Nolan *v.* Feltman, 12 Bush (Ky.) 119; Pleasant Hill Bank *v.* Wills, 79 Mo. 275.

d. Stipulations. Except in chancery,[97] or under statutory provision,[98] stipulations are not a part of the record proper, and cannot be considered on appeal unless embodied in the bill of exceptions or statement.[99]

e. Interlocutory Motions and Orders — (i) *In General.* In chancery a motion in writing becomes part of the record;[1] but, ordinarily, in actions at law, it is held that motions made in the progress of a cause and rulings thereon,[2]

See 3 Cent. Dig. tit. "Appeal and Error," § 2347.

97. Dilworth *v.* Curts, 139 Ill. 508, 29 N. E. 861 [*affirming* 38 Ill. App. 93].

98. Cord *v.* Southwell, 15 Wis. 211, holding that a stipulation made between parties as to the order in which mortgaged premises shall be decreed to be sold, and an order directing that a certain sum shall be allowed as a solicitor's fee in addition to the taxable costs, are part of the judgment-roll, as involving the merits.

99. *California.*— Spreckels *v.* Ord, 72 Cal. 86, 13 Pac. 158; Spinetti *v.* Brignardello, 53 Cal. 281.

Colorado.— Filley *v.* Cody, 4 Colo. 542.

Illinois.— Wilson *v.* McDowell, 65 Ill. 522; Chicago, etc., R. Co. *v.* Benham, 25 Ill. App. 248.

Missouri.— Bowles *v.* Faus, 3 Mo. App. 571.

Nebraska.— State Ins. Co. *v.* Buckstaff Brothers Mfg. Co., 47 Nebr. 1, 66 N. W. 27; Herbison *v.* Taylor, 29 Nebr. 217, 45 N. W. 626.

Pennsylvania.— Nicoll *v.* McCaffrey, 1 Pa. Super. Ct. 187.

Texas.— Goss *v.* Pilgrim, 28 Tex. 263; Vaughan *v.* Bailey, 11 Tex. Civ. App. 34, 31 S. W. 531.

United States.— Lanusse *v.* Barker, 3 Wheat. (U. S.) 101, 4 L. ed. 343.

See 3 Cent. Dig. tit. "Appeal and Error," § 2356.

1. Flaherty *v.* McCormick, 123 Ill. 525, 14 N. E. 846.

2. *Alabama.*— Alabama Great Southern R. Co. *v.* Bailey, 112 Ala. 167, 20 So. 313; Frieder *v.* B. Goodman Mfg. Co., 101 Ala. 242, 13 So. 423.

California.— Brady *v.* Page, 66 Cal. 232, 5 Pac. 103; Goodhue *v.* Rice, 53 Cal. 302.

Illinois.— Holden *v.* Sherwood, 84 Ill. 92; Wehrheim *v.* Thiel Detective Co., 87 Ill. App. 565.

Indiana.— Ross *v.* Banta, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732; Thiebaud *v.* Tait, (Ind. 1892) 31 N. E. 1052.

Missouri.— Robinson *v.* Hood, 67 Mo. 660; Jefferson City *v.* Opel, 67 Mo. 394; Monroe City Bank *v.* Finks, 40 Mo. App. 367.

Tennessee.—Steele *v.* Davis, 5 Heisk. (Tenn.) 75.

Wisconsin.— Cornell *v.* Davis, 16 Wis. 686; Williams *v.* Holmes, 7 Wis. 168.

See 3 Cent. Dig. tit. "Appeal and Error," § 2359.

In Iowa, since the enactment of the section of the code providing that "all proper entries made by the clerk, and all papers pertaining to a cause . . . are to be deemed parts of the record," the rule is different. Lemonds *v.* French, 4 Greene (Iowa) 123.

Attachment proceedings.— Affidavits, motions, and other papers in attachment proceedings are not a part of the record proper in the action (Jones *v.* Buzzard, 2 Ark. 415; Highway Com'rs *v.* People, 31 Ill. 97; Syndicate Imp. Co. *v.* Bradley, 6 Wyo. 171, 43 Pac. 79, 44 Pac. 60. *Contra,* Merchants Nat. Bank *v.* Grunthal, 38 Fla. 93, 20 So. 809); and where there is no bill of exceptions preserving a motion to quash an attachment, the action of the courts thereon, and exceptions thereto, the error assigned will not be reviewed (Kellogg *v.* Turpie, 2 Ill. App. 55; Little *v.* Balliette, 9 Pa. Super. Ct. 411 [*citing* Nicoll *v.* McCaffrey, 1 Pa. Super. Ct. 187]. *Contra,* Ellsworth *v.* Moore, 5 Iowa 486).

See 3 Cent. Dig. tit. "Appeal and Error," § 2365.

Change of venue.— The denial of a motion for a change of venue cannot be considered where the petition and supporting affidavits are not brought up in the record by statement or bill of exceptions.

Arkansas.— Estes *v.* Chesney, 54 Ark. 463, 16 S. W. 267; Botsford *v.* Yates, 25 Ark. 282.

Illinois.— Heacock *v.* Hosmer, 109 Ill. 245; McElwee *v.* People, 77 Ill. 493.

Indiana.— Harrison County *v.* Benson, 83 Ind. 469; Smith *v.* Smith, 77 Ind. 80.

Missouri.— Evans *v.* Trenton, 112 Mo. 390, 20 S. W. 614; Wolff *v.* Ward, 104 Mo. 127, 16 S. W. 161; Finlay *v.* Gill, 80 Mo. App. 458.

Wyoming.— Perkins *v.* McDowell, 3 Wyo. 328, 23 Pac. 71.

Contra, Pieper *v.* Centinela Land Co., 56 Cal. 173 (construing Cal. Code Civ. Proc. § 951); Bookwalter *v.* Conrad, 14 Mont. 62, 35 Pac. 226 (construing Mont. Code Civ. Proc. § 438). See also Barclay *v.* Salmon, 17 Ohio Cir. Ct. 152, holding that the affidavit of interest, bias, or prejudice of the judge need not be incorporated in a bill of exceptions, but that it is sufficient to file it with the petition in error.

See 3 Cent. Dig. tit. "Appeal and Error," § 2361.

Where the cause has been removed from one trial court to another and afterward appealed, the papers filed in the first court are part of the record on appeal (Bell *v.* Farmville, etc., R. Co., 91 Va. 99, 20 S. E. 942), and the portions of the record of the court from which the change was taken need not be designated (Powell *v.* Bunger, 91 Ind. 64).

Continuance.— A motion for continuance is not part of the record, and, if it is desired to review the ruling of the court thereon, the motion, the grounds upon which it is based, the decision of the court, and the exception, must be preserved by bill of exceptions.

Arkansas.— Evans *v.* Rudy, 34 Ark. 383.

notices of motion,[3] or of an intended hearing,[4] or interlocutory non-appealable orders,[5] can be reviewed on appeal from a final judgment[6] only when embodied in the bill of exceptions or statement.

(II) *Injunction Proceedings.* Motions for an injunction are regularly heard upon complaint, answer, and affidavits, and the appeal is heard upon the papers used in the court below. If these are properly certified it is sufficient and no bill of exceptions is necessary, unless it be to identify the papers used on the hearing.[7]

f. Evidence—(I) *In General.* Evidence introduced on a trial is not, ordinarily, a part of the record unless embodied in a bill of exceptions, case-made, or statement;[8] and cannot be made such by the unauthorized certificate of the

California.— Jacks *v.* Buell, 47 Cal. 162; Harasgthy *v.* Horton, 46 Cal. 545.

Illinois.— Bromwell *v.* Bromwell, 139 Ill. 424, 28 N. E. 1057; Chicago, etc., R. Co. *v.* Goyette, 133 Ill. 21, 24 N. E. 549.

Indiana.— Bender *v.* Wampler, 84 Ind. 172; Free *v.* Haworth, 19 Ind. 404; Rains *v.* Bolin, 6 Ind. App. 181, 33 N. E. 218.

Kentucky.— Dorman *v.* Sebree, 21 Ky. L. Rep. 634, 52 S. W. 809.

Louisiana.— Berger *v.* Spalding, 13 La. Ann. 580; Crain *v.* Kane, 5 La. Ann. 659. But see Harrison *v.* Waymouth, 3 Rob. (La.) 340.

Missouri.— Holt *v.* Simmons, 14 Mo. App. 450, wherein it was held [Thompson, J., dissenting], that orders of continuance of the motion for a new trial were matters of exception only, and constituted no part of the record proper.

Montana.— Barber *v.* Briscoe, 8 Mont. 214, 19 Pac. 589.

Texas.— Bonner *v.* Whitcomb, 80 Tex. 178, 15 S. W. 899; Texas, etc., R. Co. *v.* McAllister, 59 Tex. 349; Orange Mill-Supply Co. *v.* Goodman, (Tex. Civ. App. 1900) 56 S. W. 700.

See 3 Cent. Dig. tit. "Appeal and Error," § 2362.

Dismissal and nonsuit.— A motion to dismiss is not a part of the record proper, and, unless proper steps are taken to preserve it, a ruling thereon cannot be reviewed on appeal.

Alabama.— Hyde *v.* Adams, 80 Ala. 111.

Colorado.— Rutter *v.* Shumway, 16 Colo. 95, 26 Pac. 321.

Illinois.— Blair *v.* Ray, 103 Ill. 615 [*distinguishing* Randolph *v.* Emerick, 13 Ill. 344, (*followed* in Offield *v.* Siler, 15 Ill. App. 308)]; Douglass *v.* Parker, 43 Ill. 146.

Indiana.— Scudder *v.* Jones, 134 Ind. 547, 32 N. E. 221; Sample *v.* Carroll, 132 Ind. 496, 32 N. E. 220; Sheeks *v.* Fillion, 3 Ind. App. 262, 29 N. E. 786.

Kansas.— Sutton *v.* Nichols, 20 Kan. 43.

Mississippi.— Torrance *v.* Betsy, 30 Miss. 129.

Missouri.— Brown *v.* Foote, 55 Mo. 178; U. S. *v.* Gamble, 10 Mo. 457; School Dist. No. 4 *v.* Holmes, 53 Mo. App. 487.

New York.— Martin *v.* Bronsveld, 9 Misc. (N. Y.) 375, 29 N. Y. Suppl. 1118, 60 N. Y. St. 618.

Wisconsin.— Johannes *v.* Youngs, 42 Wis. 401.

See 3 Cent. Dig. tit. "Appeal and Error," § 2363.

So, too, the action of the trial court in granting a nonsuit cannot be reviewed unless the evidence is made a part of the record in the manner required by statute. Palmer *v.* Bice, 28 Ala. 430; Hobbs *v.* Longstreet, 72 Ga. 898; Rooney *v.* Tong, 4 Mont. 597, 2 Pac. 312, 4 Mont. 596, 1 Pac. 720; Kleinschmidt *v.* McAndrews, 4 Mont. 8, 2 Pac. 286 [on *rehearing* 4 Mont. 223, 5 Pac. 281].

Reference to page of transcript.— Where the clerk copies the motion into the transcript in connection with the order-book entry thereof, and the bill of exceptions merely refers to the page of the transcript where such copy is to be found, this does not bring the motion into the record. Gussman *v.* Gussman, 140 Ind. 433, 39 N. E. 918.

3. Barclay *v.* Barclay, 42 Ala. 345; Garey *v.* Edwards, 15 Ala. 105; Bacon *v.* Robson, 53 Cal. 399; Ayers *v.* Lewellin, 3 Leigh (Va.) 609. See 3 Cent. Dig. tit. "Appeal and Error," § 2366.

Their absence from the record is not evidence, therefore, that notice was not given. Rich *v.* Hathaway, 18 Ill. 548.

4. Prescott *v.* Grady, 91 Cal. 518, 27 Pac. 755.

5. Gilman *v.* Bootz, 80 Cal. 564, 22 Pac. 255; Gates *v.* Walker, 35 Cal. 289; Graham *v.* Linehan, 1 Ida. 780; Hoey *v.* Pierron, 67 Wis. 262, 30 N. W. 692. See 3 Cent. Dig. tit. "Appeal and Error," § 2360.

See 3 Cent. Dig. tit. "Appeal and Error," § 2360.

Order denying motion to quash alternative mandamus forms no part of the judgment-roll, as an order involving the merits and necessarily affecting the judgment. Mooney *v.* Donovan, 9 N. D. 93, 81 N. W. 50, construing N. D. Comp. Laws, § 5489.

6. **On appeal from an interlocutory order,** the entire judgment-roll need not be brought up, since it cannot be required to be made until the entry of final judgment. Emeric *v.* Alvarado, 64 Cal. 529, 2 Pac. 418.

7. Blue-Bird Min. Co. *v.* Murray, 9 Mont. 468, 23 Pac. 1022; Hamilton *v.* Icard, 112 N. C. 589, 17 S. E. 519. But see Heagy *v.* Black, 90 Ind. 534, holding that if a motion to dissolve a temporary restraining order is refused, the question cannot be reviewed unless the grounds of the motion are shown by a bill of exceptions.

8. *Alabama.*— Pomeroy *v.* State, 40 Ala. 63; Maddox *v.* Brown, 9 Port. (Ala.) 118.

Arkansas.— Hall *v.* Bonville, 36 Ark. 491.

California.— Arnaz's Estate, 45 Cal. 259.

Colorado.— Bergundthal *v.* Bailey, 15 Colo. 257, 25 Pac. 86; Learned *v.* Tritch, 6 Colo. 579; Miller *v.* Thorpe, 4 Colo. App. 559, 36 Pac. 891.

clerk,[9] or by a reference to it in the journal entry.[10] But, by statutory enactment,

Dakota.— Gress *v.* Evans, 1 Dak. 387, 46 N. W. 1132.

Florida.— Waddell *v.* Cunningham, 27 Fla. 477, 8 So. 643; Pine *v.* Anderson, 22 Fla. 330.

Georgia.— Williams *v.* Cheatham, 97 Ga. 341, 22 S. E. 971; Tumlin *v.* Bass Furnace, 93 Ga. 594, 20 S. E. 44.

Illinois.— Ebner *v.* Mackey, 186 Ill. 297, 57 N. E. 834, 78 Am. St. Rep. 280 [*affirming* 87 Ill. App. 306]; Clifford *v.* Drake, 110 Ill. 135; Colby *v.* Herron, 88 Ill. App. 299.

Indiana.— Westervelt *v.* National Paper, etc., Co., 154 Ind. 673, 57 N. E. 552; Morrison *v.* Morrison, 144 Ind. 379, 43 N. E. 437; Gifford *v.* Hess, 15 Ind. App. 450, 43 N. E. 906.

Iowa.— Drake *v.* Fulliam, 98 Iowa 339, 67 N. W. 225; Mara *v.* Bucknell, 90 Iowa 757, 57 N. W. 876.

Kansas.— Litsey *v.* Moffett, 29 Kan. 507; Clark *v.* Parkville, etc., R. Co., 5 Kan. 654.

Kentucky.—Dickerson *v.* Talbot, 14 B. Mon. (Ky.) 49.

Maryland.— Barnes *v.* Blackiston, 2 Harr. & J. (Md.) 376.

Massachusetts.—Willock *v.* Wilson, (Mass.) 1901) 59 N. E. 757.

Michigan.— Peabody *v.* McAvoy, 23 Mich. 526.

Minnesota.— Madigan *v.* Mead, 31 Minn. 94, 16 N. W. 539; Thompson *v.* Howe, 21 Minn. 98.

Mississippi.— Covington *v.* Arrington, 32 Miss. 144; Fuqua *v.* Tindall, 11 Sm. & M. (Miss.) 465.

Missouri.— Ray *v.* Brown, 80 Mo. 230; Martin *v.* Hagan, 8 Mo. 505; Barnes *v.* Buzzard, 61 Mo. App. 346, 1 Mo. App. Rep. 653.

Montana.— Blessing *v.* Sias, 7 Mont. 103, 14 Pac. 663; Higley *v.* Gilmer, 3 Mont. 433.

Nebraska.— Bankers' L. Assoc. *v.* Douglas County, (Neb. 1901) 85 N. W. 54; McKenna *v.* Dietrich, 48 Nebr. 433, 67 N. W. 181.

New York.— Matter of Clark, 58 Hun (N. Y.) 606, 11 N. Y. Suppl. 911, 34 N. Y. St. 523.

North Carolina.— McKinnon *v.* Morrison, 104 N. C. 354, 10 S. E. 513.

Oregon.— Mitchell *v.* Powers, 17 Oreg. 491, 21 Pac. 451; Ladd *v.* Higley, 5 Oreg. 296.

Pennsylvania.— Tasker *v.* Sheldon, 115 Pa. St. 107, 7 Atl. 762; Miller *v.* Hershey, 59 Pa. St. 64.

South Dakota.— Foley-Wadsworth Implement Co. *v.* Porteous, 7 S. D. 34, 63 N. W. 155; Merchants Nat. Bank *v.* McKinney, 6 S. D. 58, 60 N. W. 162.

Tennessee.— Anderson *v.* Middle, etc., Tennessee Cent. R. Co., 91 Tenn. 44, 17 S. W. 803.

Texas.— Texas, etc., R. Co. *v.* Raney, 86 Tex. 363, 25 S. W. 11; Gulf, etc., R. Co. *v.* Day, (Tex. Civ. App. 1893) 22 S. W. 772; Wade *v.* Buford, 1 Tex. App. Civ. Cas. § 1337.

Virginia.— Metropolitan L. Ins. Co. *v.* Rutherford. (Va. 1900) 35 S. E. 719 [*affirming* 98 Va. 195, 35 S. E. 361].

Washington.— Meeker *v.* Gardella, 2 Wash. Terr. 355, 7 Pac. 889.

Wisconsin.— Dodge *v.* O'Dell, 106 Wis. 296, 82 N. W. 135; Davidson *v.* Davidson, 10 Wis. 86.

United States.— Baltimore, etc., R. Co. *v.* Sixth Presb. Church, 91 U. S. 127, 23 L. ed. 260; Travelers' Protective Assoc. *v.* Gilbert, 101 Fed. 46, 41 C. C. A. 180.

See 3 Cent. Dig. tit. "Appeal and Error," § 2367.

Evidence not offered, or offered and ruled out.— Though, in an equity suit, testimony which has been objected to and ruled out will not be excluded from the record on appeal (Adee *v.* J. L. Mott Iron-Works, 46 Fed. 39), the court on appeal does not, ordinarily, consider evidence not offered, or evidence offered and rejected, at the hearing, though filed in the cause and copied into the record by the clerk.

Florida.— Kendrick *v.* Latham, 25 Fla. 819, 6 So. 871; Hanover F. Ins. Co. *v.* Lewis, 22 Fla. 568.

Illinois.— Gilchrist *v.* Gilchrist, 76 Ill. 281.

Iowa.— Stephens *v.* Pence, 56 Iowa 257, 9 N. W. 215.

Louisiana.— Sargent *v.* Slatter, 6 La. Ann. 72.

Mississippi.— Tegarden *v.* Carpenter, 36 Miss. 404.

New York.— Studwell *v.* Palmer, 5 Paige (N. Y.) 166.

Tennessee.— Taylor *v.* Smith, (Tenn. Ch. 1896) 36 S. W. 970.

See 3 Cent. Dig. tit. "Appeal and Error," § 2371.

Stenographer's report.— The report of the evidence as extended from the shorthand notes of the official stenographer is not part of the record on appeal, in the absence of a law allowing it to be filed as such.

Georgia.— Macon *v.* Harris, 75 Ga. 761.

Indiana.— Pittsburgh, etc., R. Co. *v.* Redding, 140 Ind. 101, 39 N. E. 921, 34 L. R. A. 767; Arbuckle *v.* Swim, 123 Ind. 208, 24 N. E. 105.

Kansas.— Hopkins *v.* Hopkins, 47 Kan. 103, 27 Pac. 822.

Kentucky.—McAllister *v.* Connecticut Mut. L. Ins. Co., 78 Ky. 531. But see Louisville City R. Co. *v.* Wood, 2 Ky. L. Rep. 387, holding that where such report accompanies the record and is signed by the judge and referred to in the bill of exceptions, the testimony which it contains will be considered.

Michigan.— Moote *v.* Scriven, 33 Mich. 500.

North Carolina.— Silver Valley Min. Co. *v.* North Carolina Smelting Co., 119 N. C. 415, 26 S. E. 27; Durham *v.* Richmond, etc., R. Co., 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1.

North Dakota.— Goose River Bank *v.* Gilmore, 3 N. D. 188, 54 N. W. 1032; Wood *v.* Nissen, 2 N. D. 26, 49 N. W. 103.

Oregon.— Nosler *v.* Coos Bay, etc., R., etc., Co., (Oreg. 1901) 63 Pac. 1050.

See 3 Cent. Dig. tit. "Appeal and Error," § 2370.

9. Castro *v.* Armesti, 14 Cal. 38; Wilson *v.* Middleton, 2 Cal. 54; Wall *v.* Hampton, 2 Mart. N. S. (La.) 361; Haney *v.* Clark, 1 Pinn. (Wis.) 301.

10. F. C. Austin Mfg. Co. *v.* Johnson, 89 Fed. 677, 60 U. S. App. 661, 32 C. C. A. 309.

testimony in certain proceedings becomes a part of the record by being certified to or attached to other papers,[11] and, if the case be in chancery, it becomes such by recital in the decree, by bill of exceptions, by certificate of the judge, or by a master's report.[12] So, too, a demurrer to evidence introduces the facts into the record, and its effect is to make the evidence a part thereof.[13]

(II) *Documentary Evidence*— (A) *In General.* Ordinarily, neither an account,[14] a record,[15] a judgment,[16] nor other documentary evidence[17] offered at the trial is a part of the record proper; but documentary evidence appended as an exhibit to bill or answer in chancery must come up under the clerk's certificate and is a part of the record.[18]

(B) *Affidavits.* As a general rule, affidavits are not part of the record proper,[19]

11. Davis *v.* Curtis, 68 Iowa 66, 25 N. W. 932; Powell *v.* Egan, 42 Nebr. 482, 60 N. W. 932; Howell *v.* Fry, 19 Ohio St. 556.

12. Bland *v.* Bowie, 53 Ala. 152; Benjamin *v.* Birmingham, 50 Ark. 433, 8 S. W. 183; Walker *v.* Abt, 83 Ill. 226; Martin *v.* Hargardine, 46 Ill. 322; Dooley *v.* Lackey, 55 Ill. App. 30; Ward *v.* Tennessee Coal, etc., R. Co., (Tenn. Ch. 1900) 57 S. W. 193.

13. Baker *v.* Baker, 69 Ind. 399; Lindley *v.* Kelley, 42 Ind. 294; Stiles *v.* Inman, 55 Miss. 469; Suydam *v.* Williamson, 20 How. (U. S.) 427, 15 L. ed. 978. See 3 Cent. Dig. tit. "Appeal and Error," § 2369.

A mere recital by the clerk that there was a demurrer to evidence, which was sustained, has been held not to bring the question up for review. Lusk *v.* Parsons, 39 Ill. App. 380; Willisch *v.* Indianapolis, etc., R. Co., 10 Ill. App. 402. See also Crowe *v.* People, 92 Ill. 231.

Sufficient identification of demurrer.— In Seldonridge *v.* Chesapeake, etc., R. Co., 46 W. Va. 569, 33 S. E. 293, it was objected that the demurrer was not in the record. The record recited that "the defendant demurred to the plaintiff's evidence in writing, in which demurrer the plaintiff joined," after which was the formal demurrer to evidence and the evidence. This was held a sufficient entry to make the demurrer a part of the record.

A motion to strike out part of the evidence and the ruling thereon are not before the court as part of the record proper. Posey County *v.* Harlem, 108 Ind. 164, 8 N. E. 913.

14. Hayes *v.* Woods, 72 Ala. 92; Garrity *v.* Lozano, 83 Ill. 597; Peck *v.* Tippecanoe County, 87 Ind. 221; Cornelius *v.* Merritt, 2 Head (Tenn.) 97.

15. Craig *v.* Smith, 10 Colo. 220, 15 Pac. 337; Rust *v.* Frothingham, 1 Ill. 331; Hunter *v.* Heath, 76 Me. 219; Dorsey *v.* Whetcroft, 1 Harr. & J. (Md.) 463.

16. Deem *v.* Crume, 46 Ill. 69; Kimmel *v.* Shultz, 1 Ill. 169; McKenen *v.* Duvall, 45 Md. 501.

17. *Alabama.*— Stodder *v.* Grant, 28 Ala. 416.

Colorado.— Cook *v.* Hughes, 1 Colo. 51.

Florida.— Hanover F. Ins. Co. *v.* Lewis, 22 Fla. 568; Petty *v.* Mays, 19 Fla. 652.

Georgia.— Watts *v.* Colquitt, 66 Ga. 492.

Illinois.— Johnson *v.* Freeport, etc., R. Co., 111 Ill. 413; Corey *v.* Russell, 8 Ill. 366; Reeve *v.* Peppard, 57 Ill. App. 556.

Indiana.— Langohr *v.* Smith, 81 Ind. 495.

Iowa.— State *v.* Jones, 11 Iowa 11; Potter *v.* Wooster, 10 Iowa 334.

Kentucky.—Byassee *v.* Reese, 4 Metc. (Ky.) 372, 83 Am. Dec. 481; Vaughn *v.* Mills, 18 B. Mon. (Ky.) 633; Jones *v.* Brown, 9 Ky. L. Rep. 765.

Louisiana.— Twichell *v.* Avegno, 19 La. Ann. 294.

Maine.— Starbird *v.* Eaton, 42 Me. 569; Kirby *v.* Wood, 16 Me. 81.

Maryland.— Ayres *v.* Kain, 3 Gill & J. (Md.) 24.

Massachusetts.— Pierce *v.* Adams, 8 Mass. 383; Storer *v.* White, 7 Mass. 448.

Mississippi.— Gale *v.* Lancaster, 44 Miss. 413.

Missouri.— Ivy *v.* Yancey, 129 Mo. 501, 31 S. W. 937; Eystra *v.* Capelle, 61 Mo. 578.

Oregon.— Fisher *v.* Kelly, 26 Oreg. 249, 38 Pac. 67.

Tennessee.—Anderson *v.* Walker, Mart. & Y. (Tenn.) 200.

Texas.— McLarty *v.* Prior, (Tex. 1886) 2 S. W. 752.

Wisconsin.—West *v.* Milwaukee, etc., R. Co., 56 Wis. 318, 14 N. W. 292; Cord *v.* Southwell, 15 Wis. 211.

United States.— Reed *v.* Gardner, 17 Wall. (U. S.) 409, 21 L. ed. 665; Stockwell *v.* U. S., 3 Cliff. (U. S.) 284, 23 Fed. Cas. No. 13,466.

Compare Carman *v.* Pultz, 21 N. Y. 547.

See 3 Cent. Dig. tit. "Appeal and Error," § 2375.

18. Carey *v.* Giles, 10 Ga. 1. See also Fielder *v.* Collier, 13 Ga. 495.

19. *Alabama.*— Diston *v.* Hood, 83 Ala. 331, 3 So. 746. But see Lee *v.* Davis, 16 Ala. 516, wherein, on application to set aside a sale of land under xecution, the judgment entry contained a recital that the petition, answers, and affidavits of the respective parties were on file and submitted, and that upon inspection and consideration of these the sale was discharged, and the court thought that the affidavit under this recital formed a part of the record.

California.— Clanton *v.* Coward, 67 Cal. 373, 7 Pac. 787; Gordon *v.* Clark, 22 Cal. 533. *Compare* Stone *v.* Stone, 17 Cal. 513.

Illinois.— Plotke *v.* Chicago Title, etc., Co., 175 Ill. 234, 51 N. E. 754; Anderson Transfer Co. *v.* Fuller, 174 Ill. 221, 51 N. E. 251 [*affirming* 73 Ill. App. 48]; Fuller *v.* Burke, 60 Ill. App. 600.

whether such affidavits are used in support of a motion for new trial,[20] for a continuance,[21] for a change of venue,[22] to set aside or vacate a default,[23] to sustain or dissolve an injunction,[24] to set aside or open a judgment,[25] or whether they

Indiana.— Bower *v.* Bowen, 139 Ind. 31, 38 N. E. 326; Pence *v.* Waugh, 135 Ind. 143, 34 N. E. 860.

Kansas.— Jenks *v.* School Dist., 18 Kan. 356.

Massachusetts.— Warner *v.* Collins, 135 Mass. 26.

Nebraska.— Smith Brothers L. & T. Co. *v.* Weiss, 56 Nebr. 210, 76 N. W. 564; Minick *v.* Minick, 49 Nebr. 89, 68 N. W. 374.

New York.— Graham *v.* Dunigan, 2 Bosw. (N. Y.) 516; Gallaudet *v.* Steinmetz, 6 Abb. N. Cas. (N. Y.) 224.

North Carolina.— Maxwell *v.* McDowell, 50 N. C. 391; Wallace *v.* Reid, 32 N. C. 61.

Pennsylvania.— Breitenbach *v.* Bush, 44 Pa. St. 313, 84 Am. Dec. 442; Dodds *v.* Dodds, 9 Pa. St. 315.

Tennessee.— Jones *v.* Stockton, 6 Lea (Tenn.) 133; Kincaid *v.* Bradshaw, 6 Baxt. (Tenn.) 102.

United States.— Baltimore, etc., R. Co. *v.* Sixth Presb. Church, 91 U. S. 127, 23 L. ed. 260.

See 3 Cent. Dig. tit. "Appeal and Error," § 2374.

Appeal from an award.—Where, by statute, it is provided that, where an appeal is taken from a judgment entered upon an award, certified copies of the original affidavit upon which any application in relation to such award was founded, and of all other affidavits and papers relating to such application, shall form a part of the record of the judgment, such affidavits are a part of the judgment-roll. Dundon *v.* Starin, 19 Wis. 261. See also *In re* Poole, 5 N. Y. Civ. Proc. 279.

20. *California.*— Cohen *v.* Alameda, 124 Cal. 504, 57 Pac. 377; Von Glahn *v.* Brennan, 81 Cal. 261, 22 Pac. 596.

Colorado.— Daum *v.* Conley, (Colo. 1899) 59 Pac. 753; Anderson *v.* Sloan, 1 Colo. 33.

Florida.— Reynolds *v.* State, 33 Fla. 301, 14 So. 723.

Idaho.— Rich *v.* French, (Ida. 1893) 35 Pac. 173.

Illinois.— Cairo, etc., R. Co. *v.* Easterly, 89 Ill. 156; Van Pelt *v.* Dunford, 58 Ill. 145; Spangenberg *v.* Charles, 44 Ill. App. 526.

Indiana.— Hoskinson *v.* Cavender, 143 Ind. 1, 42 N. E. 358; Iddings *v.* Iddings, 134 Ind. 322, 33 N. E. 1101; Ætna Ins. Co. *v.* Le Roy, 15 Ind. App. 49, 43 N. E. 570.

Kentucky.— Faulkner *v.* Wilcox, 2 Litt. (Ky.) 369.

Mississippi.—Ross *v.* Garey, 7 How. (Miss.) 47.

Nebraska.— Willits *v.* Arena Fruit Co., 58 Nebr. 659, 79 N. W. 624; Mercantile Trust Co. *v.* O'Hanlon, 58 Nebr. 482, 78 N. W. 925.

Oklahoma.— Berry *v.* Smith, 2 Okla. 345, 35 Pac. 576.

Texas.— Frizzell *v.* Johnson, 30 Tex. 31; Arnold *v.* Williams, 21 Tex. 413.

Utah.— Perego *v.* Dodge, 9 Utah 3, 33 Pac. 221.

United States.— Evans *v.* Stettnisch, 149 U. S. 605, 13 S. Ct. 931, 37 L. ed. 866; Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383, 9 S. Ct. 101, 32 L. ed. 439.

See 3 Cent. Dig. tit. "Appeal and Error," § 2374.

21. *Arkansas.*— Wise *v.* Martin, 36 Ark. 305; Phillips *v.* Reardon, 7 Ark. 256.

Colorado.— Interstate Land, etc., Co. *v.* Patton, 21 Colo. 503, 42 Pac. 673.

Dakota.— Everett *v.* Buchanan, 2 Dak. 249, 6 N. W. 439, 8 N. W. 31.

Illinois.— Kennedy *v.* Whittaker, 81 Ill. App. 605.

Indiana.— Swan *v.* Clark, 80 Ind. 57; Fulkerson *v.* Armstrong, 39 Ind. 472; Rains *v.* Bolin, 6 Ind. App. 181, 33 N. E. 218.

Missouri.— Pratt *v.* Rogers, 5 Mo. 51.

Nebraska.— Nelson *v.* Johnson, 44 Nebr. 7, 62 N. W. 244; Barton *v.* McKay, 36 Nebr. 632, 54 N. W. 968.

Nevada.— State *v.* Wallin, 6 Nev. 280.

Oklahoma.— Kingman *v.* Pixley, 7 Okla. 351, 54 Pac. 494.

Utah.— Hecla Gold Min. Co. *v.* Gisborn, 21 Utah 68, 59 Pac. 518.

See 3 Cent. Dig. tit. "Appeal and Error," § 2374.

22. *Arkansas.*— Estes *v.* Chesney, 54 Ark. 463, 16 S. W. 267.

Illinois.— Schlump *v.* Reidersdorf, 28 Ill. 68.

Indiana.— Compton *v.* State, 89 Ind. 338; Horton *v.* Wilson, 25 Ind. 316.

Mississippi.— Grant *v.* Planters' Bank, 4 How. (Miss.) 326.

Nebraska.— Van Etten *v.* Kosters, 31 Nebr. 285, 47 N. W. 916.

Contra, see McGovern *v.* Keokuk Lumber Co., 61 Iowa 265, 16 N. W. 106; Winet *v.* Berryhill, 55 Iowa 411, 7 N. W. 681.

23. *Arkansas.*— Fidelity Ins. Co. *v.* Hammock, (Ark. 1891) 15 S. W. 360.

Florida.— Parkhurst *v.* Stone, 36 Fla. 463, 18 So. 596; Columbia County *v.* Branch, 31 Fla. 62, 12 So. 650.

Indiana.—Hancock *v.* Fleming, 85 Ind. 571; Bingham *v.* Stumph, 48 Ind. 97.

Michigan.—Leonard *v.* Woodward, 34 Mich. 514.

Nebraska.— Beard *v.* Ringer, 41 Nebr. 831, 60 N. W. 95; Burke *v.* Pepper, 29 Nebr. 320, 45 N. W. 466.

See 3 Cent. Dig. tit. "Appeal and Error," § 2374.

24. Hobbs *v.* Hunt, 34 Nebr. 657, 52 N. W. 278; Strunk *v.* State, 31 Nebr. 119, 47 N. W. 640; Garner *v.* White, 23 Ohio St. 192; Sleet *v.* Williams, 21 Ohio St. 82; Brown *v.* Ridgway, 10 Pa. St. 42; Bowring *v.* Bowring, 4 Utah 185, 7 Pac. 716. See 3 Cent. Dig. tit. "Appeal and Error," § 2374.

25. *California.*— Ritter *v.* Mason, 11 Cal. 214.

Illinois.— Roundy *v.* Hunt, 24 Ill. 598.

Indiana.— Patton *v.* Camplin, 63 Ind. 512.

are used on the hearing of an application for an injunction.[26] It has been held, however, that an affidavit filed with the clerk as a basis on which process is to be issued ministerially by him is, like an affidavit for publication, a part of the proceedings in the case and a part of the record proper;[27] and, in chancery, affidavits used on the hearing may form part of the record.[28]

(c) *Depositions.* Depositions are not, ordinarily, a part of the record proper,[29] and the necessity of preserving them by some appropriate method is not obviated by agreement of counsel[30] or by the certificate of the clerk;[31] but if there is a sufficient identification by reference in the record to the depositions found among the papers in the cause certified up, this will be sufficient.[32] In suits in equity, however, no bill is necessary to make depositions a part of the record, but it is sufficient if they are properly filed in the cause.[33]

g. Instructions. Instructions, ordinarily, form no part of the record,[34] and

Pennsylvania.—George *v.* Tradesmen's Bldg., etc., Assoc., 1 Walk. (Pa.) 533.

Washington.— Whidby Land, etc., Co. *v.* Nye, 5 Wash. 301, 31 Pac. 752.

See 3 Cent. Dig. tit. "Appeal and Error," § 2374.

26. Morgan *v.* Twitty, 64 Ga. 426; Woolbright *v.* Wall. 60 Ga. 595; Turnbull *v.* Ellis, 35 Ind. 422; Hart *v.* Foley, 67 Iowa 407, 25 N. W. 679; Altschiel *v.* Smith, 9 Kan. 90. See 3 Cent. Dig. tit. "Appeal and Error," § 2374.

27. Bryan *v.* Congdon, 54 Kan. 109, 37 Pac. 1009.

28. Cohen *v.* Meyers, 42 Ga. 46.

29. *Arkansas.*—Moore *v.* Cairo, etc., R. Co., 36 Ark. 262.

Florida.— Myers *v.* Roberts, 35 Fla. 255, 17 So. 358.

Kansas.— Dunlap *v.* McFarland, 25 Kan. 488.

Kentucky.— King *v.* Common School Dist. No. 23, 17 Ky. L. Rep. 803, 32 S. W. 752; Goldsmith *v.* Fletcheimer, 16 Ky. L. Rep. 432, 28 S. W. 21; Louisville, etc., R. Co. *v.* Finley, 9 Ky. L. Rep. 660, 5 S. W. 753.

Louisiana.—Wiltz *v.* Dufau, 10 Mart. (La.) 20.

Michigan.— Harvey *v.* McAdams, 32 Mich. 472.

Minnesota.— Claflin *v.* Lawler, 1 Minn. 297.

Mississippi.— Giegolt *v.* Joor, 60 Miss. 817.

Nebraska.— Kyle *v.* Chase, 14 Nebr. 528, 16 N. W. 821; Nebraska City *v.* Baker, 1 Nebr. 180.

Ohio.—Pittsburgh, etc., R. Co. *v.* Probst, 30 Ohio St. 104.

Oregon.— Roberts *v.* Parrish, 17 Oreg. 583, 22 Pac. 136.

Pennsylvania.— France *v.* Ruddiman, 126 Pa. St. 257, 17 Atl. 611; Shisler *v.* Keavy, 75 Pa. St. 79.

Tennessee.—Neef *v.* Chattanooga Gas Light Co., 9 Lea (Tenn.) 467; Spurlock *v.* Fulks, 1 Swan (Tenn.) 289.

Texas.— Harris *v.* Leavitt, 16 Tex. 340; Texas, etc., R. Co. *v.* Evans, 2 Tex. Unrep. Cas. 318.

Vermont.— Sargeant *v.* Leland, 2 Vt. 277; Stearns *v.* Warner, 2 Aik. (Vt.) 26.

Washington.— See Likens *v.* Cain, 4 Wash. 307, 30 Pac. 80.

United States.— Craig *v.* Smith, 100 U. S. 226, 25 L. ed. 577; Baltimore, etc., R. Co. *v.* Sixth Presb. Church, 91 U. S. 127, 23 L. ed. 260.

See 3 Cent. Dig. tit. "Appeal and Error," § 2372.

Motion to suppress depositions.— The ruling of the court below on a motion to suppress a deposition cannot be considered on appeal unless proper steps are taken to preserve such motion and the ruling thereon. Craig *v.* Young, 2 Colo. 112; Pollak *v.* Hutchinson, 21 Fla. 128; Smith *v.* Kyler, 74 Ind. 575; Hutts *v.* Hutts, 51 Ind. 581; Davidson *v.* Peck, 4 Mo. 438. See 3 Cent. Dig. tit. "Appeal and Error," § 2373.

30. Moore *v.* Cairo, etc., R. Co., 36 Ark. 262; Bacon *v.* Green, 36 Fla. 325, 18 So. 870.

31. Moore *v.* Cairo, etc., R. Co., 36 Ark. 262; Wynne *v.* Edwards, 7 Humphr. (Tenn.) 418; Hillebrant *v.* Brewer, 6 Tex. 45, 55 Am. Dec. 757; Ramsburg *v.* Erb, 16 W. Va. 777.

32. Bacon *v.* Green, 36 Fla. 325, 18 So. 870; Washington Mut. Ins. Co. *v.* Reed, 20 Ohio 199.

Depositions not referred to or recognized in any order or decree of the court, where there is nothing to show that they were made a part of the record or that they were read on the hearing of the case, cannot be considered by the appellate court. Bloss *v.* Hull, 27 W. Va. 503; Hilleary *v.* Thompson, 11 W. Va. 113.

33. *Arkansas.*— Rose *v.* Rose, 9 Ark. 507.

Illinois.— Ryan *v.* Sanford, 133 Ill. 291, 24 N. E. 428; Smith *v.* Newland, 40 Ill. 100.

Iowa.— Gately *v.* Kniss, 64 Iowa 537, 21 N. W. 21.

Kentucky.—Connelly *v.* Shipp, 3 Litt. (Ky.) 257.

Tennessee.—Hill *v.* Bowers, 4 Heisk. (Tenn.) 272.

Virginia.— Day *v.* Hale, 22 Gratt. (Va.) 146.

West Virginia.— Turnbull *v.* Clifton Coal Co., 19 W. Va. 299.

See 3 Cent. Dig. tit. "Appeal and Error," § 2372.

34. *Arkansas.*— Jones *v.* Buzzard, 2 Ark. 415.

California.— Cohen *v.* Wallace, 107 Cal. 133, 40 Pac. 101 (where it was pointed out that, if properly authenticated by the judge, instructions become a part of the judgment-roll without being incorporated in the bill of exceptions); Matthews *v.* Jones, 92 Cal. 563, 28 Pac. 597.

they are not made a part thereof by being copied into the motion for a new trial,[35] or by reason of the fact that the refusal to give instructions requested need not be excepted to under a statute.[36] In some states, by statute, however, instructions need not be embodied in a bill of exceptions if other modes prescribed for bringing them into the record are carefully observed.[37]

h. Proceedings on Reference. In chancery,[38] and by statute in some states, the report of a referee[39] is a part of the record. In other states it is a part of the record where the terms of the reference are general, and the referee must

Colorado.— Witcher *v.* Watkins, 11 Colo. 548, 19 Pac. 540; Brink *v.* Posey, 11 Colo. 521, 19 Pac. 467; Banks *v.* Hoyt, 11 Colo. 399, 18 Pac. 448.

Dakota.— St. Croix Lumber Co. *v.* Pennington, 2 Dak. 467, 11 N. W. 497.

Florida.— Union Bank *v.* Call, 5 Fla. 409. But where the instruction is manifestly without the limits of the issue joined between the parties, and is likely to mislead the jury in making up their verdict, the court may pronounce upon it even in the absence of the bill of exceptions provided it be properly attested by the signature of the judge below. McKay *v.* Bellows, 8 Fla. 31; McKay *v.* Friebele, 8 Fla. 21; Fash *v.* Clark, 8 Fla. 16.

Illinois.— Drew *v.* Beall, 62 Ill. 164; Mann *v.* Russell, 11 Ill. 586; Chicago, etc., R. Co. *v.* Haselwood, 91 Ill. App. 103.

Indiana.— Riley *v.* Allen, 154 Ind. 176, 56 N. E. 240; Van Meter *v.* Barnett, 119 Ind. 35, 20 N. E. 426; Eaken *v.* Thompson, 4 Ind. App. 393, 30 N. E. 1114.

Indian Territory.— Case *v.* Hall, (Indian Terr. 1898) 46 S. W. 180.

Iowa.— Pierce *v.* Locke, 11 Iowa 454; Ewing *v.* Scott, 2 Iowa 447.

Kansas.— Kshinka *v.* Cawker, 16 Kan. 63; McArthur *v.* Mitchell, 7 Kan. 173.

Kentucky.— Cartmel *v.* Unverzaught, 21 Ky. L. Rep. 1282, 54 S. W. 965; Tinsley *v.* White, 21 Ky. L. Rep. 1151, 54 S. W. 169.

Louisiana.— Soulié *v.* Ranson, 29 La. Ann. 161.

Massachusetts.— Parker *v.* Lawrence Mfg. Co., 176 Mass. 203, 57 N. E. 366; Holt *v.* Roberts, 175 Mass. 558, 56 N. E. 702.

Missouri.—Greenabaum *v.* Millsaps, 77 Mo. 474; Robinson *v.* Hood, 67 Mo. 660.

Ohio.— Pettett *v.* Van Fleet, 31 Ohio St. 536; Lockhart *v.* Brown, 31 Ohio St. 431.

Pennsylvania.— Quellman *v.* Jacobs, (Pa. 1852) 1 Am. Law Reg. 248; Lehigh Valley F. Ins. Co. *v.* Tighe. 2 Pennyp. (Pa.) 505.

Tennessee.— McMillan Marble Co. *v.* Black, 89 Tenn. 118, 14 S. W. 479; Chesapeake, etc., R. Co. *v.* Foster, 88 Tenn. 671, 13 S. W. 694, 14 S. W. 428.

Texas.— Davis *v.* Calhoun, 41 Tex. 554; Henry *v.* Shain, 1 Tex. App. Civ. Cas. § 1074.

Virginia.— Ferguson *v.* Wills, 88 Va. 136, 15 Va. L. J. 569, 13 S. E. 392.

Washington.— Medcalf *v.* Bush, 4 Wash. 386, 30 Pac. 325.

West Virginia.—Winters *v.* Null, 31 W. Va. 450, 7 S. E. 443.

Wisconsin.— Collins *v.* Breen, 75 Wis. 606, 44 N. W. 769; Koenigs *v.* Jung, 73 Wis. 178, 40 N. W. 801.

United States.— Struthers *v.* Drexel, 122 U. S. 487, 7 S. Ct. 1293, 30 L. ed. 1216; Phoenix Ins. Co. *v.* Lanier, 95 U. S. 171, 24 L. ed. 383; Sternenberg *v.* Mailhos, 99 Fed. 43, 39 C. C. A. 408.

See 3 Cent. Dig. tit. "Appeal and Error," § 2376.

35. Whetton *v.* Clayton, 111 Ind. 360, 12 N. E. 513; Gheens *v.* Golden, 90 Ind. 427; Henley *v.* Bronnenberg, (Ind. App. 1892) 31 N. E. 583; Garland *v.* Wholebau, 20 Iowa 271. See 3 Cent. Dig. tit. "Appeal and Error," § 2376.

36. Kleinschmidt *v.* McDermott, 12 Mont. 309, 30 Pac. 393.

37. *Alabama.*— Highland Ave., etc., R. Co. *v.* South, 112 Ala. 642, 20 So. 1003; Alabama Great Southern R. Co. *v.* Dobbs, 101 Ala. 219, 12 So. 770.

Florida.— Richardson *v.* State, 28 Fla. 349, 9 So. 704; Parish *v.* Pensacola, etc., R. Co., 28 Fla. 251, 9 So. 696.

Indiana.— Krom *v.* Vermillion, 143 Ind. 75, 41 N. E. 539; Insurance Co. of North America *v.* Osborn, (Ind. App. 1901) 59 N. E. 181; Otis *v.* Weiss, 22 Ind. App. 161, 53 N. E. 428.

Iowa.— Davis *v.* Campbell, 93 Iowa 524, 61 N. W. 1053; Allison *v.* Jack, 76 Iowa 205, 40 N. W. 811.

Mississippi.—Shelby *v.* Brown, (Miss. 1899) 24 So. 531; State *v.* Spengler, 74 Miss. 129, 20 So. 879, 21 So. 4.

Nebraska.—Blumer *v.* Bennett, 44 Nebr. 873, 63 N. W. 14; Eaton *v.* Carruth, 11 Nebr. 231, 9 N. W. 58. See also State *v.* Bartley, 56 Nebr. 810, 77 N. W. 438; Yates *v.* Kinney, 23 Nebr. 648, 37 N. W. 590.

North Carolina.—Davis *v.* Duval, 112 N. C. 833, 17 S. E. 528; Marshall *v.* Stine, 112 N. C. 697, 17 S. E. 495.

Utah.— Utah Optical Co. *v.* Keith, 18 Utah 464, 56 Pac. 155.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 2377, 2378.

38. Gaylord *v.* Couch, 4 Day (Conn.) 374; Fouché *v.* Harison, 78 Ga. 359, 3 S. E. 330 [*followed* in Arendale *v.* Smith, 107 Ga. 494, 33 S. E. 669; Green *v.* Coast Line R. Co., 97 Ga. 15, 24 S. E. 814, 54 Am. St. Rep. 379, 33 L. R. A. 806]; Ferris *v.* McClure, 40 Ill. 99; Clapp *v.* Sturdivant, 10 Me. 68.

39. Daune *v.* Connelly, (Colo. 1899) 59 Pac. 753; Western Union Cold Storage Co. *v.* Bankers' Nat. Bank, 176 Ill. 260, 52 N. E. 30; Ferguson *v.* Hamilton, 35 Barb. (N. Y.) 427; Bash *v.* Culver Gold Min. Co., 7 Wash. 122, 34 Pac. 462. See also Lyddy *v.* Chamberlain, 24 Hun (N. Y.) 377, holding that, where a referee's report is sent back because of defects therein and a new report is made, the latter only belongs in the judgment-roll.

make a general report on the whole case in order that judgment may be entered thereon;[40] but where the reference is to report facts, or evidence and facts, the report is not part of the record.[41]

i. Verdict — (I) *In General.* The verdict is, as a rule, a part of the record proper;[42] but a sealed verdict,[43] or a verdict which has been set aside,[44] is not a part of the record.

(II) *Special Verdict, Interrogatories, and Answers.* A special verdict has the effect of incorporating facts into the record, and a bill of exceptions is not necessary to make it a part thereof.[45] So, too, interrogatories and answers of the jury are held to be part of the record,[46] unless the interrogatories are rejected[47]

40. Faulkner *v.* Hendy, 103 Cal. 15, 36 Pac. 1021.

41. *Indiana.*— Lee *v.* State, 88 Ind. 256; Beard *v.* Hand, 88 Ind. 183.

Maine.— Vance *v.* Carle, 7 Me. 164.

Massachusetts.— Davis *v.* Gay, 141 Mass. 531, 6 N. E. 549.

Missouri.— Turley *v.* Barnes, 131 Mo. 548, 33 S. W. 172; Walton *v.* Walton, 17 Mo. 376.

Oregon.— Van Bibber *v.* Fields, 25 Oreg. 527, 36 Pac. 526; Osborn *v.* Graves, 11 Oreg. 526, 6 Pac. 227.

Montana.— Murphy *v.* Patterson, 24 Mont. 575, 63 Pac. 375 (holding that Mont. Code Civ. Proc. § 1196, including the findings of a referee in the judgment-roll, does not refer to findings of fact under an order to hear testimony, but only to findings under a referee to hear and determine issues raised by the pleadings); Kleinschmidt *v.* Iler, 6 Mont. 122, 9 Pac. 901.

Virginia.— Magarity *v.* Shipman, 82 Va. 806, 7 S. E. 381.

United States.— Dietz *v.* Lymer, 63 Fed. 758, 27 U. S. App. 415, 11 C. C. A. 410 [*affirming* 61 Fed. 792, 19 U. S. App. 663, 10 C. C. A. 71].

See 3 Cent. Dig. tit. "Appeal and Error," § 2380.

Testimony, reduced to writing and signed by each of the witnesses, is reported to the court of common pleas with the certificate of the referee, in order that such court may, in entering judgment, have the testimony as a guide in considering exceptions, but it is not a part of the record which the circuit court may consider in determining whether the findings of the referee and the judgment thereof were correct. Johnson *v.* Johnson, 19 Ohio Cir. Ct. 610, 10 Ohio Cir. Dec. 411.

Submission and award.— Where a statute authorizes parties by their submission to have the award made a judgment of the court, "the submission is as much the basis of the action as the declaration, and the award, the foundation of the judgment as the verdict of the jury," and a bill of exceptions is unnecessary. Buntain *v.* Curtis, 27 Ill. 374.

42. *Arizona.*— Bashford *v.* Kendall, (Ariz. 1885) 7 Pac. 176.

Idaho.— Rich *v.* French, (Ida. 1893) 35 Pac. 173.

Illinois.— Chicago, etc., R. Co. *v.* Melville, 66 Ill. 329; French *v.* Hotchkiss, 60 Ill. App. 580.

Iowa.— Davis *v.* Campbell, 93 Iowa 524, 61 N. W. 1053.

New York.— Overton *v.* National Bank, 3 N. Y. St. 169.

See 3 Cent. Dig. tit. "Appeal and Error," § 2381.

The verdict as recorded is the only one of which the appellate court will take cognizance. It can be gathered only from the language used in the record of the judgment which it is sought to correct, and a copy of a paper found in the transcript, and purporting to be a verdict, will not be considered. The written memorandum declaring the verdict returned by the jury as their verdict is not a part of the record, or evidence of it.

Alabama.— Comer *v.* Jackson, 50 Ala. 384; Patterson *v.* Cook, 8 Port. (Ala.) 66.

California.— Coleman *v.* Gilmore, 49 Cal. 340, an appeal from an order denying a new trial, where the court struck from the record two papers entitled, "Verdict of Jury," and "Order Modifying Verdict."

Illinois.— McRea *v.* Becker, 90 Ill. App. 439; Goldstein *v.* Reynolds, 86 Ill. App. 390.

Maine.— Goodwin *v.* Appleton, 22 Me. 453.

Minnesota.— Seeman *v.* Feeney, 19 Minn. 79.

See 3 Cent. Dig. tit. "Appeal and Error," § 2381.

An entry on the order-book that the court instructed that the "following verdict" be returned, setting it out, does not take the place of a bill of exceptions. Hall *v.* Durham, 109 Ind. 434, 9 N. E. 926, 10 N. E. 581.

43. Rees *v.* Stillé, 38 Pa. St. 138; Wood Paving Co. *v.* Bickel, 14 Phila. (Pa.) 152, 37 Leg. Int. (Pa.) 132.

44. Galley *v.* Galley, 13 Nebr. 200, 13 N. W. 172.

45. Clark's Code Civ. Proc. N. C. (1900), § 409; Suydam *v.* Williamson, 20 How. (U. S.) 427, 15 L. ed. 978; Daube *v.* Philadelphia, etc., Coal, etc., Co., 77 Fed. 713, 46 U. S. App. 591, 23 C. C. A. 420.

Refusal to strike out special verdict is no part of the record paper. Tague *v.* Owens, 11 Ind. App. 200, 38 N. E. 541.

46. Frank *v.* Grimes, 105 Ind. 346, 4 N. E. 414; Boots *v.* Griffiths, 97 Ind. 241.

Making interrogatories more specific.—An order overruling a motion to require a jury to make answers to special interrogatories more specific must be brought up by a bill of exceptions. Pittsburgh, etc., R. Co. *v.* Indiana Horseshoe Co., 154 Ind. 322, 56 N. E. 766.

47. De Pauw *v.* Kaiser, 77 Ga. 176, 3 S. E. 254.

or unless the interrogatories are not shown to have been properly submitted to the jury.[48]

j. Findings of Court. The finding of the court, signed[49] and filed, is a part of the record, without a bill of exceptions or statement;[50] but an additional finding, made after the entry of judgment and without notice to the other party, should be stricken from the transcript,[51] and, in general, special findings of fact and conclusions of law found by the court are held not to be a part of the record proper.[52]

k. Proceedings on Motion For Arrest of Judgment. Proceedings on motion in arrest will not, in the absence of a bill of exceptions, be reviewed, as such motion can be brought up only by bill of exceptions.[53]

48. Aiken *v.* Ising, 94 Ind. 507; Ogle *v.* Dill, 61 Ind. 438.

Where the record discloses that questions submitted to the jury were returned into court with the general verdict, this sufficiently shows that the questions were in fact submitted and answered. Atchison, etc., R. Co. *v.* Johnson, 3 Okla. 41, 41 Pac. 641.

49. Signature of judge.— That the finding may go on the record it is essential, in the absence of a bill of exceptions, that it should be signed by the judge (Smith *v.* Davidson, 45 Ind. 396; Roberts *v.* Smith, 34 Ind. 550; Galvin *v.* Syfers, 22 Ind. App. 43, 52 N. E. 96; [but see McCullagh *v.* Allen, 10 Kan. 150, where special findings not signed by the judge, but spread upon the journal by order of the court, were held as much a part of the record as the pleadings]); but where conclusions of law immediately follow the finding of facts, both constituting one instrument, the judge's signature following the conclusions of law is a sufficient signing (Martin *v.* Marks, 154 Ind. 549, 57 N. E. 249).

50. *California.*— Thompson *v.* Hancock, 51 Cal. 110; Reynolds *v.* Harris, 8 Cal. 617.

Connecticut.— Hoadley *v.* Danbury Sav. Bank, 71 Conn. 599, 42 Atl. 667.

Idaho.— Rich *v.* French, (Ida. 1893) 35 Pac. 173 [*citing* Ida. Rev. Stat. (1887), § 4456, subsec. 2].

Iowa.— Hodges *v.* Goetzman, 76 Iowa 476, 41 N. W. 195 [*citing* Iowa Code, § 2743].

Minnesota.— Farnham *v.* Thompson, 34 Minn. 330, 26 N. W. 9, 57 Am. Rep. 59; Morrison *v.* March, 4 Minn. 422.

New York.— Nobis *v.* Pollock, 53 Hun (N. Y.) 441, 6 N. Y. Suppl. 273, 26 N. Y. St. 155. *Compare* Walrath *v.* Abbott, 85 Hun (N. Y.) 181, 32 N. Y. Suppl. 596, 66 N. Y. St. 164.

Ohio.— Ralston *v.* Kohl, 30 Ohio St. 92.

South Dakota.— Colonial, etc., Mortg. Co. *v.* Bradley, 4 S. D. 158, 55 N. W. 1108 [*citing* S. D. Comp. Laws, §§ 4756, 5103].

Washington.— Dodd *v.* Bowles, 3 Wash. Terr. 383, 19 Pac. 156 [*citing* Wash. Code, § 451].

Wisconsin.— Smith *v.* Lewis, 20 Wis. 350.

United States.— Ætna Ins. Co. *v.* Boon, 95 U. S. 117, 24 L. ed. 395; Wesson *v.* Saline County, 73 Fed. 917, 34 U. S. App. 680, 20 C. C. A. 227.

See 3 Cent. Dig. tit. "Appeal and Error," § 2382.

51. Hodges *v.* Goetzman, 76 Iowa 476, 41 N. W. 195; Loewen *v.* Forsee, (Mo. 1896) 35 S. W. 1138; Hamilton *v.* Armstrong, 120 Mo. 597, 25 S. W. 545; Kahn *v.* Central Smelting Co., 102 U. S. 641, 26 L. ed. 266.

52. *Arkansas.*— Bradley *v.* Harkey, 59 Ark. 178, 26 S. W. 827; Hall *v.* Bonville, 36 Ark. 491.

Illinois.— Firemen's Ins. Co. *v.* Peck, 126 Ill. 493, 18 N. E. 752; Wehrheim *v.* Thiel Detective Co., 87 Ill. App. 565.

Indiana.— McCray *v.* Humes, 116 Ind. 103, 18 N. E. 500; Branch *v.* Faust, 115 Ind. 464, 17 N. E. 898.

Minnesota.— National Invest. Co. *v.* Schicklig, 56 Minn. 283, 57 N. W. 663; Prouty *v.* Hallowell, 53 Minn. 488, 55 N. W. 623.

Missouri.— Martin *v.* Martin, 27 Mo. 227; Ragan *v.* McCoy, 26 Mo. 166.

Nevada.— Streeter *v.* Johnson, 23 Nev. 194, 44 Pac. 819 (holding that the method of bringing up the finding is not altered by Nev. Acts (1895), p. 58, allowing original papers to be certified up); Beck *v.* Thompson, 22 Nev. 109, 36 Pac. 562.

Texas.— Madden *v.* Madden, 79 Tex. 595, 15 S. W. 480.

See 3 Cent. Dig. tit. "Appeal and Error," § 2382.

Request for special finding.— It is indispensable that a request be made by one or both of the parties (Wilson *v.* Buell, 117 Ind. 315, 20 N. E. 231); but it has been held that where the court has tried a case without a jury and is required, under statute, to put the decision in writing, a special finding of facts, whether made with or without the request of the parties, comes in the place of a special verdict and is part of the record, and that, in the absence of a showing to the contrary, a request will be presumed (Delashman *v.* Berry, 20 Mich. 292, 4 Am. Rep. 392).

53. Wiggins *v.* Witherington, 96 Ala. 535, 11 So. 539; Turley *v.* Barnes, 131 Mo. 548, 33 S. W. 172; Ryan *v.* Growney, 125 Mo. 474, 28 S. W. 189, 755; Puller *v.* Thomas, 36 Mo. App. 105; Thompson *v.* Backenstos, 1 Oreg. 17; Rolette *v.* Crawford County, 1 Pinn. (Wis.) 384. *Contra*, Daniels *v.* Denver, 2 Colo. 669; Midland R. Co. *v.* Smith, 135 Ind. 348, 35 N. E. 284 (wherein the court said: "Where the motion relates to matters apparent upon the face of the record, it is not necessary to present it by bill of exceptions").

l. Proceedings on Motion For New Trial — (I) *In General.* As a rule, neither the notice of motion for new trial,[54] the motion itself, nor the ruling of the court thereon,[55] form a part of the record proper. There are jurisdictions, however, where it is held that such motions and the rulings thereon have no place in the bill of exceptions or statement,[56] though the affidavits used on the hearing and the evidence on which the judge acted must be preserved by a bill of exceptions.[57]

See 3 Cent. Dig. tit. "Appeal and Error," § 2384.

54. Leonard *v.* Shaw, 114 Cal. 69, 45 Pac. 1012; Nye *v.* Marysville, etc., St. R. Co., 97 Cal. 461, 32 Pac. 530; Rich *v.* French, (Ida. 1893) 35 Pac. 173; Linton *v.* Housh, 4 Kan. 535; Perego *v.* Dodge, 9 Utah 3, 33 Pac. 221. *Contra,* Arnold *v.* Sinclair, 12 Mont. 248, 29 Pac. 1124.

See 3 Cent. Dig. tit. "Appeal and Error," § 2386.

55. *Alabama.*— Richmond, etc., R. Co. *v.* Jones, 102 Ala. 212, 14 So. 786; Tyree *v.* Parham, 66 Ala. 424.

Arizona.— Maricopa County *v.* Osborn, (Ariz. 1895) 40 Pac. 313; Snead *v.* Tietjen, (Ariz. 1890) 24 Pac. 324.

Arkansas.— Beidler *v.* Friedell, 44 Ark. 411; Gaines *v.* Summers, 39 Ark. 482.

California.— Larkin *v.* Larkin, 76 Cal. 323, 18 Pac. 396; Hearst *v.* Dennison, 72 Cal. 227, 13 Pac. 628. *Compare* remark of Hayne, C., in Randall *v.* Duff, 79 Cal. 115, 19 Pac. 532, 21 Pac. 610, 3 L. R. A. 754 (decided under Cal. Code Civ. Proc. § 952).

Colorado.— Anderson *v.* Sloan, 1 Colo. 33.

Florida.— Grady *v.* Jeffares, 25 Fla. 743, 6 So. 828; Orthing *v.* Gundersheimer, 12 Fla. 640.

Idaho.— Rich *v.* French, (Ida. 1893) 35 Pac. 173, construing Ida. Rev. Stat. (1887), § 4467, subsec. 2.

Illinois.— Young *v.* Wells Glass Co., 187 Ill. 626, 58 N. E. 605 [*affirming* 87 Ill. App. 537]; Nason *v.* Letz, 73 Ill. 371; French *v.* Hotchkiss, 60 Ill. App. 580.

Louisiana.— State *v.* Williams, 35 La. Ann. 742.

Michigan.— Stevenson *v.* Detroit, etc., R. Co., 118 Mich. 651, 77 N. W. 247; Monnier *v.* Mizner, 17 Mich. 271.

Missouri.— Cooper *v.* Maloney, (Mo. 1901) 63 S. W. 372; Morris *v.* Whyte, 158 Mo. 20, 57 S. W. 1037 (holding that copying affidavits into the bill of exceptions, in support of the motion for a new trial on the ground of misstatements to the jury in the closing arguments, was insufficient); Patterson *v.* Gallimore, 79 Mo. App. 457.

Montana.— Helena First Nat. Bank *v.* Irvine, 2 Mont. 554.

New York.— Kenney *v.* Sumner, 12 Misc. (N. Y.) 86, 33 N. Y. Suppl. 95, 66 N. Y. St. 696. And see Lord *v.* Van Gelder, 16 Misc. (N. Y.) 24, 37 N. Y. Suppl. 693, 73 N. Y. St. 134.

Oklahoma.— Blanchard *v.* U. S., 6 Okla. 587, 52 Pac. 736, 54 Pac. 300; McMechan *v.* Christy, 3 Okla. 301, 41 Pac. 382 (construing Okla. Code, § 3964).

Oregon.— Oregonian R. Co. *v.* Wright, 10 Oreg. 162; Thompson *v.* Backenstos, 1 Oreg. 17.

Utah.— Perego *v.* Dodge, 9 Utah 3, 33 Pac. 221; People *v.* Smith, 3 Utah 425, 4 Pac. 242. But, under Utah Rev. Stat. § 3283, an order denying a motion for a new trial, if made in defendant's absence, or under some other circumstances, will be deemed excepted to, and become a part of the judgment-roll. Hecla Gold Min. Co. *v.* Gisborn, 21 Utah 68, 59 Pac. 518.

Wyoming.— Rubel *v.* Willey, 5 Wyo. 427, 40 Pac. 761; Seibel *v.* Bath, 5 Wyo. 409, 40 Pac. 756; Perkins *v.* McDowell, 3 Wyo. 328, 23 Pac. 71.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 2385, 2387.

56. *Georgia.*— Patterson *v.* Collier, 77 Ga. 292, 3 S. E. 119 (holding that exhibits attached to the motion and constituting the evidence in support of it, are a part of the pleadings); Cox *v.* Weems, 64 Ga. 165.

Indiana.— Hunter *v.* Hatfield, 68 Ind. 416 (holding that though a part of the record it is sufficient if the bill of exceptions sets it out); Cooper *v.* Howard County, 64 Ind. 520.

Kansas.— McCullagh *v.* Allen, 10 Kan. 150.

Kentucky.— McAllister *v.* Connecticut Mut. L. Ins. Co., 78 Ky. 531, holding that the grounds for a new trial, when filed and entered on the order-book, become a part of the record.

Mississippi.— Barrington *v.* Mississippi Cent. R. Co., 32 Miss. 370.

Nebraska.— Eaton *v.* Carruth, 11 Nebr. 231, 9 N. W. 58.

North Dakota.— Goose River Bank *v.* Gilmore, 3 N. D. 188, 54 N. W. 1032, decided under N. D. Laws (1891), c. 120, § 5, providing that, on appeal from an order, the order appealed from and the original papers shall be transmitted to the appellate court.

South Dakota.— Reagan *v.* McKibben, 11 S. D. 270, 76 N. W. 943; Daley *v.* Forsythe, 9 S. D. 34, 67 N. W. 948.

Wisconsin.— Dunbar *v.* Hollinshead, 10 Wis. 505, construing Wis. Rev. Stat. c. 139, § 5.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 2385, 2387.

57. *Indiana.*— Cornell *v.* Hallett, 140 Ind. 634, 40 N. E. 132; Powers *v.* Nesbit, 127 Ind. 497, 27 N. E. 501; Hood *v.* Tyner, 3 Ind. App. 51, 28 N. E. 1033.

Louisiana.— State *v.* Waggoner, 39 La. Ann. 919, 3 So. 119; State *v.* Chatman, 34 La. Ann. 881.

Maine.— Maxwell *v.* Mitchell, 61 Me. 106.

(II) *Statement Used on Hearing.* The statement of the case used on the hearing of a motion for a new trial[58] is part of the record upon which an appeal from a judgment may be heard,[59] if properly authenticated and filed in accordance with the requirements of the statute;[60] but such statement will not be received by the appellate court as evidence of the existence of facts alleged as the ground of the motion, but such facts must be brought to the notice of the court by bill of exceptions, or something tantamount thereto.[61] If amendments are allowed to a statement, they must be inserted in the appropriate places and the whole instrument duly authenticated;[62] but where the amendments comprise additional matter, complete and intelligible in itself, so that inconvenience or uncertainty will not result from their occupying a separate position at the end of the statement, inserting them in that place will be sufficient.[63]

m. Judgment and Proceedings Relating Thereto — (I) *Motion for Judgment.* A motion for judgment on special findings notwithstanding a general verdict,[64] and the ruling on a motion to direct the clerk to enter judgment *nunc pro tunc*,[65] are parts of the record proper.

Montana.— Helena First Nat. Bank *v.* Irvine, 2 Mont. 554.

Nebraska.— Langdon *v.* Wintersteen, 58 Nebr. 278, 78 N. W. 501; Morsch *v.* Besack, 52 Nebr. 502, 72 N. W. 953.

See also *supra*, XIII, B, 6, b, (II).

See 3 Cent. Dig. tit. "Appeal and Error," §§ 2385, 2387.

58. Statement on appeal distinguished from statement on motion for new trial.— In Raymond *v.* Thexton, 7 Mont. 299, 17 Pac. 258, the difference between the authentication of a statement on motion for a new trial, and the authentication of a statement on appeal as provided for and regulated by the code, was carefully considered. The statement on appeal, it was said, may be agreed to by the parties or their attorneys, and certified to by them as correct, or it may be certified to by the judge, but in all cases the statement on motion for a new trial must be certified to by the judge. See also Harper *v.* Minor, 27 Cal. 107; Gregory *v.* Frothingham, 1 Nev. 253 (where it was held that, on a statement on motion for a new trial, the court would consider, without a statement on appeal, copies of depositions, exhibits, amendments of the clerk, notes of the judge, etc., certified by the clerk as used on the hearing of the motion, and which seem to be pertinent to the ground set forth in the motion).

59. *California.*—Douglass *v.* McFarland, 92 Cal. 656, 28 Pac. 687; Craig *v.* Fry, 68 Cal. 363, 9 Pac. 550.

Idaho.— Hyde *v.* Harkness, 1 Ida. 623.

Montana.— Scherrer *v.* Hale, 9 Mont. 63, 22 Pac. 151.

Nevada.— Jones *v.* Adams, 18 Nev. 60, 8 Pac. 798 (decided under Nevada civil procedure act, section 197); Lockwood *v.* Marsh, 3 Nev. 138.

Utah.— Marks *v.* Culmer, 6 Utah 339, 23 Pac. 757.

See 3 Cent. Dig. tit. "Appeal and Error," § 2388.

60. Authentication by waiver.— Some of the earlier California cases allowed an implied authentication by waiver, but, under the California code of 1874, the authentication of the statement on motion for a new trial has never been implied. Scherrer *v.* Hale, 9 Mont. 63, 22 Pac. 151 [*citing* Hayne New Tr. & App. § 157, where the California cases are reviewed].

Statement incorporated with bill of exceptions.— The fact that the statement and bill of exceptions are incorporated in one paper does not render either invalid, if the requirements for their preparation have been duly observed. Spottiswood *v.* Weir, 66 Cal. 525, 6 Pac. 381.

61. *California.*— Fee *v.* Starr, 13 Cal. 170.

Connecticut.— Chambers *v.* Campbell, 15 Conn. 427.

Florida.— McSwain *v.* Howell, 29 Fla. 248, 10 So. 588.

Indiana.— Ireland *v.* Emmerson, 93 Ind. 1, 47 Am. Rep. 364; Bake *v.* Smiley, 84 Ind. 212; Huhn *v.* Hammond First Nat. Bank, 6 Ind. App. 702, 33 N. E. 663.

Missouri.— Dougherty *v.* Whitehead, 31 Mo. 255.

Montana.— Daniels *v.* Andes Ins. Co., 2 Mont. 500.

See 3 Cent. Dig. tit. "Appeal and Error," § 2388.

62. Smith *v.* Davis, 55 Cal. 26; Gallatin Canal Co. *v.* Lay, 10 Mont. 528, 26 Pac. 1001 (where it was held that tacking amendments on at the end of the statement, with references to the pages and lines of the original draft, was insufficient).

63. Penn Placer Min. Co. *v.* Schreiner, 14 Mont. 121, 35 Pac. 878.

64. Dimick *v.* Chicago, etc., R. Co., 80 Ill. 338 (where the court said "that making the motion admits the evidence as sufficient to warrant the special findings"); Terre Haute, etc., R. Co. *v.* Clark, 73 Ind. 168; Salander *v.* Lockwood, 66 Ind. 285 [*overruling* Shaw *v.* Merchants Nat. Bank, 60 Ind. 83]; Schaffner *v.* Kober, 2 Ind. App. 409, 28 N. E. 871. See 3 Cent. Dig. tit. "Appeal and Error," § 2391.

65. Parrott *v.* McDevitt, 14 Mont. 203, 36 Pac. 193.

(II) *The Judgment*—(A) *In General.* The final judgment is a part of the record proper [66] and must appear therein;[67] and, in examining the circumstances attending the entry of judgment, the court may look only into the record.[68] Where the judgment is set aside and a new judgment entered, the latter only remains in the record.[69]

(B) *By Confession or Consent.* When a judgment is entered by confession in vacation,[70] on the filing of the proper papers it becomes a part of the record.[71] When the judgment was entered by consent the consent must be shown;[72] but it is sufficient for the decree to recite that it was assented to, without further preserving in the record the evidence on which the facts were found.[73] Recitals contained in a judgment cannot be considered, however, unless they were necessary for the proper entry of the judgment.[74]

(III) *Matters Subsequent to Judgment*—(A) *In General.* Matters subsequent to judgment constitute no part of the record.[75]

(B) *Opening, Vacating, or Modifying.* Neither a motion to set aside a judgment,[76] nor the affidavits on which such a motion is based,[77] a motion to amend *nunc pro tunc*,[78] nor a motion to modify a judgment, nor the reasons therefor,[79] are part of the record proper.

66. French *v.* Hotchkiss, 60 Ill. App. 580; Van Cott *v.* Sprague, 5 Ill. App. 99; Junction City *v.* Webb, 44 Kan. 71, 23 Pac. 1073; Granite Mountain Min. Co. *v.* Weinstein, 7 Mont. 346, 17 Pac. 108. See 3 Cent. Dig. tit. "Appeal and Error," § 2389.

Judgment defined.—The word "judgment" in the record may mean "decree," "decision," or "order," according to the context. Sparrow *v.* Strong, 4 Wall. (U. S.) 584, 18 L. ed. 410.

In proceedings against garnishee, judgment against original debtor is not portion of the record. Faulks *v.* Heard, 31 Ala. 516; Gunn *v.* Howell, 27 Ala. 663, 62 Am. Dec. 785.

In proceedings against sheriff and sureties for failure to return the execution, a judgment on which the execution issued is no part of the record. Garey *v.* Edwards, 15 Ala. 105.

Judgment rendered at a prior term against a garnishee is no part of the record on an appeal from the judgment rendered at a succeeding term in the same cause. Jones *v.* Manier, 102 Ala. 676, 15 So. 437.

67. Sperling *v.* Stubblefield, 83 Mo. App. 266; National L. Ins. Co. *v.* Scheffer, 131 U. S. App. cciii, appendix, 26 L. ed. 1110. See also Terhune *v.* Hill, 49 Ill. App. 257.

68. Ogle *v.* Potter, 24 Mont. 501, 62 Pac. 920, holding that the court could not be controlled by statements contained in affidavits for a new trial, to the effect that the entry of judgment was conditioned upon a compliance by the referee with a previous order, even though such statements furnished the ground upon which the district court based the order under consideration.

69. Paige *v.* Roeding, 96 Cal. 388, 31 Pac. 264, wherein the court said: "The statute clearly contemplates that there shall be but one judgment and one set of findings in the judgment-roll. . . . It is only upon a bill of exceptions that we would be allowed to examine into the sufficiency of the reasons which moved the court to set aside and declare void its first judgment rendered in the case."

70. When entered in term-time the warrant of attorney and the note in which the judgment is confessed become a matter of record only by being preserved in the bill of exceptions. Waterman *v.* Caton, 55 Ill. 94; Roundy *v.* Hunt, 24 Ill. 598; Magher *v.* Howe, 12 Ill. 379; Schmidt *v.* Bauer, 33 Ill. App. 92.

71. Stein *v.* Good, 115 Ill. 93, 3 N. E. 735; Durham *v.* Brown, 24 Ill. 93.

A power of attorney to confess judgment forms no part of the record unless it be brought up by bill of exceptions or be recited in the judgment. Hodges *v.* Ashurst, 2 Ala. 301; Boyles *v.* Chytraus, 175 Ill. 370, 51 N. E. 563; Galt *v.* Dibrell, 10 Yerg. (Tenn.) 146.

72. San Francisco Sav. Union *v.* Myers, 76 Cal. 624, 18 Pac. 686, holding that the words "agreed to," written on the back of the judgment, was not sufficient showing.

73. Holderman *v.* Graham, 61 Ill. 359.

74. Severs *v.* Northern Trust Co., 1 Indian Terr. 1, 35 S. W. 232, holding that statements in the judgment, from which it might be inferred that the bond for costs was not filed in the court below, could not be considered on appeal.

75. Morris *v.* Morris, 27 Miss. 370.

76. Stern *v.* Collier, 101 Ala. 424, 14 So. 477; Miller *v.* Seybert, 4 Colo. 352 (decided under Colo. Code, § 2210); Chouteau *v.* Nuckolls, 33 Mo. 148. But see Seattle, etc., R. Co. *v.* Johnson, 7 Wash. 97, 34 Pac. 567, an appeal from an order denying the petition to vacate the judgment, where it was held that the petition was properly in the record; and *compare* Coulbourn *v.* Fleming, 78 Md. 210, 27 Atl. 1041.

77. Anderson *v.* Sloan, 1 Colo. 33; O'Brien *v.* Lynch, 90 Ill. App. 26.

78. Wiggins *v.* Witherington, 96 Ala. 535, 11 So. 539.

79. Hamrick *v.* Loring, 147 Ind. 229, 45 N. E. 107; Scanlin *v.* Stewart, 138 Ind. 574, 37 N. E. 401, 38 N. E. 401; Whipple *v.* Shewalter, 91 Ind. 114; Evansville, etc., R. Co. *v.* Frank, 3 Ind. App. 96, 29 N. E. 419.

(c) *Setting Aside Default.* Motions to set aside a default, and affidavits in support of such motions, are not part of the record proper, and must be brought into the record by bill of exceptions or in some other method recognized by law.[80]

(d) *Proceedings Relating to Costs.* The ruling of the court on a motion for the allowance of costs, or that plaintiff be required to give a bond for costs, cannot be reviewed without a bill of exceptions, or its equivalent;[81] and where, after judgment is arrested, judgment is entered against plaintiff for costs, the latter judgment is not a part of the record on appeal from the order in arrest.[82]

(e) *Executions and Forthcoming Bonds.* Neither the order granting execution nor the motion therefor,[83] the execution nor the return thereon,[84] a motion to quash an execution,[85] a forthcoming bond and the execution thereon,[86] nor the bond for trial of right of property, nor the affidavit of claimant,[87] are a part of the record proper.

n. Proceedings for Review — (i) *Certiorari.* A petition for a writ of certiorari which the judge refuses to sanction,[88] or a motion to quash such a writ, and the ruling of the court thereon,[89] are not part of the record proper.

(ii) *Writ of Review.* The return of an officer, properly made in obedience to a writ of review, forms a part of the record.[90] So, too, do uncontradicted affidavits on which a motion for the writ was granted.[91]

(iii) *Record of Intermediate Court* — (a) *In General.* The dismissal of an appeal in the intermediate court cannot be reviewed unless the motions and affidavits therefor, and the rulings thereon, are preserved by bill of exceptions or order of court,[92] and matters which are not in the record of the intermediate

80. *Arkansas.*— Hurlburt *v.* Wheeler, etc., Mfg. Co., 38 Ark. 594.

California.— White *v.* White, 88 Cal. 429, 26 Pac. 236.

Florida.— Hellen *v.* Steinwender, 28 Fla. 191, 10 So. 207.

Illinois.— Horn *v.* Neu, 63 Ill. 539.

Mississippi.— Vickery *v.* Rester, 4 How. (Miss.) 293.

Missouri.— Loudon *v.* King, 22 Mo. 336; Christy *v.* Myers, 21 Mo. 112.

Tennessee.— Smith *v.* Foster, 3 Coldw. (Tenn.) 139.

See 3 Cent. Dig. tit. "Appeal and Error," § 2393.

81. *California.*— Faulkner *v.* Hendy, 103 Cal. 15, 36 Pac. 1021.

Indiana.— Clodfelter *v.* Hulett, 92 Ind. 426; Bunnell *v.* Studebaker, 22 Ind. 338.

Maine.— Valentine *v.* Norton, 30 Me. 194.

Montana.— Granite Mountain Min. Co. *v.* Weinstein, 7 Mont. 440, 17 Pac. 113.

Nevada.— McFadden *v.* Ellsworth Mill, etc., Co., 8 Nev. 57; Howard *v.* Richards, 2 Nev. 128, 90 Am. Dec. 520.

Wisconsin.— Perkins *v.* Davis, 16 Wis. 470; Cord *v.* Southwell, 15 Wis. 211.

Texas.— Wachsmuth *v.* Sims, (Tex. Civ. App. 1895) 32 S. W. 821.

But see St. Louis, etc., R. Co. *v.* Lewright, 113 Mo. 660, 21 S. W. 310, a proceeding to condemn land, where the report of commissioners assessing the damages was set aside and trial had by jury, and it was held that the taxation of costs accruing after the setting aside of the report of the commissioners was matter of record.

See 3 Cent. Dig. tit. "Appeal and Error," § 2396.

82. Powell *v.* Kinney, 6 Blackf. (Ind.) 359. 359.

83. Thomas *v.* Savage, 8 Wis. 160.

84. Mattoon *v.* Burge, 1 Greene (Iowa) 153; Stephens *v.* Roby, 27 Miss. 744; Kohn *v.* Lucas, 17 Mo. App. 29. But in Georgia, in a claim case, the execution is one of the papers which, with the affidavit and claim bond, the sheriff must return under section 3736 of the code, and is a part of the record. Bosworth *v.* Clark, 62 Ga. 286.

In garnishment proceedings, execution against the original debtor will not be considered on appeal from a judgment against the garnishee. Gunn *v.* Howell, 27 Ala. 663, 62 Am. Dec. 785.

85. Davis *v.* Baldwin, 1 How. (Miss.) 550; Corby *v.* Tracy, 62 Mo. 511. But *compare* Wallop *v.* Scarburgh, 5 Gratt. (Va.) 1.

86. Mattheny *v.* Totten, 2 Sm. & M. (Miss.) 52; Sprawles *v.* Barnes, 1 Sm. & M. (Miss.) 629. See 3 Cent. Dig. tit. "Appeal and Error," § 2395.

87. Kibble *v.* Butler, 14 Sm. & M. (Miss.) 207.

88. Warren *v.* State, 72 Ga. 215.

89. Snell *v.* Clinton M. E. Church Soc., 58 Ill. 290; Belleville *v.* Stauder, 47 Ill. App. 376.

90. Johns *v.* Marion County, 4 Oreg. 46, where the court said that though the statute did not specifically mention this class of returns as being included in the judgment-roll, yet, since it was the only means by which issue could be taken upon a petition, it would be impossible to make up an intelligible record without it.

91. Douglas County Road Co. *v.* Douglas County, 5 Oreg. 406.

92. *Colorado.*— Rutter *v.* Shumway, 16 Colo. 95, 26 Pac. 321; Wike *v.* Campbell, 5 Colo. 126.

Illinois.— Hyatt *v.* Brown, 82 Ill. 28; Saunders *v.* Bernard, 11 Ill. App. 514.

court, but which are sent up with the transcript, are no more a part of the record in the supreme court than they were in the intermediate court.[93] The reasons of the appellate court for rendering its judgment are no part of the record in the supreme court;[94] and the bill of exceptions taken in the intermediate court must show upon what that court rendered its decision, though the transcript contained the evidence in the trial court.[95]

(B) *Petition for Rehearing.* On appeal from the supreme court of a state to the supreme court of the United States, a petition for a rehearing in the state court is no part of the record.[96]

2. Certificate or Statement of Clerk or Judge. A clerk's statement in a record, or appended to a record, regarding the condition of certain documents or the existence of certain facts in the case, is, generally, no part of the record,[97] and a certificate of the clerk, made without legal authority, is powerless to bring into the record matters which are not properly there in the mode prescribed by law.[98] So, too, a paper signed by the judge, and purporting to contain the evidence, will not be regarded as a part of the record, such evidence not having been incorporated in the bill of exceptions,[99] nor will a recital, in an amended bill of exceptions by a trial judge, that he did not consider, in arriving at his decision, certain evidence contained in the bill of exceptions be so regarded.[1]

Indiana.— Washington Ice Co. *v.* Lay, 103 Ind. 48, 2 N. E. 222; Crumley *v.* Hickman, 92 Ind. 388; Yost *v.* Conroy, 92 Ind. 464, 47 Am. Rep. 156.

Mississippi.— Battle *v.* Woolf, 22 Miss. 318.

Missouri.— Crane *v.* Taylor, 7 Mo. 285.

Nebraska.— Aldrich *v.* Bruss, 39 Nebr. 569, 58 N. W. 194; Barry *v.* Barry, 39 Nebr. 521, 58 N. W. 193.

See 3 Cent. Dig. tit. "Appeal and Error," § 2399.

Finding of facts by intermediate court from bill of exceptions.— Ohio Rev. Stat. § 6710, provides that "on application of any party excepting to a ruling or decision of the circuit court during the trial, or on motion for a new trial, such court shall find from the evidence and state on the record the facts upon which the alleged error arises." This does not authorize the circuit court to make a finding of facts upon which, in the absence of the bill of exceptions, the action of that court can be reviewed in the supreme court. Young *v.* Pennsylvania Co., 46 Ohio St. 558, 24 N. E. 595; Columbus, etc., R. Co. *v.* Thurstin, 44 Ohio St. 525, 9 N. E. 232.

93. Chicago, etc., R. Co. *v.* Harper, 128 Ill. 384, 21 N. E. 561; Chicago, etc., R. Co. *v.* Yando, 127 Ill. 214, 20 N. E. 70; Wheeler *v.* Dahms, 50 Ill. App. 531; Elsenrath *v.* Kallmeyer, 61 Mo. App. 430, 1 Mo. App. Rep. 638; Swope *v.* Smith, 1 Okla. 283, 33 Pac. 504.

Proceedings in the trial court, upon remand after the judgment of reversal in the intermediate court, form no part of the record of such judgment on appeal to the supreme court. Collins *v.* Davis, 32 Ohio St. 76.

The transcript of the county court, on appeal to the circuit court, becomes a part of the record on appeal from the latter court to the supreme court. U. S. Express Co. *v.* Meints, 72 Ill. 293. And see Wheelock *v.* Sears, 19 Vt. 559.

The judgment of the court appealed from is always a part of the record of the case. Clinton *v.* Missouri Pac. R. Co., 122 U. S. 469, 7 S. Ct. 1268, 30 L. ed. 1214.

94. Traeger *v.* Mutual Bldg., etc., Assoc., 189 Ill. 314, 59 N. E. 544.

95. Chenowith *v.* Lockard, 19 Ill. 352.

96. Grame *v.* Virginia Mut. Assur. Soc., 154 U. S. 676, 14 S. Ct. 1193, 26 L. ed. 740; Lagrange *v.* Chouteau, 4 Pet. (U. S.) 287, 7 L. ed. 861.

97. *Arkansas.*— Duke *v.* Crabtree, 5 Ark. 478; Lenox *v.* Pike, 2 Ark. 14.

Colorado.—Burnell *v.* Wachtel, 4 Colo. App. 556, 36 Pac. 887.

Florida.— Robinson *v.* L'Engle, 13 Fla. 482.

Illinois.— Dyer *v.* Flint, 21 Ill. 80, 74 Am. Dec. 73; Dignan *v.* Gilbert, 43 Ill. App. 536; Jacksonville *v.* Cherry, 39 Ill. App. 617.

Indiana.—Conaway *v.* Weaver, Smith (Ind.) 142.

Louisiana.— Stark *v.* Bossier, 19 La. Ann. 179.

Maryland.— Berry *v.* Derwart, 55 Md. 66.

West Virginia.— Sweeney *v.* Baker, 13 W. Va. 158, 31 Am. Rep. 757.

See 3 Cent. Dig. tit. "Appeal and Error," § 2407.

98. Melrose *v.* Bernard, 126 Ill. 496, 18 N. E. 671; Crosby *v.* Clary, 43 Mo. App. 222; Reed *v.* Marsh, 13 Pet. (U. S.) 153, 10 L. ed. 103; Fisher *v.* Cockerell, 5 Pet. (U. S.) 248, 8 L. ed. 114. But in Turnbull *v.* Clifton Coal Co., 19 W. Va. 299, it was held that depositions, filed in the office of the clerk by either party to a cause, might be indorsed by the clerk and the time of filing entered, and such an indorsement would be considered as an authorized official act and entitled to weight in determining whether the failure to recite in the decree that the cause was heard upon deposition should be considered by the court as being a mere clerical mistake.

99. Hopkins *v.* Dowd, 11 Ark. 627.

1. Potter *v.* Gronbeck, 117 Ill. 404, 7 N. E. 586.

3. Order as to Contents of Record. A judge's order that certain papers be made a part of the record on appeal because used on the trial will be considered in connection with, and in corroboration of, the affidavit of one of the parties that such papers were used, and will not be reversed;[2] but the mere direction of the trial judge that a paper be filed does not make such paper a part of the record unless the law declares that it shall become so upon such filing.[3] Where the statute authorizes the making of extrinsic matters a part of the record by order of court,[4] such an order, if made, should designate and point out with reasonable certainty the matters intended to be made a part of the record, leaving nothing to inference, speculation, or surmise.[5] The trial court ought not to dispense with any part of the record with the assent of the plaintiff in error only.[6]

4. Stipulation as to Contents of Record. Parties cannot, by stipulation, make or add to the record of the court.[7]

5. Lost or Destroyed Record — a. In General. The appellant must bring into the appellate court a perfect record.[8] The loss of a portion of the record is no ground for reversal;[9] but if a material portion of the record has been lost, the case will be dismissed;[10] or, in some jurisdictions, if appellant is without fault, the case will be remanded for a new trial.[11] If the original writ is lost, so that

2. Gilpin *v.* Baltimore, etc., R. Co., 17 N. Y. Suppl. 520, 44 N. Y. St. 298.

3. Anderson *v.* Oliver, 138 Pa. St. 156, 27 Wkly. Notes Cas. (Pa.) 123, 20 Atl. 981 (where it was held that the filing or notice of evidence, in obedience to the direction of the court, did not bring them into the record); Barksdale *v.* Parker, 87 Va. 141, 12 S. E. 344 (where a deed not referred to in the proceedings was placed among the files, and it was said that Va. Code, § 3459, referred to elections which shall be made from the record as already completed, and did not authorize additions thereto after final decision).

Stenographer's minutes.— In Wood *v.* Nissen, 2 N. D. 26, 49 N. W. 103, construing N. D. Comp. Stat. (1887), § 5103, the court directed that the transcript of the proceedings at the trial, embracing the evidence as extended by the stenographer, should be annexed to the judgment-roll. It was held that this transcript did not become a part of the record, it lacking the essential elements of the bill of exceptions.

4. **Special findings.**— In Woolf *v.* Chalker, 31 Conn. 121, 81 Am. Dec. 175, the court thought it doubtful whether a special finding, ordered to be placed on file, could be regarded as a part of the record.

A paper that has been struck from the files in a chancery case may be again brought into the record by order, as if by bill of exceptions at law. Lloyd *v.* McDaniel, 36 Ark. 484.

5. Russ *v.* Russ, 142 Ind. 471, 41 N. E. 941. See also Ohio Falls Car Co. *v.* Sweet, etc., Co., 7 Ind. App. 163, 34 N. E. 533, where an order to make affidavits a part of the record was held too indefinite and general.

6. Williams *v.* Jones, 69 Ga. 277.

7. Sternberg *v.* Strauss, 41 Ill. App. 147; Meinke *v.* Chicago, 9 Ill. App. 516; Hubbell *v.* U. S., 6 Ct. Cl. 53. See also *infra*, XIII, C, 4, a. But see Grete *v.* Knott, 2 Ida. 18, 3 Pac. 25, holding that papers in a case which properly form no part of the judgment-roll, and which would, on motion, have been stricken from it, may be considered on appeal as a part of the record by stipulation of the parties. See 3 Cent. Dig. tit. "Appeal and Error," §§ 2357, 2358.

8. Wolf *v.* Smith, 6 Oreg. 73.

If the judgment is lost, never found, and never entered, the record is not complete. Reichenbach *v.* Sage, 8 Wash. 250, 35 Pac. 1081, holding that the affidavit of the attorney attempting to recite the judgment, did not constitute a sufficient record.

9. Devore *v.* Territory, 2 Okla. 562, 37 Pac. 1092; Carland *v.* Heineborg, 2 Oreg. 75.

In Eborn *v.* Chote, 22 Tex. 32, where the charge was lost, the court on appeal refused to reverse because the trial judge did not supply the charge, he having forgot it. The appellate court said: "It is fair to presume that, if there had been anything in the charge in violation of the rights of the party, it could have been set out by counsel in connection with the motion, in such way as to have revived the judge's recollection. Or, if the charge was objected to, it might have been supplied by a bill of exceptions. Or, if the matter in the charge were important, and the party had no means of supplying the lost record, then it was incumbent on him to have set out fully the facts in relation to the matter upon a motion for a new trial."

10. Buckman *v.* Whitney, 28 Cal. 555; Close *v.* Close, 28 Oreg. 108, 42 Pac. 128.

Burned record.— In Cutting *v.* Tavares, etc., R. Co., 61 Fed. 150, 23 U. S. App. 363, 9 C. C. A. 40, the court refused to dismiss an appeal where the record had been burned during the trial, the transcript containing subsequent proceedings and as much of the prior proceedings as had been reëstablished.

11. Dauchite Lumber Co. *v.* Lane, etc., Co., 52 La. Ann. 1937, 28 So. 232; Nichols *v.* Harris, 32 La. Ann. 646; Greenville *v.* Old Dominion Steamship Co., 98 N. C. 163, 3 S. E. 505; Ballard *v.* Caston, Harp. Eq. (S. C.) 90. See 3 Cent. Dig. tit. "Appeal and Error," § 2409.

Lack of proper diligence.— One who waits five years before making an application to

it cannot be made a part of the record, the court will presume, after verdict, that there was once a good writ, and, if the writ recited in the declaration be bad, it will be presumed that the mistake was a clerical one.[12]

b. Substitution of Copies and Supplying Loss by Affidavit. If the files of a court are lost or destroyed, the court[13] may, in its discretion, allow new papers to be filed;[14] but such permission ought not to be given unless the court is thoroughly satisfied of the loss or destruction, and that the substitutes proposed are true copies of the papers lost.[15] An order authorizing the filing of copies is a determination of the correctness of the copies, and papers thus substituted are entitled to the same weight as would be given to the originals.[16] A new record cannot be supplied upon *ex parte* affidavits of either party,[17] nor can it be supplied by affidavit in the appellate court;[18] and what appellant alleges to be the substance of the testimony cannot be accepted as a substitute for the original, when appellee has never assented, and the court below has no opportunity to approve or disapprove;[19] but, if an essential paper has been lost, the appellate court may, upon sufficient evidence, allow a new one to be substituted.[20]

C. Necessity of Bill of Exceptions, Case, or Statement of Facts — 1. Decisions Not Otherwise Reviewable — a. In General. Where the error sought to be remedied appears upon the record, the party aggrieved may avail himself of it on appeal or writ of error without bill of exceptions, case, statement, or other statutory remedy.[21] But rulings and decisions of the lower court, the correctness

have the cause remanded for a new trial, on the ground that the statement of facts has been lost, cannot be said to be without fault. Dewees *v.* Hudgeons, 1 Tex. 192.

12. Turberville *v.* Long, 3 Hen. & M. (Va.) 309; Redman *v.* Edolph, 1 Saund. 317.

13. **A clerk cannot supply a lost record,** and cannot make up a transcript from what he states to be copies of the original papers. Dougherty *v.* Ringo, 7 Ky. L. Rep. 360.

14. **Proper course explained.**— Since a transcript on an appeal is a true copy of a record or a part of a record actually existing in the court below, if a record be lost the court cannot order that certain papers may be used on appeal. It should first order that certain papers should be substituted for those lost, and supply its own record. A transcript of the record thus supplied could be made up on appeal (Buckman *v.* Whitney, 28 Cal. 555. See also De Wolf *v.* Boswell, 64 Ill. App. 664; Stevenson *v.* Seymour, 3 Cinc. L. Bul. 325; Lane *v.* Jones, 2 Coldw. (Tenn.) 318); and the necessary steps to repair the loss should be taken by the party who would be prejudiced by the defective record (Martin *v.* White, 20 Tex. 174).

15. Troy *v.* Reilley, 4 Ill. 259. And see Steiner *v.* Steiner, 49 Iowa 70.

16. Hibernia Sav., etc., Soc. *v.* Matthai, 116 Cal. 424, 48 Pac. 370.

Recitals of substituted record binding.— Where the substituted record recites that defendant was served with process, it is not necessary that the order of substitution should show that defendant had notice of the motion to make the substitution. After the service of process parties are in court, and so continue till the case is disposed of. Mobile, etc., R. Co. *v.* Smith, 51 Ala. 329.

17. Troy *v.* Reilley, 4 Ill. 19.

18. *Iowa.*— Morris *v.* Steele, 62 Iowa 228, 17 N. W. 490.

Oregon.— Corbitt *v.* Bauer, 10 Oreg. 340.

Tennessee.—Lane *v.* Jones, 2 Coldw. (Tenn.) 318.

Vermont.— Fish *v.* Field, 19 Vt. 141.

Washington.—Reichenbach *v.* Sage, 8 Wash. 250, 35 Pac. 1081.

Contra.— On appeals from the municipal court of New York, where the evidence taken on the trial is lost and wholly omitted from the return, parties may, under N. Y. Code Civ. Proc. § 3056, present affidavits showing what the evidence was. Walker *v.* Baermann, 44 N. Y. App. Div. 587, 61 N. Y. Suppl. 91.

See 3 Cent. Dig. tit. "Appeal and Error," § 2411.

19. Humphrey *v.* Tozier, 154 Pa. St. 410, 32 Wkly. Notes Cas. (Pa.) 229, 26 Atl. 542.

20. Hitchcock *v.* Shager, 32 Nebr. 477, 49 N. W. 374 (where there was no denial that a copy of an instruction, certified by the clerk to have been lost, was a correct copy); Van Campen *v.* Ribble, 17 N. J. L. 433.

Loss of writ of error.—In Hawkins *v.* Craig, 1 B. Mon. (Ky.) 27, where a writ of error had been lost, the court received the testimony of its clerk to prove the issuance of the writ and that he had indorsed on the record, "W. E., issued in May, 1839," and held this sufficient to establish the date.

If a necessary paper is certified as having been sent up with the record, and it is not found among the papers, it will be presumed that it was lost in transmission, and, on suitable proof, a copy may be filed. Jefferson *v.* Columbus, 7 Ga. 181.

21. *Alabama.*— Petty *v.* Dill, 53 Ala. 641; Rolater *v.* Rolater, 52 Ala. 111; Darden *v.* James, 48 Ala. 33.

Arkansas.— Webb *v.* Kelsey, 66 Ark. 180, 49 S. W. 819; Anthony *v.* Brooks, 31 Ark. 725.

California.— Mock *v.* Santa Rosa, 126 Cal. 330, 58 Pac. 826; Hunt *v.* Steese, 75 Cal. 620, 17 Pac. 920.

of which cannot be determined from the record proper, must be made a part of the transcript by bill of exceptions, case, statement of facts, or other mode prescribed by statute, in order to their review by the appellate court.[22]

Connecticut.— Nugent *v.* Fair Haven, etc., R. Co., (Conn. 1900) 46 Atl. 49.

District of Columbia.— Mansfield *v.* Winter, 10 App. Cas. (D. C.) 549; Evans *v.* Humphreys, 9 App. Cas. (D. C.) 392.

Florida.— Ropes *v.* Snyder-Harris-Bassett Co., 35 Fla. 537, 17 So. 651; McGee *v.* Ancrum, 33 Fla. 499, 15 So. 231. *Compare* Dupont *v.* Baker, 14 Fla. 272; Malley *v.* Ingersoll, 14 Fla. 200; Bogue *v.* McDonald, 14 Fla. 66 (decided under the provisions of the code of 1870, subsequently repealed).

Idaho.— Warren *v.* Stoddart, (Ida. 1899) 59 Pac. 540; Washington, etc., R. Co. *v.* Osborne, 2 Ida. 527, 21 Pac. 421; Guthrie *v.* Phelan, 2 Ida. 89, 6 Pac. 107; Jones *v.* St. John Irrigating Co., 2 Ida. 58, 3 Pac. 1.

Illinois.— Alley *v.* McCabe, 147 Ill. 410, 35 N. E. 615; Van Dusen *v.* Pomeroy, 24 Ill. 289; Baldwin *v.* McClelland, 50 Ill. App. 645.

Indiana.— Doctor *v.* Hartman, 74 Ind. 221.

Indian Territory.— Little *v.* Atchison, etc., R. Co., (Indian Terr. 1899) 53 S. W. 331.

Iowa.— Black *v.* Howell, 56 Iowa 630, 10 N. W. 216; Redman *v.* Williamson, 2 Iowa 488. See also Newburry *v.* Getchell, etc., Lumber, etc., Co., 106 Iowa 140, 76 N. W. 514.

Kansas.— Deibolt *v.* Bradley, (Kan. 1900) 62 Pac. 431; McKinstry *v.* Carter, 48 Kan. 428, 29 Pac. 597.

Kentucky.— Collins *v.* Richart, 14 Bush (Ky.) 621.

Louisiana.— State *v.* Judge, 40 La. Ann. 809, 5 So. 407; Denis *v.* Cordeviella, 4 Mart. (La.) 654.

Maryland.— Blake *v.* Pitcher, 46 Md. 453; Minke *v.* McNamee, 30 Md. 294, 96 Am. Dec. 577.

Michigan.— Carney *v.* Baldwin, 95 Mich. 442, 54 N. W. 1081.

Minnesota.— Stevens *v.* Stevens, (Minn. 1900) 84 N. W. 457.

Missouri.— Meier *v.* Hinkson, 146 Mo. 458, 48 S. W. 447; Cunningham *v.* Roush, 141 Mo. 640, 43 S. W. 161; Cramer *v.* Akin, 49 Mo. App. 163.

Montana.— Barber *v.* Briscoe, 8 Mont. 214, 19 Pac. 589.

Nebraska.—Hines *v.* Cochran, 35 Nebr. 828, 53 N. W. 1118; O'Donohue *v.* Hendrix, 13 Nebr. 255, 13 N. W. 215.

Nevada.— Peers *v.* Reed, 23 Nev. 404, 48 Pac. 897; Klein *v.* Allenbach, 6 Nev. 159.

New Mexico.—Territory *v.* Browne, 7 N. M. 568, 37 Pac. 1116.

New York.— Smith *v.* Ingham University, 76 Hun (N. Y.) 605, 23 N. Y. Civ. Proc. 393, 28 N. Y. Suppl. 220, 59 N. Y. St. 437; Goldschmidt *v.* Goldschmidt, 47 N. Y. Super. Ct. 184; Berger *v.* Dubernet, 7 Rob. (N. Y.) 1; Brown *v.* Hardie, 5 Rob. (N. Y.) 678; Palmer *v.* Ranken, 56 How. Pr. (N. Y.) 354; Brush *v.* Blot, 42 N. Y. Suppl. 761.

North Carolina.— Lyman *v.* Ramseur, 113 N. C. 503, 18 S. E. 690; Knowles *v.* Norfolk Southern R. Co., 102 N. C. 59, 9 S. E. 7; Brooks *v.* Austin, 94 N. C. 222; Hutchison *v.* Rumfelt, 82 N. C. 425.

North Dakota.— Oliver *v.* Wilson, 8 N. D. 590, 80 N. W. 757, 73 Am. St. Rep. 784.

Ohio.— Howell *v.* Fry, 19 Ohio St. 556.

Oregon.— Taylor *v.* Patterson, 5 Oreg. 121; Rickey *v.* Ford, 2 Oreg. 251.

South Dakota.— Kehoe *v.* Hanson, 6 S. D. 322, 60 N. W. 31.

Tennessee.— Duane *v.* Richardson, (Tenn. 1900) 59 S. W. 135; Bush *v.* Phillips, 3 Lea (Tenn.) 63.

Texas.—Gardner *v.* Broussard, 39 Tex. 372; Neill *v.* Newton, 24 Tex. 202; Cunningham *v.* Wheatly, 21 Tex. 184. *Compare* Dangerfield *v.* Paschal, 20 Tex. 536, in which it was held that although the correct rule was in no case to revise a judgment refusing a continuance, unless the point had been reserved by bill of exceptions, yet, as the practice had always been to consider the question as raised by the entries upon the record, it should not be suddenly changed to the prejudice of parties litigant.

Utah.— Walker *v.* Hamburg-Bremen F. Ins. Co., 2 Utah 109; McClelland *v.* Dickenson, 2 Utah 100.

Vermont.— Small *v.* Haskins, 30 Vt. 172.

Virginia.— Russell Creek Coal Co. *v.* Wells, 96 Va. 416, 31 S. E. 614.

Washington.—Swift *v.* Stine, 3 Wash. Terr. 518, 19 Pac. 63.

Wisconsin.— Lewis *v.* Chicago, etc., R. Co., 97 Wis. 368, 72 N. W. 976; Nœsen *v.* Port Washington, 37 Wis. 168.

United States.— Moline Plow Co. *v.* Webb, 141 U. S. 616, 12 S. Ct. 100, 35 L. ed. 879; Coughlan *v.* District of Columbia, 106 U. S. 7, 1 S. Ct. 37, 27 L. ed. 74; Wilmington *v.* Ricaud, 90 Fed. 212, 32 C. C. A. 578.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 2417, 2472 *et seq.*

22. *Alabama.*—Mobile, etc., R. Co. *v.* Owen, 121 Ala. 505, 25 So. 612; Dunham *v.* Hatcher, 31 Ala. 483.

Arizona.— Sutherland *v.* Putnam, (Ariz. 1890) 24 Pac. 320.

Arkansas.—Bradley *v.* Harkey, 59 Ark. 178, 26 S. W. 827; St. Louis, etc., R. Co. *v.* Murphy, 38 Ark. 456.

California.— Stewart *v.* Hollingsworth, 129 Cal. 177, 61 Pac. 936; Hawley *v.* Kocher, 123 Cal. 77, 55 Pac. 696.

Colorado.— Sholes *v.* Norris, (Colo. App. 1900) 63 Pac. 124.

Florida.— Dorman *v.* Bigelow, 1 Fla. 323.

Idaho.— Jones *v.* St. John Irrigating Co., 2 Ida. 58, 3 Pac. 1.

Illinois.— Zimmerman *v.* Cowan, 107 Ill. 631, 47 Am. Rep. 476; Tower *v.* Bradley, 66 Ill. 189; Thacker *v.* Bulkley, 66 Ill. App. 646; Boyles *v.* Chytraus, 66 Ill. App. 592; Dobson *v.* Hughes, 66 Ill. App. 487. See also Gillet *v.* Stone, 2 Ill. 539.

Indiana.— Huntington First Nat. Bank *v.*

b. Final Judgments — (I) *In General.* On an appeal or writ of error from a final judgment, the judgment-roll itself is the record, and there may be no occa-

Henry, 156 Ind. 1, 58 N. E. 1057; Welborn *v.* Lewis, 42 Ind. 363.

Iowa.— Moss *v.* Appanoose County, 109 Iowa 671, 81 N. W. 159; Acton *v.* Coffman, 74 Iowa 17, 36 N. W. 774.

Kansas.— Dyal *v.* Topeka, 35 Kan. 62, 10 Pac. 161.

Kentucky.— McAllister *v.* Connecticut Mut. L. Ins. Co., 78 Ky. 531; Harper *v.* Harper, 10 Bush (Ky.) 447.

Louisiana.—Pecquet *v.* Pecquet, 17 La. Ann. 204; Graugnard *v.* Lombard, 14 La. Ann. 234.

Maryland.— Chappell *v.* Real Estate Pooling Co., 89 Md. 258, 42 Atl. 936.

Minnesota.— Wheadon *v.* Mead, 71 Minn. 322, 73 N. W. 975; Flibotte *v.* Mullen, 36 Minn. 144, 30 N. W. 448.

Mississippi.—Kibble *v.* Butler, 14 Sm. & M. (Miss.) 207; Berry *v.* Hale, 1 How. (Miss.) 315. *Compare* Yerger *v.* Greenwood, 77 Miss. 378, 27 So. 620.

Missouri.— Tower *v.* Moore, 52 Mo. 118.

Montana.— Harding *v.* McLaughlin, 23 Mont. 334, 58 Pac. 865; King *v.* Sullivan, 1 Mont. 282.

Nebraska.— Gay *v.* Reynolds, 57 Nebr. 194, 77 S. W. 661; Beatrice Sav. Bank *v.* Beatrice Chautauqua Assembly, 54 Nebr. 592, 74 N. W. 1065.

New York.— Smith *v.* Starr, 70 N. Y. 155; Essex County Bank *v.* Russell, 29 N. Y. 673; Smith *v.* Grant, 15 N. Y. 590; Johnson *v.* Whitlock, 13 N. Y. 344; Hunt *v.* Bloomer, 13 N. Y. 341; Onondaga County Mut. Ins. Co. *v.* Minard, 2 N. Y. 98; Burdick *v.* Collins, Seld. Notes (N. Y.) 23; Clason *v.* Baldwin, 59 Hun (N. Y.) 622, 13 N. Y. Suppl. 73, 36 N. Y. St. 550; Delano *v.* Harp, 37 Hun (N. Y.) 275; Matter of Potter, 32 Hun (N. Y.) 599; Young *v.* Cuddy, 23 Hun (N. Y.) 249; McLean *v.* Cole, 13 Hun (N. Y.) 300; John Douglas Co. *v.* Moler, 3 Misc. (N. Y.) 373, 30 Abb. N. Cas. (N. Y.) 293, 22 N. Y. Suppl. 1045, 52 N. Y. St. 259; Bissell *v.* Pearse, 21 How. Pr. (N. Y.) 130; Conolly *v.* Conolly, 16 How. Pr. (N. Y.) 224.

North Carolina.— Crinkley *v.* Egerton, 113 N. C. 444, 18 S. E. 669; Abernathy *v.* Withers, 99 N. C. 520, 6 S. E. 376.

Ohio.— Burch *v.* Young, 2 Ohio Dec. 377.

Oregon.— Kimery *v.* Taylor, 29 Oreg. 233, 45 Pac. 771; Burgtorf *v.* Bentley, 27 Oreg. 268, 41 Pac. 163.

Texas.— Galveston, etc., R. Co. *v.* Cody, 92 Tex. 632, 51 S. W. 329; Madden *v.* Madden, 79 Tex. 595, 15 S. W. 480; Ackerman *v.* Ackerman, (Tex. Civ. App. 1900) 55 S. W. 755.

Utah.— Reever *v.* White, 8 Utah 188, 30 Pac. 685; Lowell *v.* Parkinson, 4 Utah 64, 6 Pac. 58.

Virginia.— Magarity *v.* Shipman, 82 Va. 806, 7 S. E. 381.

Washington.—Schlotfeldt *v.* Bull, 22 Wash. 362, 60 Pac. 1126; Stenger *v.* Roeder, 3 Wash. 412, 28 Pac. 748, 29 Pac. 211.

West Virginia.— Turbee *v.* Shay, 46 W. Va. 736, 34 S. E. 746.

Wisconsin.— Midlothian Iron Min. Co. *v.* Dahlby, 108 Wis. 195, 84 N. W. 152; Billings *v.* Oneida County, 98 Wis. 584, 74 N. W. 339; Griggs *v.* Docter, 89 Wis. 161, 61 N. W. 761, 46 Am. St. Rep. 824, 30 L. R. A. 360.

United States.— Preston *v.* Prather, 137 U. S. 604, 11 S. Ct. 162, 34 L. ed. 788 [*affirming* 29 Fed. 498]; Shepherd *v.* The Schooner Clara, 102 U. S. 200, 26 L. ed. 145; Hildreth *v.* Grandin, 97 Fed. 870, 38 C. C. A. 516. And see Rio Grande Irrigation, etc., Co. *v.* Gildersleeve, 174 U. S. 603, 19 S. Ct. 761, 43 L. ed. 1103.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 2412 *et seq.*, 2472 *et seq.*

"The only office of a motion for a new trial and a bill of exceptions is to bring into the record for review matters which would not otherwise appear in it." McAllister *v.* Connecticut Mut. L. Ins. Co., 78 Ky. 531.

The office of a statement on appeal is to bring into the record those orders and rulings, together with the facts necessary to explain them, which were made in other stages of the proceedings in the case, and not during the progress of the trial, and which were not contained in the judgment-roll. Harper *v.* Minor, 27 Cal. 107. See also De Johnson *v.* Sepulbeda, 5 Cal. 149.

Error apparent upon judgment-roll.— In New York it has been held that an objection that a judgment in replevin is for money only, instead of for a return of the property, or for its value in case of its non-delivery, cannot be reviewed on appeal except on a case made and settled according to the established practice. McLean *v.* Cole, 13 Hun (N. Y.) 300.

Appeal from territorial courts.—Under the act of congress of April 7, 1874 [18 Stat. at L. p. 27, c. 80], a statement of fact is necessary in case of an appeal from the supreme court of a territory to the supreme court of the United States. Bonnefield *v.* Price, 154 U. S. 672, 14 S. Ct. 1194, 26 L. ed. 1022; Gray *v.* Howe, 108 U. S. 12, 1 S. Ct. 136, 27 L. ed. 634.

"Case on appeal" not necessary.—Where the record proper presents the matters excepted to a formal statement of case is not necessary (Brooks *v.* Austin, 94 N. C. 222; State *v.* Crook, 91 N. C. 536); as, for instance, when the case below is tried upon a case agreed or demurrer (Greensboro *v.* McAdoo, 112 N. C. 359, 17 S. E. 178; Chamblee *v.* Baker, 95 N. C. 98); or when the appeal is from an order granting an injunction (Hamilton *v.* Icard, 112 N. C. 589, 17 S. E. 519).

Appeal from order vacating award.—Under N. Y. Code Civ. Proc. § 2381, authorizing an appeal from an order vacating an award, and from a judgment entered upon it, as from an order for a judgment in an action, it has been held that appellant need not make or serve a case. The appeal is heard upon the papers on which the motion was made. *In re* Poole, 5 N. Y. Civ. Proc. 279.

sion for anything further to present the question raised.[23] If, however, any further record is required, it must be made by bill of exceptions, case, or statement.[24]

(II) *By Confession.* Where the judgment is entered by confession, defendant can only take exception by moving the court to vacate the judgment and preserve the evidence heard upon the motion by a proper bill of exceptions.[25]

(III) *On Demurrer or Case Agreed.* A bill of exceptions, case, or statement of facts is unnecessary upon an appeal from a judgment upon a demurrer or case agreed.[26]

(IV) *On Demurrer to Evidence.* Nor is a bill of exceptions necessary upon a demurrer to evidence, since the demurrer incorporates the evidence.[27]

(V) *On Report of Referee.* The rule above stated [28] is applicable to a judgment entered upon the report of a referee, and where the error complained of does not appear of record it must be brought into it by the appropriate statutory method.[29]

c. Orders After Judgment. In case of appeals or writs of error prosecuted from orders made subsequent to final judgment, a bill of exceptions, case, or statement is necessary.[30]

d. On Trial by Court Without Jury — (I) *In General.* A bill of exceptions, case, or statement of facts is the appropriate remedy by a party aggrieved by any ruling of the court, on a trial without a jury, which would affect the conclusions of fact — as upon the admission or rejection of evidence;[31] but when the

23. Thompson *v.* Hancock, 51 Cal. 110; Wetherbee *v.* Carroll, 33 Cal. 549; Orman *v.* Keith, 1 Colo. 81; Fredericks *v.* Davis, 6 Mont. 457, 13 Pac. 124; Merchants' Bank *v.* Scott, 59 Barb. (N. Y.) 641. See also *In re* Poole, 5 N. Y. Civ. Proc. 279; Reade *v.* Street, 122 N. C. 301, 30 S. E. 124.

24. See *supra*, XIII, C, 1, a.

25. Boyles *v.* Chytraus, 66 Ill. App. 592.

26. Greensboro *v.* McAdoo, 112 N. C. 359, 17 S. E. 178; Chamblee *v.* Baker, 95 N. C. 98.

27. Mitchell *v.* Nashville, etc., R. Co., 100 Tenn. 329, 45 S. W. 337, 40 L. R. A. 426; Chesapeake, etc., R. Co. *v.* Sparrow, 98 Va. 630, 37 S. E. 302.

28. See *supra*, XIII, C, 1, a.

29. Condon *v.* Churchman, 32 Ill. App. 317; Miller *v.* Groome, 109 N. C. 148, 13 S. E. 840; Southern Fertilizer Co. *v.* Reams, 105 N. C. 283, 11 S. E. 467; Perry *v.* Hardison, 99 N. C. 21, 5 S. E. 230; Reever *v.* White, 8 Utah 188, 30 Pac. 685.

In New York, under N. Y. Code Civ. Proc. § 998, it is not necessary to make a case where a party intends to appeal from a judgment entered upon a referee's report. Under the earlier practice it was necessary, for a party desiring to prosecute a writ of error from a judgment of the supreme court confirming the report of a referee, to have the facts prepared in the form of a special or supplemental report of the referee in the nature of a bill of exceptions or special verdict, and have the same entered on the records. Kauffman *v.* Copous, 16 Wend. (N. Y.) 478. Subsequently the correct practice, under the rules of court, required that a case should be made containing the facts found by the referee, together with his conclusions of law (Westcott *v.* Thompson, 16 N. Y. 613; Otis *v.* Spencer, 16 N. Y. 610; Turner *v.* Haight, 16 N. Y. 465; Stratton *v.* Cornfield, 2 Keyes (N. Y.) 55; Young *v.* Cuddy, 23 Hun (N. Y.) 249; Cheesebrough *v.* Agate, 7 Abb. Pr. (N. Y.) 32, 26 Barb. (N. Y.) 603; Rogers *v.* Beard, 20 How. Pr. (N. Y.) 282; Mones *v.* Hope Mut. L. Ins. Co., 5 How. Pr. (N. Y.) 157, 3 Code Rep. (N. Y.) 192), unless, by leave of court or consent, the case presented contained only questions of law (Johnson *v.* Whitlock, 13 N. Y. 344, 12 How. Pr. (N. Y.) 571. See also Crossby *v.* Adams, 25 N. Y. Suppl. 462, 55 N. Y. St. 218, in which it was held that, on appeal in a cause in which a reference to inquire and report was ordered, a formal case, and exceptions showing the proceedings before the referee, were not necessary to protect appellant's rights, and that an order striking out such case was proper). See also Douglas *v.* Douglas, 11 Hun (N. Y.) 406; Palmer *v.* Ranken, 56 How. Pr. (N. Y.) 354.

30. Wetherbee *v.* Carroll, 33 Cal. 549. But see Thiessen *v.* Riggs, (Ida. 1897) 51 Pac. 107, decided, however, under the provisions of Ida. Rev. Stat. § 4427. See *supra*, XIII, C, 1, a.

31. *District of Columbia.*— Lyon *v.* Ford, 7 App. Cas. (D. C.) 314.

Florida.— Bogue *v.* McDonald, 14 Fla. 66.

Indiana.— Blackburn *v.* Wagner, 83 Ind. 325.

Maryland.— Tyson *v.* Western Nat. Bank, 77 Md. 412, 26 Atl. 520, 23 L. R. A. 161.

Michigan.— See Trudo *v.* Anderson, 10 Mich. 357, 81 Am. Dec. 795.

New Jersey.— Wanamassa Amusement Park Assoc. *v.* Clark, 61 N. J. L. 611, 41 Atl. 153.

New York.— Otis *v.* Spencer, 16 N. Y. 610; Conolly *v.* Conolly, 16 How. Pr. (N. Y.) 224; Smith *v.* Grant, 15 N. Y. 590; Magie *v.* Baker, 14 N. Y. 435; Rogers *v.* Beard, 20 How. Pr. (N. Y.) 282; Hunt *v.* Bloomer, 13 N. Y. 341, 12 How. Pr. (N. Y.) 567.

only error alleged is that the finding of fact does not support the judgment, no exceptions are necessary, as the finding is in the nature of a special verdict, and itself becomes a part of the record, thus presenting the question as fully as it could be presented by exceptions.[32]

(II) *Failure to File Conclusions of Law and Fact.* In order to raise the question of the failure of the court below to place its conclusions of law and fact in the record, it is necessary to make the matter the subject of a bill of exceptions.[33]

e. Chancery Cases — (I) *In General.* In chancery all pleadings, evidence (except where oral evidence[34] is permissible at the hearing), rulings, and decrees are part of the record, and, therefore, need not be set forth in a bill of exceptions, case, abstract, or statement of facts in order to present them on appeal.[35]

Pennsylvania.— Com. *v.* Hulings, 129 Pa. St. 317, 18 Atl. 138.

Wisconsin.— Geekie *v.* Wells, 37 Wis. 362; Concanon *v.* Blake, 16 Wis. 518.

United States.— Preston *v.* Prather, 137 U. S. 604, 11 S. Ct. 162, 34 L. ed. 788; Norris *v.* Jackson, 9 Wall. (U. S.) 125, 19 L. ed. 608; Weems *v.* George, 13 How. (U. S.) 190, 14 L. ed. 108.

See 3 Cent. Dig. tit. "Appeal and Error," § 2424.

Trial upon agreed statement of facts.— Where, by consent, a cause is tried before a court without a jury upon an agreed statement of facts, rulings of the court should be brought up for review by bill of exceptions the same as in a jury trial. Tyson *v.* Western Nat. Bank, 77 Md. 412, 26 Atl. 520, 23 L. R. A. 161. See also Blackburn *v.* Wagner, 83 Ind. 325. *Contra*, Davenport *v.* Leary, 95 N. C. 203; Chamblee *v.* Baker, 95 N. C. 98, which hold that the appeal in such case is an exception.

In Louisiana, where the judge tried the whole case without a jury, a bill of exceptions to the admission of testimony by the judge cannot be sustained in the supreme court of the United States, but a case should be made. Weems *v.* George, 13 How. (U. S.) 190, 14 L. ed. 108.

32. Peck *v.* City Nat. Bank, 51 Mich. 353, 16 N. W. 577, 47 Am. Rep. 577; Peabody *v.* McAvoy, 23 Mich. 526; Amboy, etc., R. Co. *v.* Byerly, 13 Mich. 439; Trudo *v.* Anderson, 10 Mich. 357, 81 Am. Dec. 795; Allen *v.* St. Louis Nat. Bank, 120 U. S. 20, 7 S. Ct. 460, 30 L. ed. 573. See also Norris *v.* Jackson, 9 Wall. (U. S.) 125, 19 L. ed. 608.

In New York the judgment on a decision of a judge may be reviewed in respect to the soundness of conclusions of law, duly excepted to by filing exceptions and appealing from the judgment without making a case. Schwartz *v.* Weber, 18 Abb. N. Cas. (N. Y.) 60.

Decision contrary to pleadings.— In Gilchrist *v.* Stevenson, 7 How. Pr. (N. Y.) 273, it was held that, on trial by the court, objection may be taken without a case where the decision is contrary to the pleadings.

33. Minor *v.* Willoughby, 3 Minn. 225; Landa *v.* Heermann, 85 Tex. 1, 19 S. W. 885; Cotulla *v.* Goggan, 77 Tex. 32, 13 S. W. 742; Maverick *v.* Burney, (Tex. Civ. App. 1895) 30 S. W. 566.

See 3 Cent. Dig. tit. "Appeal and Error," § 2423.

After order granting request.—Where an order is entered granting the request of a party that the court file its conclusions of law and fact, the failure of the court to do so cannot be reviewed on appeal except by a bill of exceptions, taken by such party before adjournment. Landa *v.* Heermann, 85 Tex. 1, 19 S. W. 885.

34. Oral evidence.— In Ferris *v.* McClure, 40 Ill. 99, it is said that no bill of exceptions in a chancery cause is ever necessary or proper unless it be to preserve oral evidence introduced upon the hearing under the statute allowing that to be done. See also Lemay *v.* Johnson, 35 Ark. 225.

Proof of exhibits.— Under the practice in Indiana, exhibits might be proved by parol, and it has been held that the proper mode of showing that exhibits have not been proved is by bill of exceptions. Gafney *v.* Reeves, 6 Ind. 71; English *v.* Roche, 6 Ind. 62; Brown *v.* Woodbury, 5 Ind. 254; Ward *v.* Kelly, 1 Ind. 101.

35. *Florida.*— Lente *v.* Clarke, 22 Fla. 515, 1 So. 149; Smith *v.* Gibson, 14 Fla. 218.

Illinois.— Ferris *v.* McClure, 40 Ill. 99; Swift *v.* Castle, 23 Ill. 209.

Iowa.— Gately *v.* Kniss, 64 Iowa 537, 21 N. W. 21. *Compare* Buckwalter *v.* Craig, 24 Iowa 215; Snowden *v.* Snowden, 23 Iowa 457, decided under sections 2999, 3000, of the Revision.

Mississippi.— Bell *v.* Gordon, 55 Miss. 45.

New York.— Dunham *v.* Watkins, 12 N. Y. 556. *Compare* Griffith *v.* Merritt, 19 N. Y. 529.

North Carolina.— Mitchell *v.* Moore, 62 N. C. 281; Graham *v.* Skinner, 57 N. C. 94.

Washington.— Parker *v.* Denney, 2 Wash. Terr. 176, 2 Pac. 351. *Compare* Smith *v.* State, 5 Wash. 273, 31 Pac. 865, decided under Wash. Laws (1890), p. 448.

Contra, Madden *v.* Madden, 27 Mo. 544, in which it was held that bills of exception were as necessary previous to the practice act of 1848 as they were in suits at common law, but that was a judgment upon the settlement of an administration account, and exceptions were necessary to indicate what was erroneous.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 2418, 2437.

(11) *Under Codes and Practice Acts.* Under some of the codes and practice acts, however, appeals in suits of an equitable character can only be prosecuted upon a proper bill of exceptions, case, or statement.[36]

f. Probate Cases. Unless specifically required by statute,[37] a bill of exceptions, case, or statement of facts is not required on appeal from decrees in probate matters, where the error complained of appears on the face of the record,[38] but is necessary where the error does not so appear.[39]

g. Effect of Statutes on Pending Cases. Statutes regulating the practice on appeals and writs of error do not have a retroactive effect so as to affect suits and actions pending at the time they become operative;[40] nor will a court whose appellate jurisdiction has attached prior to the taking effect of such statute lose its jurisdiction thereby.[41]

2. To Presentation of Grounds of Review — a. In General. In accordance with the rule above stated,[42] a bill of exceptions, case, or statement of facts, settled and allowed in accordance with the requirements of law, is indispensable to the presentation of errors alleged to have occurred during the trial of the cause, but which do not appear upon the face of the record, together with the grounds of

36. *Arizona.*— Shute *v.* Keyser, (Ariz. 1892) 29 Pac. 386.

Colorado.— Putnam *v.* Sea, 8 Colo. 298, 7 Pac. 172; Marshall Silver Min. Co. *v.* Kirtley, 8 Colo. 108, 5 Pac. 649.

Dakota.— Gress *v.* Evans, 1 Dak. 387, 46 N. W. 1132.

Iowa.— Buckwalter *v.* Craig, 24 Iowa 215; Snowden *v.* Snowden, 23 Iowa 457.

Missouri.— See State *v.* Judges, 41 Mo. 574; Madden *v.* Madden, 27 Mo. 544.

New York.— Griffith *v.* Merritt, 19 N. Y. 529.

Washington.— Bently *v.* Port Townsend Hotel, etc., Co., 6 Wash. 296, 32 Pac. 1072; Smith *v.* State, 5 Wash. 273, 31 Pac. 865.

Wisconsin.— Davidson *v.* Davidson, 10 Wis. 86.

United States.— U. S. *v.* Hooe, 1 Cranch (U. S.) 318, 2 L. ed. 121; Jennings *v.* The Brig Perseverance, 3 Dall. (U. S.) 336, 1 L. ed. 625.

See 3 Cent. Dig. tit. "Appeal and Error," § 2437.

Under the judiciary act of 1789 a statement of facts must accompany the transcript upon appeal in chancery cases. U. S. *v.* Hooe, 1 Cranch (U. S.) 318, 2 L. ed. 121. See also Jennings *v.* The Brig Perseverance, 3 Dall. (U. S.) 336, 1 L. ed. 625.

Appeal in territorial court.— Under Ariz. Rev. Stat. (1887), c. 93, in all cases of appeal to the supreme court of a territory the trials must be on a statement of fact, on a bill of exceptions, on a special verdict, or on an error in law, either assigned or appearing on the face of the record. Shute *v.* Keyser, (Ariz. 1892) 29 Pac. 386. In this case the above provision was held to apply to injunction suits under Ariz. Rev. Stat. § 2144, which provides that the principles, practices, and procedures governing courts of equity shall govern proceedings in injunctions.

37. In Alabama an appeal from a decree of the probate court, rendered on the final settlement of an administrator's account, is required, by Ala. Code, § 1891, to be tried on the bill of exceptions, and the court will look at nothing else. Bartee *v.* James, 33 Ala. 34; Dunham *v.* Hatcher, 31 Ala. 483; Turner *v.* Key, 31 Ala. **202**; Harris *v.* Dillard, 31 Ala. 191.

38. *Alabama.*— Tapp *v.* Cox, 56 Ala. 553; Watson *v.* Stone, 40 Ala. 451, 91 Am. Dec. 484.

Arkansas.— Moreland *v.* Gilliam, 21 Ark. 507; Dempsey *v.* Fenno, 16 Ark. 491.

California.— Matter of Lux, 100 Cal. 606, 35 Pac. 345.

New York.— Matter of Jackson, 32 Hun (N. Y.) 200.

North Carolina.— *Ex p.* Spencer, 95 N. C. 271.

Wisconsin.— Hall *v.* Wilson, 6 Wis. 433.

Appeals from clerk.— In *Ex p.* Spencer, 95 N. C. 271, it was held that in appeals from the clerk in that class of cases of which he has jurisdiction in his capacity as clerk, such as auditing the accounts of executors and administrators, he need not transmit to the judge any statement on appeal.

39. Tapp *v.* Cox, 56 Ala. 553; Angevine *v.* Ward, 102 Ind. 291, 1 N. E. 697.

40. Mundell *v.* Hugh, 2 Gill & J. (Md.) 193; Brown *v.* Fargo, 1 N. Y. 429; Thompson *v.* Blanchard, 3 How. Pr. (N. Y.) 260; Doty *v.* Brown, 3 How. Pr. (N. Y.) 375; Clarke *v.* Crandall, 2 Code Rep. (N. Y.) 70. See also *supra*, I, C, 2, g.

Suit begun before adoption of code.—A chancery suit begun before the adoption of the code of procedure, but in which the proofs had not, at the time this took effect, been fully taken, having been heard in conformity with the statute of 1849 [Laws (1849), p. 708], before a single judge of the supreme court at a special term in April, 1850, and also on appeal at the general term in May, 1851, may be wholly reviewed by the court of appeals without a bill of exceptions or statement of facts, as required by the code. Dunham *v.* Watkins, 12 N. Y. 556.

41. Butler *v.* Miller, 1 N. Y. 428.

42. See *supra*, XIII, C, 1, a.

objection to the rulings or decision complained of.[43] This has been held necessary to the review of decisions of the lower court upon questions of law arising upon the trial of an action;[44] of intermediate orders or rulings;[45] of objections with

43. *Alabama.*— Cowert *v.* McCorkle, 113 Ala. 662, 21 So. 63.

Arkansas.— White *v.* Reagan, 25 Ark. 622.

California.— Mack *v.* Santa Rosa, 126 Cal. 330, 58 Pac. 826; Matter of Page, 57 Cal. 238; Wixon *v.* Bear River, etc., Water, etc., Co., 24 Cal. 367, 85 Am. Dec. 69.

Colorado.— Marean *v.* Stanley, 21 Colo. 43, 39 Pac. 1086.

Georgia.— Hays *v.* Slade, 65 Ga. 570; Jones *v.* Lavender, 55 Ga. 228.

Illinois.— Grundies *v.* Martin, 90 Ill. 552; Hermann *v.* Pardrige, 79 Ill. 471; Wehrleim *v.* Thiel Detective Co., 87 Ill. App. 565; Auburn Cycle Co. *v.* Foote, 69 Ill. App. 644.

Indiana.— Illinois Cent. R. Co. *v.* Cheek, 152 Ind. 663, 53 N. E. 641; Quill *v.* Gallivan, 108 Ind. 235, 9 N. E. 99; Benford *v.* Dukes, 25 Ind. App. 670, 58 N. E. 854; Floyd County *v.* Scott, 19 Ind. App. 227, 49 N. E. 395.

Kansas.— Morgan *v.* Chapple, 10 Kan. 216.

Kentucky.— Brashears *v.* Frazier, 102 Ky. 237, 19 Ky. L. Rep. 1259, 1265, 1284, 43 S. W. 244, 427.

Louisiana.— State *v.* Drew, 32 La. Ann. 1043; Gray *v.* Thomas, 18 La. Ann. 412.

Maine.— Monaghan *v.* Longfellow, 82 Me. 419, 19 Atl. 857; Cowan *v.* Wheeler, 24 Me. 79; State *v.* Davis, 23 Me. 403.

Maryland.— Chappell *v.* Real Estate Pooling Co., 89 Md. 258, 42 Atl. 936.

Michigan.— Hubbard *v.* Garner, 115 Mich. 406, 73 N. W. 390, 69 Am. St. Rep. 580.

Minnesota.— Minor *v.* Willoughby, 3 Minn. 225.

Missouri.— Hoyt *v.* Williams, 41 Mo. 270; Harris *v.* Brevator, 40 Mo. 599; Franklin Sugar-Refining Co. *v.* Massey, 75 Mo. App. 466.

Nebraska.— Noble *v.* Neal, 57 Nebr. 797, 78 N. W. 383; Everingham *v.* Harris, 51 Nebr. 627, 71 N. W. 300.

Nevada.— Roberts *v.* Webster (Nev. 1899) 57 Pac. 180.

New Hampshire.— Mooney *v.* Boston, etc., R. Co., 65 N. H. 670, 19 Atl. 571.

New Jersey.— Williams *v.* Sheppard, 13 N. J. L. 76.

New York.— Powell *v.* Waters, 8 Cow. (N. Y.) 669.

Ohio.— Hare *v.* Harrington, Wright (Ohio) 290; Brotton *v.* Allston. 2 Ohio Dec. 393.

Oregon.— Clemens *v.* Hanley, 27 Oreg. 326, 41 Pac. 658.

Pennsylvania.— Haines, etc., Co. *v.* Young, 13 Pa. Super. Ct. 303.

South Carolina.— Hubbard *v.* Camperdown Mills, 25 S. C. 496, 1 S. E. 5.

Texas.— Landa *v.* Heermann, 85 Tex. 1, 19 S. W. 885; Cotulla *v.* Goggan, 77 Tex. 32, 13 S. W. 742; Galveston, etc., R. Co. *v.* Robinett, (Tex. Civ. App. 1899) 54 S. W. 263.

Virginia.— Colgin *v.* Henley, 6 Leigh (Va.) 85; Barrett *v.* Wills, 4 Leigh (Va.) 114, 26 Am. Dec. 315.

West Virginia.— Furber *v.* Shay, 46 W. Va. 736, 34 S. E. 746; Seibright *v.* State, 2 W. Va. 591.

Wisconsin.— Watson *v.* Milwaukee, 107 Wis. 328, 82 N. W. 692.

United States.— Knapp *v.* Troy, etc., R. Co., 20 Wall. (U. S.) 117, 22 L. ed. 328; Hildreth *v.* Grandin, 97 Fed. 870, 38 C. C. A. 516; Marion Phosphate Co. *v.* Cummer, 60 Fed. 873, 13 U. S. App. 604, 9 C. C. A. 279.

See 3 Cent. Dig. tit. "Appeal and Error," § 2427.

44. Decisions on questions of law.— *Alabama.*— Frieder *v.* B. Goodman Mfg. Co., 101 Ala. 242, 15 So. 423.

Iowa.— Corner *v.* Gaston, 10 Iowa 512 (trial by court without jury).

New York.— Gould *v.* Ogden, 6 Cow. (N. Y.) 52; Benedict *v.* New York, etc., R. Co., 8 N. Y. Leg. Obs. 168. But see, *contra*, Zabriskie *v.* Smith, 11 N. Y. 480, decided under the code.

North Dakota.— Hostetter *v.* Brooks Elevator Co., 4 N. D. 357, 61 N. W. 49.

Pennsylvania.— Miller *v.* Hershey, 59 Pa. St. 64, holding this to be true of reserved questions of law.

Vermont.— Small *v.* Haskins, 30 Vt. 172.

United States.— Springfield F. & M. Ins. Co. *v.* Sea, 21 Wall. (U. S.) 158, 22 L. ed. 511 (trial by court without jury).

See also McChesney *v.* Chicago, 151 Ill. 307, 37 N. E. 872; Harper *v.* Gordon, 128 Cal. 489, 61 Pac. 84. But see, *contra*, Barfield *v.* South Side Irrigation Co., 111 Cal. 118, 43 Pac. 406 [*approving* Shadburne *v.* Daly, 76 Cal. 355, 18 Pac. 403, and *disapproving* Miller *v.* Wade, 87 Cal. 410, 25 Pac. 487].

See 3 Cent. Dig. tit. "Appeal and Error," § 2428.

45. Intermediate orders or rulings not forming a part of the judgment-roll, must be brought into the record by means of a bill of exceptions, case, or statement of fact, together with such facts, forming the basis of the orders, as are necessary to explain the action of the lower court.

Arkansas.— St. Louis, etc., R. Co. *v.* Murphy, 38 Ark. 456 (refusal of application to amend bill of exceptions).

California.— Coole *v.* Caulfield, 45 Cal. 107; Harper *v.* Minor, 27 Cal. 107.

Indiana.— Hill *v.* Armstrong, Wils. (Ind.) 359.

Minnesota.— Stevens *v.* Stevens, (Minn, 1900) 84 N. W. 457.

Texas.— Martin-Brown Co. *v.* Wainscott, 66 Tex. 131, 1 S. W. 264.

Utah.— Evans *v.* Jones, 10 Utah 182, 37 Pac. 262; Lowell *v.* Parkinson, 4 Utah 64, 6 Pac. 58.

But see Schofield *v.* Territory, 9 N. M. 526, 56 Pac. 306, holding that, under N. M. Code Civ. Proc. § 172, providing that all motions and rulings made during the trial shall be-

regard to the selection, qualification, or conduct of a jury;[46] of questions as to the competency of witnesses;[47] of alleged impropriety in an attorney's remarks in argument to the jury, or other misconduct on his part;[48] and of objcetions to the remarks of the lower court which are alleged to be improper.[49]

b. Evidence — (1) *Necessity of Bringing Up.* While generally unnecessary under the former chancery practice,[50] in order that the evidence adduced upon the trial in the court below may be considered on an appeal or writ of error, it must be brought up by a bill of exceptions, case, or statement of facts.[51]

come part of the record for purposes of review, and that it shall not be necessary to prepare or have settled any bill of exceptions in order to make such matters part of the record, it is not necessary, in civil cases, to have the instructions of the court, the decisions of the judge granting or refusing them, or the motion for a new trial incorporated in a bill of exceptions. When they are in the record they can be considered.

46. People *v.* Board of Education, 26 Ill. App. 476 (competency of); Ohio, etc., R. Co. *v.* Stein, 140 Ind. 61, 39 N. E. 246 (qualification); Boardman *v.* Westchester F. Ins. Co., 54 Wis. 364, 11 N. W. 417 (misconduct).

47. Questions as to the competency of witnesses.— Powell *v.* Waters, 8 Cow. (N. Y.) 669.

48. Conduct and remarks of counsel.— *Georgia.*— Smith *v.* Wellborn, 75 Ga. 799.

Illinois.— Kepperly *v.* Ramsden, 83 Ill. 354 (instruction as to improper remarks); Snyder *v.* Travers, 45 Ill. App. 253.

Iowa.— Farmer *v.* Brokaw, 102 Iowa 246, 71 N. W. 246; Little Sioux Sav. Bank *v.* Freeman, 93 Iowa 426, 61 N. W. 936.

Kansas.— Lindley *v.* Atchison, etc., R. Co., 47 Kan. 432, 28 Pac. 201.

Minnesota.— Smith *v.* Kingman, 70 Minn. 453, 73 N. W. 253; Smith *v.* Wilson, 36 Minn. 334, 31 N. W. 176, 1 Am. St. Rep. 669; St. Martin *v.* Desnoyer, 1 Minn. 156, 61 Am. Dec. 494.

Missouri.— Norton *v.* St. Louis, etc., R. Co., 40 Mo. App. 642.

Nebraska.— Summers *v.* Simms, 58 Nebr. 579, 79 N. W. 155.

Texas.— Galveston, etc., R. Co. *v.* Walter, (Tex. Civ. App. 1894) 25 S. W. 163.

See 3 Cent. Dig. tit. "Appeal and Error," § 2431.

49. Remarks of court.—Welker *v.* Butler, 15 Ill. App. 209; Smith *v.* Kingman, 70 Minn. 453, 73 N. W. 253.

50. See *supra*, XIII, C, 1, e.

51. *Alabama.*— Pomeroy *v.* State, 40 Ala. 63; Hendricks *v.* Johnson, 6 Port. (Ala.) 472.

Arizona.— Cheda *v.* Skinner, (Ariz. 1899) 57 Pac. 64.

Arkansas.— Hall *v.* Bonville, 36 Ark. 491.

California.— Haynes *v.* Backman, (Cal. 1892) 31 Pac. 746; Bunting *v.* Beideman, 1 Cal. 181.

Colorado.— Bergundthal *v.* Bailey, 15 Colo. 257, 25 Pac. 86; Miller *v.* Thorpe, 4 Colo. App. 559, 36 Pac. 891.

Dakota.— Fargo *v.* Palmer, 4 Dak. 232, 29 N. W. 463.

District of Columbia.— Maulsby *v.* Barker, 3 Mackey (D. C.) 165.

Florida.— Waddell *v.* Cunningham, 27 Fla. 477, 8 So. 643; Pine *v.* Anderson, 22 Fla. 330.

Georgia.— Williams *v.* Cheatham, 97 Ga. 341, 22 S. E. 971; Hodges *v.* Roberts, 79 Ga. 212, 9 S. E. 424.

Illinois.— Martens *v.* People, 186 Ill. 314, 57 N. E. 871 [*affirming* 85 Ill. App. 66]; Firemen's Ins. Co. *v.* Peck, 126 Ill. 493, 18 N. E. 752; Moss *v.* Flint, 13 Ill. 570; Wehrheim *v.* Thiel Detective Co., 87 Ill. App. 565.

Indiana.— Pennsylvania Co. *v.* Brush, 130 Ind. 347, 28 N. E. 615; Conner *v.* Marion, 112 Ind. 517, 14 N. E. 488; Combs *v.* Pittsburgh, etc., R. Co., (Ind. App. 1900) 58 N. E. 1064. See also Knights Templars', etc., L. Indemnity Co. *v.* Dubois, (Ind. App. 1900) 57 N. E. 943.

Indian Territory.— Brown *v.* Woolsey, (Indian Terr. 1899) 51 S. W. 965.

Iowa.— Drake *v.* Fulliam, 98 Iowa 339, 67 N. W. 225; Mara *v.* Bucknell, 90 Iowa 757, 57 N. W. 876.

Kansas.— Litsey *v.* Moffett, 29 Kan. 507; Clark *v.* Parkville, etc., R. Co., 5 Kan. 654.

Kentucky.—Dickerson *v.* Talbot, 14 B. Mon. (Ky.) 49.

Louisiana.— Mollon *v.* Thompson, 9 Mart. (La.) 275.

Maryland.— Main *v.* Kinzer, 91 Md. 760, 46 Atl. 1070; Barnes *v.* Blackiston, 2 Harr. & J. (Md.) 376.

Michigan.— Peabody *v.* McAvoy, 23 Mich. 526.

Minnesota.— Thompson *v.* Lamb, 33 Minn. 196, 22 N. W. 443 (trial by court without jury); St. Anthony Mill Co. *v.* Vandall, 1 Minn. 246.

Mississippi.— Grego *v.* Grego, (Miss. 1900) 28 So. 817; Covington *v.* Arrington, 32 Miss. 144.

Missouri.— Ray *v.* Brown, 80 Mo. 230; Martin *v.* Hagan, 8 Mo. 505; Barnes *v.* Buzzard, 61 Mo. App. 346, 1 Mo. App. Rep. 653.

Montana.— Rumney Land, etc., Co. *v.* Detroit, etc., Cattle Co., 19 Mont. 557, 49 Pac. 395; Higley *v.* Gilmer, 3 Mont. 433.

Nebraska.— Doolittle *v.* American Nat. Bank, 58 Nebr. 454, 78 N. W. 926; Hartford F. Ins. Co. *v.* Corey, 53 Nebr. 209, 73 N. W. 674 (holding that affidavits for continuance must be embodied).

New York.— Magie *v.* Baker, 14 N. Y. 435; Chapin *v.* Thompson, 18 Hun (N. Y.) 446. See also Davie *v.* Van Wie, 1 Thomps. & C. (N. Y.) 530; Sturgis *v.* Merry, 3 How. Pr. (N. Y.) 418.

This has been held necessary to a review of rulings of the trial court admitting or excluding evidence;[52] to the review of a decision overruling a motion for a

Ohio.— Toledo *v.* Libbie, 19 Ohio Cir. Ct. 704.

Oklahoma.— D County *v.* Wright, 8 Okla. 190, 57 Pac. 203; U. S. *v.* Choctaw, etc., R. Co., 3 Okla. 404, 41 Pac. 729.

Oregon.— Carney *v.* Dunlway, 35 Oreg. 131, 57 Pac. 192, 58 Pac. 105; Mitchell *v.* Powers, 17 Oreg. 491, 21 Pac. 451.

Pennsylvania.— Tasker *v.* Sheldon, 115 Pa. St. 107, 7 Atl. 762.

South Dakota.— Foley-Wadsworth Implement Co. *v.* Porteous, 7 S. D. 34, 63 N. W. 155; Merchants Nat. Bank *v.* McKinney, 6 S. D. 58, 60 N. W. 162.

Texas.— Ingram *v.* Drinkard, 14 Tex. 351; Dewees *v.* Hudgeons, 1 Tex. 192; Campbell *v.* Cates, (Tex. Civ. App. 1899) 51 S. W. 268; Ragsdale *v.* Groos, (Tex. Civ. App. 1899) 51 S. W. 256.

Washington.— Casey *v.* Okes, 17 Wash. 409, 50 Pac. 53; Meeker *v.* Gardella, 2 Wash. Terr. 355, 7 Pac. 889. *Compare* Watson *v.* Sawyer, 12 Wash. 35, 40 Pac. 413, 41 Pac. 43.

Wisconsin.— Concanon *v.* Blake, 16 Wis. 518; Merwins *v.* O'Day, 9 Wis. 156.

United States.— Nelson *v.* Flint, 166 U. S. 276, 17 S. Ct. 576, 41 L. ed. 1002; Strain *v.* Gourdin, 2 Woods (U. S.) 380, 23 Fed. Cas. No. 13,521.

See 3 Cent. Dig. tit. "Appeal and Error," § 2433 *et seq.*

Where findings are admitted by both parties to be true it is unnecessary that the case contain the evidence. Tayloe *v.* Tayloe, 108 N. C. 69, 12 S. E. 836.

Framed issues in equity.— The evidence given before a jury upon framed issues submitted to them in an equity case may be included in the case on appeal. Chapin *v.* Thompson, 18 Hun (N. Y.) 446.

Depositions attached to bill.—Where the oral evidence is contained in the bill of exceptions, and the depositions are attached thereto as an exhibit, with a reference therein contained making them a part thereof, all of which is followed by the usual certificate of the judge, the writ of error will not be dismissed. Atlanta, etc., R. Co. *v.* Wood, 48 Ga. 565. *Compare* Stubbs *v.* Central Bank, 7 Ga. 258.

Bill treated as case.—Where the bill of exceptions contains all the evidence offered in the court below, it may be treated as a case stated. Maulsby *v.* Barker, 3 Mackey (D. C.) 165.

Special bill of exceptions — Statute construed.— Under Ind. Rev. Stat. (1894), § 642 [Rev. Stat. (1881), § 630], authorizing a special bill of exceptions to review "any question of law decided" during the progress of the cause, a special bill of exceptions will not lie to determine the sufficiency of the evidence to support the findings, as the question is one of mixed law and fact. Haney *v.* Farnsworth, 149 Ind. 453, 49 N. E. 383.

52. **Evidence admitted or excluded** should be embodied.

California.— Hagman *v.* Williams, 88 Cal. 146, 25 Pac. 1111; Pierce *v.* Minturn, 1 Cal. 470; Gunter *v.* Geary, 1 Cal. 462.

Florida.— Jacksonville St. R. Co. *v.* Walton, (Fla. 1900) 28 So. 59, holding that where the evidence does not of itself show its pertinency and relevancy to the issue, and there is other evidence, either admitted, or proffered and rejected, that will connect it with the case and show such relevance and pertinence, the connecting evidence should be set forth so as to enable the appellate court fully and fairly to pass upon the propriety or impropriety of the admission or rejection thereof; but that testimony adduced in rebuttal or impeachment of the evidence on which any charge was predicated has no place in the exposition, in the bill of exceptions, of the evidence upon which such charge was actually predicated.

Georgia.— Benton *v.* Baxley, 90 Ga. 296, 15 S. E. 820; Jackson *v.* Jackson, 47 Ga. 99.

Illinois.— Ebner *v.* Mackey, 186 Ill. 297, 57 N. E. 834, 78 Am. St. Rep. 280 [*affirming* 87 Ill. App. 306]; Clifford *v.* Drake, 110 Ill. 135; Masters *v.* Masters, 13 Ill. App. 611. But see Schwarz *v.* Herrenkind, 26 Ill. 208, holding that a bill need not show that the note sued on was offered in evidence to the jury, if this fact otherwise appeared in the case.

Indiana.— Roose *v.* Roose, 145 Ind. 162, 44 N. E. 1; Blizzard *v.* Hayes, 46 Ind. 166, 15 Am. Rep. 291; South Bend Chilled-Plow Co. *v.* Giedie, 24 Ind. App. 673, 57 N. E. 562; Elmer *v.* Marsh, 3 Ind. App. 558, 30 N. E. 154.

Kentucky.— Chesapeake, etc., R. Co. *v.* Smith, 101 Ky. 707, 19 Ky. L. Rep. 1826, 42 S. W. 538.

Louisiana.— Graugnard *v.* Lombard, 14 La. Ann. 234 (holding that the clerk's statement in his minutes that evidence was objected to does not dispense with the necessity); Bryan *v.* Dubois, 5 La. Ann. 17; Holmes *v.* Holmes, 6 La. 463, 24 Am. Dec. 482.

Massachusetts.— Peirce *v.* Adams, 8 Mass. 383; Storer *v.* White, 7 Mass. 448.

Michigan.— Trudo *v.* Anderson, 10 Mich. 357, 81 Am. Dec. 795.

Mississippi.— Wright *v.* Alabama Bank, 6 Sm. & M. (Miss.) 251.

Missouri.— St. Louis Public Schools *v.* Risley, 40 Mo. 356.

Nebraska.— Cole *v.* Arlington State Bank, 54 Nebr. 632, 74 N. W. 1100; Kearney County *v.* Kent, 5 Nebr. 227.

New Jersey.— Allaire *v.* Hartshorne, 21 N. J. L. 665, 47 Am. Dec. 175.

Ohio.— Brock *v.* Becker, 5 Cinc. L. Bul. 852.

Oregon.— Ladd *v.* Higley, 5 Oreg. 296.

Pennsylvania.— Quellman *v.* Jacobs, (Pa. 1852) 1 Am. L. Reg. 248.

Tennessee.— Ward *v.* Tennessee Coal, etc., Co., (Tenn. 1900) 57 S. W. 193; Anderson *v.* Middle, etc., Tennessee Cent. R. Co., 91 Tenn. 44, 17 S. W. 803.

new trial, whether on the ground that the verdict is contrary to the evidence,[53] or where a motion for a new trial is made on the ground of newly-discovered evidence;[54] to the evidence on which questions of law raised by instructions given or refused arose;[55] and to evidence taken in a proceeding in a probate court.[56]

(II) *What Evidence Should Be Brought Up.* Only so much of the evidence, however, as is needed to show the questions raised by appellant or plaintiff in error should be incorporated in the bill of exceptions, case, or statement of facts.[57]

Texas.— Texas, etc., R. Co. *v.* Raney, 86 Tex. 363, 25 S. W. 11; Lockett *v.* Schurenberg, 60 Tex. 610; King *v.* Sassaman, (Tex. Civ. App. 1899) 54 S. W. 304.

Vermont.— Keyes *v.* Throop, 2 Aiken (Vt.) 276.

Virginia.— Norfolk, etc., R. Co. *v.* Shott, 92 Va. 34, 22 S. E. 811.

Wisconsin.— Bue *v.* Ketchum, 51 Wis. 324, 8 N. W. 231; Shipman *v.* State, 44 Wis. 458.

United States.— Springfield F. & M. Ins. Co. *v.* Sea, 21 Wall. (U. S.) 158, 22 L. ed. 511; Thompson *v.* Riggs, 5 Wall. (U. S.) 663, 18 L. ed. 704; Northern Pac. R. Co. *v.* Charless, 51 Fed. 562, 7 U. S. App. 359, 2 C. C. A. 380.

See 3 Cent. Dig. tit. "Appeal and Error," § 2436.

On motion for summary relief.— The statute of 13 Edw. I, c. 31, relating to bills of exceptions, does not, on motion for summary relief, authorize a bill of exceptions to the opinion of the court in receiving or rejecting evidence. Murphy *v.* Flood, 2 Grant (Pa.) 411. See also Shortz *v.* Quigley, 1 Binn. (Pa.) 222.

53. Aycock *v.* Bainbridge Bank, 92 Ga. 575, 17 S. E. 922; Rowan *v.* Dosh, 5 Ill. 460; McLaughlin *v.* Walsh, 4 Ill. 185. See also McGonnigle *v.* Arthur, 27 Ohio St. 251, in which it was held that where a motion for a new trial, made on the ground that the finding and judgment of the court is not supported by the law and the evidence, was overruled, and all the testimony offered before the trial court is in an agreed statement of facts, in writing, carried into the record, and found by the court to be all the testimony offered by the parties on the trial, it is not necessary, on overruling the motion, to reëmbody the testimony in a bill of exceptions.

54. Wade *v.* Buford, 1 Tex. App. Civ. Cas. § 1335; Nelson *v.* Brixen, 7 Utah 454, 27 Pac. 578, in which latter case it was held that the newly-discovered evidence contained in a motion for a new trial, though printed in the abstract, cannot be considered on appeal unless incorporated in the statement or bill of exceptions.

55. Instructions given or refused.—*Florida.* — Jacksonville St. R. Co. *v.* Walton, (Fla. 1900) 28 So. 59, holding that if a charge is given or refused by a judge that hypothesizes a state of facts which there is no testimony tending to prove, it should be stated in the bill of exceptions that there was no evidence adduced tending to prove such state of facts.

Kentucky.— Chesapeake, etc., R. Co. *v.* Smith, 101 Ky. 707, 19 Ky. L. Rep. 1826, 42 S. W. 538.

Maryland.— Albert *v.* State, 66 Md. 325, 7 Atl. 697, 59 Am. Rep. 159.

Michigan.— Crane *v.* Wayne Cir. Judge, 24 Mich. 532.

United States.— Southwestern Virginia Imp. Co. *v.* Frari, 58 Fed. 171, 8 U. S. App. 444, 7 C. C. A. 149, holding that it is not enough that the testimony be found in another part of the record.

But see Keitt *v.* Spencer, 19 Fla. 748, to the effect that where it appears from the charge that evidence was before the trial court making pertinent certain instructions asked for by appellant, the supreme court may consider such evidence for the purpose of determining whether appellant was entitled to a ruling of the court on the questions presented, though there is no bill of exceptions bringing up the testimony.

56. Armaz's Estate, 45 Cal. 259; Angevine *v.* Ward, 66 Ind. 460; Clark *v.* Parkville, etc., R. Co., 5 Kan. 654. See also Baker *v.* Hentig, 22 Kan. 323; Matter of Clark, 58 Hun (N. Y.) 606, 11 N. Y. Suppl. 911, 34 N. Y. St. 523, in which latter case, where an executrix elected to have her appeal from a decree of a surrogate on her accounting, "heard on the decision of the surrogate, and the decree and questions of law only," and no case containing the evidence was presented, it was held that findings of fact by the surrogate could not be reviewed, nor exceptions thereto considered, though mentioned in the notice of appeal.

57. *Alabama.*— Meredith *v.* Naish, 4 Stew. & P. (Ala.) 59.

California.— Dobbins *v.* Dollarhide, 15 Cal. 374; Reynolds *v.* Lawrence, 15 Cal. 359; Barrett *v.* Tewksbury, 15 Cal. 354.

Iowa.— Philbrick *v.* University Place, 106 Iowa 352, 76 N. W. 742.

Missouri.— Wallace *v.* Boston, 10 Mo. 660; Walls *v.* Gates, 4 Mo. App. 1.

Nebraska.— Dietrichs *v.* Lincoln, etc., R. Co., 12 Nebr. 225, 10 N. W. 718.

New York.— Smith *v.* Grant, 15 N. Y. 590.

North Carolina.— Durham *v.* Richmond, etc., R. Co., 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1; Green *v.* Collins, 28 N. C. 139.

Washington.— Jones *v.* Jenkins, 3 Wash. 17, 27 Pac. 1022.

West Virginia.—Renick *v.* Correll, 4 W. Va. 627.

Wisconsin.— Knowlton *v.* Culver, 2 Pinn. (Wis.) 93, 1 Chandl. (Wis.) 25, 52 Am. Dec. 156.

United States.— De Groot *v.* U. S., 5 Wall. (U. S.) 419, 18 L. ed. 700; Johnston *v.* Jones, 1 Black (U. S.) 209, 17 L. ed. 117.

3. To Presentation of Exceptions. Where an exception to a ruling of the lower court fully appears on the record proper, it is not indispensable that it should be brought before an appellate court by a bill of exceptions, case, or statement of facts.[58] In other cases, however, a party desiring a review in an appellate court must prepare his bill of exceptions, case, or statement of facts, incorporating all exceptions taken to the rulings of the trial court which he wishes to have revised; and filing the exceptions in the clerk's office, or serving them on the clerk or the opposite party, is insufficient.[59] Such has been held to be the rule

See 3 Cent. Dig. tit. "Appeal and Error," § 2434.

In appeals to the supreme court from the court of claims only such statement of fact should form part of the record as may be necessary to enable the supreme court to decide upon the correctness of the ruling of law of the court below. The facts so found are to be the ultimate propositions established by evidence in the nature of a special verdict, and not the evidence itself upon which these facts are founded. De Groot *v.* U. S., 5 Wall. (U. S.) 419, 18 L. ed. 700.

Contrary evidence.— In Renick *v.* Correll, 4 W. Va. 627, it was held that the court below is not bound to certify to the appellate court any contrary evidence further than is sufficient to show the pertinency of an instruction thereon predicated. But *compare* Knowlton *v.* Culver, 2 Pinn. (Wis.) 93, 1 Chandl. (Wis.) 25, 52 Am. Dec. 156, in which it was held that, if there is conflicting evidence upon the same point, the parties taking exceptions should state the evidence at large, and aver that it is all the evidence given on the point.

Irrelevant statement.— In Walsh *v.* Gilmor, 3 Harr. & J. (Md.) 383, 6 Am. Dec. 502, it was held that the court will not permit a statement of facts considered irrelevant to the subject-matter to be added to a bill of exceptions taken at the trial of the cause.

58. Egolf *v.* Bryant, 63 Ind. 365; Farnsworth *v.* Coquillard, 22 Ind. 453; Winet *v.* Berryhill, 55 Iowa 411, 7 N. W. 681; Laub *v.* Paine, 46 Iowa 550, 26 Am. Rep. 163; Cadwallader *v.* Blair, 18 Iowa 420; Long *v.* Billings, 7 Wash. 267, 34 Pac. 936; Wilson *v.* Pauly, 72 Fed. 129, 37 U. S. App. 642, 18 C. C. A. 475. See also Cofer *v.* Schening, 98 Ala. 338, 13 So. 123; Nance *v.* Chesney, 101 Tenn. 466, 47 S. W. 690. See 3 Cent. Dig. tit. "Appeal and Error," §§ 2442, 2443.

Refusal of judgment non obstante veredicto.— Under Ind. Rev. Stat. (1881), § 628 [Rev. Stat. (1894), § 640], which provides that where the decision objected to is entered on the record and the grounds of objection appear in the entry, exception may be taken by causing it to be noted at the end of the decision, the refusal of a judgment *non obstante veredicto* upon the answers to the interrogatories may be reviewed without a bill of exceptions. Cargar *v.* Fee, 140 Ind. 572, 39 N. E. 93.

59. *Alabama.*— Bell *v.* Wallace, 81 Ala. 422, 1 So. 24.

California.— Niosi *v.* Empire Steam Laundry, 117 Cal. 257, 49 Pac. 185.

Colorado.— Solomon *v.* Saly, 6 Colo. App. 170, 40 Pac. 150.

Georgia.— Lamar *v.* State, 72 Ga. 205.

Idaho.— Fox *v.* West, 1 Ida. 782.

Illinois.— Union Pac. R. Co. *v.* Chicago, etc., R. Co., 164 Ill. 88, 45 N. E. 488; Martin *v.* Foulke, 114 Ill. 206, 29 N. E. 683; Harman *v.* Brigham, 78 Ill. App. 427.

Indiana.— Lewis *v.* Godman, 129 Ind. 359, 27 N. E. 563; Adams *v.* La Rose, 75 Ind. 471.

Maryland.— Hartsock *v.* Mort, 76 Md. 281, 25 Atl. 303.

Massachusetts.— Barker *v.* Lawrence Mfg. Co., 176 Mass. 203, 57 N. E. 366.

Michigan.— Cotherman *v.* Cotherman, 58 Mich. 465, 25 N. W. 467.

Mississippi.— Harris *v.* Planters' Bank, 7 How. (Miss.) 346.

Missouri.— Critchfield *v.* Linville, 140 Mo. 191, 41 S. W. 786; Rotchford *v.* Creamer, 65 Mo. 48; Clark *v.* Davis, 56 Mo. App. 206. See also Jones *v.* Rush, 156 Mo. 364, 57 S. W. 118.

Montana.— Rooney *v.* Tong, 4 Mont. 596, 1 Pac. 720.

Nevada.— Paul *v.* Cragnas, (Nev. 1900) 59 Pac. 857, 60 Pac. 983, 47 L. R. A. 540.

New York.— Wilcox *v.* Hawley, 31 N. Y. 648; Hunt *v.* Bloomer, 13 N. Y. 341, 12 How. Pr. (N. Y.) 567. *Compare* Deming *v.* Post, 1 Code Rep. (N. Y.) 121, wherein it was held that it is not necessary that exceptions to conclusions of law of a referee should be presented by case.

Wisconsin.— Merwins *v.* O'Day, 9 Wis. 156.

United States.— Case *v.* Hall, 94 Fed. 300, 36 C. C. A. 259; North American L. & T. Co. *v.* Colonial, etc., Mortg. Co., 76 Fed. 623; Locke *v.* U. S., 2 Cliff. (U. S.) 574, 15 Fed. Cas. No. 8,442.

See 3 Cent. Dig. tit. "Appeal and Error," § 2441.

A statement in the clerk's minutes that a bill of exceptions was sealed and placed on file (Locke *v.* U. S., 2 Cliff. (U. S.) 574, 15 Fed. Cas. No. 8,442) or that exceptions were taken in time (Harris *v.* Planters' Bank, 7 How. (Miss.) 346) cannot supply an omission in the bill of exceptions.

A general statement of exceptions at the end of a bill of exceptions is not enough to save specific questions for review. Robinson *v.* Suter, 15 Mo. App. 599.

An exception merely noted becomes no part of the judgment-roll without filing a bill of exceptions. Rooney *v.* Tong, 4 Mont. 596, 1 Pac. 720.

Special exceptions set out in record.— Though special exceptions which are filed are

with exceptions to rulings on pleading;[60] exceptions to the admission or rejection of evidence;[61] exceptions to the granting or refusal of instructions;[62] exceptions to rulings upon motions;[63] exceptions to the report of a referee relied on for reversal of a judgment, which must either be incorporated in the bill of exceptions or so referred to as to identify them;[64] and exceptions taken to the findings or final judgment had in the trial court.[65] Exceptions taken during the progress of a trial may be embraced in the final bill of exceptions taken upon

set forth in the record, they cannot be considered unless incorporated in the bill of exceptions and certified by the seal of the trial judge. Hartsock *v.* Mort, 76 Md. 281, 25 Atl. 303.

Exceptions in county or justices' courts — Nebraska.— Under Nebr. Code Civ. Proc. §§ 988, 1086, exceptions taken in the county or justice's court must be entered on the docket, and presented to the district court by a transcript, and not by a bill of exceptions, as section 587*a*, authorizing the certification of the original bill of exceptions, applies only to proceedings in the supreme court reviewing judgments of district courts. Sedgwick *v.* Durham, 45 Nebr. 86, 63 N. W. 142.

60. Rulings on pleadings.— *Alabama.*— Holley *v.* Coffee, 123 Ala. 406, 26 So. 339.

Idaho.— Berry *v.* Alturas County, 2 Ida. 274, 13 Pac. 233; Purdum *v.* Taylor, 2 Ida. 153, 9 Pac. 607 (order for judgment on pleadings).

Indiana.— Combs *v.* Pittsburgh, etc., R. Co., (Ind. App. 1900) 58 N. E. 1064; Brown *v.* Langner, 25 Ind. App. 538, 58 N. E. 743.

Indian Territory.— Bell *v.* Eddy, (Indian Terr. 1899) 51 S. W. 959.

Missouri.— Nichols *v.* Stevens, 123 Mo. 96, 25 S. W. 578, 27 S. W. 613, 45 Am. St. Rep. 514, in which it was held that an exception to a ruling permitting the amendment of a petition was abandoned by not being preserved in the bill of exceptions.

New York.— Schoonmaker *v.* Hilliard, 55 N. Y. App. Div. 140, 67 N. Y. Suppl. 160.

61. Admission or rejection of evidence.— Watson *v.* Henniger, 63 Ill. App. 124; Cambridge City First Nat. Bank *v.* Colter, 61 Ind. 153; Trogden *v.* Deckard, 45 Ind. 572; McKnew *v.* Duvall, 45 Md. 501; Houston, etc., R. Co. *v.* Red Cross Stock Farm, (Tex. Civ. App. 1898) 45 S. W. 741.

62. Granting or refusing instructions.— *Illinois.*— Rock Island *v.* Riley, 26 Ill. App. 171.

Missouri.— State *v.* Ragsdale, 59 Mo. App. 590.

North Carolina.—State *v.* Blankenship, 117 N. C. 808, 23 S. E. 455; Marshall *v.* Stine, 112 N. C. 697, 17 S. E. 495; Taylor *v.* Plummer, 105 N. C. 56, 11 S. E. 266.

Texas.— Houston, etc., R. Co. *v.* Red Cross Stock Farm, (Tex. Civ. App. 1898) 45 S. W. 741.

Wisconsin.— Stadler *v.* Grieben, 61 Wis. 500, 21 N. W. 629.

As a general rule the exceptions to the charge must be specific and point out the errors. An unpointed, "broadside" exception to the charge of the court will be disregarded. State *v.* Webster, 121 N. C. 586, 28 S. E. 254; Burnett *v.* Wilmington, etc., R. Co., 120 N. C. 517, 26 S. E. 819.

63. Rulings on motions.—Wiggins *v.* Witherington, 96 Ala. 535, 11 So. 539; East St. Louis Electric St. R. Co. *v.* Cauley, 148 Ill. 490, 36 N. E. 106 [*affirming* 49 Ill. App. 310]; Mullen *v.* People, 138 Ill. 606, 28 N. E. 988; Jones *v.* Rush, 156 Mo. 364, 57 S. W. 118; Hart *v.* Walker, 31 Mo. 26; McNeil *v.* Home Ins. Co., 30 Mo. App. 306.

A recital in the judgment order that an exception has been taken to an order overruling a motion for a new trial is not sufficient (East St. Louis Electric St. R. Co. *v.* Cauley, 148 Ill. 490, 36 N. E. 106 [*affirming* 49 Ill. App. 310]); but where an exception to an order denying a new trial is shown by the bill of exceptions, matters *in pais* will be reviewed even though such exception is not shown by the record, since recital of exceptions in the bill of exceptions is sufficient (Jones *v.* Rush, 156 Mo. 364, 57 S. W. 118).

64. Report of referee.— Turley *v.* Barnes, 131 Mo. 548, 33 S. W. 172; Rotchford *v.* Creamer, 65 Mo. 48; Trummer *v.* Konrad, 32 Oreg. 54, 51 Pac. 447.

65. Findings or final judgment.—Colorado Fuel Co. *v.* Maxwell Land-Grant Co., 22 Colo. 71, 43 Pac. 556; Patrick *v.* Weston, 21 Colo. 73, 39 Pac. 1083; Harris *v.* Colorado Trading, etc., Co., 9 Colo. App. 436, 48 Pac. 900; McCumber *v.* Haynes, 9 Colo. App. 353, 48 Pac. 903; West Chicago St. R. Co. *v.* People, 155 Ill. 299, 40 N. E. 599; National Bank *v.* Le Moyne, 127 Ill. 253, 20 N. E. 45; Wehrheim *v.* Thiel Detective Co., 87 Ill. App. 565; Hughey *v.* Rokker, 84 Ill. App. 473; Newton *v.* Williams, 94 Wis. 222, 68 N. W. 990; Cramer *v.* Hanaford, 53 Wis. 85, 10 N. W. 15; Concanon *v.* Blake, 16 Wis. 518. See 3 Cent. Dig. tit. "Appeal and Error," § 2448.

Finding of jury.— That an exception was taken to the finding of a jury as being against the evidence must appear by bill of exceptions, signed and sealed by the trial judge. Wolf *v.* Campbell, 23 Ill. App. 482.

Special findings.—Exceptions to judgments on special findings of the court will be considered without a bill of exceptions. Farnsworth *v.* Coquillard, 22 Ind. 453; Fireman's Fund Ins. Co. *v.* Dunn, 22 Ind. App. 332, 53 N. E. 251. See also Ins. Co. *v.* Walser, 22 Ind. 73; Matlock *v.* Todd, 19 Ind. 130; Raleigh *v.* Peace, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330.

Where the judgment is part of the record proper the appeal is itself a sufficient exception thereto. Murray *v.* Southerland, 125 N. C. 175, 34 S. E. 270; Delozier *v.* Bird, 123 N. C. 689, 31 S. E. 834; Thornton *v.* Brady, 100 N. C. 38, 5 S. E. 910.

the denial of a motion for a new trial;[66] but, when not so embraced or mentioned in the final bill, they are not thereby abandoned, but may be relied upon in the appellate court.[67]

4. Changing Case Into Bill of Exceptions or Special Verdict — a. In General. Within the discretion of the trial court,[68] a case-made may be converted into a bill of exceptions or special verdict, leave to do so being obtained at the trial;[69] but, unless the right to change a case into a bill of exceptions or special verdict is stipulated for and reserved at the trial, it will only be granted under special and peculiar circumstances.[70]

b. Election of Alternatives. Where the right has been granted a party to change a case-made into a special verdict or bill of exceptions, he must elect which of the alternative methods he will pursue, or whether he will proceed by the case, and he will be bound by the mode of procedure which he selects.[71]

c. Effect of Failure to Change After Election. Where an election is made to

66. Ryman *v.* Crawford, 86 Ind. 262; Pitzer *v.* Indianapolis, etc., R. Co., 80 Ind. 569.

67. Hardee *v.* Griner, 80 Ga. 559, 7 S. E. 102; South Carolina R. Co. *v.* Nix, 68 Ga. 572; Jordan *v.* Greensboro Furnace Co., 126 N. C. 143, 35 S. E. 247, 78 Am. St. Rep. 644; McKinnon *v.* Morrison, 104 N. C. 354, 10 S. E. 513.

68. **A discretionary power.**— Permission to make a case, with leave to turn it into a bill of exceptions or special verdict, is within the sound discretion of the court. Zabriskie *v.* Smith, 11 N. Y. 480; Clark *v.* Brown, 1 Barb. (N. Y.) 215; Hammond *v.* Hazard, 1 E. D. Smith (N. Y.) 314, 10 N. Y. Leg. Obs. 56. *Compare* Root *v.* King, 8 Cow. (N. Y.) 125, where it was held that if a party requests, on the trial, leave to make a case, subject to be turned into a bill of exceptions or special verdict, it is the duty of the court to allow this privilege.

69. Lutkins *v.* Den, 21 N. J. L. 337; Zabriskie *v.* Smith, 11 N. Y. 480; Beach *v.* Raymond, 1 Hilt. (N. Y.) 201; Hammond *v.* Hazard, 1 E. D. Smith (N. Y.) 314, 10 N. Y. Leg. Obs. 56; Allen *v.* Way, 7 Barb. (N. Y.) 585, 3 Code Rep. (N. Y.) 243; Clark *v.* Brown, 1 Barb. (N. Y.) 215; Beach *v.* Gregory, 3 Abb. Pr. (N. Y.) 78, 2 Abb. Pr. (N. Y.) 203; Masters *v.* Bailey, 1 How. Pr. (N. Y.) 42; Root *v.* King, 8 Cow. (N. Y.) 125; Foote *v.* Silsby, 1 Blatchf. (U. S.) 542, 9 Fed. Cas. No. 4,917.

Consent of parties necessary.—A special case, with leave to turn it into a special verdict, can only be made by consent. It should appear in some way that such case had been agreed to by the parties, or settled in pursuance of an agreement at the trial, or it will be disregarded by the court upon a writ of error. Lutkins *v.* Den, 21 N. J. L. 337.

Separation of exceptions from case.— Where, on appeal to the court of appeals, the exceptions are in the first instance stated in a case containing matter not necessary to present the legal questions arising on them, the party desiring a review in such court should procure the exceptions to be separated from the case, by or under the direction of the court below, or of a justice thereof. Zabriskie *v.* Smith, 11 N. Y. 480.

Leave to change should be obtained at trial. — Hammond *v.* Hazard, 1 E. D. Smith (N. Y.) 314, 10 N. Y. Leg. Obs. 56; Masters *v.* Bailey, 1 How. Pr. (N. Y.) 42. *Compare* Oakley *v.* Aspinwall, 1 Sandf. (N. Y.) 694; Slocum *v.* Fairchild, 7 Hill (N. Y.) 292, which were decided, however, as pointed out in Hammond *v.* Hazard, 1 E. D. Smith (N. Y.) 314, 10 N. Y. Leg. Obs. 56, under peculiar circumstances.

70. Lutkins *v.* Den, 21 N. J. L. 337; Lewis *v.* Stevenson, 2 Hall (N. Y.) 271; Smith *v.* Caswell, 4 How. Pr. (N. Y.) 286, 2 Code Rep. (N. Y.) 148; Masters *v.* Bailey, 1 How. Pr. (N. Y.) 42; Green *v.* Russell, 1 How. Pr. (N. Y.) 8; Woolsey *v.* Camp, 3 Cow. (N. Y.) 358. *Compare* Oakley *v.* Aspinwall, 1 Sandf. (N. Y.) 694; Slocum *v.* Fairchild, 7 Hill (N. Y.) 292.

Leave granted though right not reserved.— Leave to turn a case into a bill of exceptions, where no such right was reserved at the trial, will only be granted where the amount involved is large or the questions to be raised of a novel character, affecting the merits, Harris *v.* Bennett, 3 Code Rep. (N. Y.) 23. See also Benedict *v.* New York, etc., R. Co., 3 Code Rep. (N. Y.) 15; Oakley *v.* Aspinwall, 1 Sandf. (N. Y.) 694; Foote *v.* Silsby, 2 Blatchf. (U. S.) 260, 9 Fed. Cas. No. 4,919.

71. Hammond *v.* Hazard, 1 E. D. Smith (N. Y.) 314, 10 N. Y. Leg. Obs. 56; Stewart *v.* Hawley, 22 Wend. (N. Y.) 561.

A reasonable time will be granted the party in which to make his election, and the adverse party should not proceed to enforce his judgment without due notice to appellant of his intention. Jackson *v.* Sinclair, 4 Cow. (N. Y.) 43.

Failure due to inadvertence — Change allowed after affirmance.—After affirmance of the judgment of the lower court by the supreme court of the United States because of the absence of a bill of exceptions, there being no error patent on the face of the record, where a case made had been, through inadvertence, carried into the record without changing it into a bill of exceptions, the defect not having been noticed by either party, the circuit court allowed plaintiff in error to turn the case into a bill of exceptions on payment of costs. Williamson *v.* Suydam, 4 Blatchf. (U. S.) 323, 30 Fed. Cas. No. 17,756.

change a case into a bill of exceptions or special verdict, but no change is in fact made, the appellate court has no record upon which to review the action of the lower court, and must either dismiss the writ or affirm the judgment of the court below.[72]

5. Case or Statement in Addition to Bill. The practice is not uniform in the several states as to requiring a case or statement of fact to be added to a bill of exceptions. In some jurisdictions a case or statement is not required;[73] while in others, with some qualifications, the contrary rule prevails.[74]

6. Substitutes — a. In General. The statutory mode of bringing up for review matters not otherwise of record must be strictly pursued. Consequently, unless authorized by statute, no substitute is allowable for a bill of exceptions, case, or statement of facts, and, where matter is sought to be brought into the record otherwise than in the manner prescribed by statute, it will be disregarded by the appellate court.[75] So it has been held that a stipulation

72. Livingston *v.* Radcliff, 2 N. Y. 189; Berly *v.* Taylor, 5 Hill (N. Y.) 577; Suydam *v.* Williamson, 20 How. (U. S.) 427, 15 L. ed. 978.

73. De Johnson *v.* Sepulbeda, 5 Cal. 149; Lee *v.* Kilburn, 3 Gray (Mass.) 594; Near *v.* Mitchell, 23 Mich. 382. See also O'Neal *v.* District of Columbia, MacArthur & M. (D. C.) 68, in which it was held that it is irregular to bring a suit to the general term upon a bill of exceptions and a separate case embracing all the evidence. When, on the ground of insufficiency of the evidence, or excessive damages, there is an appeal from an irregular overruling of a motion for a new trial, a case may then be made; and, in order to obtain the ruling of the appellate court upon a question of law, the exceptions should be embodied in the case.

74. Piper *v.* Thompson, 34 Kan. 62, 7 Pac. 793; Burns *v.* Burgett, 19 Kan. 162; Dull *v.* Drake, 68 Tex. 205, 4 S. W. 364; Devore *v.* Crowder, 66 Tex. 204, 18 S. W. 501; Yarzombeck *v.* Grier, (Tex. Civ. App. 1895) 32 S. W. 236. See 3 Cent. Dig. tit. "Appeal and Error," § 2457.

Rulings upon instructions.— The rulings of the court below upon instructions will not, where there is no statement of facts, be revised on appeal. Hutchins *v.* Wade, 20 Tex. 7; Dever *v.* Branch, 18 Tex. 615; Armstrong *v.* Lipscomb, 11 Tex. 649.

Qualification of rule.—A bill of exceptions is sufficient without a statement of facts when it discloses facts enough to show that the court excluded competent testimony, the relevancy and materiality of which appear from the pleadings. Tarlton *v.* Daily, 55 Tex. 92; Fox *v.* Sturm, 21 Tex. 406; Sublett *v.* Kerr, 12 Tex. 366; Salinas *v.* Wright, 11 Tex. 572. So, too, a statement of facts will not be required, where the errors complained of are shown to have worked injury to the appellant (Missouri, etc., R. Co. *v.* Stafford, 13 Tex. Civ. App. 192, 35 S. W. 48), or where findings of fact are accepted by appellant, and the objection urged on appeal is that the conclusions of law are not properly drawn thereupon (Brown *v.* Kern, 21 Wash. 211, 57 Pac. 798).

75. *Alabama.*— Alabama Fruit Growing and Winery Assoc. *v.* Garner, 119 Ala. 70, 24 So. 850; Clark *v.* McCrary, 80 Ala. 110.

California.—Ramsbottom *v.* Fitzgerald, 128 Cal. 75, 60 Pac. 522; Sprigg *v.* Barber, 122 Cal. 573, 55 Pac. 419.

Illinois.— Wheeler Chemical Works *v.* Boston Nat. Bank, 70 Ill. App. 354; Illinois Cent. R. Co. *v.* Gilchrist, 9 Ill. App. 135 (holding a stipulation as to a certain document to be insufficient).

Indiana.— Morrison *v.* Morrison, 144 Ind. 379, 43 N. E. 437; Martin *v.* Martin, 74 Ind. 207.

Iowa.— McCarthy *v.* Watrous, 69 Iowa 260, 28 N. W. 586.

Kansas.— State *v.* Bohan, 19 Kan. 28.

Louisiana.— Warner *v.* Clark, 45 La. Ann. 863, 13 So. 203, 21 L. R. A. 502; Page *v.* Caetano, McGloin (La.) 250.

Maryland.— National Bank *v.* Armstrong, 66 Md. 113, 6 Atl. 584, 59 Am. Rep. 156.

Minnesota.— Osborne *v.* Williams, 39 Minn. 353, 40 N. W. 165; Coolbaugh *v.* Roemer, 32 Minn. 445, 21 N. W. 472.

Missouri.— Martin *v.* Nugent, (Mo. 1891) 15 S. W. 422; White *v.* Caldwell, 17 Mo. App. 691 (holding a motion in arrest of judgment to be insufficient). *Compare* Hicks *v.* Hoos, 44 Mo. App. 571, where it was held that though there be no bill of exceptions certified by the stenographer, yet if the clerk has certified the record entries, and the parties have served and filed abstracts, the cause will, under Mo. Rev. Stat. (1889), § 2253, be fully before the appellate court.

Montana.— Marden *v.* Wheelock, 1 Mont. 49. *Compare* Griggs *v.* Kalispell Mercantile Co., 14 Mont. 300, 36 Pac. 81.

Nebraska.— Stuart *v.* Burcham, 50 Nebr. 823, 70 N. W. 383; Edwards *v.* Kearney, 14 Nebr. 83, 15 N. W. 329.

Nevada.— See Gillig *v.* Lake Bigler Road Co., 2 Nev. 214, in which the court, while deprecating the "inexcusable neglect" shown by the party in not presenting a proper statement of the grounds of error, nevertheless treated the exceptions to the rulings of the court as a substitute therefor.

North Dakota.— Brynjolfson *v.* Thingvalla Tp., 8 N. D. 106, 77 N. W. 284.

Oklahoma.— Lookabaugh *v.* La Vance, 6 Okla. 358, 49 Pac. 65, holding a transcript of

between the parties to a suit;[76] an affidavit or deposition;[77] a certificate of

record to be insufficient. *Compare* Logan County *v.* Harvey, 5 Okla. 468, 49 Pac. 1006.

South Carolina.— Thompson *v.* Thompson, 6 Rich. (S. C.) 279.

Texas.— Graves *v.* George, (Tex. Civ. App. 1899) 54 S. W. 262; Maury *v.* Keller, (Tex. Civ. App. 1898) 53 S. W. 59; Simpson *v.* Texas Tram, etc., Co., (Tex. Civ. App. 1899) 51 S. W. 655.

Wisconsin.— Watson *v.* Milwaukee, 107 Wis. 328, 82 N. W. 692.

United States.— Crews *v.* Brewer, 19 Wall. (U. S.) 70, 22 L. ed. 63 (holding a mere report of evidence to be insufficient); Lincoln Sav. Bank, etc., Co. *v.* Allen, 82 Fed. 148, 49 U. S. App. 498, 27 C. C. A. 87.

See 3 Cent. Dig. tit. "Appeal and Error," § 2461.

Allegation that court omitted to settle statement.—An allegation upon appeal that the inferior court omitted to settle a statement which was submitted to him cannot be taken as a substitute for the statement, nor does it constitute a reason for reversing the judgment. Hoadley *v.* Crow, 22 Cal. 265.

Motion assuming existence of facts.— A mere motion of a party, filed in a cause, assuming that certain facts exist, cannot be regarded as a substitute for a bill of exceptions or statement of facts agreed on by the parties or certified by the court, as contemplated by the statute. Marden *v.* Wheelock, 1 Mont. 49.

Statement as substitute for bill.—In North Carolina a statement of the case, signed by counsel of both parties, or the trial judge, is a substitute for a bill of exceptions. State *v.* Hart, 116 N. C. 976, 20 S. E. 1014; Chasteen *v.* Martin, 84 N. C. 391; Clark's Code Civ. Proc. N. C. (1883), § 550.

Trial below upon agreed statement.— In Texas an agreed statement of facts on which a case is tried in the court below, and which the court embodies or refers to in its statement, and expressly makes the basis thereof, is, under Tex. Rev. Stat. art. 1293, sufficient to authorize a revision of the judgment on matters growing out of such facts in the absence of a statement of facts or finding of fact by the court, or an agreed case for appeal under Tex. Rev. Stat. arts. 1333, 1414. Bomar *v.* West, 87 Tex. 299, 28 S. W. 519; State *v.* Connor, 86 Tex. 133, 23 S. W. 1103; State *v.* Connor, (Tex. Civ. App. 1894) 25 S. W. 815.

76. Stipulation between parties.— *Colorado.*— McKenzie *v.* Ballard, 14 Colo. 426, 24 Pac. 1; Ross *v.* Duggan, 5 Colo. 85; Molandin *v.* Colorado Cent. R. Co., 3 Colo. 173.

Florida.— Bacon *v.* Green, 36 Fla. 325, 18 So. 870; Florida Cent., etc., R. Co. *v.* St. Clair-Abrams, 35 Fla. 514, 17 So. 639.

Georgia.— But see Lane *v.* Partee, 41 Ga. 202.

Illinois.— Mallers *v.* Whittier Mach. Co., 170 Ill. 434, 48 N. E. 992 [*affirming* 70 Ill. App. 17]; Stock Quotation Tel. Co. *v.* Chicago Board of Trade, 144 Ill. 370, 33 N. E. 42 [*affirming* 44 Ill. App. 358]; Mosher *v.* Scofield, 55 Ill. App. 271; Everett *v.* Collinsville Zinc Co., 41 Ill. App. 552; Schwarze *v.* Spiegel, 41 Ill. App. 351; People *v.* Coultas, 9 Ill. App. 39.

Indiana.— *Compare* Indiana, etc., R. Co. *v.* Keeney, 93 Ind. 100. But see, *contra*, Truitt *v.* Truitt, 38 Ind. 16.

Iowa.—*Compare* Bunyan *v.* Loftus, 90 Iowa 122, 57 N. W. 685. But see Hutchinson *v.* Wells, 67 Iowa 430, 25 N. W. 690, construing Iowa Code, § 3170.

Louisiana.— But see Sojourner *v.* Charpontier, 10 La. 210.

Missouri.— Disse *v.* Frank, 52 Mo. 551; Lamb *v.* Brolaski, 38 Mo. 51; Landgraf *v.* Saunders Press Brick Co., 80 Mo. App. 538; Heiter *v.* East St. Louis Connecting R. Co., 53 Mo. App. 331; Woodward *v.* Hodge, 24 Mo. App. 677; Mister *v.* Corrigan, 17 Mo. App. 510; Mangels *v.* Mangels, 8 Mo. App. 603.

Nebraska.— Murphy *v.* Warren, 55 Nebr. 220, 75 N. W. 575; Denise *v.* Omaha, 49 Nebr. 750, 69 N. W. 119.

New Jersey.— Robbins *v.* Vanderbeck, 55 N. J. L. 364, 26 Atl. 919.

New York.— Bonnefond *v.* De Russey, 73 Hun (N. Y.) 377, 26 N. Y. Suppl. 193, 55 N. Y. St. 918 (construing N. Y. Code Civ. Proc. § 997); Zelinka *v.* Krauskopf, 1 N. Y. City Ct. 89 (construing Supreme Court Rules, No. 44).

Oregon.— Kimery *v.* Taylor, 29 Oreg. 233, 45 Pac. 771; Umatilla Irrigation Co. *v.* Barnhart, 22 Oreg. 389, 30 Pac. 37.

Texas.— McDowell *v.* Fowler, 80 Tex. 587, 16 S. W. 431; Caswell *v.* State, (Tex. 1889) 12 S. W. 219; Cunningham *v.* State, 74 Tex. 511, 12 S. W. 217; Taylor *v.* Dupuy, (Tex. Civ. App. 1896) 38 S. W. 531.

Utah.— *Compare* Klimer *v.* Schnorf, 3 Utah 442, 24 Pac. 909.

Washington.— Howard *v.* Ross, 3 Wash. 292, 28 Pac. 526, construing Wash. Acts (1890), § 4.

Wisconsin.— Leonard *v.* Warriner, 20 Wis. 41; Brower *v.* Merrill, 3 Pinn. (Wis.) 46, 3 Chandl. (Wis.) 46. But see Houlehan *v.* Rassler, 73 Wis. 557, 41 N. W. 720.

United States.— Stelk *v.* McNulta, 99 Fed. 138, 40 C. C. A. 357.

See 3 Cent. Dig. tit. "Appeal and Error," §§ 2357, 2358, 2464.

77. Affidavit or deposition.— *California.*— *In re* Connor, 128 Cal. 279, 60 Pac. 862; Williams *v.* Harter, 121 Cal. 47, 53 Pac. 405.

Missouri.— Scott *v.* Haynes, 12 Mo. App. 597.

Ohio.— Young *v.* State, 23 Ohio St. 577.

Tennessee.— Dinwiddie *v.* Louisville, etc., R. Co., 9 Lea (Tenn.) 309; Boren *v.* Cox, Peck (Tenn.) 367.

Texas.— Live Oak County *v.* Heaton, 39 Tex. 499; Thompson *v.* House, 23 Tex. 178; Garnett *v.* Roberts, 16 Tex. 555.

Virginia.— Stannard *v.* Graves, 2 Call (Va.) 369.

Wisconsin.— See Webster *v.* Modlin, 12 Wis. 368, wherein plaintiff in error sought to use the affidavit of the judge before whom the cause was tried in place of a bill of ex-

evidence;[78] the reporter's notes of the evidence and proceedings had upon the trial of a suit;[79] the incorporation of specifications of errors of law, or particulars in which the evidence is insufficient in a motion for a new trial;[80] or a brief of the evidence filed on a motion for a new trial,[81] will not dispense with the necessity of a proper bill of exceptions, case, or statement of facts.

ceptions, the judge having gone out of office before any bill of exceptions was settled, and holding that he was not authorized to sign one thereafter. Without determining whether this was proper practice or not, the court affirmed the judgment, since the only error relied on was a refusal to grant a new trial, and the judge's affidavit did not show that any exception was taken. The counsel for plaintiff in error sought to supply this defect by his own affidavit showing that he did except, but the court refused to adopt the practice of trying the record upon affidavits of parties or counsel, while the judge, before whom the trial was had, was living. The court further said that if the affidavit of the judge could be received in place of a bill of exceptions at all it must show that the necessary exceptions were taken.

Wyoming.— Chadron Bank *v.* Anderson, 7 Wyo. 441, 53 Pac. 280.

United States.— Nelson *v.* Flint, 166 U. S. 276, 17 S. Ct. 576, 41 L. ed. 1002.

Hence, where no attempt is made to make papers or rulings of the court a part of the record except by affidavit, such papers or rulings will not be considered on appeal. Pardy *v.* Montgomery, 77 Cal. 326, 19 Pac. 530 (where affidavits purported to show the circumstances under which the action was dismissed by the lower court); Wilkes *v.* Tibbets, (Cal. 1892) 31 Pac. 609; Parker v. Indianapolis Nat. Bank, 1 Ind. App. 462, 27 N. E. 650 (where the attorney attempted by his affidavit to support a claim to which a demurrer had been sustained); Buscher *v.* Scully, 107 Ind. 246, 5 N. E. 738, 8 N. E. 37 (where the affidavit attempted to bring into the record rulings excluding evidence and checking counsel in argument); Indianapolis, etc., Road Gravel Co. *v.* Christian, 93 Ind. 360, (affidavit concerning rulings and evidence). See 3 Cent. Dig. tit. "Appeal and Error," § 2408.

78. Certificate of evidence.— Colehour *v.* Roby, 88 Ill. App. 478; Rohrof *v.* Schulte, 154 Ind. 183, 55 N. E. 427; Wright *v.* Dudley, 8 Mich. 74. And see Western Union Tel. Co. *v.* Powell, 94 Va. 268, 26 S. E. 828, construing Va. Code (1887), § 3484. But see Ingraham *v.* Gildermester, 2 Cal. 161, holding that under the two hundred and seventy-first section of the code, regulating proceedings in civil cases, where the evidence is taken down in the court below at the request of a party and certified according to the statutes, it is a substitute for a bill of exceptions, or statement of facts, if no such bill or statement is made.

79. Reporter's notes.— *Arkansas.*— Moore *v.* State, 65 Ark. 330, 46 S. W. 127.

Montana.— Fant *v.* Tandy, 7 Mont. 443, 17 Pac. 560.

Oregon.— Reynolds *v.* Jackson County, 33 Oreg. 422, 53 Pac. 1072; McQuaid *v.* Portland, etc., R. Co., 19 Oreg. 535, 25 Pac. 26.

South Dakota.— Merchants Nat. Bank *v.* McKinney, 6 S. D. 58, 60 N. W. 162.

Texas.— Wentworth *v.* King, (Tex. Civ. App. 1899) 49 S. W. 696.

Wyoming.— Johns *v.* Adams, 2 Wyo. 194.

Compare Hamilton *v.* Gordon, 22 Oreg. 557, 30 Pac. 495, where it is said that there is no authority for striking from the files a *verbatim* copy of the reporter's notes of the proceedings at the trial made part of the record as a bill of exceptions, in the place of a bill of exceptions, stating only the questions sought to be presented with so much of the evidence, or other matter, necessary to state the exceptions, though the supreme court will not examine such record when it is difficult to clearly ascertain the questions sought to be presented. And see Heyer *v.* Cunningham Piano Co., 6 Pa. Super. Ct. 504, 42 Wkly. Notes Cas. (Pa.) 14, where it was held that exceptions noted by the stenographer, by direction of the court, are equivalent to the formal sealing of a bill of exceptions.

80. Incorporating specifications in motion for new trial.—*Arkansas.*— Carroll *v.* Bowler, 40 Ark. 168; Berry *v.* Singer, 10 Ark. 483.

Connecticut.— Chambers *v.* Campbell, 15 Conn. 427.

Florida.—Richardson *v.* State, 28 Fla. 349, 9 So. 704; Parrish *v.* Pensacola, etc., R. Co., 28 Fla. 251, 9 So. 696.

Indiana.— Nickless *v.* Pearson, 126 Ind. 477, 26 N. E. 478; Clouser *v.* Ruckman, 104 Ind. 588, 4 N. E. 202; O'Donald *v.* Constant, 82 Ind. 212.

Missouri.— Churchman *v.* Kansas City, 49 Mo. App. 366.

South Dakota.— Chandler *v.* Kennedy, 8 S. D. 56, 65 N. W. 439.

Texas.— Taylor *v.* Davis, (Tex. 1890) 13 S. W. 642; Ballew *v.* Casey, (Tex. 1888) 9 S. W. 189.

See 3 Cent. Dig. tit. "Appeal and Error," § 2463.

Affidavits in support of motion.— In Republican Valley R. Co. *v.* Boyse, 14 Nebr. 130, 15 N. W. 364, it was held that, where affidavits of misconduct on the part of a juror are presented to the trial judge on a motion for a new trial, a bill of exceptions is not needed to make them a part of the record, since they become such by being attached to, and made a part of, the motion for a new trial.

Motion founded on court's minutes.— When the motion for a new trial is made on the minutes of the court, the incorporation of the specifications of error in a bill of exceptions or statement is unnecessary. Chandler *v.* Kennedy, 8 S. D. 56, 65 N. W. 439.

81. Brief of evidence on motion for new trial.—Wetmore *v.* Chavers, 9 Ga. 546.

b. Bill or Statement on Motion for New Trial — (I) *Appeal From Order on Motion.* On appeal from an order granting or refusing a new trial, any matter properly pertaining to such order, unless it may have arisen subsequent to the notice of motion, may be considered without any other statement than that used on the motion for a new trial.[82]

(II) *Appeal From Judgment Proper.* Unless authorized by statute, or by virtue of a stipulation to that effect, a statement made on a motion for a new trial cannot, where no appeal is taken from the order denying the motion, be used as a statement on appeal from the judgment.[83]

(III) *Appeal From Order and Judgment.* Where an appeal is taken from both the order denying the motion for a new trial and also from the judgment below, the statement on the motion may be used as the statement on appeal.[84]

c. Convertibility of Modes of Procedure. Unless authorized by statute,[85] the modes of procedure for obtaining a review of the rulings and judgments of lower courts — as by bill of exceptions, case, special verdict, abstract, or statement of facts — are not convertible. Where one method is pointed out, another cannot be substituted in its place,[86] and even where a choice of methods is allowed, the

82. Casgrave *v.* Howland, 24 Cal. 457; Walden *v.* Murdock, 23 Cal. 540, 83 Am. Dec. 135; Kidd *v.* Laird, 15 Cal. 161, 76 Am. Dec. 472; Kleinschmidt *v.* McDermott, 12 Mont. 309, 30 Pac. 393; Johnson *v.* Wells, 6 Nev. 224, 3 Am. Rep. 245; O'Neale *v.* Cleaveland, 3 Nev. 485; Bryant *v.* Carson River Lumbering Co., 3 Nev. 313, 93 Am. Dec. 403; Alexander *v.* U. S., 57 Fed. 828, 15 U. S. App. 158, 6 C. C. A. 602.

See 3 Cent. Dig. tit. "Appeal and Error," § 2468.

83. *Arizona.*— Grounds *v.* Ralph, 1 Ariz. 227, 25 Pac. 648.

California.— Bedan *v.* Turney, 99 Cal. 649, 34 Pac. 442; Jue Fook Sam *v.* Lord, 83 Cal. 159, 23 Pac. 225, decided under Cal. Code Civ. Proc. § 950, which allows any statement or bill of exceptions used on motion for a new trial to be used on appeal from a final judgment. *Compare* Thompson *v.* Connolly, 43 Cal. 636; Reed *v.* Bernal, 40 Cal. 628 [*overruling* Treadwell *v.* Davis, 34 Cal. 601, 94 Am. Dec. 770]; Casgrave *v.* Howland, 24 Cal. 457; Burdge *v.* Gold Hill, etc., Water Co., 15 Cal. 198.

Idaho.—Rumpel *v.* Oregon Short Line, etc., R. Co., (Ida. 1894) 35 Pac. 700, 22 L. R. A. 725; Bradbury *v.* Idaho, etc., Land Imp. Co., 2 Ida. 221, 10 Pac. 620, under Ida. Code, § 653.

Nevada.— Robinson *v.* Benson, 19 Nev. 331, 10 Pac. 441; Nesbitt *v.* Chisholm, 16 Nev. 39.

United States.— Head *v.* Hargrave, 105 U. S. 45, 26 L. ed. 1028. See also Kerr *v.* Clampitt, 95 U. S. 188, 24 L. ed. 493.

See 3 Cent. Dig. tit. "Appeal and Error," § 2468.

Where there is a stipulation that a statement of evidence on motion for a new trial shall stand as the statement on appeal, no further statement will be necessary. Head *v.* Hargrave, 105 U. S. 45, 26 L. ed. 1028. See also Grounds *v.* Ralph, 1 Ariz. 227, 25 Pac. 648; Thompson *v.* Connolly, 43 Cal. 636; Elder *v.* Frevert, 18 Nev. 278, 3 Pac. 237.

Statute construed — California.— Under Cal. Code Civ. Proc. § 950, allowing any statement or bill of exceptions used on motion for a new trial to be used on appeal from a final judgment, such statement cannot be used on appeal unless it was used on motion for a new trial, and for that purpose prepared and served within the ten days required by section 659. Jue Fook Sam *v.* Lord, 83 Cal. 159, 23 Pac. 225. *Compare* Elder *v.* Frevert, 18 Nev. 278, 3 Pac. 237, in which it was held that a statement filed too late to be available for a motion for a new trial, may be treated as sufficient for a statement on appeal where, when made, it was treated as both a statement on motion and on appeal.

84. Johnson *v.* Wells, 6 Nev. 224, 3 Am. Rep. 245; Bryant *v.* Carson River Lumbering Co., 3 Nev. 313, 93 Am. Dec. 403.

85. *California.*— Harper *v.* Minor, 27 Cal. 107.

Michigan.— Beeson *v.* Hollister, 11 Mich. 193; Richardson *v.* Yawkey, 9 Mich. 139.

Montana.— Kleinschmidt *v.* McAndrews, 4 Mont. 8, 2 Pac. 286 [*affirmed* in 4 Mont. 223, 5 Pac. 281].

New York.— Schwarz *v.* Weber, 103 N. Y. 658, 8 N. E. 728.

Washington.— Jones *v.* Jenkins, 3 Wash. 17, 27 Pac. 1022. See also Stenger *v.* Roeder, 3 Wash. 412, 28 Pac. 748, 29 Pac. 211.

Substitution allowed by court.— In Morse *v.* Evans, 6 How. Pr. (N. Y.) 445, it was held that where, pending a settlement of a bill of exceptions taken to his decision, a justice of the supreme court dies, the party will be allowed to make a case, containing the exceptions, which may be settled by any justice of the court.

86. Frost *v.* O'Neil, 4 Mont. 226, 2 Pac. 315; Kleinschmidt *v.* McAndrews, 4 Mont. 8, 2 Pac. 286 [*affirmed* in 4 Mont. 223, 5 Pac. 281]; Carolan *v.* Jefferson, 24 Tex. 229; Baxter *v.* Baker, (Tex. Civ. App. 1893) 22 S. W. 258; Stenger *v.* Roeder, 3 Wash. 412, 28 Pac. 748, 29 Pac. 211. See also, to the effect that a case is not a substitute for a bill of exceptions, special verdict, or statement of facts: Benedict *v.* New York, etc., R. Co., 3 Code Rep. (N. Y.) 15; Colie *v.* Brown, Code Rep. N. S. (N. Y.) 416; King *v.* Dennis, 3 How. Pr. (N. Y.) 419; Wright *v.* Douglass, 3 How. Pr. (N. Y.) 418; Livingston *v.* Radcliff, 3 How. Pr. (N. Y.) 417.

election of one will exclude the other;[87] nor can an appeal or writ of error be prosecuted partly in one mode and partly in another.[88]

7. Effect of Failure to Make Bill, Case, or Statement. In the absence of any error appearing on the face of the record proper,[89] where appellant or plaintiff in error fails to make a bill of exceptions, case, or statement of facts, prepared and settled as required by law, the order, judgment, or decree appealed from should be affirmed, or his appeal or writ of error dismissed.[90]

87. Richardson *v.* Yawkey, 9 Mich. 139.

88. Jones *v.* Jenkins, 3 Wash. 17, 27 Pac. 1022.

89. See *supra*, XIII, C, 1, a.

90. *Alabama.*—Turner *v.* Key, 31 Ala. 202; Harris *v.* Dillard, 31 Ala. 191.

Arizona.— McAllister *v.* Benson Min., etc., Co., (Ariz. 1888) 16 Pac. 271.

California.— Howell *v.* Howell, 101 Cal. 115, 35 Pac. 443; Huse *v.* Den, (Cal. 1892) 30 Pac. 1104.

Florida.— Dupont *v.* Baker, 14 Fla. 272; Malley *v.* Ingersoll, 14 Fla. 200; Bogue *v.* McDonald, 14 Fla. 66, all decided under the provisions of the code of 1870, repealed in 1873. But *compare* Ropes *v.* Snyder-Harris-Bassett Co., 35 Fla. 537, 17 So. 651; Gates *v.* Hayner, 22 Fla. 325; Stewart *v.* Mathews, 19 Fla. 752; Sams *v.* King, 18 Fla. 552.

Illinois.— Chicago, etc., R. Co. *v.* Benham, 25 Ill. App. 248; Vanarsdale *v.* Andrews, 7 Ill. App. 199.

Indiana.— Boothe *v.* Driver, 44 Ind. 470.

Louisiana.— Lockwood *v.* Zuntz, 23 La. Ann. 746; Hampson *v.* Reynaud, 2 La. Ann. 996.

Maryland.— New *v.* Taylor, 82 Md. 40, 33 Atl. 435.

Minnesota.— Duncan *v.* Everitt, 55 Minn. 151, 56 N. W. 591; Flibotte *v.* Mullen, 36 Minn. 144, 30 N. W. 448. See also Mankato First Nat. Bank *v.* Parsons, 19 Minn. 289; Morrison *v.* March, 4 Minn. 422.

Missouri.— Martin *v.* Nugent, (Mo. 1891) 15 S. W. 422; Snyder *v.* Free, 102 Mo. 325, 14 S. W. 875; Mills *v.* McDaniels, 59 Mo. App. 331.

New York.— Cowenhoven *v.* Ball, 118 N. Y. 231, 23 N. E. 470, 28 N. Y. St. 870; Smith *v.* Starr, 70 N. Y. 155; Brooke *v.* Tradesmen's Nat. Bank, 68 Hun (N. Y.) 129, 22 N. Y. Suppl. 633, 52 N. Y. St. 31; Clason *v.* Baldwin, 59 Hun (N. Y.) 622, 13 N. Y. Suppl. 73, 36 N. Y. St. 550; Pope *v.* Dinsmore, 29 Barb. (N. Y.) 367; Vandenbergh *v.* Mathews, 7 N. Y. Annot. Cas. 484, 65 N. Y. Suppl. 365. See also Anonymous, 36 How. Pr. (N. Y.) 366.

North Carolina.— Royster *v.* Burwell, 90 N. C. 24; Meekins *v.* Tatem, 79 N. C. 546.

Ohio.— Mathers *v.* Bull, 18 Ohio Cir. Ct. 196, 10 Ohio Cir. Dec. 16.

Pennsylvania.— Harris *v.* Schuylkill River East Side R. Co., 156 Pa. St. 252, 27 Atl. 297; Mehring *v.* Commonwealth Bldg., etc., Assoc., 17 Wkly. Notes Cas. (Pa.) 422.

Texas.— Hodges *v.* Longscope, 23 Tex. 155; Lewis *v.* Black, 16 Tex. 652; Litton *v.* Thompson, 2 Tex. Unrep. Cas. 577.

Washington.— Smith *v.* State, 5 Wash. 273, 31 Pac. 865; Whittier *v.* Cadwell, 4 Wash. 819, 820, 30 Pac. 1097, 1098; Tacoma Foundry, etc., Co. *v.* Wolff, 4 Wash. 818, 30 Pac. 1053.

Wisconsin.— Geekie *v.* Wells, 37 Wis. 362.

Wyoming.— White *v.* Sisson, 1 Wyo. 395; Geer *v.* Murrin, 1 Wyo. 37; Murrin *v.* Ullmann, 1 Wyo. 36.

United States.— New Orleans Bank *v.* Caldwell, 154 U. S. 592, 14 S. Ct. 1171, 21 L. ed. 305.

But *compare* Hines *v.* Cochran, 35 Nebr. 828, 53 N. W. 1118; Baldwin *v.* Foss, 14 Nebr. 455, 16 N. W. 480.

See 3 Cent. Dig. tit. "Appeal and Error," § 2472 *et seq.*

Where there is no statement of facts, and the record contains no fundamental error, the judgment appealed from must be affirmed. Cunningham *v.* Cunningham, 121 N. C. 413, 28 S. E. 525; Delafield *v.* Lewis Mercer Constr. Co., 115 N. C. 21, 20 S. E. 167; Juergeons *v.* Missouri, etc., R. Co., 16 Tex. Civ. App. 452.

Failure to file case in intermediate court.— An appeal to the court of appeals from a judgment on a verdict subject to the opinion of the court, where the general term certifies that the record contains questions of law which should be reviewed, will not be considered if there is no special case, settled under direction of the general term, containing a concise statement of the questions of law arising thereon, as provided by N. Y. Code Civ. Proc. § 1339. People *v.* Featherly, 131 N. Y. 597, 30 N. E. 48, 42 N. Y. St. 878 [*dismissing* appeal 59 Hun (N. Y.) 615, 12 N. Y. Suppl. 389, 35 N. Y. St. 156]; Rigney *v.* Savory, 6 Abb. Pr. N. S. (N. Y.) 284 note.

Statement on appeal to United States supreme court.—Unless a statement of the case is furnished according to the rule, the cause must either be dismissed or continued. Peyton *v.* Brooke, 3 Cranch (U. S.) 92, 2 L. ed. 376.

Remandment for new trial.— Where the judge has mislaid his notes, and so cannot make a statement, the cause will be remanded for a new trial, as appellant cannot, without his fault, be deprived of his right of appeal. Porter *v.* Dugat, 9 Mart. (La.) 92. See also Meyer *v.* Mates, 15 Tex. Civ. App. 11, 37 S. W. 963, in which it was held that where, on appeal, the certificate of the trial judge and the affidavit of appellant's counsel showed that appellant did everything required of him by law to procure a statement of facts, and his failure to do so arose from the neglect of appellee's counsel to prepare, as he promised and as was his duty, a statement and present it to the judge, the judgment would be reversed and a new trial granted.

Waiver by appellee.— A waiver of a case and exceptions by appellee cannot cure the defect of a failure on the part of appellant to make a bill of exceptions, case, or statement of facts. Dupont *v.* Baker, 14 Fla. 272; Malley *v.* Ingersoll, 14 Fla. 200; Bogue *v.* McDonald, 14 Fla. 66.